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HOPE BASKET COMPANY *v.* HARTSFIELD.

4-3429

Opinion delivered April 2, 1934.

[redacted]

McRae & Tompkins, for appellant.
Atkins & Stewart, for appellee.

SMITH, J. Appellee was employed at appellant's factory in making baskets, and, while so employed, sustained an injury, to compensate which she recovered the judgment from which this appeal comes. A machine was used which required the service of three persons, who were designated as a band-ringer, a band-puncher, and the operator who controlled the movement of the machine. The machine was operated by two foot pedals, one

of which controls the folding ring, which moves up and forms or shapes the web or mat into basket shape and holds it while the bands or hoops are stitched on, and the other pedal releases the folding ring and causes it to back up and stay out of the way while the finished basket is removed from the form. When the pedal which starts the folding ring in motion is stepped on and the folding ring actually starts, there is no way of stopping it until it closes over the form. The folding ring moves about twenty inches, and moves at uniform speed. Pressure on the pedal starts it. The form is round and bucket-shaped, and it is over the form that the web or mat of thin pieces of veneer is molded or formed into basket shape.

At the time appellee was injured she was band-ringer on the machine. Leona Johnson was band-puncher, and Doyle Bruce was operator. In making a basket, the following procedure was had. Appellee would first put a band or hoop over the form, then Bruce would place a web in the rack against the bottom of the form, then he would press the foot pedal which started the folding ring in motion and shaped the web over the form. After the folding ring closed over the form holding the web in basket shape, Leona Johnson would start pushing strips through little slats or guides, and the operator would start the machine to stitching, and the form would turn around as the bands were being stitched on. After the basket had been stitched all around, it would then be a completed basket, and Bruce would step on the release pedal, causing the folding ring to back up or to move off the form, releasing the basket, which Bruce would then slip off the form and stack on a pile behind him. This finished the operation, and the basket was complete.

An instruction numbered 2, given at the request of appellant, declared the law applicable to appellant's theory of the case. It reads as follows: "If you find from the evidence that plaintiff had been instructed and warned never to attempt to straighten or unhang a hoop if it hung, or she dropped or fumbled it, and you further find that on the day she was injured she caught, dropped

or fumbled a hoop as she attempted to place it on the form, and that she violated the instructions and warnings given to her and attempted to loosen or adjust the hoop, and that her hand was caught and injured by the folding ring as it closed over the form in the usual and customary manner, then plaintiff is not entitled to recover herein, and your verdict should be for the defendant."

Much testimony was offered by appellant to the effect that appellee dropped or fumbled a hoop as she attempted to place it on the form, and that, in violation of her instructions and the warnings given her for her own protection, she attempted to loosen or adjust the hoop after the folding ring was put in motion and closed over the form in the usual and customary manner, there being no way of stopping it after being put in motion. Instruction numbered 2, set out above, told the jury that, if appellee was injured in this manner, she could not recover.

Appellee testified that, before she had time to place the hoop on the form, but while she was engaged in so doing, Bruce released the folding ring, which he was not expected to do, thereby catching her hand between the folding ring and the form and crushing it. We do not review the testimony, as it suffices to say that it is in sharp and irreconcilable conflict, and this conflict has been resolved by the jury in appellee's favor.

The court gave, at appellee's request, an instruction reading as follows: "No. 3. You are instructed that contributory negligence cannot be presumed, but must be proved, and the burden of proving is on the defendant."

Appellant requested that the instruction be modified by adding thereto the phrase, "unless it should be shown by the evidence introduced on behalf of the plaintiff."

This instruction is usually given in the form it would have appeared if modified, but the refusal to so modify the instruction was not prejudicial error under the facts of this case, for the reason that, in view of instruction numbered 2 referred to, the jury could not have been misled.

The court gave, at appellee's request, an instruction numbered 5, reading as follows: "The court instructs the jury that, if you find from a preponderance of the evidence that the witness, Doyle Bruce, was in the employ of the defendant, and as such employee was operating the machine at which the plaintiff worked at the time she was injured, and that he negligently, in the operation of such machine, at a time when plaintiff was in a place of danger, released the iron rim, or follower, on said machine forcing said follower against the basket web and over the drum or form of said machine, and that plaintiff's hand was caught by said follower and jammed between the said follower and the drum, or form, and plaintiff was injured thereby; and you further find at the time she was exercising due care for her own safety, and had not assumed the risk; and if you further find from the testimony that, due to such negligent operation of defendant's machine, if any, Marion Hartsfield was injured, then the court tells you that Hope Basket Company is liable for all injuries and damages suffered as an approximate and natural result of such negligence."

Specific objection was made to the phrase, "at a time when plaintiff was in a place of danger," for the reason that there is no question of "discovered peril" in the case.

We think, however, that the objection is not well taken. The controlling question of fact in the case is whether Bruce released the iron rim or follower at a time when it endangered appellee's safety to do so. In other words, appellee was in a place of danger if Bruce prematurely released the rim, as appellee testified he did, and the instruction makes no application of the doctrine of discovered peril. It was not contended that Bruce could have done anything to avert the injury after putting the rim or follower in motion. His alleged negligence consisted in prematurely starting the machine at a time when to do so endangered appellee's safety, and we conclude therefore that there is no error in the instruction.

It is finally insisted that the verdict, which was for $5,000, is excessive. But we do not think so. Appellee is

unmarried, and was only seventeen at the time of the trial. She testified that her hand was mashed flat like a biscuit, and that she was confined in the hospital for eighteen days, where she suffered great pain, and that she continues to suffer pain. There was a shortening and misplacement of the bones in healing, which has resulted in the disfigurement of the hand, and the attending physician testified that appellee's fingers were not only of no service to her but were rather in her way, because they were stiff.

There appears to be no error, and the judgment will therefore be affirmed.

LASTER *v.* OLDHAM.

4-3351

Opinion delivered April 2, 1934.

Fred M. Pickens and *Golden Blount,* for appellant.

John E. Miller, C. E. Yingling and *R. H. Lindsey,* for appellees.

HUMPHREYS, J. Appellees, the sole heirs of Adam Reeder, deceased, brought suit in the chancery court of White County against appellants to cancel a deed to certain real estate in said county executed by Emma Reeder Laster and to recover said lands and all other property received by him from Emma Reeder Laster, and from the estate of the said Adam Reeder and Emma Reeder Laster.

Emma Reeder Laster's first husband was Adam Reeder. At the time she married Adam Reeder he was a widower, and appellees are his children and grandchildren. No children were born to them. According to the clear weight of the testimony, in 1914 they became estranged, and through friends were influenced to renew their marital relationship under oral agreement that they would pool their property and in the future conduct their business in the name of themselves as husband and wife, and, in the event Reeder predeceased his wife, that she would continue to manage their property and would execute a will bequeathing all of the property remaining at her death to the children and grandchildren of Adam Reeder. The agreement was fully performed by the parties as long as Adam Reeder lived and until his wife married J. O. Laster. After the marriage, she executed a deed to the lands in question, which had been conveyed to Adam Reeder and her as husband and wife, to J. O. Laster and bequeathed to him all the personal property so held by her at the time of her death, of her own free will and accord. This suit was commenced when J. O. Laster filed the deed for record and the will for probate. The chancery court found the facts detailed in substance above were supported by the clear weight of the evidence, and rendered a decree impressing a trust upon the personal property, but refusing to impress a trust upon the real estate because the agreement was not in writing. Appellants have appealed from that part of the decree impressing a trust upon the personal property.

The first contention is that the trust agreement was established by the testimony of the attorney, C. L. Pearce, who acted for and advised with both Adam and Emma Reeder when they were reconciled after a short separation. It is argued that his testimony was inadmissible and should not have been considered by the trial court on account of the fourth subdivision of § 4146 of Crawford & Moses' Digest, which reads as follows:

"The following persons shall be incompetent to testify: an attorney concerning any communication

made to him by his client in that relation, or his advice thereon, without the client's consent."

The testimony of Mr. Pearce relates to an agreement entered into by clients in his presence concerning their property and the future disposition thereof to third parties and not to "communication made to him by his client in that relation, or his advice thereon." The subject-matter detailed by him was not within the spirit or letter of the statute. His testimony was clearly admissible. Section 40, "Cyc," p. 2368, subdivision 7.

It is also contended that an express trust relating to personal property cannot be created by parol. This court said in the case of *Scott* v. *Miller,* 179 Ark. 7, 13 S. W. (2d) 819: "In some jurisdictions an express trust cannot be created by parol, even as to personal property, but the clear weight of authority is to the effect that the statute of frauds does not extend to trusts of personal property, and that such trusts may be created and proved by parol."

No error appearing, the decree is affirmed.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* LANE.

4-3430

Opinion delivered April 2, 1934.

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J. Loyd Shouse and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

V. D. Willis and *Shinn & Henley,* for appellee.

KIRBY, J., (after stating the facts). It is not questioned that the certificates were issued under the group policies to appellant and were both in force at the time he sustained the injury which necessitated the amputation of his left leg below the knee. The accidental dis-

memberment policy provided that the loss of one foot, the severance at or above the ankle, should entitle the insured to $500, and appellee presented a claim under this certificate soon after the accident, and the same was paid by the company.

Subsequently, appellee presented a claim under the certificate which provided benefits in the event of total and permanent disability. The appellant denied the claim because it did not consider the insured totally and permanently disabled within the meaning of the provisions of the policy hereinabove set out.

The policy by its terms did not provide occupational insurance, or that the insurer would become liable if the insured became unable to perform the duties of his occupation of brakeman; but provided that insured, to be entitled to recover under said certificate, must show that he "is unable to perform any work for any kind of compensation of financial value during the remainder of his lifetime."

There is no doubt about the injury suffered by the insured being permanent; and appellant's only insistence is that the testimony is insufficient to support the allegation that said injury is total. It will suffice to say, however, that the instructions given by the court are not complained of here, and were in accordance with the doctrines of this court as announced in *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; and *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812.

Insured testified that he was 47 years of age; that his leg was amputated about 9 inches below the knee joint; that he was unable to perform any kind of work for gain or profit; that he had railroaded all his life and had no knowledge of any other vocation nor sufficient education or training to follow any profession.

It is true the disability or injury suffered by the insured did not constitute of itself a total and permanent disability within the express provisions of the policy, but

said policy also provides: "If any person insured under this policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, etc., * * * the company, upon receipt of due proof of such disability, will grant the following benefits:" Said policy also recognizes certain injuries to be permanent and total disabilities.

The jury had the insured before it, saw his condition and necessarily knew somewhat about the question of his disability from its own information and experience acquired through association with its fellowmen; and under our Constitution it was exclusively within the jury's province to determine the question under the circumstances of this case. Having done so, and there being material testimony to support its verdict, the judgment thereon will not be disturbed. Affirmed.

SMITH, MCHANEY and BUTLER, JJ., dissent.

BUNTING *v.* ROLLINS.

4-3424

Opinion delivered April 2, 1934.

Nat T. Dyer, for appellant.
H. J. Denton, for appellee.

MEHAFFY, J. Jesse J. Bunting and Mary M. Bunting, his wife, the appellant here, became the owners of the land involved in this suit, and other lands, with the right of survivorship. During the lifetime of the husband on July 2, 1930, the appellant and her husband executed a mortgage to W. J. Bennett, conveying to him lands on the southwest side of the highway shown on the diagram, to secure the payment of an indebtedness of $2,500.

On September 19, 1930, Jesse J. Bunting died, and the appellant thereupon became the owner of all the real estate in her own right. On July 2, 1931, the appellant entered into the following contract:

"Mountain Home, Ark., July 2, 1931.

"This contract entered into on this the 2d day of July, 1931, by and between Mrs. J. J. Bunting and L. Harry Carpenter, and Mary E. Carpenter, hereinafterwards known as part of the first and second part respectively, witnesseth:

"That the party of the first part has sold to the party of the second part a certain tract of land, situated in Baxter County, Arkansas, and fully described in deed hereto attached and made a part of this contract, containing 76 acres of land.

"The contract price of land being four thousand dollars, paid and to be paid as follows: $200 in cash, the receipt of which is hereby acknowledged, and the balance of $3,800 in the 19 promissory notes of $200 each, the first one of which is to be due on or before November 1, 1932, and one of each of the remaining notes to become due on or before November 1 each year thereafter, making the last note due on or before November 1, 1950. All of said notes are to be of even date herewith and to draw interest at the rate of 6 per cent. from date until paid, interest on all notes to be paid annually.

"The party of the first part is to furnish a warranty deed to said land and place same in the Farmers' & Merchants' Bank of Mountain Home, Arkansas, and, when one-half of the above-mentioned notes are paid, is to make an abstract of title to said land, showing a good

title to same, free of all debts and incumbrances, and the bank at that time is to deliver to the party of the second part the deed and abstract, taking a lien on the land for all notes unpaid at that time.

"The party of the first part is to have the crop growing on the land for the year 1931 and is to give possession of the land on or before November 1, 1931, with the understanding that, if all the crop is not ready to gather at that time, she is to have a reasonable time to get same off.

"It is further understood that the party of the second part is to keep the house on said land insured, in some good insurance company, for not less than $750 after they take possession.

"The Farmers' & Merchants' Bank of Mountain Home, Arkansas, is hereby made escrow agent in said deal, and all papers above mentioned is to be placed in same, with instructions that when the terms of this contract is complied with, it is to deliver all of above papers in keeping with this contract. Should the party of the second part fail or refuse to make payments as above set out, then in that event the said bank is hereby authorized to return the deed and abstract to the party of the first part and all unpaid notes to party of second part, and all payments made shall be the property of the first party for rents and damages, and this contract shall become null and void.

"[Signed] Mrs. J. J. Bunting
"L. Harry Carpenter
"Mary E. Carpenter."

On September 12, 1932, the appellee obtained judgment in the Baxter Circuit Court against the appellant for the sum of $310.65. On October 15, 1932, execution was issued on said judgment, and placed in the hands of the sheriff of Baxter County for levy and sale. The sheriff levied upon the personal property and on the real property north and east of the public highway, as shown on the diagram, and 6.5 acres southwest of the public highway.

On October 31, 1932, the appellant gave notice that she would, on November 7, file her schedule of exemptions before the clerk of the Baxter Circuit Court. She filed said schedule at the time mentioned, and then on November 13th filed an amended schedule, and the appellee thereupon applied to the clerk for the appointment of a board of appraisers. Certain appraisers were selected by agreement, and they fixed the value of the personal property at $890.50, whereas the appellant, in her schedule had fixed the value of the property at $419.80. The appraisers fixed the value of the real property as follows: All that part of the land shown in the diagram north and east of the highway, and the four acres also claimed as exempt, on the southwest side of the highway, at $3,500. The clerk allowed the exemptions as claimed by appellant and issued supersedeas. The appellee prosecuted an appeal to the circuit court, and the circuit court allowed the exemptions as to the personal property, but disallowed appellant's claim for exemptions as to the real estate, and quashed the supersedeas as to the real estate. To reverse this order of the circuit court disallowing exemptions as to real estate, this appeal is prosecuted.

As to the personal property, but little need be said. The appellant was entitled to claim as exempt personal property not exceeding in value the sum of $500. Article 9, § 2, Constitution of Arkansas; § 5545 of Crawford & Moses' Digest.

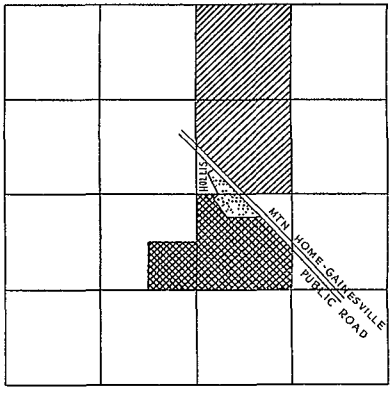
The only question as to the personal property was its value, and, as we have already said, the appellant fixed the value at $419.80, and the appraisers fixed the value at $890.50. It appears, however, from the evidence that the appraisers placed the full value on articles selected without any regard to the amount of interest of appellant. The record shows that appellant had purchased certain property from Montgomery Ward & Company for $140, and had paid only $10. The appraisers fixed the value of this property at $140. Montgomery Ward & Company had retained title to the property, and therefore appellant had only $10 equity in the property. The same appears to be true with reference to

the automobile. Appellant fixed the value of the automobile at $150, but showed that there was a $300 mortgage. The appraisers fixed the value at $450 without taking into consideration the mortgage. It appears therefore that the value fixed by the appellant was correct. At any rate, this was a question of fact to be determined by the evidence, and the finding of the lower court is conclusive here.

Appellant was entitled to claim the real property described in her schedule as exempt unless she had abandoned it, and this is the only question for our determination with reference to the real property.

Article 9 of § 4 of the Constitution provides that the homestead outside of a city, town or village shall consist of not exceeding 160 acres of land with the improvements thereon to be selected by the owner, provided the same shall not exceed in value the sum of $2,500, and in no event shall the homestead be reduced to less than 80 acres without regard to value. This section of the Constitution is copied as § 5540 of Crawford & Moses' Digest.

This land, claimed as exempt as a homestead, being worth more than $2,500, prevented her from claiming more than 80 acres. The evidence shows that she thought she could claim the entire tract. She was advised by her attorney, however, that she could only claim 80 acres, and then filed her amended schedule, claiming the 76 acres northeast of the public highway, and 4 acres southwest of the highway. The following diagram or map shows the situation of the land:



the 76 acres northeast of the highway and the 4 acres southwest of the highway are the lands claimed as homestead. The land shown southwest of the highway was mortgaged to secure a debt of $2,500. The 76 acres and the 4 acres are the tract claimed as the homestead.

The appellant and her husband lived on the 4 acres southwest of the highway during the husband's lifetime, and appellant continued to live there after his death. She, however, claimed the entire tract of land as her homestead. She had made the above contract to sell the land, and it is claimed by appellee that, having done this, she cannot claim the land northeast of the highway as a homestead, because, after the contract of sale and before it was forfeited, execution was issued on the judgment against her.

Whether a homestead has been abandoned is a question of intent to be determined from the facts and circumstances in each case. *Creekmore* v. *Scott,* 179 Ark. 1113, 20 S. W. (2d) 177.

The facts in this case are that in 1930, prior to the death of appellant's husband, they executed a mortgage on all the land southwest of the highway to secure the payment of an indebtedness of $2,500. This debt has not been paid. It is entirely probable that, because of the depression and the decreased value of all lands in the country, it would not sell for enough to pay the indebtedness. The statement of facts shows that appellant and her husband claimed the entire tract of land shown in the diagram as their homestead, and that she claimed it as her homestead after his death. The only land that she had that was not mortgaged was the land northeast of the highway. It is agreed that she thought that was a part of her homestead, and she entered into a contract for a conditional sale of that property, and received in cash $200. She did not convey any title and did not intend to do so, unless and until one-half of the amount was paid, and the contract expressly provided: "Should the party of the second part fail or refuse to make payments as above set out, then in that event the said bank is hereby authorized to return the deed and abstract to the party

of the first part, and all unpaid notes to the party of the second part, and all payments made shall be the property of the first party for rents and damages, and this contract shall become null and void."

This court said: "The relation that thus was created and arose between the parties sprung from the contract, and began with its execution, whether it was that of vendor and vendee or of landlord and tenant. The exact nature of the relation that would exist was determined on December 1, the date of the performance or nonperformance of the condition, but the inception of that relation arose at the date of the making of the contract. So that when, by the performance or nonperformance of the condition, the relation between the parties was determined, that relation went back to the time of the execution of the contract and continued thereafter." *Murphy* v. *Myar,* 95 Ark. 32, 128 S. W. 359.

In the instant case the relation was created by contract. The exact nature of the relation was determined when the purchasers failed to pay the first note. The contract itself expressly provides that it shall be void if there is a failure to pay the note. While the relation was determined upon the default of the purchasers, the inception of that relation arose at the date of making the contract. There never was any absolute conveyance of this property. On the default of the purchasers, they became tenants of the appellant, and, since the relation was determined by the default of the purchasers, and that relation related back to the time of making the contract, there was never a time when a lien would attach to the homestead property, and there was no abandonment.

Appellee calls attention to numerous authorities, some of them holding that, where there is a conveyance and the purchaser is in default, the relation of landlord and tenant does not exist, unless there is something in the contract indicating that such is the intention of the parties. But the contract in this case expressly provides, not only for the contract becoming void upon the purchaser's failure to pay, but it expressly provides also

that the payments that have been made shall be the property of the vendor for rents and damages.

We have many times held that the exemption laws must be liberally construed. "It is the settled policy of this court that our homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended." *Franklin Fire Ins. Co.* v. *Butts,* 184 Ark. 263, 42 S. W. (2d) 559.

Again we said: "As we have already seen, the whole theory of our homestead laws is based upon the idea of giving a family home to debtors which is exempt from the liens of judgments and executions levied upon them except in certain specified cases. The policy of the statute is to preserve the home to the family." *Bank of Hoxie* v. *Graham,* 184 Ark. 1065, 44 S. W. (2d) 1099; *Pemberton* v. *Bank of Eastern Arkansas,* 173 Ark. 949, 294 S. W. 64.

In discussing the object of the homestead laws, it is said in 29 C. J. 782: "The object of the provisions is to provide a home for each citizen of the government, where his family may be sheltered and live beyond the reach of financial misfortune, and to inculcate in individuals those feelings of independence which are essential to the maintenance of free institutions. Also, the purpose of the homestead provision is to protect the family as an entirety, and not the individual who for the time being is the head of the family. Furthermore, the State is concerned that the citizen shall not be divested of means of support and reduced to pauperism."

If the appellant could not claim as exempt the property included in her schedule, she would be deprived of all of her property except that portion on which there existed a mortgage, which she probably could never pay.

The majority is of the opinion that the conditional sale was not an abandonment of the homestead, and that appellant is entitled to claim as exempt the 76 acres northeast of the highway and the 4 acres southwest of the highway as her homestead.

The judgment of the circuit court is therefore reversed, and the cause remanded with directions to allow

appellant's exemptions in said property, and issue a supersedeas preventing its sale under execution.

CONWAY COMPRESS COMPANY *v.* ADKISSON.

4-3425

Opinion delivered April 2, 1934.

R. W. Robins, for appellants.

George W. Clark, for appellee.

McHANEY, J. Appellee brought this action in replevin in the justice court against appellants for the recovery of eight bales of cotton, grown in 1932 by Elmer Barrett, on which he held a valid recorded mortgage. From a judgment in his favor, an appeal was prosecuted to the circuit court, where, on a trial to a jury, he recovered judgment for the cotton or its value, $238.

The only question argued on this appeal is the sufficiency of the evidence to support the verdict and judgment, it being contended that the court erred in refusing to direct a requested verdict for appellants. The facts are not in dispute, and are substantially as follows: The cotton was grown by Barrett in 1932. On February 1, 1932, he executed a chattel mortgage to appellee to secure an indebtedness, which was duly filed for record and which remained unpaid and unsatisfied. Sometime after the cotton was harvested and baled, Barrett, without appellee's knowledge, hauled the cotton to Conway for sale, but, being unable at that time to get a satisfactory offer for same, stored it in the Conway Compress Company's warehouse, receiving compress re-

ceipts therefor rather than haul it back to his home, a distance of about 30 miles. On January 23, 1933, Barrett sold the cotton to Austin Johnson, a cotton buyer, at $5.60, with the agreement that Johnson should hold same, and that he, Barrett, should receive any advance in price up to January 26, 1933, and the compress receipts were delivered to Johnson, who, on January 25, sold a part of the cotton to appellant, Cockrill & Company, and a part to appellant, McFadden & Oates, delivering to them the compress receipts. Johnson deposited the proceeds of these sales in the Bank of Conway and drew his check on said bank in favor of Barrett for the purchase price of $5.60, which check was not delivered to Barrett until he returned to Conway on January 28, at which time the Bank of Conway was closed and in the hands of the State Bank Commissioner for liquidation. Barrett refused to accept the check on said insolvent bank, and notified appellee of the situation, who immediately brought this action. Neither Johnson nor appellants had any actual knowledge of appellee's mortgage, nor did they make any inquiry of Barrett regarding same. Barrett had been trading with appellee under a like mortgage for about ten years, during which time he permitted Barrett to sell his cotton at such time and for such price as suited him, but at all previous times the cotton had been paid for and Barrett had accounted to appellee for the proceeds.

Under this state of facts, appellants contend "that, by his admitted practice, extended over a period of about ten years, in permitting Barrett to sell cotton covered by a chattel mortgage at such time and place, and at such price and to such persons as he might deem proper, and when the sale was made to bring him the proceeds of the cotton, the appellee waived his lien on the cotton, and created an agency on the part of Barrett to sell this cotton, which agency he is now estopped to deny."

This case was not tried in the lower court on the theory that appellee had made Barrett his agent for the sale of this or other cotton, and no instruction was requested or given in this regard. An instruction was

asked, and given in part as follows: "And so in this case, if you find from the evidence that Adkisson by his conduct had permitted or acquiesced in the sale of mortgaged cotton by Barrett, then this would amount to a release of his mortgage on such cotton and your verdict should be for the defendant." It is not contended that appellee knew this cotton had been removed from the farm or stored in the compress, or that Barrett had sold it or contemplated selling it. The only custom established by the evidence under previous mortgages was that Barrett would sell his cotton for cash and pay the proceeds to appellee. Here no completed sale was ever consummated between Barrett and Johnson, as the agreement for sale contemplated payment in cash and not by a check on an insolvent bank. Had Barrett received the sale price in cash and failed to account to appellee therefor, a wholly different case would be presented, not now necessary to decide. In 11 C. J. 627 it is said: "If the mortgagor is not the mortgagee's agent for the sale, the mortgagee will not be estopped to assert his rights against a purchaser by any act of the mortgagor, unless the mortgagee has knowledge of the mortgagor's intention and the purchaser relies thereon in ignorance of the truth, and a mortgagee is not estopped to assert his rights against the purchaser where the latter has not paid the purchase money and so is not damaged."

Johnson, although not a party to this action, cannot be damaged, as he has failed to pay the purchase price. Appellants cannot be damaged as they have, or did have, their right of action against Johnson. Neither appellants nor Johnson bought the cotton on the faith of any former custom between appellee and Barrett. Moreover, we are of the opinion that the fact that appellee had permitted Barrett to sell mortgaged cotton in former years is insufficient to establish an implied consent to sell this particular cotton, or a waiver of his lien under the mortgage. Neither Johnson nor appellants had ever bought any cotton from Barrett prior to this sale, and it would be rather far-fetched to hold that they had a right to rely on a course of dealing between mortgagor and

mortgagee, of which they had no knowledge. Appellee's mortgage being of record or on file, both Johnson and appellants were bound to take notice thereof, and bought subject thereto. We have examined the authorities cited by appellants, but do not find them to be of controlling influence here.

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* GLOVER.

4-3428

Opinion delivered April 2, 1934.

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

D. C. Abington and *Tom W. Campbell,* for appellee.

BUTLER, J. Allen L. Glover brought suit in the White Circuit Court against the Missouri Pacific Railroad Company to recover for personal injuries received on February 4, 1933. There was a verdict and judgment in his favor, from which the railroad company has appealed.

At the conclusion of the testimony, the defendant moved for a directed verdict, which motion was overruled. The case was thereupon submitted to the jury.

The appellant contends that the trial court erred in not directing a verdict in its favor and in refusing to give instructions Nos. 3, 5 and 7, requested by it.

The evidence in the case is practically undisputed and tends to establish the following state of facts: Glover sustained his injuries while engaged in loading cattle on one of the cars of the appellant at Beebe, Arkansas. Practically all of the cattle were steers and were loaded from the regular stock pen by means of a cattle chute made of plank constructed with a bottom and sides. The cattle were passed from the loading pen into this chute and driven up it by Glover. He was behind the bunch of steers in the chute "pushing them up into the car." While so engaged, one of the hindmost steers stepped upon a plank in the bottom of the chute, causing it to break. The steer's hind legs fell through the opening thus made in the bottom of the chute and Glover stepped through it at practically the same time. At the point where the plank broke the bottom of the chute was about four feet above the ground. As Glover's leg went through the hole, the steer, which weighed approximately 1,000 pounds, fell back on him, which resulted in a severe injury to him.

Instruction No. 5, requested by the defendant and refused by the court, in effect told the jury that, if the plaintiff could have seen the hole by the use of ordinary care and failed to use such care, and in so doing was guilty of negligence which caused his injury, the jury should return a verdict for the defendant.

Instruction No. 7, requested by the defendant and refused by the court, is as follows: "The jury are instructed that the plaintiff was a man of mature years, and had been engaged in the line of loading cattle prior to this time; was familiar with the stock pens and loading chute of the defendant company, and whatever dangers and risks there was attendant upon his said duties, you are instructed that the plaintiff assumed all the dangers necessary and incident to his work."

The refusal of the court to give these instructions is assigned as error, and also the giving of instruction No. 1, requested by the plaintiff, which is as follows: "The jury is instructed that, if you find from a preponderance of the evidence that the plaintiff's injury was caused by the floor of the chute of the stock pen breaking through as plaintiff was helping to load some cattle into a car on the Missouri Pacific Railroad at Beebe and causing a steer to fall on plaintiff and injure him, and that the floor of the chute broke because the plank was rotten and unsound, and that the defendant railroad company, in permitting the chute of said stock pen to be in such condition, failed to exercise ordinary care for the safety of persons loading stock at said chute, and that the plaintiff was not guilty of contributory negligence, you should find for the plaintiff."

The testimony fails to show that there was any observable defect in the plank which broke, but that when this occurred Glover noticed that the cause of the break was that the plank was rotten underneath. The law is that, when the defendant engaged in the business of common carrier and constructed stock pens and chutes for the purpose of loading cattle upon its cars, the duty rested upon it to construct and maintain them in a reasonably safe condition, and that the failure to do so resulting in injury to one rightfully using the same would be negligence. The question as to whether or not the defendant had performed this duty was submitted to the jury by instruction No. 1, with directions to find for the plaintiff if it should find that the defendant was negligent in maintaining the chute, if the plaintiff him-

self was not guilty of contributory negligence. There was no error in the giving of this instruction of which the appellant can complain.

By instruction No. 2, given at the instance of the plaintiff and immediately following instruction No. 1, contributory negligence was defined, and the question of the plaintiff's contributory negligence was submitted to the jury. These two instructions fairly presented the plaintiff's theory.

The court did not err in refusing to give instruction No. 3 as requested by the defendant, or in modifying it and giving it as modified. That instruction, as requested, told the jury that, if the plaintiff, by the exercise of ordinary care, could have seen the hole in the chute, and by the use of such care could have kept from falling through it, but that he fell on account of his own carelessness, he would not be entitled to recover. The court modified this instruction by adding the words "in time to avoid the injury" immediately after the clause: "could have seen the hole in the chute," and gave it as modified. There was no error in the modification, for, if the evidence was that the plaintiff could not have seen the hole in the exercise of ordinary care in time to avoid the danger, certainly he could not be negligent for not having observed it sooner.

There is, however, a better reason, which is also sufficient to justify the court in its refusal to give instructions Nos. 5 and 7, and that is that there was no testimony to support either instructions 3, 5 or 7. If the condition of the chute was so obviously dangerous because of the hole in it that it would be negligence for one to attempt to load cattle over it, it was the duty of the defendant to prove such condition. This it failed to do. On the contrary, the inference is unmistakable that there was no danger apparent to one engaged as Glover was, for there was no hole in the chute until the plank was broken by the steer. The defect in the plank was not observable from above because the plank was decayed underneath.

There was no error committed by the trial court of which the defendant may complain in the giving or refusal of any of the instructions, or in the modifications made. The evidence was ample to sustain the verdict, and the judgment of the lower court is therefore affirmed.

ROBESON *v.* KEMPNER.

4-1818

Opinion delivered April 9, 1934.

J. R. Long, for movants.

PER CURIAM. A motion has been filed which prays that the opinion appearing in 182 Ark. 746, 32 S. W. (2d) 616, be annulled, and that the decree of this court rendered pursuant thereto be vacated. We there affirmed the decree of the Garland Chancery Court from which the appeal came. That opinion was delivered November 24, 1930. The ground of the motion is that no mandate has issued from this court, and it is insisted that, as the mandate cannot now issue, jurisdiction to enforce the decree has been lost, and the decree has become a nullity.

The disposition of the motion requires the consideration and construction of §§ 2177 and 2178, Crawford & Moses' Digest, and of act 112 of the Acts of 1929 (vol. 1, Acts 1929, page 563), amending these sections.

Section 2177, Crawford & Moses' Digest, reads as follows: "The Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all parties, and, when the judgment or order has been reversed, the Supreme Court

may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just. Provided, when a cause is reversed and remanded the mandate must be taken out and filed in the court from which the appeal was taken by the plaintiff within one year from the rendition of the judgment reversing the cause; and, immediately upon the expiration of the period of one year after the judgment of reversal is entered, when the mandate is not taken out, the clerk of the Supreme Court shall, upon application of the party entitled thereto, issue an execution for all costs accrued up to the date of reversal in the Supreme Court and in the court from which said cause has been appealed."

Section 1 of the act of 1929, *supra,* amended this section so that its provisions would apply to cases which had been affirmed as well as to cases which had been reversed, with the added proviso that the mandate must be taken out within one year from the date of the disposition of the appeal, "and not thereafter."

Section 2178, Crawford & Moses' Digest, reads as follows: "Upon the determination of any appeal or writ of error the Supreme Court may award execution to carry the same into effect, or may remand the record, with the decision of such court thereon, to the circuit court in which the cause originated, and order such decision to be carried into effect."

Section 2 of the act of 1929 amends § 2178 by the addition of the following proviso: "Provided the mandate is taken out and filed with the court from which the appeal came within twelve months from the determination of any appeal; and such decision shall be carried into effect within ten years from the rendition of the judgment, and not thereafter."

It does appear that mandates must issue, if at all, within one year from the date of the disposition of an appeal, whether that disposition be the affirmance, modification or reversal of the judgment or decree appealed from, but it does not follow that the judgment of this court becomes a nullity unless the mandate does issue within twelve months after the disposition of the appeal.

We would hesitate to give the legislation a construction producing this anomalous result unless that construction was plainly required. In our opinion, this construction is not only not required, but is not warranted, as this was not the purpose, nor is it the effect, of the amendatory act.

If the prevailing litigant desires to invoke the aid of the court from which the appeal came to enforce the judgment, he must file the mandate in that court within twelve months, as limited by § 2177 and the amendatory act. But the failure so to do does not annul the judgment or decree of this court. On the contrary, § 2 of the amendatory act of 1929 provides that "such decision shall be carried into effect within ten years from the rendition of the judgment, and not thereafter." The judgment could not be carried into effect if the failure to have mandate issued within twelve months rendered it void. The power therefore inheres in this court to enforce its judgment, whether the mandate issued or not, and the motion is therefore overruled.

SHEPARD *v.* MCDONALD.

4-3181

Opinion delivered April 9, 1934.

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

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

Rose, Hemingway, Cantrell & Loughborough, amici curiae.

JOHNSON, C. J. This proceeding is a continuation of the case of *Shepard* v. *McDonald,* 188 Ark. 124, wherein we said: "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, etc."

The question thus expressly reserved for future determination is here presented, and we now proceed to its determination.

The ballot title submitted with the referendum petition is as follows:

"The purpose of this act is to abolish the State Board of Education elected by the people; to create a new State Board of Education appointed by the Governor; to create the office of State Superintendent of Public Instruction; and to repeal certain sections of the 'school law' which fix a regular time of meeting for the State Board of Education and requires said board to serve without remuneration."

In *Westbrook* v. *McDonald,* 184 Ark. 740, 44 S. W. (2d) 231, in reference to the sufficiency of a ballot title submitted with a petition to refer, we stated the rule as follows: "The ballot title should be complete enough to convey an intelligible idea of the scope and import of the proposed law, and it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must contain no partisan coloring."

The rule thus stated is broad enough to be all inclusive and flexible enough to afford ample relief in all meritorious cases, therefore we reaffirm it without citing or discussing authorities from other jurisdictions.

The only question here presented is, does the ballot title under consideration fall within or without the rule stated?

The first phrase of the submitted ballot title contains the following: "elected by the people." The only purpose for the use of these words was to lend partisan color to the position assumed by the petitioners. It was and is wholly immaterial whether or not the abolished board was elective or appointive. The Legislature has plenary power to create and abolish such boards and commissions.

The second phrase of the submitted title is likewise partisan and colored. The undue emphasis placed upon "appointed by the Governor" does not add to or detract from the merits or demerits of the act.

Not only is this phrase colored and partisan, but it is misleading and contains a half truth only. The act provides that the new State Board of Education shall be appointed by the Governor with the advice and consent of the Senate. Thus it appears that the elective Senate of the State is a part and parcel of the appointive power, but this is skillfully withheld by the proponents of the referendum petitions.

The third phrase of the submitted title is likewise partisan, colored and misleading. It provides, "to create the office of State Superintendent of Public Instruction." This language is partisan and colored because it withholds from the voters the fact that the superintendent is to be elected by vote of the people, and this, in the face of the fact that undue emphasis has just been placed upon the facts that the "abolished board is elected by the people," and that the new board is "appointed by the Governor." If it were important to advise the voters that the old board was elected by the people, and that the new board would be appointed by the Governor, certainly it was equally important to advise the voters that the superintendent would be elected by the people.

The third phrase of the submitted title is misleading because it creates the impression that a new office, that of superintendent of public instruction, is being created. This office has been in existence for the past fifty years,

although for the past few years operating under the appellation of Commissioner of Education. The effect of the language employed in the act is to substitute the office of Superintendent of Public Instruction for that of Commissioner of Education under existing law, and this should have been reflected in the title instead of the converse, as was done.

The fourth and last phrase of the submitted ballot title as follows: "And to repeal certain sections of 'the school law' which fix a regular time of meeting for the State Board of Education and requires said board to serve without remuneration" is likewise misleading, partisan and colored. It is misleading because the fact is the members of the abolished State Board of Education do receive actual expenses while attending meetings of the State Board of Education. It is partisan and colored because it is immaterial whether or not such members are compensated. The inference sought to be conveyed by the use of the language thus employed is that the new State Board of Education to be appointed by the Governor will receive compensation when such is not the fact. If the language thus employed in the title is of importance to the voters, it was of equal importance that they be directly advised that the new State Board of Education to be appointed by the Governor would likewise be required to serve without remuneration.

Thus it appears that each sentence and phrase of the proposed title is either misleading, colored or partisan, and that each and all falls squarely within the prohibition announced in the Westbrook case, cited *supra*.

It is argued that the language contained in the proposed title is true, therefore cannot be considered as misleading, colored or partisan. The willful withholding of a material fact is equally as reprehensible as the misstatement of a material fact. This was fully recognized in the Westbrook case just referred to. There we had under consideration a proposed ballot title as follows: "To permit the granting of decrees of divorces to applicants who have resided in the State for a period of only three months." Each word, phrase and sentence of this

proposed ballot title was literally true, yet we held it misleading because it did not directly advise the voters that it would be necessary for applicants for divorces to establish by evidence a legal cause for divorce in addition to the required three months' residence. Thus it definitely appears that this contention was decided and determined adversely to respondent's contention here.

Our conclusion is therefore, that the submitted ballot title in the instant case falls within the prohibition of the Westbrook case and is insufficient.

After the filing of this suit, one W. E. Greene *et al.* were permitted to intervene upon the theory that they were offering as a part and parcel of the petition for referendum a supplemental and substituted ballot title. Prior to the submission of this cause, however, interveners requested permission to withdraw said intervention. We have concluded that interveners have the right to withdraw said intervention and substituted or supplemental ballot title. Therefore this question passes out of the case.

It follows from what we have said that the respondent, McDonald, Secretary of State, should have denied the petition for referendum, because of the insufficiency of the ballot title submitted therewith, and his actions in submitting and referring same is quashed, and a peremptory writ of prohibition is awarded in behalf of petitioners.

Justices Smith, Mehaffy and McHaney dissent.

Smith, J., (dissenting). If the majority opinion in the case of *Westbrook* v. *McDonald,* 184 Ark. 740, 44 S. W. (2d) 231, was critical in construing the requirements of the Initiative and Referendum Amendment in the matter of the sufficiency of the ballot title, as was said of it in the dissenting opinion in that case, then the majority opinion in the instant case is hypercritical in the same respect. If only those ballot titles may be approved which are above and immune from criticism, the amendment has lost its value in both initiative and referendum features, as ballot titles must be submitted in either case. It is beyond contemplation or comprehension that the

ballot title should advise the voter fully what the exact state of the law will be if the majority vote is cast for the legislation, which is called "the measure" in the amendment. If such a test is to be applied, it would be equally important to advise the elector what the state of the law will be if the majority vote is not cast for the proposed measure.

Act 78 of the Acts of 1933, hereinafter referred to as act 78, here sought to be referred, amends, in several particulars, act 169 of the Acts of 1931, hereinafter referred to as act 169. Suppose it had been attempted to refer this act 169? How could a ballot title ever be prepared which could meet the tests to which the majority have here subjected the ballot title relating to act 78? Act 169 consists of 198 sections, and extends from page 476 to page 588 in the Acts of 1931. It repeals 320 sections of Crawford & Moses' Digest and 8 sections of Kirby's Digest, and either repeals or amends 19 separate acts of the General Assembly. What kind of a ballot title could be employed or devised which would advise the bewildered elector, when he saw the ballot which he was about to cast, what the effect of these changes would be? It must be remembered that the general election law provides that: "No elector shall be allowed to occupy a booth or compartment for the purpose of voting for a longer time than five minutes." Section 3800, Crawford & Moses' Digest. Several times that length of time would be required to read even a synopsis of act 169, even though the voter was not interested in any other question being voted on or in any candidate for office.

The answer to all such suggestions is that the Initiative and Referendum Amendment does not contemplate the particularity and certainty which would be required to meet the objections which the majority have found to the ballot title here submitted. The requirement of the amendment is that "at the time of filing petitions, the exact title to be used on the ballot shall by the petitioners be submitted with the petition." Now, as was said in the Westbrook case, *supra*: "The ballot title should be complete enough to convey an intelligible idea of the scope and import of the proposed law, and ought to be

free from any misleading tendency, whether of amplification, of omission, or of fallacy, and must contain no partisan coloring." These requirements could in most cases be met by employing as a ballot title the same title given to legislation by the General Assembly. The same rule, based upon the same reason, applies alike to legislation or measures initiated by or referred to the people. It would not be fair to permit the proponents of an initiated act to give it a title which was calculated to deceive the elector when he came to vote, and induce him, by reason of the misleading title, to vote for the measure; nor would it be fair to permit the opponents of the measure who had caused it to be referred to the people, to encompass its defeat by reason of a misleading title. It ought to convey an intelligible idea of the scope and import of the proposed law, without misleading tendency, and should contain no partisan coloring having that effect.

Now, under this test, it occurs to me that holding the ballot title insufficient and defective in the Westbrook case, *supra,* affords no justification for holding the ballot title insufficient in the instant case. There the suggested title read as follows: "Referendum of the act of the Legislature of 1931, amending § 3505 of Crawford & Moses' Digest of the laws of the State of Arkansas so as to permit the granting of decrees of divorce to applicants who have resided in the State for a period of only three months." The act there sought to be referred did not permit the granting of decrees of divorce to applicants who had resided in the State for a period of only three months, and the majority thought it unfair and misleading to so state. What the act did—and all it did—was to shorten the time—which had previously been a year—during which one must reside in this State before having the right to sue for a divorce in the courts of this State. Unlike that title, the ballot title in the instant case contains no misstatement of a fact, and there is no omission or amplification or partisan coloring calculated or intended to mislead, in my opinion.

The first statement of the ballot title here under review is that "The purpose of the act is to abolish the

State Board of Education elected by the people." And so it is.

The first section of act 78 repeals §§ 3, 6, 7, 8 and 22 of act 169. Section 3 of act 169 created a State Board of Education, composed of one member from each Congressional district, and by § 4 it was provided that the members "shall be elected by the qualified electors of each Congressional district at the regular annual school election." In other words, the electors of each Congressional district elect their own member, so that they are elected by the people.

The second statement of the ballot title is to "create a new State Board of Education appointed by the Governor." And so it is. Section 2 of act 78 reads as follows: "The State Board of Education as now constituted by law is hereby abolished, and there is hereby created a State Board of Education to be composed of seven members to be appointed by the Governor by and with the advice and consent of the Senate." This means, of course, that the appointment made by the Governor must be confirmed by the Senate, and, as stated in the ballot title, the appointments are made by the Governor, and if, for any reason, the appointments made are not confirmed, the Governor makes other appointments. The appointing power abides in the Governor.

But, again, I beg to suggest that if such mere matters of detail must be recited in the ballot title, as that an appointment made by the Governor must be confirmed by the Senate, then it will be difficult, if not impossible, to prepare a practical ballot title. It should not be required to employ a title of such length and intricacy as to cause the despair, if not the disgust, of the elector in the five minutes he is allowed to prepare and cast his ballot. This statement appears to me to be equally applicable to other objections made to the ballot title.

The third purpose stated in the ballot title is "To create the office of State Superintendent of Public Instruction." And so it is. The first paragraph of § 3 of act 78 reads as follows: "The office of Commissioner of

Education is hereby abolished and the office of State Superintendent of Public Instruction is hereby created."

The fourth purpose is stated in the ballot title to be "To repeal certain sections of the School Law which fixes the regular time of meeting for the State Board of Education, and requires said board to serve without remuneration." Section 6 of act 169 reads, in part, as follows: "The State Board of Education shall meet annually on the second Monday in September in the office of the Commissioner of Education, and shall also hold regular quarterly meetings on the second Monday in December, March, and June." This section is expressly repealed by act 78, as stated in the ballot title.

Section 8 of act 169, which is expressly repealed by act 78, provided that: "The members of the State Board of Education shall serve without remuneration, other than their actual expenses while attending meetings of the Board," so that the 4th statement of the purpose of the act appearing in the ballot title is literally true, except that the members of the State Board of Education under act 169 were allowed their actual expenses while attending meetings of the board. Being allowed this and nothing more, it may well be questioned whether the board members were to receive any remuneration. They were paid nothing for their services, and were only allowed expenses incurred while attending meetings to perform their otherwise unremunerated duties. This must be *de minimis*.

Now, it may or may not be wholly unimportant whether the board which is to administer the educational affairs of the State is elected or appointed, as the majority say. It is not, in my opinion, our function to say that there is no difference, when the number of electors required by the constitutional amendment to invoke its aid, have done so, for the purpose of retaining an elective rather than an appointive board.

It is said that the ballot title is partisan and colored, because it withholds from the voters the fact that the State Superintendent of Public Instruction, provided for by act 78, is to be elected by the people, because it had stated that the "abolished board is elected by the peo-

ple," whereas the new board is "appointed by the Governor."

The majority opinion furnishes what appears to me to be a satisfactory answer to this objection, and that is, that the office of Superintendent of Public Instruction was not an innovation in the educational history of this State. We had had such an office for more than fifty years; in fact, since December 7, 1875, until it was abolished by recent school legislation, during all of which time that official had been elected as other State officers were elected. Section 8793, Crawford & Moses' Digest.

However, had the ballot title recited, as the majority say it should have done, that upon the re-creation of this office it would be filled as it had been during its former existence, it might have been objected that the statement was not accurate, but was partisan and colored, for the reason that § 3 of act 78 provides that: "Immediately after this act has taken effect and is in force, the State Board of Education herein created shall elect a State Superintendent of Public Instruction, who shall serve until the next general election and until his successor is duly elected and qualified."

Can it be imagined that any one could prepare a ballot title to which no objection could be found, and which would be approved by all persons who considered it? On the contrary, it is impracticable, if not impossible, except in very simple matters of legislation, to advise the elector what the exact state of the law will be after the measure has been adopted or rejected by the people, and no such requirement should be imposed if the Initiative and Referendum Amendment is to produce the results, the anticipation and expectation of which induced its adoption.

The majority have said nothing about the substitute ballot title which was submitted in anticipation of the possible rejection of the original title submitted along with the petition, and I shall not, therefore, consider its sufficiency, as, in my opinion, the original title was sufficient. But I feel constrained to say that it was expressly held in the former opinion in this case to which the majority opinion refers, that the ballot title is a part of the

petition. *Shepard* v. *McDonald,* 188 Ark. 124. The amendment expressly provides that the petition may be amended; therefore, the ballot title, which is a part of the petition, may be amended. The amendment provides that: "If the Secretary of State * * * shall decide any petition to be insufficient, he shall, without delay, notify the sponsors of such petition, and permit at least thirty days from the date of such notification * * * for correction or amendment."

Prior to the decision in this case there was no occasion to invoke this provision of the amendment, because the title had not been held insufficient. On the contrary, the Secretary of State held it to be sufficient. He must now, under the majority opinion, hold the ballot title insufficient, and, this being true, an opportunity to amend, for which the amendment itself provides should be afforded.

I therefore most respectfully dissent and am authorized to say that Justices MEHAFFY and MCHANEY concur in the views here expressed.

MEHAFFY, J., (dissenting). I do not agree with the majority in holding that the ballot title is insufficient because it is misleading, colored or partisan, or that it is insufficient or defective for any other reason. I wrote a dissenting opinion in the case of *Westbrook* v. *McDonald,* in which I reviewed the authorities, and I do not deem it necessary to review all those authorities again. The dissenting opinion in the Westbrook case may be found in 184 Ark., beginning at page 753, 44 S. W. (2d) 331.

Mr. Justice SMITH, in his dissenting opinion in this case, has called attention to the law which prohibits any elector from occupying a booth or compartment for the purpose of voting for a longer time than five minutes. During that time, the voter must cast his vote for State, district, county and township officers. It would be unreasonable to expect any voter, within that time, to have any time to study ballot titles or anything else, except simply to cast his vote.

The law provides that, when a petition is filed to refer any act to the people, there must be filed with the petition an exact copy not only of the title, but of the act

itself, and the only useful purpose of the ballot title is to enable the voter to identify that with the act filed in the Secretary of State's office, or the one published in the newspapers. It would be entirely unreasonable to expect a voter, in five minutes, to study the ballot title for any other purpose than to identify it with the act which he is supposed to have read.

The Constitution simply provides that the exact title to be used on the ballot shall be, by the petitioners, submitted with the petition. There is no intimation or suggestion in the Constitution or the law as to what the title shall contain.

I have no doubt that a ballot title might be prepared by each of a dozen lawyers, and that they would all be different, and I submit that no one could prepare a ballot title that every one would agree was correct. Voters are not expected, within five minutes, to get information about the merits of an act and decide whether they want to vote for or against it; they are supposed to have that knowledge before they go into the booth to vote. That is the reason that the law requires an exact copy of the act to be filed with the petition, and that is the reason that the act is required to be published in every county in the State for four months. The voters get their information as to the purpose of the act from the act itself, and not from the ballot title.

I think the decisions of this court have annulled the amendment to the Constitution providing for referendum. It should not be required that the ballot title should be such that the voters could learn the purpose and effect of the act from it. It should be such only as identifies it with the act filed in the Secretary of State's office and published in each county. I do not believe that any lawyer could prepare a ballot title that some one would not object to.

The Supreme Court of Oregon, in discussing ballot title, said:

"There is nothing in the Constitution as amended implying that the full title as appears in the proposed measure shall appear upon the ballot, nor does the act under consideration so require. The method provided

is adequate to identify the bill, as indicated on the ballot, with the proposed measure on file in the office of the Secretary of State, the full title and text of which appear in pamphlets, a copy of which, under the law in force at the time the local option law was voted on, was presumably in the hands of each voter. The method then in use, and as since improved upon, was, and is, analogous to the proceeding before the legislative assembly. There, before the roll call for voting on a proposed measure is had, the presiding officer announces that "We are about to vote on House (or Senate) Bill No. 104, or whatever number the bill may have, which number as thus announced identifies the bill to be voted upon with the printed bill on the desk of each member. True, the title is previously read, as is the entire bill, and so it is presumed to have been previously read by each voter under the initiative system.

"The only question, then, to determine is, Does the title as designated and used on the ballot come within the purview of the Constitution as amended and supplemented by the act of 1903? We think it does. * * * As above stated, the title of a bill before the legislative assembly is required to be read with the measure to be voted upon, and the full title is presumed to appear thereon. This method under the initiative would be impracticable; for, as manifest from the length of the title of the act under consideration, if many measures should be submitted to the voters at one time, to print upon the ballot a full title to each would require the ballot to contain many pages of printed matter, which cumbersome method was plainly intended to be avoided. To recognize the rule invoked by appellant would defeat the very purpose contemplated by the adoption in our fundamental laws of our direct, and additional, system of lawmaking. The system provided, as above considered, was obviously designed to take the place of that employed by the Legislature, and accomplishes the same result." *State* v. *Langworthy,* 55 Ore. 503, 104 Pac. 424, 106 Pac. 336.

The Oklahoma Supreme Court said: "As to the ballot title prepared and filed with the Secretary of State and with the Attorney General, it appears that the parties

submitting the proposition have complied with the law. The ballot title was prepared by the Attorney General, acting in conjunction with the attorney for the parties submitting the proposition, and contains the gist of the measure, without any argument or statement either for or against it. The protestant has offered no substitute title for the one prepared and filed, as required by section 3377." In Re Referendum Petition No. 30, State Question No. 94. 71 Okla. 91, 175 Pac. 500.

The protestants here have offered no substitute title and the court offers none. If the title is defective, as the majority holds, then it would seem to be fair that either the protestants or the court should prepare a title that would be sufficient. That is especially true in this case because, since the decision, the Secretary of State is compelled to hold that the ballot title is insufficient; but whenever he makes that holding, the law provides that the parties shall be notified and given an opportunity to amend.

What could be accomplished by amending, if the amended or substituted ballot title is to be attacked with no reason to believe that it will be held sufficient? If the court would prepare a substitute ballot title, the people would then be permitted to vote on the act and the constitutional amendment providing for referendum would not be made ineffective. The purpose of the amendment was to permit the public to vote on measures like this; and if the ballot title is held insufficient by the court, the court certainly should tell them what would be a sufficient ballot title.

In the case of *State* v. *Duluth & N. M. Ry. Co.*, 102 Minn. 26, 112 N. W. 897, it was claimed that the act did not repeal the provisions of prior statutes. The Supreme Court of Minnesota said: "It is perfectly obvious from a mere reading of this statute, and we so hold, that it was intended to and did repeal all classifications of railroad companies in the matter of taxation," etc.

In the case of *Wagoner* v. *City of LeGrande*, 89 Ore. 192, 173 Pac. 305, the court, in discussing the ballot title, said: "We think that the title of the act is sufficient.

"The ballot title expressly directed attention to the amendment to the charter authorizing these assessments. It was sufficient within the rule announced in *State* v. *Langworthy,* 55 Ore. 303, 104 Pac. 424. The amended complaint admits that the election at which the charter was adopted was duly and regularly held. It follows from this admission that every voter received a copy of the proposed amendment with the official arguments, if any, for and against its adoption. We must assume that the electors voted intelligently, and there is nothing in the record to impeach the validity of their action."

In this State the act must be published in every county, and every voter has a right and an opportunity to read it, and, as said by the Oregon court, we must assume that they will vote intelligently.

I think the Westbrook case is wrong and should be overruled, but, if that is not done, this case can be clearly distinguished, in my judgment, from the Westbrook case, and this ballot title should be held sufficient, so as to permit the people to vote on the question. If, however, the ballot title is insufficient, the court should prepare one that meets with its approval, to the end that the people may be permitted to vote on this act.

The North Dakota court said:

"Distinction must be made between the 'ballot title' and the statement of the question to be voted upon. The proposed 'ballot title' is not misleading. It does not purport to be a statement of the question—it is merely the title. It is possible it could be improved. It may not be labeled the way others may label it; but the only way it could have been stated at the time the petition was circulated was as 'Senate Bill No. 100,' and, in addition, to prevent any misunderstanding it stated this bill provided for the tax of 4 cents per gallon. * * * Strenuous objection is made to the form of the 'ballot title,' as if this constitutes the manner in which the electors will be apprised of the contents of the law referred." *Schumacher* v. *Byrne,* 61 N. D. 220, 237 N. W. 741.

In this case more than 25,000 voters signed the petition for the referendum, and yet, because the leaders of the movement failed to prepare a ballot title in the man-

ner this court thinks it should have been prepared, these more than 25,000 voters are not permitted to have the act referred. The Secretary of State, whose duty it is to pass on the ballot title, thought it was sufficient; the petitioners thought it was sufficient, and three members of this court think it is sufficient.

I think when there is such difference of opinion about it that the doubt, whatever it is, should be resolved in favor of the ballot title, thereby enabling the people to vote on this measure.

POULAS *v.* KUMPURES.

4-3440

Opinion delivered April 9, 1934.

T. P. Oliver and *Coulter & Coulter,* for appellant.

Brown & Bradley, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the municipal court of Little Rock to recover $300 principal and $108.94 interest, or a total of $408.94, upon four out of a series of rent notes executed

by Peter Kumpures to N. Brastos, alleging that he (appellant) was the owner thereof for a valuable consideration, and that no part of said notes had been paid.

Appellee filed an answer admitting the execution of the notes to N. Brastos, but denied that Brastos transferred them to appellant for a valuable consideration, and denied that no part of said notes had been paid, and, by way of further answer, alleged that the notes were executed as rent notes subject to the terms and conditions of a lease entered into on the 6th day of May, 1928, by and between Christine M. Bryan, lessor, and Peter Kumpures, lessee, under the terms of which the rent should cease and all unpaid rental notes should become void in the event the leased property should be destroyed by fire and rendered untenantable.

Upon a trial of the cause, the municipal court rendered judgment in favor of appellee, from which an appeal was duly prosecuted to the circuit court of Pulaski County, Second Division.

In the circuit court, appellee was permitted, over the objection and exception of appellant, to file an amended answer and counterclaim, in which he adopted a part of his former answer, and, by way of counterclaim, alleged that on or about December 19, 1930, the appellee paid the sum of $600 to appellant for $700 worth of the unpaid notes, which were a part of the same series as those sued upon, under agreement with appellant that, should the building be destroyed by fire, he would refund said amount to him.

The cause was submitted upon the pleadings, the evidence adduced, and instructions of the court, resulting in a judgment dismissing appellant's complaint, from which is this appeal.

The facts reflected by the record are, in substance, as follows:

Brastos had a lease on certain property in El Dorado belonging to Mrs. Christine M. Bryan. He ran a billiard hall therein, and Mrs. Bryan desired to make a five-year lease on the property to appellee and was compelled to buy the Brastos lease in order to do so. Appellant had

advanced Brastos money with which to conduct his business, and was anxious to collect same. Appellant and Brastos were willing to accept $1,000 in cash and take a certain number of appellee's rent notes for the Brastos lease and billiard hall. Mrs. Christine M. Bryan, acting through her husband, purchased the lease and billiard hall from Brastos and leased a part of the premises thus acquired to appellee. Her husband ran the billiard hall and cut off a space therein for appellee's hat shop. The lease for which appellee executed the series of rent notes provided that they should become void in case the building should be destroyed by fire. The series of rent notes were made payable to Brastos. He turned them over to appellee without indorsing them. The check for $1,000 was indorsed by both appellant and Brastos when they cashed it. Appellant afterwards proposed to discount a part of the rent notes which he had received, and appellee accepted his proposition and paid him $543 in cash for them on condition, according to testimony introduced by him, that he (appellant) would refund the money in case the building should be destroyed by fire. Appellant testified that they were discounted and turned over to appellee unconditionally, and that he made no promise to return the money in case the building was destroyed by fire. There is a dispute in the testimony as to whether appellant took the notes originally from Brastos with knowledge that they were to be void in case the building should be destroyed by fire. Appellant denied such knowledge, but two witnesses testified on behalf of appellee that the lease was read to appellant twice before the notes were assigned and delivered to him, and that he knew such a clause had been inserted in the lease. The record also reflects, without dispute, that appellee refused to execute the lease and sign the rent notes until such a clause was inserted in the lease, and that, after same was inserted therein, he delivered the rent notes to Brastos and took possession of the part of the space he was entitled to under the lease and occupied same until the building was destroyed by fire. The lease itself was not signed by appellee after said clause was inserted in accordance with his request and demand. The building was

destroyed by fire on May 31, 1931. Three of the notes sued upon matured before the fire and one thereafter. The notes which were discounted and turned over to appellee by appellant had not matured at the time of the fire.

At the conclusion of the testimony, appellant requested the court to instruct a verdict in his favor for the full amount, principal and interest, covered by the notes sued upon, which was refused. Then he requested the court to instruct a verdict for the amount, principal and interest, covered by the three notes which matured before the building was destroyed by fire, which was refused.

These instructions were requested by appellant on the theory that he was an innocent purchaser of the notes for value before maturity, and the refusal of the court to give these instructions and the submission of this issue to the jury constitute the main contention of appellant for a reversal of the judgment. These instructions could only be justified on the ground that the undisputed testimony showed that appellant was an innocent purchaser for value of the notes before maturity; whereas there is testimony in the record showing that appellant knew all about the transaction, and that the lease contained a clause to the effect that the rent notes should be void in case the building should be destroyed by fire.

Appellant also contends for a reversal of the judgment on the ground that the written lease does not refer to the written notes nor the written notes to the lease, and that the court committed error in admitting oral evidence to show the connection between them. Oral testimony showing the connection between them does not have the effect of contradicting the terms of either as argued by appellant. The effect of the testimony was to show that they were parts of the same agreement and not for the purpose of changing or modifying the provisions of the written instruments. Again, it is always permissible "to show the consideration for a promissory note by oral proof for the purpose of showing want or failure of consideration, or illegality of consideration." *Vinson* v. *Wooten,* 163 Ark. 170, 259 S. W. 366.

Appellant also contends for a reversal of the judgment because the undisputed evidence reflects that the lease was never signed by appellee. It is immaterial under this record whether the lease was signed by appellee or not. It was signed by the lessor and accepted by the appellee, who went into possession under it and remained in the building until it was destroyed by fire.

Appellant also contends for a reversal of the judgment because appellee was permitted to plead a counterclaim for the first time in circuit court. It is true the written answer filed in the municipal court did not set out the counterclaim, but that does not necessarily mean that it was not orally pleaded. In fact, the judgment rendered by the municipal court could not have been rendered upon any other theory than that the counterclaim was pleaded. Oral pleadings are permissible in municipal or justice's courts, and it was within the discretion of the circuit court to allow appellee to embody in the amended answer the counterclaim pleaded orally in the municipal court.

No error appearing, the judgment is affirmed.

FORD *v.* HARRINGTON.

4-3411

Opinion delivered April 9, 1934.

Partlow & Rhine, for appellant.

KIRBY, J. The sole question for determination here is whether lands in Arkansas purchased with money paid by the United States Government to World War veterans as adjusted service compensation or bonus are subject to taxation.

The section of the United States statute (§ 454, title 38, USCA) upon which the claim is based reads as follows: "The compensation, insurance and maintenance and support allowance payable under parts II, III, IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under parts II, III or IV; and shall be exempt from all taxation. Such compensation, insurance and maintenance and support allowance shall be subject to any claims which the United States may have, under parts I, III, IV and V against the person on whose account the compensation, insurance or maintenance and support allowance is payable."

In *Wilson* v. *Sawyer,* 177 Ark. 492, 6 S. W. (2d) 825, this court held that money paid to a disabled soldier under guardianship by virtue of the World War Veterans' Act was not subject to garnishment whether in the hands of the soldier or his guardian.

In *Stone* v. *Stone,* 188 Ark. 622, it was held that the guardian of a war veteran, appointed by the State court, is not an agent or instrumentality of the United States; any payment to such guardian vested title in the ward discharging the obligation of the United States in respect to such installments. That money paid by the United States as a pension to the guardian of a war veteran, who had been adjudged incompetent, and by him deposited in the bank for his ward, was the property of the ward and subject to apportionment between the ward and his divorced wife under the provisions of our statute, the award to the wife of a portion of such money not creating the relationship of debtor and creditor within the meaning of the provisions of the Veterans' Act and was not exempt thereunder.

In *Spicer* v. *Smith,* 288 U. S. 430, it was held that compensation funds paid to World War veterans on deposit in a bank at the time of its insolvency were not entitled to priority "as debts due the United States" under § 191, title 31, USCA. That a guardian appointed by a State court for an insane World War veteran was not an agent or instrumentality of the United States, and pay-

ment to the guardian for such ward vested title to such funds in the ward.

The exact question raised by this appeal has already been determined by the United States Supreme Court in *Trotter* v. *Tennessee,* 290 U. S. 354, 54 Supreme Court Reporter, No. 3, page 138, where it was held that real estate purchased with compensation money was not exempt from taxation. The court there said: "We think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into lands and buildings. The statute speaks of 'compensation, insurance and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the State. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here."

It thus appears from the above decision of the United States Supreme Court that the exemption does not follow the compensation money after its investment in lands or other forms of securities, nor relieve the owner from regular taxation thereon. The decree is affirmed.

SEWELL *v.* REED.

4-3437

Opinion delivered April 9, 1934.

Haynie, Parks & Westfall, Nash & Ahern, Newby, Rathburn & Burditt and *Coleman & Riddick,* for appellants.

Nace B. Crawford, Remington Rogers and *Coulter & Coulter,* for appellee.

BUTLER, J. On the 23d day of May, 1933, Joe Reed, appellee, filed his complaint in the Ouachita Chancery Court, in which he alleged "that he, George Reed, Mary Reed Gaskin, Arthur W. Sewell and John W. Sewell, minors, heirs at law of Parthenia Berry Sewell, deceased, and certain other parties, the heirs at law of Millie Reed Weaver, deceased, were the owners as tenants in common of the west half of the northeast quarter and the east half of the northwest quarter of section 33, township 15 south, range 15 west, in Ouachita County, Arkansas, and that they derived title to said lands through Fannie Reed, the common source, to whom a patent was issued from the United States on or about January 15, 1885.

"He stated that Fannie Reed died intestate in Ouachita County on April 2, 1885, seized and possessed of the lands above described, and leaving surviving as her heirs at law the following named persons: the plaintiff, Joe Reed, a son; George Reed, a son and defendant; Mary Reed Gaskin, a daughter and defendant; Millie Reed Weaver, a daughter, and Nannie Reed Berry, a daughter, defendants.

"That Nannie Reed Berry died possessed of her interest in the property and leaving as her sole heir at law a daughter, Parthenia Berry Sewell, who later died without having alienated her interest in the property and leaving surviving as her sole heirs at law defendants Arthur W. Sewell and John W. Sewell, minors; that Millie Reed Weaver died intestate, leaving surviving numerous heirs at law who were made parties defendant, but who are not parties to this appeal.

"That title to the above-described property is now vested in the following persons as tenants in common as follows: In Joe Reed, plaintiff, an undivided one-fifth interest; in George Reed, an undivided one-fifth interest; in the minors, Arthur W. and John W. Sewell, through their mother, Parthenia Berry Sewell, heir at law of Nannie Reed Berry, an undivided one-fifth interest. In numerous defendants, heirs at law of Millie Reed Weaver, an undivided one-fifth interest.

"That the defendants have at all times mentioned been in possession of the lands described for the benefit of the plaintiff and said defendants; that on or about October 16, 1922, defendants sold a commercial oil and gas mining lease on the property for the sum of $70,000, but failed to account to the plaintiff for his interest; that since the sale of the lease the defendants have collected royalties under the lease amounting to more than $100,000, for which they have refused to account.

"That defendant, Chicago Title & Trust Company, holds certain sums of money for its wards, Arthur W. and John W. Sewell; that certain defendant oil companies [later dismissed by plaintiff], unless restrained, would continue to pay over the royalties to plaintiff's cotenants to plaintiff's irreparable injury.

"Plaintiff prayed for an accounting and judgment for a one-fifth share in the sum realized from the sale of oil and gas from the property; for a decree of partition of the lands between himself and his defendant cotenants; and for the impounding of the other interests in the land for the satisfaction of his claims."

To this complaint, certain oil companies which had been made defendants filed their answers, but these pleadings need not be noticed since the suit as to these defendants was dismissed by the plaintiff. The guardian of the appellants, Arthur W. and John W. Sewell, made answer, denying the allegations of the complaint and setting up as an affirmative defense that "Fannie Reed, at the time of her death, was the owner of the land described; that after her death an administrator was appointed to administer upon her estate, that certain claims were filed and probated and that the probate court of Ouachita County, Arkansas, ordered a sale of the lands involved to secure funds with which to discharge the claims. That, in pursuance to the order of the probate court, the lands described were sold to one Chandler, and an administrator's deed executed and delivered to him. A copy of the deed was attached as a part of the answer and marked Exhibit A. It alleged the sale by Chandler of the property involved to Nannie Reed Berry, attaching his deed as Exhibit B and making it a part of the answer. It alleged that Nannie Reed Berry went in possession of the land under her deed from Chandler and remained in possession until her death, claiming to be the owner thereof; that, upon the death of Nannie Reed Berry, the land passed into the possession and ownership of Parthenia Berry Sewell, who remained in open, notorious and exclusive possession, claiming ownership for more than seven years. It alleged the death of Parthenia Berry Sewell, the vesting of the title in the minors, Arthur W. and John W. Sewell, and their subsequent open and notorious possession under claim of ownership. The defendant prayed the dismissal of the complaint for want of equity."

On the pleadings and evidence adduced, the trial court found the issues of law and fact in favor of the

plaintiff, and rendered a decree in accordance with the prayer of the complaint. From that decree, this appeal is prosecuted.

The correctness of the decree is challenged on the following grounds: (1) that the proof is not sufficient to establish that Joe Reed was the child of Fannie Reed; (2) that his claim as a tenant in common is barred by limitation; (3) that the appellee is barred by his laches; and (4) that the sale of the land by the Ouachita Probate Court divested the title out of all the heirs of Fannie Reed.

We are of the opinion that the contention last made is sound, and there is therefore no necessity for us to deal with the other questions presented by the appellant and to discuss the evidence relating thereto.

On April 19, 1892, the probate court of Ouachita County, by its order, duly entered of record, approved the appointment of J. C. Russell as administrator of the estate of Fannie Reed, deceased, made by the clerk in vacation. On January 17, 1894, said court made and entered an order reciting the application by the administrator for an order to sell the lands of the intestate to pay debts probated against the estate, it being alleged that there was no personal property of the estate out of which the debts could be paid. The prayer of the administrator's petition was granted, and the sale ordered to be held on February 28, 1894. At the April term of the probate court, on April 16, 1894, an order was duly made and entered of record confirming the sale of the lands to D. W. Chandler for the sum of $190. On August 2, 1895, an administrator's deed containing the proper recitals was executed, conveying the lands to the purchaser, Chandler, which deed was duly acknowledged and recorded on August 29, 1895.

The judgment of the probate court is sought to be set aside on the theory that the grant of letters to Russell was improvidently made by the court because the heirs of Fannie Reed, who were *sui juris* and lived within the county, had not been served with citation under the provisions of the statute giving a preferential right to administer to one entitled to a distributive part of the

estate of the intestate; and, second, because there were in fact no debts due by the estate, or any other necessity for an administration, and, in consequence thereof, the administration proceedings on the estate of Fannie Reed are void.

The evidence shows that on the 11th day of February, 1904, Chandler, the purchaser at the administration sale, by his quitclaim deed of that date, his wife joining therein, duly executed and acknowledged, conveyed said land to Nannie Berry, a daughter of Fannie Reed and the mother of the Sewell appellants. It is the contention of the appellee that, if the validity of the administration proceedings be conceded, since Nannie Berry, after the death of her mother, Fannie Reed, was a tenant in common with the appellee, the purchase by her inured to his benefit, and that their status as tenants in common was not changed by reason of her purchase from Chandler.

A probate court has exclusive original jurisdiction in matters relative to the estates of deceased persons, executors and administrators. Therefore, in the administration proceedings, it was acting within its jurisdiction. As to all such matters, it is a court of superior jurisdiction, and its judgments import the same degree of verity as that of other superior courts. *Flowers* v. *Reece,* 92 Ark. 611, 123 S. W. 773. Jurisdiction is specifically given probate courts to order a sale of real estate of an intestate to pay debts. *Stumpff* v. *Louann,* 173 Ark. 193, 292 S. W. 106; *Sullivan* v. *Times Publishing Co.,* 181 Ark. 27, 24 S. W. (2d) 865. Since the court had jurisdiction in the proceedings, errors and irregularities would not render its judgment void. Therefore the fact that the heirs had no notice would be an error which might have been corrected in that court or by appeal. If there was an error in granting the letters to Russell without notice to the heirs, it was such one as did not render the proceedings void. *Jackson* v. *Reeve,* 44 Ark. 496. The fact also that there might have been no debts due by the estate was not sufficient to render the judgment void. *Stuart* v. *Peay,* 21 Ark. 117. The judgment of a probate court as to the necessity for an administration is conclusive on collateral

attack. *Sharp* v. *Himes,* 129 Ark. 327, 196 S. W. 131; *Turley* v. *Gorman,* 133 Ark. 473, 202 S. W. 822.

The appellee contends, however, that the instant proceeding is not a collateral, but a direct, attack upon the judgment of the probate court for fraud in its procurement. It will be observed by reference to the complaint filed by the appellee that the action was for a purpose independent of the judgment of the probate court and contemplated other relief than the setting aside of that judgment. The rule announced and approved in *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, is as follows: "If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral." In *Woods* v. *Quarles,* 178 Ark. 1158, 13 S. W. (2d) 617, this court said: "A direct attack on a judgment is an attempt to amend it, correct it, reaffirm it, vacate it, or enjoin the execution in a proceeding instituted for that purpose." The judgment of the probate court was pleaded by the appellants in bar of the appellee's right to have the lands partitioned, and for an accounting for the proceeds derived from the land by the appellants. Although it was necessary to appellee's success in the suit which he had filed that the judgment of the probate court be overturned, this did not change the proceedings from a collateral to a direct attack. Since this is a collateral proceeding, the judgment of the probate court could only be avoided for lack of jurisdiction, and that must be apparent on the face of the record. *Blanton* v. *Forrest City Mfg. Co.,* 138 Ark. 508, 212 S. W. 230; *St. L.-S. F. R. Co.* v. *Wardell, etc., Rd. Imp. Dist.,* 157 Ark. 557, 249 S. W. 17. See also *Sullivan* v. *Times Publishing Co.,* 181 Ark., *supra.*

It is next contended by the appellee that, when Nannie Berry bought the lands from Chandler, the purchaser at the administrator's sale, she must be deemed to have purchased it for herself and for the benefit of her co-tenants, and states his contention as follows: "In any event, the purchase of an outstanding title against the commu-

nity property by one tenant in common would inure to the benefit of all cotenants." A number of cases of our court are cited to support this contention, among them being *Britton* v. *Handy,* 20 Ark. 381; *Ferguson* v. *Etter,* 21 Ark. 160; *Moore* v. *Woodall,* 40 Ark. 42; *Clements* v. *Cates,* 49 Ark. 242, 4 S. W. 776; *Cocks* v. *Simmons,* 55 Ark. 104, 17 S. W. 594; *Sanders* v. *Sanders,* 145 Ark. 188, 224 S. W. 732; *Tompkins* v. *Tompkins,* 151 Ark. 572, 273 S. W. 103. Without discussing these cases at length, it may be said they do not sustain the appellee's contention. The general principle is laid down in *Britton* v. *Handy, supra,* which prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase, and therefore no one may be permitted to purchase for his own benefit an interest where he has a duty to perform which is inconsistent with his character of purchaser. There was no relationship of trust existing between Nannie Berry and her brothers and sisters, nor any duty to discharge the debt due by the intestate. She was not the purchaser at the administrator's sale, but from the purchaser at that sale, and she bought from him the lands 10 years subsequent to the administrator's sale. By reason of the sale by the administrator, an outstanding title was created, and, although Nannie Berry had been a tenant in common of her brothers and sisters subsequent to the death of Fannie Reed, their mother, and preceding their divesture of title by such sale, her purchase of the same from Chandler was not void, nor did that interest then acquired vest in her cotenants. Freeman on Cotenancy, § 156.

Moreover, a preponderance of the evidence clearly indicates that Nannie Berry, the mother of the appellants, minors, held the land after her purchase from Chandler adversely against all the world. She, acting through her husband, exercised rights of dominion over it, such as cutting and removing the timber, selling the same and executing mortgages, which manifested exclusive ownership in her, and that she was claiming adversely to her former co-tenants is conclusively shown by litigation between them in 1911, when all her known brothers and sisters

brought suit alleging that they and Nannie Berry were the sole heirs at law of Fannie Reed, deceased, and asking for a partition of the lands. This suit was resisted by Nannie Berry, and a decree rendered by the Ouachita Chancery Court denying the prayer of the plaintiffs in that case, and confirming title in Nannie Berry. In 1926 the same litigation was again instituted by the same parties plaintiff, and in the lower court and this court it was held that their rights were concluded by the judgment of the chancery court rendered in 1911. See *Reed* v. *Rumph,* 170 Ark. 258, 280 S. W. 357.

Our conclusion being that the judgment of the probate court authorizing and approving the sale of the lands by the administrator is valid on collateral attack and served to divest the title of the heirs of Fannie Reed, and that title acquired by Nannie Berry thereunder was not for the benefit of her co-tenants, it follows that the decree of the trial court must be reversed, and the case is remanded with directions to dismiss the complaint for want of equity.

BURTON *v.* TRIBBLE.

4-3442

Opinion delivered April 16, 1934.

Will Steel and *Frank S. Quinn,* for appellant.

Martin, Wootton & Martin, for appellee.

JOHNSON, C. J. Appellant instituted this suit in the Garland Circuit Court against appellee, alleging, that appellee was, at all the times hereinafter stated, and is now, a duly practicing physician and surgeon; that in the year 1926 appellant employed appellee to perform, and that he did perform, a major operation upon her abdomen or abdominal cavity; that, at the conclusion of said operation, appellee carelessly and negligently left remaining in her abdominal cavity a ball of gauze 1½ inches in diameter, and that appellee carelessly and negligently closed the incision into her abdominal cavity without first removing said ball of gauze and thereby inclosed same within her body; that thereafter appellee continued to treat appellant as physician and surgeon, but carelessly and negligently withheld from appellant any and all information or knowledge in reference to her abdominal cavity containing said foreign substance; that appellant had no information, and did not know, that said foreign substance was left in her abdominal cavity until 1933, at which time she was compelled to undergo another operation at Texarkana for the removal of said foreign substance. Appellant further alleged continuous pain and suffering from the date of the operation in 1926 until the date of the second operation in 1933, and laid damages in the sum of $35,000.

Appellee interposed, and the trial court sustained, a demurrer to appellant's complaint upon the theory that the alleged cause of action accrued at the time of the operation in 1926, and was barred by limitation three years thereafter. Judgment was entered dismissing ap-

pellant's complaint, and this appeal is prosecuted to reverse this judgment.

But one question is presented for determination: Is appellant's alleged cause of action barred by the three-year statute of limitation?

In *Field* v. *Gazette Publishing Co.*, 187 Ark. 253, 59 S. W. (2d) 19, we announced the applicable rule of limitation in tort actions as follows: That in all tort actions arising in this jurisdiction, not otherwise limited by law, and where the means of information in reference to the cause of the injury were equally accessible to each party, and there was no fraudulent concealment of the cause or extent of the injury, the three-year statute of limitation was applicable and barred the action. The rule thus stated is the inevitable conclusion deducible from the following language which was employed in the Field case. "As we understand this record, appellant does not contend that appellee fraudulently concealed any fact with reference to his injury, and he does not contend that appellee had knowledge of facts or information other than those well known to appellant." Thus it certainly appears that the alleged facts in the instant case do not necessarily fall within the rule of limitation as announced in the Field case.

By his demurrer, appellee admits that he carelessly and negligently left remaining in appellant's abdominal cavity a ball of gauze 1½ inches in diameter, and continued to treat her thereafter without disclosing to her this unfortunate condition until more than three years had elapsed. It is the well-established doctrine in this jurisdiction that a practicing physician and surgeon must exercise that degree of care, skill and learning ordinarily possessed and exercised by members of their profession in good standing in the community, and that they must exercise reasonable care in the exercise of their skill while attending their patients. *Gray* v. *McDermott*, 188 Ark. 1.

It cannot be said as a matter of law that appellee did not know that this foreign substance was left in appellant's abdominal cavity because, under the rule just stated, he was required to exercise ordinary care in the

performance of said operation, and, when thus measured, might have known that the foreign substance was left remaining in appellant's body; if, in the exercise of ordinary care and skill, appellee knew that the foreign substance was left in appellant's abdominal cavity, it then and thereupon became his imperative duty to apprise appellant of this fact and not conceal it from her until the statute of limitation had attached. Appellee had the duty resting upon him not only to perform the operation with ordinary care and skill, but also to make immediate disclosure to appellant of any injury inflicted by or through his carelessness and negligence in the performance thereof, and his failure to make this disclosure was a continuing act of negligence.

Not only is this case distinguishable from the Field case in the particulars just mentioned, but it is otherwise distinguishable in this: Appellee performed the operation upon appellant and knew, or by the exercise of ordinary care might have known, that the foreign substance was left remaining in her abdominal cavity. The information thus known to appellee was unknown to appellant, and the duty rested upon appellee to make known to appellant all facts within his knowledge in reference to the injury. The cause of action alleged in appellant's complaint grows out of a breach of duty which the law implies from the physician's and surgeon's employment in undertaking to perform the operation. It was a constant and daily obligation to use ordinary care and skill, and if, by omission or negligence, he has left a foreign substance within the walls of the abdominal cavity at the operation, it behooved him to afford timely relief. The neglect of this duty imposed by a continuous obligation was a continuous and daily breach of the same. *Gillette* v. *Tucker,* 67 Ohio 106, 65 N. E. 865, 93 Am. St. Rep. 639; *Bowers* v. *Santee,* 99 Ohio 361, 124 N. E. 238; *Groendal* v. *Westrate,* 171 Mich. 92, 137 N. W. 87, Ann. Cas. 1914B, 906.

Cases from several jurisdictions have been cited in support of the doctrine that in all tort actions the cause of action arises upon the infliction of the injury and tend-

ing to support the contention that the applicable statute of limitation cannot be tolled or held in abeyance in its application. Among the cases cited are *Johnson* v. *Nolan,* 105 Cal. App. 293, 288 Pac. 78; *Schmidt* v. *Esser,* 183 Minn. 354, 236 N. W. 622, 74 A. L. R. 1312.

Upon examination, it is found that a number of cases cited, notably *Johnson* v. *Nolan,* are based upon specific statutes which expressly provide that all malpractice suits shall and must be brought within a certain period of time after the infliction of the injury, but we have no such statute in this State. Other cases cited are based upon general principles of law, but we believe they are not sound in principle, therefore decline to follow them.

Our conclusion is therefore that appellee's acts of leaving the ball of gauze in appellant's abdominal cavity and his failure to apprise appellant thereof were such fraudulent concealments and continuing acts of negligence as toll the statute of limitation until appellee performed his duty of removing the foreign substance or appellant learned or should have learned of its presence.

It results from what we have said that the trial court erred in sustaining appellee's demurrer to appellant's complaint, and for this reason the judgment will be reversed and remanded, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

General Motors Acceptance Corporation *v.* Hicks.

4-3420

Opinion delivered April 16, 1934.

Dixon & Williams and *W. A. Leach,* for appellant.

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

SMITH, J. On May 26, 1930, Mrs. G. P. McDonald, who resided in Brinkley, purchased a Frigidaire from J. E. Freeman, a local dealer at Helena. The purchase price was $598, of which $64 was paid in cash. The balance was to be paid in monthly installments of $22.25 each, the first payment being due June 26, 1930. The purchase was made under a written conditional sales contract, whereby the title was reserved by the seller until the purchase money had been fully paid, and the right was reserved upon default in any payment to retake the possession of the Frigidaire, wherever found and without notice to the purchaser.

This contract of sale was executed upon a printed form, which was prepared in contemplation of its assignment to the General Motors Acceptance Corporation, hereinafter referred to as the corporation, and that assignment was made by Freeman, who guaranteed that

deferred payments would be made, in consideration for which assignment and guaranty the dealer was paid his profit in the transaction, and the appellant corporation became the owner of the sales contract retaining the title and giving the right to repossession upon default in payments.

The Frigidaire was purchased for and used in a store in Brinkley in which Mrs. K. E. Hicks had an interest, and she testified that she made most of the payments while she and Mrs. McDonald were jointly interested in the Frigidaire, and that she later acquired Mrs. McDonald's interest, after which time she alone made payments. The sales contract provided that the purchaser should not resell the Frigidaire except with the consent of the owner of the sales contract, and that a transfer charge of ten dollars should be paid for that consent. Upon being advised that Mrs. McDonald had sold her interest in the Frigidaire to Mrs. Hicks, the corporation's general agent at Memphis, Tennessee, wrote Mrs. Hicks and demanded payment of the ten-dollar transfer charge. Upon being shown this letter, Freeman advised Mrs. Hicks that the transfer charge would be waived, and it was not paid, nor was further demand of payment made.

The sales contract prohibited the removal of the Frigidaire from Brinkley, the place of its original installation, without the consent of the owner of the contract, but Freeman gave this consent to Mrs. Hicks, and the Frigidaire was removed to Clarendon by her and installed there. She discontinued the business in connection with which the Frigidaire was used and placed it in storage. Payments were made and accepted after the removal of the Frigidaire to Clarendon, and the testimony sustains the finding by the jury that, if Freeman did not possess the authority which he exercised, his unauthorized acts had been ratified and confirmed by the corporation.

The payments were not made on or before the 26th of each month as the sales contract required, and Mrs. Hicks testified that Freeman agreed she might have a month's indulgence, that is, that the payments thereafter

to be made might each be made one month later than when due. Several, in fact, a number of payments appear to have been so made, which were accepted by the corporation, and were duly credited. On December 29, 1931, Mrs. Hicks deposited in the mails at Clarendon a postoffice money order for $22.25 to cover the payment which, according to the sales contract, was due November 26. This payment was accepted and credited by the corporation. In the forenoon of January 26, 1932, Mrs. Hicks remitted from Clarendon another postoffice money order for $22.25, which, in due course of the mails, would have been received by the corporation at its Memphis office not later than January 27. The corporation had from time to time written Mrs. Hicks about her payments, but in none of those letters had it been intimated that the corporation would take possession of the Frigidaire if the payments were not made in strict accordance with the sales contract.

On the afternoon of January 27, after the money order had been mailed in the forenoon of the preceding day, an agent of the corporation broke into and entered the building where the Frigidaire was stored and removed it. This was done without demand or notice to Mrs. Hicks. Through the failure to properly lock the building where the Frigidaire had been stored other trespassers entered the building and committed other trespasses, removing certain articles of personal property belonging to Mrs. Hicks which were also stored there. These consisted of lumber, a meat pan, a meat saw, knives, and a pair of scales, alleged to be worth $102.50. The corporation had no interest in any of this property except the Frigidaire, and removed nothing else. At the time of taking possession of the Frigidaire, there was a balance of $66.75 due, and it was sold to Mrs. Hicks' son by the corporation for that amount. This son testified that he bought the Frigidaire for his own, and not for his mother's, account, and that she was not advised of nor interested in his purchase. Mrs. Hicks gave testimony to the same effect.

Mrs. Hicks brought suit for the conversion of the Frigidaire, and for the loss of the other personal prop-

erty, and prayed judgment for $612.50, which was alleged to be the value of the property, less the balance due the corporation. There was a verdict and judgment in Mrs. Hicks' favor, from which is this appeal. The verdict awarded $321.95 on account of the Frigidaire and $12.50 for the other property.

The court submitted the issues raised by the testimony herein summarized, over the objection of the appellant corporation, under an instruction reading as follows:

"The contract by which defendant held title to the motor and coils required plaintiff to pay certain installments of the purchase price at certain times, and under the contract defendant had the right to take possession of the property on a default in payment of any installment, unless the defendant had waived that provision of the contract by agreeing to an extension of the time, and unless it had established a long course of dealing in disregard of that provision of the contract and payments had been made pursuant to such agreed extension and such established course of dealing, if any. Plaintiff had not made her payment of installments according to the terms of the contract, so the plaintiff must prove a waiver of such terms of the contract in order to recover. The mere fact that plaintiff offered to accept a return thereof would not necessarily defeat her right, if any, under the evidence and instructions of the court to recover. If the defendant, without notice, wrongfully and unlawfully broke and entered the building in which property of the plaintiff, if any, was lawfully stored, and, if at such entry the building in which it was stored had been and was securely locked, closed and fastened, and if defendant negligently and wrongfully and without authority left the building open and unlocked and left the property of plaintiff, if any, unprotected and open to trespassers, and if, because of such acts and conduct of defendant, if any, any property of plaintiff was taken away and lost to plaintiff, without any fault on the part of plaintiff, then defendant would be liable to plaintiff for damage, if any, thereby caused to plaintiff by defendant.

"If you find for plaintiff on account of the Frigidaire equipment, motor and coils, you may so state in your verdict, and there state the amount of your verdict; and, if you find for the plaintiff as to the other property, you should so state in your verdict, and state the amount you find. In other words, your verdict may show the amount of the two separate items, in the event you find for the plaintiff.

"If you find for the plaintiff, you may add interest to your verdict at the rate of 6 per cent. per annum from July 1, 1932." This was the date of the conversion.

We think there was no error prejudicial to the appellant corporation in this instruction. The court gave correct instructions on the measure of damages, and directed the jury, if there was a finding for the plaintiff, to allow credit for any balance of purchase money unpaid. The court also charged the jury that: "If you find from the testimony that Freeman had the authority to grant extension on monthly payments, and the company ratified it, then the company would be bound by his acts." This instruction is a correct application of an elementary principle of the law of agency, except, of course, that Freeman's acts would not require ratification if he acted with authority.

It is conceded by appellee that the vendor may grant an extension of time, and may change the means of payment without waiving his reservation of title, provided he does not cancel the debt thus secured. *Hollenberg Music Co.* v. *Bankston,* 107 Ark. 337, 154 S. W. 1139; *Summers* v. *Carbondale Machine Co.,* 116 Ark. 252, 173 S. W. 194. It is conceded also that, if the right to repossess the Frigidaire existed at the time that action was taken, the fact that appellant corporation wrongfully entered the building would not make it liable for the value of the Frigidaire as for conversion, whatever the liability for the trespass may have been. *Berger* v. *Miller,* 86 Ark. 58, 109 S. W. 1015. See also chapter on Sales, 55 C. J., page 1288, and cases there cited.

But it is also the law, as was said by the Supreme Court of Washington in the case of *Lundberg* v. *Switzer,*

146 Wash. 416, 263 Pac. 178, that (to quote a headnote): "The right to forfeit a conditional sales contract for overdue payments cannot be exercised without demand and a reasonable opportunity to comply, after there has been a waiver of strict performance by the acceptance of delayed payments." This case is annotated in 59 A. L. R. 131, where many other cases to the same effect are cited.

The testimony abundantly supports the finding, if, indeed, it is not undisputed, that there had been a waiver of strict performance by the acceptance of delayed payments. Indeed, according to Mrs. Hicks' testimony, she was not in arrears with her payments, because of the one-month extension granted her by Freeman. This being true, the corporation should have given reasonable notice of its intention to thereafter demand strict compliance, and must have given reasonable time in which to comply, before taking possession of the Frigidaire. However, there was no notice that strict performance would be required, and the instruction set out above correctly states the principle of law upon which the corporation was held liable for conversion.

This principle is that one may lose the right to enforce a contract strictly according to its terms if he induces the other party to the contract to believe that he will not strictly enforce it, unless, after inducing this belief, he gives reasonable notice that the indulgence will not be continued and a reasonable opportunity is given to comply after such notice.

This principle is not confined in its application to questions arising under conditional sales contract. It was recently applied in the case of *Columbian Mutual Life Ins. Co.* v. *High,* 188 Ark. 798, 67 S. W. (2d) 1005, which involved the payment of a monthly insurance assessment, which the insurer had been accustomed to accept at a later date than was provided for in the contract of insurance. We there said: "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."

Other questions are discussed in the briefs which are of minor importance. One of these is that there was no proper and sufficient proof of the market value of the Frigidaire at the time and place of the conversion. This assignment of error may be disposed of by saying that the testimony shows the market value of this Frigidaire, when new, to have been $598, and that it was in sound and undamaged condition, and was described by the witnesses as being as good as new. Moreover, the purchaser of the Frigidaire testified that he knew its market value, which he stated to be largely in excess of its value as found by the verdict of the jury.

There appears to be no error prejudicial to appellant, and the judgment must therefore be affirmed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MCKINNEY.

4-3423

Opinion delivered April 16, 1934.

[redacted]

Thos. B. Pryor and *H. L. Ponder,* for appellant.
Tom W. Campbell, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of White County to recover damages for the death of his son, Owen McKinney, who was struck by appellant's train through the alleged carelessness and negligence of its employees in operating same. The alleged negligence consisted in the failure of its employees to exercise ordinary care to protect appellee's son or to prevent injuring him while he was crossing appellant's track south of the town of Beebe, along a well-defined footpath crossing from the east to the west side thereof.

Appellant filed an answer specifically denying any negligence on its part in killing appellee's son, but alleging that the cause of his death was the result of the boy's own negligence.

The cause was submitted upon the pleadings, evidence introduced by each party, and the instructions of the court, which resulted in a verdict and consequent judgment against appellant in the sum of $3,000, from which is this appeal.

The railroad track runs north and south through the town of Beebe. About a quarter of a mile south of the depot, a well-defined footpath crosses the track in a diagonal direction from the northeast to the southwest. This footpath had been used by the public for many years in crossing from one side of the track to the other. It was not a road crossing at which the statute requires railroad companies to sound their whistle or ring their bell in approaching same. At this point, appellant maintained three tracks on a dump some ten or twelve feet high. The main tracks were about eight feet apart, one being two feet higher than the other, and the side track east of the other two some six feet lower than the main tracks.

The testimony introduced by appellee tended to show that appellee's son left home on the morning of July 29, 1932, to visit a boy who lived on the opposite side of the

tracks; that, as he approached the dump or tracks, traveling in a southwest direction, an engine and tender running north was approaching the footpath appellee's son was walking in, and that it crossed the footpath just as his son reached the crest of the dump, and that, in passing around it onto the next track, a fast south-bound freight train, without giving any warning of its approach, struck the boy and cut off one leg and an arm, and broke the other leg in two places, from which injuries he died in about two hours; that the north-bound engine prevented him from seeing the south-bound train, and that the noise therefrom prevented him from hearing the south-bound freight as it approached; that the boy was struck and fatally injured while in the footpath.

The evidence introduced by appellant tended to show that appellee's son, in company with a companion, had decided to catch the south-bound freight for Little Rock and from there to go to an uncle who lived in the northwest; that, in an effort to catch the moving train, he caught hold of a box car some ten or twelve cars in the rear of the engine and was thrown under the train and injured, not in the footpath, but some considerable distance north of it; that the north-bound engine and tender had neared the depot before the south-bound freight reached the footpath, and that the trains did not meet at or near the footpath, and that same could not have prevented appellee's son from seeing the south-bound freight as it approached the footpath.

At the conclusion of the testimony, appellant requested an instructed verdict on the ground that the testimony was insufficient to show liability on its part. Of course, if the undisputed evidence showed that, after the engine passed appellee's son, he tried to board the fast-moving freight train and was thrown under it and injured, there would be no liability on the part of appellant, and the evidence would be insufficient to support the verdict and judgment, or, if the undisputed evidence showed that appellee's son stepped in front of the south-bound freight when he could have seen or heard it as it approached the footpath, the evidence would be insufficient

to support the verdict and judgment. The evidence was, however, in conflict on both points, and presented questions for determination by the jury and not by the court. The jury found adversely to appellant's theories, and it is bound by the finding.

Appellant contends, however, that appellee's son was a trespasser on its right-of-way and not entitled to any protection except not to wantonly injure or kill him after discovery. It is argued that the statutory signals are not required to be given by railroads in approaching footpaths; that railroads are required to sound whistles and ring bells only when approaching a road or public crossing. Although this is true, it does not follow that railroad companies owe no degree of care to pedestrians who pass over its tracks on well-defined footpaths with its knowledge and implied consent for a long period of time. This court said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hudson,* 86 Ark. 183, 110 S. W. 590, that: "The question in dispute was whether or not the railroad company, at the time of appellant's injury, was permitting the public to use the path through the yards. If it was, then appellee enjoyed the license, with the balance of the public, of traveling the path, and the employees of the company owed her the duty of ordinary care not to injure her while crossing the tracks." This declaration finds its origin in the common law, which is in full force and effect in this State. The rule is general and has application where the signal statute has none. In 22 R. C. L., the rule is stated in the following words: "It is clearly the duty of a railroad company at common law to give notice of the approach of trains at all points of known or reasonably apprehended danger. And failure to do so will render the company liable where such failure was the proximate cause of injury to one not guilty of contributory negligence." See also White on Personal Injuries, vol. 2, pp. 1288-1290 and 1293; Thompson on Negligence, vol. II, § 1725; *Houston & Texas Central Railroad Company* v. *Boozer,* 70 Tex. 530.

The evidence is ample to sustain the verdict and judgment under the rule of law declared in the authori-

ties referred to, and, under this rule, the instructions given by the court relative to liability were correct.

Appellant also contends for a reversal of the judgment because the court instructed the jury as to the law of comparative negligence. It is argued that there was no negligence at all on the part of the appellant; hence no negligence on its part to compare with the negligence of appellee's son. The record, according to the evidence introduced by appellee, tended to show that the southbound freight approached the footpath, where appellee's son was killed, at a fast rate of speed without giving any warning and without regard to the danger incident to passing or meeting another train which might obstruct its view of the footpath and the view of its approach by any one in the footpath while in the act of crossing the track. The testimony justified the instruction given on comparative negligence.

Appellant also contends for a reversal or reduction of the judgment on the ground that it is excessive. Appellee's son was 18 years of age when killed, and had been a dutiful and hard-working son. He not only assisted his father on the farm, but worked out when he could find work, and contributed practically all his earnings to his father and the support of the family. The testimony tended to show he had an earning capacity of about $500 a year. We do not understand the rule to be, as contended by appellant, that the parent is limited absolutely to a recovery for damages, in case of the wrongful killing of his child, to its earning capacity during the remainder of its minority; but, on the contrary, is entitled to recover such sum as the parent would have received had the child continued to live, considering all the facts and circumstances in the particular case. 8 R. C. L., p. 839, § 113.

No error appearing, the judgment is affirmed.

Justices SMITH, MCHANEY and BUTLER dissent.

FAIRVIEW SCHOOL DISTRICT NO. 7 *v.* MAMMOTH SPRING SCHOOL DISTRICT NO. 2.

4-3444

Opinion delivered April 16, 1934.

H. A. Northcutt and *R. L. Bickley,* for appellant.

Oscar E. Ellis and *John C. Ashley,* for appellee.

HUMPHREYS, J. This proceeding to annex appellant school district to appellee school district was brought by proper petition in the county court of Fulton County and there tried, with the result that said districts were consolidated.

An appeal from the order of consolidation was prayed and granted to the circuit court of said county upon the filing of a proper affidavit and a purported bond, as follows:

"In the Fulton County Court, August Adjourned Term, 1933.

"Mammoth Spring School District No. 2, Plaintiff, v. Fairview School District No. 7, Defendant.

"The undersigned, E. L. Stevenin, Lee Burrow and L. F. Burrow, as directors of Fairview School District No. 7, of Fulton County, Arkansas,. acknowledge ourselves to be indebted as said directors of said district in the sum of $100, to be void upon the following conditions:

"Whereas, Fairview School District No. 7 of Fulton County, Arkansas, has appealed from the judgment of the Fulton County Court in an action pending wherein Mammoth Spring School District No. 2 is plaintiff and Fairview School District No. 7 is defendant.

"Now, if the said Fairview School District No. 2 shall prosecute this appeal with due diligence to a decision, and on such appeal said judgment be affirmed, or if, in a trial thereof anew in the circuit court, judgment be given against the said Fairview School District No. 2, they shall pay all costs, not to exceed the sum of $100, then this bond shall be null and void, otherwise to remain in full force and effect.

"L. F. Burrow,
"President of Board of Directors,
Fairview School District No. 7.
"E. L. Stevenin,
"Secretary of Board of Directors,
Fairview School District No. 7.
"John L. Burrow,
"Treasurer of Board of Directors
of Fairview School Dist. No. 7."

Upon the filing of the transcript in the circuit court of the proceedings had and done in the county court, which transcript contained the bond copied above, appellee moved to dismiss the appeal because the bond did not conform to the statute governing appeals in this class of cases. The statute is, in part, as follows: "* * * Any person or persons, being a party to the record or proceeding in a matter brought before any county board of education (county court), who feels aggrieved by any final order or decision of any such board of education (county court), may prosecute an appeal from any such final order or decision, provided, any such person or persons shall within thirty (30) days from the date of the final order or decision complained of make an affidavit that the appeal taken from such final order or decision of any such county board of education (county court) is not taken for the purpose of delay, and enter into a bond with good and sufficient surety thereon, * * *."

It is argued that the bond contains no filing mark indicating that it was filed within thirty days from the final order or decision of the county court, and was not signed and executed by any surety. The purported bond appears in the transcript of the proceedings of the county

court in said cause, so we must presume it was left with the county clerk or court for filing. It is true that the bond was not signed by any surety, but the record before us reflects that appellee offered to amend the bond in this respect and to meet any other defect therein when the motion to dismiss the appeal was filed. Under § 797 of Crawford & Moses' Digest, this request to amend the bond should have been granted. That section of the statute reads as follows: "Where any bond provided for by the Code is adjudged to be defective, a new and sufficient one may be executed in such reasonable time as the court may fix, with the same effect as if originally executed."

Appellee argues that the rule to amend does not apply because the bond herein was no bond at all. We cannot agree that it was or is a scrap of paper. It is in form a bond, but defective because not signed by sureties. Being a defective bond, it was subject to amendment. *Morrison* v. *State,* 40 Ark. 448.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to permit the bond to be amended and to proceed with the trial thereof.

MEYER *v.* MCKENZIE.

4-3446

Opinion delivered April 16, 1934.

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Reinberger & Reinberger and *Arnold Fink,* for appellant.

Ben J. Altheimer and *Rowell & Rowell,* for appellees.

KIRBY, J., (after stating the facts). It was not necessary that there should be a waiver by the landlord in writing of his lien for supplies furnished. *Griggs* v. *Horton,* 84 Ark. 623, 104 S. W. 930; 36 C. J., p. 521; *Wilson* v. *Citizen's Bank,* 170 Ark. 1194, 282 S. W. 689.

B. J. Altheimer and others testified to the effect that Meyer, the agent of appellant, orally agreed with him that he would waive the landlord's lien up to $2,000, if they would help his tenant to get merchandise and supplies for the purpose of making and gathering the crop. Altheimer also testified that he had to indorse the account with the Altheimer Agricultural Credit Corpora-

tion as they could not get the money without the indorsement, and that he furnished the remaining $350 himself.

It is true that Meyer, the agent of appellant who executed the lease, denied making the oral agreement for the waiver of the landlord's lien, but his testimony cannot be said to have been uncontradicted; and McKenzie corroborated the testimony of B. J. Altheimer.

There is no doubt about the supplies having been furnished in the amount as stated, nor that the credit corporation authorized the furnishing of the additional $350 by appellees.

On the whole case the testimony is sufficient to support the chancellor's findings that there was an oral waiver of the landlord's lien for said amount and that the credit company had the right to do the furnishing up to the amount specified in the lease, $2,000, and upon its consent, or rather arranging for the loan of the balance of the amount necessary for making the crop, it cannot be said that the amount of this account, $350, furnished by Altheimer, Bowen & Clary was furnished only upon an open guaranty.

A careful examination of the whole record does not disclose the chancellor's findings contrary to the preponderance of the evidence, and the decree will not be disturbed here. Affirmed.

NEW AMSTERDAM CASUALTY COMPANY *v.* SQUIRES.

4-3326

Opinion delivered April 16, 1934.

Buzbee, Harrison, Buzbee & Wright, for appellant.

A. G. Meehan, John W. Moncrief, John L. McClellan, Malcolm T. Garner and *Sam T. & Tom Poe,* for appellees.

MEHAFFY, J. The appellee, Frank Squires, recovered a judgment for $10,000 against H. E. Pattison, in the Saline Circuit Court, as the result of an automobile accident. Pattison had a policy of automobile liability insurance issued by the Union Indemnity Company.

After obtaining judgment, an execution was issued in favor of Squires against Pattison and the execution returned unsatisfied. Suit was then brought in the Little River Circuit Court against the Union Indemnity Company and the appellant, New Amsterdam Casualty Company.

While this suit was pending in the Little River Circuit Court against the appellant, suit was brought against the New Amsterdam Casualty Company in the Pulaski Chancery Court by the Independence Indemnity Company. The Independence Indemnity Company had also given a qualifying bond for the Union Indemnity Company. In this suit brought in the Pulaski Chancery Court the New Amsterdam Casualty Company filed answer and cross-complaint in which it made Squires, the appellee here, and others cross-defendants, and asked that they be required to interplead and file claims against the New Amsterdam Casualty Company for adjudication in the Pulaski Chancery Court, and asked that the appellee, Squires, be enjoined from further prosecuting the suit in

Little River County against the appellant. The appellant admitted giving a qualifying bond in the sum of $20,000, but denied liability under said bond. A restraining order was issued prohibiting Squires from prosecuting his suit at law in Little River County against the New Amsterdam Casualty Company.

The appellee, Squires, then filed a petition in this court for a writ of prohibition, prohibiting the Pulaski Chancery Court and the special chancellor from interfering with the prosecution of the suit in Little River County. The writ prayed for was issued by this court. *Squires* v. *New Amsterdam Casualty Co.*, 187 Ark. 467, 60 S. W. (2d) 185.

The New Amsterdam Casualty Company filed answer in the Little River Circuit Court denying all the material allegations in appellee's complaint. Numerous other persons were made parties to the suit, and the appellant filed its motion to transfer the case to equity. Response was made to this petition, and the motion to transfer to equity was overruled, but the motion to make other parties defendant was granted. We deem it unnecessary to set out the pleadings with reference to other parties to the suit.

At the trial of this case in the Little River Circuit Court the appellant submitted certain findings of fact and declarations of law, which the court overruled, and judgment was entered in favor of the appellee against the appellant for the sum of $10,447.48 with interest at the rate of 6 per cent. per annum from July 14, 1933, until paid. The appellant thereupon filed a motion for a new trial which was overruled, exceptions saved, and the case is here on appeal.

H. A. Hoover and William Snotzmeier also obtained judgments at the same time, aggregating $8,192.35. It is unnecessary to discuss these judgments and appeals separately.

Appellant's first contention is that there is no liability on its part because, while it admits filing the $20,000 qualifying bond on February 26, 1931, it alleges that thereafter on March 6, 1931, securities were deposited, and that under the terms of the statute these depos-

its were in lieu of the bond executed on February 26th, and that thereafter there was no liability on the $20,000 bond.

The statute provides for the filing of the $20,000 bond, § 5980 of Crawford & Moses' Digest. Section 5981 of Crawford & Moses' Digest provides that, in lieu of the bond above mentioned, the insurance company may file the certificate of deposit provided for in § 2 of act 220 of the Acts of the General Assembly of 1913. Section 6 of act 493 of the Acts of 1921, provides that the insurance company shall "file a bond in the sum of $20,000 covering its casualty business with the insurance commissioner, and subject to his approval as provided in § 5980 of Crawford & Moses' Digest, or in lieu of such $20,000 bond, shall file the certificate of deposit provided for in § 20 of act 220 of the Acts of the General Assembly of 1913."

The argument is made that authority under the law to file the certificate of deposit of securities in lieu of the bond, authorized the filing of the certificate of deposit after the bond had been filed, and that the filing of this certificate of deposit of securities took the place of the bond that had theretofore been filed. We do not agree with appellant in this contention. A reasonable construction of the statute is that the insurance company may file the $20,000 bond, or, if it does not do so, it may, instead of filing the $20,000 bond, file the certificate of deposit of securities. The bond is given for one year, and, when filed, it was in lieu of the certificate of deposit of securities, and, there is no authority under the law to withdraw the bond or substitute the certificate of deposit of securities. In other words, the insurance company might have filed a certificate of deposit of securities, or the $20,000 bond. It could have filed either, but, when it filed the bond, it could not thereafter relieve the sureties on the bond so filed by filing the certificate of deposit of securities.

Appellant correctly states that "in lieu of" means "instead of" or "in place of." Instead of filing a surety bond for $20,000, the insurance company could have filed

the certificate of deposit of securities, but it did not do this; it filed the $20,000 bond.

Appellant argues that it was clearly the intention of the Legislature that only one bond or one certificate should be in effect at any one time. Assuming this to be true, when the $20,000 bond was filed, it was in effect, and by the express terms of the bond it was effective for one year ending March 1, 1932. The statute, which is written into the bond, also provides for an annual renewal of the bond.

Appellant argues that, in lieu of the certificate of deposit, the insurance company may execute a bond for $20,000 conditioned solely for use of claimants on account of policies written in the State of Arkansas. It argues that this bond may be filed in lieu of the certificate of deposit, and, when so filed, the certificate is no longer necessary or effective. That is true. When the $20,000 bond was filed, it became effective, and it was in lieu of any certificate that might be filed or that could have been filed. There is no law authorizing the filing of certificates of deposits in lieu of a bond that has already been filed. When either is filed, the law is complied with, and there is no provision in the law for substituting one for the other. If a bond is filed, there is no provision for substituting a certificate and releasing the bond, and, if the certificate of deposit of securities had been filed, there is no statute authorizing substituting a bond for the certificate.

It is true that filing the certificate of deposit would have authorized the Union Indemnity Company to do business in Arkansas without the filing of any bond, but the filing of the $20,000 bond was sufficient to authorize the Union Indemnity Company to do business in Arkansas, and, as stated by the appellant, either was entirely sufficient, and either could be filed in lieu of the other, but when one was filed there could be no substitution. There is no evidence of any intention to release the $20,000 bond, and no evidence that the certificate was filed as a substitute.

Appellant calls attention to *Massachusetts Bonding & Insurance Company* v. *Home Life & Accident Co.*, 113

Ark. 576, 168 S. W. 1062, to sustain its contention that it was the intention of the Legislature that claimants could have recourse to only one bond. The bonds given in that case were for one year periods, just as the bond in this case. One of the bonds covered the period from March 1, 1911, to March 1, 1912, and the second bond covered the period from March 1, 1912, to March 1, 1913, and the last bond covered a period from March 1, 1913, to March 1, 1914. The court in that case stated: "The issue in this case relates to the liability on the successive bonds, the particular question being which bond is liable, whether it is the bond covering the period during which the policies were written, or the last bond, which is the one covering the period during which the liability to policyholders accrued, or both."

In that case, three separate bonds had been given, each for a period of one year. The question decided there might have been involved here if, at the end of the period which the $20,000 bond covered, another bond had been given for another year, but we have no such question in this case. There was but one bond given, and it was not displaced or canceled, and there is no evidence that the certificate of deposit of securities was given in substitution or to take the place of this bond.

The $20,000 bond given by appellant, as we have already said, was for one year, and there is no provision for giving another bond until the end of that period.

The court, in the case above cited, also said: "But it seems to us that a fair interpretation of the legislative will is that the sureties on an annual bond are only liable for claims of policyholders which arise and accrue during the period covered by the bond and beyond that period, too, upon all policies issued during the lifetime of the bond until it is renewed."

It will be observed that the court there held that the insurance company was liable for claims of policyholders, not only those which arise and accrue during the period covered by the bond, but beyond that period too, upon all policies issued during the lifetime of the bond until it is renewed.

The language in § 5980 of Crawford & Moses' Digest is: "conditioned for the prompt payments of all claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by such company," etc. The act does not say when a cause of action accrues, but it provides for claims arising and accruing to any person during the term of said bond. A claim might arise and accrue before the cause of action accrued.

The rights of the parties became fixed at the time of the accident, although there was no cause of action against the appellant until judgment had been obtained against the wrongdoer, and an execution had been returned unsatisfied.

We said in a recent case: "The rights of the parties had become fixed at a time no premium was due. While the cause of action had not accrued, yet the liability existed." *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533. The liability existed in this case when the accident occurred, and the accident occurred during the life of the bond.

This court said: "The question first presented is, when did the claim arise and accrue, within the meaning of the statute and terms of the bond, so as to create liability on the part of sureties on the bond of the company? Did that contingency occur when the property was destroyed, or when the amount of the loss became payable according to the terms of the policy?

"A consideration of the language of the statute leads to the conclusion that the liability of the sureties is fixed when the loss by fire occurs, and not from the date when the amount becomes payable. The happening of that contingency fixes the liability of the principal in the bond upon its policy, and nothing remains to be done but to ascertain and adjust the amount of the loss. The liability is fixed when the loss occurs, though payment does not become due until sixty days later. It follows that the liability of the sureties becomes fixed with that of the principal, and ripens into a mature cause of action when default is made by the principal in the payment according to the terms of the policy." *U. S. Fidelity & Guar. Co.* v. *Fultz,* 76 Ark. 410, 89 S. W. 93.

The happening of the accident in the instant case fixes the liability of the principal in the bond upon its policy, and the claim then arises. It is conceded that the accident and injuries to the three persons, appellees here, occurred during the life of the bond. The appellees, however, could not maintain a suit against the insurance company until they had obtained judgment against the wrongdoer, and until execution had been issued and returned unsatisfied. We think any other construction of the statute would be unreasonable, and we think the plain meaning of the statute is that for all claims where accidents happened while the bond was effective, there is liability against the insurance company if the wrongdoer is insolvent, although suit is not brought until after the expiration of the bond. The happening of the accident fixes the liability, and the claim accrues at that time. It is immaterial when the cause of action arose if the claim arose while the bond was in effect.

The bond of the appellant provides: "If the said Union Indemnity Company shall promptly pay all claims arising and accruing to any person or persons during said term of one year, by virtue of any policy issued by the said company upon the life or person of any citizen of the State of Arkansas, or upon any property situated in the State of Arkansas when the same shall become due, etc."

It will be observed that the bond provides for prompt payment of all claims that arise and accrue during said term of one year. We have already said that the claim arose and accrued at the time of the accident, but it was not due and payable until judgment was had against the wrongdoer and execution returned unsatisfied.

It is next contended by the appellant that the motion to transfer to equity should have been granted. However, the appellant did not raise this question in its motion for a new trial. It made this same contention in the suit in the Pulaski Chancery Court, and this court said: "In the first place, liability under the bond was not admitted; but, on the contrary, was specifically denied. An admission of liability was essential and neces-

sary before the cross-complaint could be treated as a bill of interpleader or a bill in the nature of a bill of interpleader.'' *Squires* v. *New Amsterdam Casualty Co.*, 187 Ark. 467, 60 S. W. (2d) 185.

In the instant case liability under the bond was not admitted, but on the contrary was specifically denied. If appellant had admitted its liability in the sum of $20,000, the amount of its bond, and offered to pay, then its suit in the Pulaski Chancery Court would have been proper, and all the parties interested would have been brought in; but when a defendant is sued and says that it does not owe any one on the bond, then it has no right to bring in all parties who assert claims against it, but it can only do this when it admits liability.

We find no error, and judgment is affirmed.

HENDERSON COMPANY *v.* MURPHY.

4-3422

Opinion delivered April 16, 1934.

Jeff Davis and *Pace & Davis*, for appellant.

McNalley & Sellers, for appellee.

McHANEY, J. Certain parties known in this record as the Cates heirs, in October, 1921, executed and delivered to one Stover, trustee, an oil and gas lease on the south-

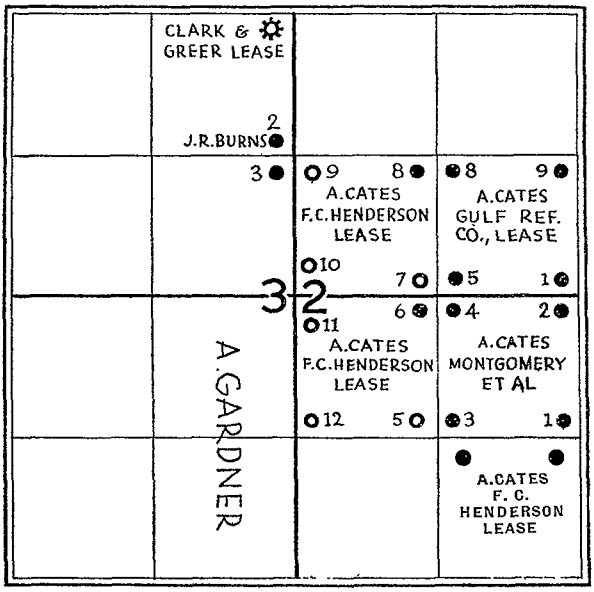
west northeast, the northwest southeast and the southeast southeast section 32, township 18 south, range 15 west, for a substantial cash consideration and a deferred consideration of $60,000 payable out of one-half of the first oil produced from the 120-acre lease. In fact, three leases were executed by said heirs, all in like form covering the said land, and all were on the ordinary form of oil and gas lease generally in use in the El Dorado oil field. These leases provided that they might be assigned, but, if so, the assignee took same burdened with all the duties and obligations assumed by the lessee. On December 8, 1921, Stover, trustee, for a cash consideration, assigned his leases to J. R. Gardner, who, two days later, assigned same to W. D. Ball for a cash consideration of $66,000 and a deferred oil payment of $12,000, to be paid out of one-half of the first oil produced from the lease after the oil payment due the lessors had been paid. On the same day, December 10, Ball assigned the same leases, except the south quarter of southeast southeast, to F. C. Henderson for a cash consideration of $66,500 and a deferred oil payment consideration of $90,000, to be paid from one-half the first oil produced from the same leases, $60,000 of which was first to be paid the Cates heirs. Henderson thereafter conveyed to the Henderson Company, appellant, his purchase being for the company of which he is the president and principal owner.

On December 16, 1921, W. D. Ball sold and assigned $15,000 of the oil payment due him under his assignment of leases to Henderson to appellee, and on September 30, 1926, J. R. Gardner assigned $9,000 of the oil payment due him under his assignment to Ball to appellee. Appellee then owned $24,000 oil payment, but not due to be paid except out of one-half the first oil produced, and then only after the $60,000 oil payment due the Cates heirs had been paid.

Immediately after acquiring these leases in the manner above stated, appellant began the development of the properties for oil and gas, and, during the first half of 1922, had drilled four wells upon the leased premises, as

follows: One in the northeast corner and one in the northwest corner of the southeast southeast; one in the northeast corner of the northwest southeast, indicated on the plat hereafter shown as No. 6, and one in the northeast corner of the southwest northeast, indicated as No. 8. The plat follows:

Section 32, Township 18, Range 15



Gulf Refining Co. No. 5, 200 feet north and 112 feet west of southeast corner of NE¼ of section 32-18-15.

Gulf Refining Co. No. 8, 1,500 feet south and 1,120 feet west of northeast corner of section 32-18-15.

During the same time appellant was drilling said wells, other operators were developing their properties in this (the south) field. The Gulf Refining Company drilled four wells on its Cates lease in the southeast northeast. Montgomery drilled four wells on his Cates lease in the northeast southeast. Clark & Greer drilled two wells on their Burns lease, off-setting the north forty of the Henderson lease.

The four wells drilled by appellant were small producers of oil. In 1925 a string of tubing was accidentally dropped in well No. 6, at a time it was making only 15

barrels of oil per day, and the well was abandoned. In March, 1927, appellant's only producing well was No. 8, off-setting the Gulf lease, and some time prior to March 15, 1927, the derrick and pumping equipment, of this well were destroyed by fire. It was decided by appellant not to reconstruct the derrick and equipment, and this well was abandoned. Thereafter, on April 22, 1927, after advice from its attorney that the old lease was no longer effective by reason of abandonment, a new lease was taken from the Cates heirs in the name of J. O. Huffman, as trustee for appellant. This lease was procured through J. R. Gardner, husband of one of the Cates heirs.

On July 18, 1928, this suit was filed by appellee, against F. C. Henderson and appellant, charging that they had failed to drill wells on the Cates lease which should have been drilled; had failed to protect it from drainage by off-set wells, and had failed to operate the wells drilled with proper diligence. It was further charged that Henderson and appellant had conspired with the Cates heirs to take a new lease to Huffman in 1927 and thereby deprive him of his rights under his oil payments mentioned in the assignments above set out in the sum of $24,000, for which amount he prayed judgment against appellant, Henderson, each of the Cates heirs, Huffman and Gardner. The defendants answered, denying the charges of breach of duty and conspiracy, or that they were so indebted. A large volume of testimony was taken, upon consideration of which the court found that appellant was in default by its failure to drill well No. 9, shown on the plat, off-setting wells 2 and 3 on the Clark and Greer lease, and that it should have removed the tubing from well No. 6 in 1925, and operated it until the lease was abandoned in 1927. The court further found that appellant owed no duty to appellee to drill wells in addition to the four drilled, except No. 9, and that there was no fraud in the procurement of the new lease in 1927. All parties defendant were dismissed except appellant, against whom judgment was rendered in the sum of $17,592.50 damages, with interest at 6 per cent. from the date suit was filed. This money judg-

ment against appellant appears to be based upon the testimony of the witness, Hess, to the effect that, given the number of barrels of oil produced on the southeast of the northeast of section 32, he can, within a differential of 3 per cent. to 5 per cent., estimate the exact number of barrels of oil that should have been produced on the southwest of the northeast of said section.

For a reversal of this judgment, appellant makes a number of contentions. First, that it had no obligation as to appellee to drill any wells on said lease, either to develop it, to protect it from drainage by offset wells, or to operate any of the wells that were drilled upon it. We think this contention is sound. Appellee is neither a lessee nor an assignee of the lease. He is simply a purchaser from assignees of the leases of an interest in an overriding royalty or oil payment to become due and payable only if and when a sufficient quantity of oil were produced to pay out of the first one-half thereof his and prior obligations. The written instrument passing title to him of oil payments from Gardner provides: "Do hereby bargain, sell, transfer, assign, set over and deliver unto P. E. Murphy all my rights, title and interest in and to $12,000 (twelve thousand dollars) of the consideration payable out of oil under the terms of a certain assignment executed by me to W. D. Ball," etc. There was no assignment or sale of an interest in the lease. Appellee's rights must depend, as said in *Murdock* v. *Sure Oil Corporation,* 171 Ark. 61, 283 S. W. 4, "on the protection paragraph of the written assignment," and, there being no right such as is here asserted, his action must fail. *Kile* v. *Amerada Petroleum Corporation,* 118 Okla. 176, 247 Pac. 681; *Matthews* v. *Ramsey-Lloyd Oil Co.,* 121 Kan. 75, 245 Pac. 1064; *Simms Oil Co.* v. *Colquitt,* Tex. Civ. App. 289 S. W. 980.

This court is committed to the rule that, where a portion of the consideration for an oil and gas lease is payable out of the oil produced, if no oil is produced then there is no payment due. As we said in *Gilbert* v. *Patterson,* 174 Ark. 61, 295 S. W. 386: "And the obligation, we think, was to pay out of the first oil produced, and, if

no oil was produced, there would be no obligation to pay." See also *Hirsch* v. *Cadrin & Staten,* 178 Ark. 209, 10 S. W. (2d) 2.

The undisputed facts show that appellant paid $66,-500 cash for 110-acre lease; that it drilled four wells thereon at an expense of approximately $60,000; that these wells were not profitable, even on a 7/8's working interest basis; and that the wells were abandoned because they would not pay operating expenses. It was vitally interested in the development of this property as it had a large sum of money invested. It had the right to exercise its own judgment, in the absence of fraud, and none is shown, in the further development of this property, and, in such situations, the courts will not substitute their judgment for its.

Moreover, the testimony of the witness Hess as to the number of barrels of oil this lease should have made, based on the production of wells on the adjacent 40 acres to the east, is too fantastic, too speculative, conjectural and unreliable to furnish the basis for the judgment rendered. It is simply his guess as to what the lease should produce, and has no substantial foundation in fact.

Reversed and dismissed.

CONINE *v.* MIZE.

4-3482

Opinion delivered April 16, 1934.

S. M. Casey, for appellants.
J. J. McCaleb, for appellee.

McHaney, J. Appellee brought this action against appellants to cancel an alleged transfer of a certain wholesale grocery and feed business, which, it is alleged, belonged to the bankrupt, B. B. Conine, Jr., located in the city of Batesville and which in some manner was transferred by him to appellants, his father and sister. It was alleged the transfer was fraudulent and made with the intent to hinder, delay and defraud creditors of the bankrupt. Also that the conveyance was void in that the Bulk Sales Law had not been complied with. Appellants defended on the ground that the bankrupt was not and never had been the owner of said business, but that it was their property; that the bankrupt had not transferred it to them, as it had always been their property, except for a few dollars invested in it by the bankrupt, which had been repaid to him, and that he operated the business for them on a salary basis; that they had permitted him to operate the business for a time in the name of B. B. Conine, Jr., Company, knowing that he was indebted in a considerable sum, but did not think such old indebtedness would involve said business until about June, 1933, when a judgment was taken against Conine, Jr.; that on the advice of counsel, and to save possible complications, they changed the name of said business to B. B. Conine, Sr., Company.

Just when Conine, Jr., was adjudicated a bankrupt is not shown, but in October and November, 1933, on hearings before the referee in bankruptcy to obtain authority for the trustee to bring this action, certain testimony was

taken and transcribed relating to the ownership of the bankrupt of the property here involved. On the trial of this case, this transcript of testimony taken before the referee was offered in evidence and excluded by the court, but a decree was entered awarding judgment against appellants in the sum of $2,500, or that they turn over goods and merchandise of that value to the trustee.

We agree with the trial court that the testimony taken before the referee was incompetent, no showing being made that the witnesses who there testified were not available as witnesses in this proceeding. Appellants were not parties to the hearing before the referee, had no opportunity to cross-examine the witnesses, and were not bound by such testimony. It has long been the rule in this State that testimony of a witness at a former trial between the same parties in the same case may be admitted if such witness is dead, or out of the jurisdiction without the procurement of the offering party, and if the address of the absent witness could not be obtained by reasonable diligence in time to take his deposition, provided the adverse party had an opportunity to cross-examine such witness when his original evidence was given. *Clinton* v. *Estes,* 20 Ark. 216; *Pine Bluff Co.* v. *Bobbitt,* 174 Ark. 41, 294 S. W. 1002. It will readily be seen that the offered testimony was not competent under the above rule.

The only evidence left in the case touching the ownership of the business is that of the bankrupt, Conine, Jr., and he testified that at first he put $115 in the business and that appellants put all the other money that was invested in it; that he withdrew all he had in it shortly thereafter, and that appellants at all times owned it; that it was for a time operated in his name, but, when it appeared that complications might arise because of his old indebtedness, the name was changed to B. B. Conine, Sr., & Company; that there was no sale or transfer of the business to appellants; and that it at all times belonged to them. This testimony was offered by appellee, and it is not contradicted by any other evidence. We are therefore of the opinion that the judgment of the court is with-

out evidence to support it. No fraudulent conveyance is established. Indeed no conveyance of any kind is established. The creditors complaining are all prior creditors and must prove fraud to prevail. We said in the recent case of *Stuttgart Rice Mill Co.* v. *Lockridge,* 185 Ark. 349, 47 S. W. (2d) 596: "Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but may be proved by circumstances. 'Slight circumstances or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results' are not sufficient evidence. 'They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.' They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically and clearly indicate its existence."

The burden of proving a fraudulent conveyance was on appellee. Not having met the burden, the decree of the trial court must be reversed, and the cause dismissed at the cost of appellee.

ARKANSAS POWER & LIGHT COMPANY *v.* KENNEDY.

4-3439

Opinion delivered April 16, 1934.

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

Tom J. Terral, for appellee.

BUTLER, J. G. G. Kennedy brought this action to recover for injuries sustained by reason of a street car belonging to the appellant company coming in contact with his automobile at or near the intersection of 23d and State streets in Little Rock, Arkansas. A trial of the case resulted in a verdict and judgment in his favor, from which is this appeal.

The principal claim made for reversal is that the undisputed evidence establishes negligence on the part of the plaintiff which directly contributed to his injury, and that the trial court should have, at defendant's request, directed a verdict in its favor.

To make his case, plaintiff testified in his own behalf and was corroborated by one Bell, who professed to have been an eyewitness to the collision and who described the circumstances attendant thereon. The street car motorman, and some passengers on the car testified on behalf of the defendant, and this testimony is in sharp conflict with the evidence adduced on the part of the plaintiff.

In discussing the plaintiff's testimony, certain discrepancies in the account he gave of the occurrence are suggested which tend to discredit his testimony, and circumstances are argued which, it is claimed, cast doubt on the testimony of the witness Bell. The matters argued are not properly for our consideration, but were for the jury, and doubtless were presented to, and considered by it. The jury having resolved these questions in favor of the plaintiff, under settled rules we must accept its

conclusion as final. The question then is, does the evidence on the part of the plaintiff, viewed in a light most favorable to him, justify us in declaring as a matter of law that it presents no question for the jury, but conclusively shows the failure of the plaintiff under the then existing circumstances to act as an ordinarily prudent person would similarly situated?

To sustain its contention, appellee calls to our attention the cases of *Chicago, R. I. & P. Ry. Co.* v. *Abel,* 182 Ark. 651, 32 S. W. (2d) 1059; *Fair Oaks Stave Co.*v. *Shue,* 184 Ark. 1041, 44 S. W. (2d) 670; *Missouri Pac. Rd. Co.* v. *Trotter,* 184 Ark. 790, 43 S. W. (2d) 762; *St. Louis, S. F. R. Co.* v. *Tidmore,* 185 Ark. 177, 47 S. W. (2d) 16,—and insists that the facts of the instant case are so nearly like those of the cases cited as to make it necessary for us to reach an identical conclusion.

In the case first cited, the plaintiff was an employee of the railway company and engaged in interstate commerce. His work, at the time he was injured, required him to be near the line of the railway over which trains were passing to and fro, and it was his duty to watch for the trains and get out of their way. The work in which he was engaged made a great deal of noise so as to interfere with his hearing the approach of trains. While engaged in work and at a place where his view was unobstructed for half a mile, he stepped upon the track without looking for the approach of trains and was struck by one passing at that time and was injured. On this state of facts it was held that according to appellee's own statement he assumed the risk incident upon the performance of his duties without relying upon his own watchfulness to keep "in the clear," as the rules of the company required, and therefore he was responsible, himself, for his injury.

In the Shue case, next cited, plaintiff and his wife procured a hand car to go on a mission for their own business and pleasure, and were operating the car at night on the log road of the defendant company. They were advised that a tractor with two cars attached to it was being operated on the road by the company that night and were warned to look out for it. They pro-

ceeded on their journey without keeping any lookout for the tractor. The court said: "Although advised to look out for this equipment, neither did so, but blindly proceeded into a collision, which resulted in her (the wife's) death."

In the Trotter case, *supra,* the injury to Trotter was caused by a passing railroad train as he stepped upon a railroad crossing. It was at night, the headlight of the locomotive was burning, casting a brilliant light down the track, the brightest point being about 700 feet ahead of the engine where it illuminated the track and entire right-of-way with a beam of light approximately 100 feet wide. The plaintiff admitted that he walked upon the track without looking or listening for an approaching train with his vision obscured by a sack which he was carrying upon his shoulder. He failed to observe the light of the approaching train until it was so near that he could not spring aside and save himself from injury.

In the Tidmore case, *supra,* the person injured was an experienced workman of the railway company and, at the time of his injury, was engaged in interstate commerce. He admitted that at the place of his work, which was near the track of the railroad company, he was required by the rules of the company to look out for his own safety, and that he was injured because he carelessly got in the way of a moving train. In that case it was held that there was no evidence of any negligence on the part of the crew of the engine, but that the accident occurred by reason of appellee's inattention in taking a position sufficiently near the track to cause him to be struck by a moving car, which position it was unnecessary for him to occupy in the performance of his duty.

In the case at bar the evidence accepted by the jury distinguishes it from the cases above cited, and tends to show that when Kennedy was attempting to turn into 23d Street from State in an automobile driven by himself, a car parked near the corner made it necessary for him to describe a greater arc than usual, which put him upon the track of the street railway; and because of some holes in the pavement he applied his brakes in an effort to lessen the speed of his car and inadvertently "stalled"

his engine while still upon the track. At this time the street car was approaching, and was then about 150 feet away. Kennedy did not attempt to get out of his car, but tried to get it in motion, knowing at the time that he was in some danger. He succeeded in starting his engine, but before he could clear the track the street car struck him. Before this happened and while he was attempting to start his car, observing the inattention of the motorman, he sounded his horn to attract his notice to his predicament.

Invoking the rule that a duty rests upon the driver of an automobile to exercise ordinary care in its operation for his own and the safety of others (*Northwestern Cas. & Surety Co.* v. *Rose,* 185 Ark. 263, 46 S. W. (2d) 796), appellant argues that such care would require that appellee should have abandoned his car when he saw the street car 150 feet away approaching, and that the motorman was not keeping a constant lookout ahead; that, therefore, he should not have assumed that the motorman would stop before hitting him. *Ark. P. & L. Co.* v. *Boyd,* 188 Ark. 254. In support of this argument we are cited to a number of cases where an occupant of a stalled automobile was held negligent as a matter of law for failure to get out of it and reach a place of safety. We do not review these cases, but the general rule which governs them is stated in *Va. & S. W. Ry. Co.* v. *Skinner,* 119 Va. 843, 89 S. E. 887, cited in one of these cases; *Dick* v. *Va. E. & P. Co.,* 158 Va. 77, 163 S. E. 75: "No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another without assuming the consequences of the omission of such care." We do not dissent from this doctrine, but under the facts of the case at bar we think it a question for the jury as to whether or not the plaintiff did this. For we cannot say that the minds of all reasonable persons would agree that appellee failed to act as a man of ordinary prudence under the circumstances. It develops that Kennedy used poor judgment in remaining in his car, but the jury might have justly inferred that he did not rely solely upon the motorman to stop the street car, and that he might reasonably have expected to be able to extricate both him-

self and the car from the place of danger before the street car reached him; and also that, if he were unable to do this, the motorman would see his situation in time to keep from running him down.

The general rule by which the conduct of Kennedy is to be measured is stated in Berry on Automobiles, vol. 1 (6th Ed.) p. 165, approved by this court in *Ark. P. & L. Co.* v. *Crooks,* 188 Ark. 513, where it is said: "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."

As a further ground for reversal, it is argued that the court erred in giving certain instructions to the jury at the request of the plaintiff. We do not deem it necessary to set out these instructions, since it is our opinion that they are clear declarations of well-settled principles supported by the evidence in the case. We do not think that the objections made to these instructions are sound, and there was no error in giving them.

On the whole case we find no reversible error, and the judgment of the trial court is therefore affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES *v.* POOL.

4-3421

Opinion delivered April 23, 1934.

McKay & McKay, for appellant.

J. F. Quillin and *T. B. Vance,* for appellee.

JOHNSON, C. J. This action was instituted by appellee against appellant in the circuit court of Miller County, seeking recovery upon a certain policy of insurance of date December 27, 1926. Appellee alleged that, during the effectiveness of said policy, he was totally and permanently disabled prior to attaining the age of 60 years, and that appellant was due him under said contract the sum of $10 per month for the balance of his life; he further alleged that, by the terms of said contract of insurance, appellant agreed to waive all future premiums after total and permanent disability suffered; that appellant had breached its contract by failing and refusing to pay monthly installments on and after April 10, 1933; and by then and there demanding payment of the June, 1933, premium and by thereafter, on July 27, 1933, asserting and declaring a forfeiture of said policy for nonpayment of the June, 1933, premium.

Appellant answered the complaint and denied liability because of total and permanent disability, and its prayer was that the complaint be dismissed and that it have judgment for its costs.

The testimony introduced upon trial tended to establish the following facts:

That appellee suffered total and permanent disability prior to January 1, 1932, which was recognized by appellant by making monthly payments according to the terms of the policy up to and until April, 1933; that on the 10th day of April, 1933, appellant notified appellee that on and after that date it would discontinue payments upon the total and permanent disability clause of said policy of insurance and that it would not waive the payment of premium on said policy which would mature June 27, 1933. Appellee refused to pay the June, 1933, premium on said policy, and thereafter, on July 27, 1933, appellant notified appellee that his policy of insurance had lapsed because of nonpayment of the June, 1933, premium, and thereafter this suit was instituted.

But two contentions are urged upon us by appellant for reversal: first, that, under the facts and circumstances here presented, appellant did not renounce or repudiate its contract, therefore its liability is limited to monthly payments as they accrue according to the terms of the policy; secondly, that the verdict of the jury and judgment of the court are excessive.

Adverting to the first contention, it may be said that, according to the uncontradicted evidence, appellant, through its local agent, on July 27, 1933, notified appellee that his policy of insurance had lapsed for nonpayment of premium on or prior to that date. This assumed position by appellant was an unequivocal renunciation and repudiation of its contract of insurance. This exact question was so decided by us in *Ætna Life Ins. Co.* v. *Phifer*, 160 Ark. 98, 254 S. W. 335. In the Phifer case, just cited, the insurance company wrote Phifer a letter in which it stated:

"It also appears from our records that this insurance lapsed by reason of the nonpayment of the Novem-

ber 17, 1921, premium, and is being continued on the extension feature. By referring to the permanent disability clause, it will be noted that, in order for it to be effective, all premiums should have been paid."

In disposing of the contention there made as here, we said: "This evinced an intention on the part of appellant not to be bound by the terms of the contract, and was equivalent to a renunciation thereof. It stated in express words that the policy had lapsed. This denial of liability justified appellee, who was not in default, in treating the contract as breached and suing for gross damages, which he did."

It therefore certainly appears that the facts of the instant case come squarely within the rule as announced in the Phifer case and must be governed by it.

Appellant contends, however, that the rule as announced in the Phifer case has been modified or impaired by the doctrine as announced in the more recent case of *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 52 S. W. (2d) 433, and that the facts and circumstances of the instant case fall within the rule as announced in the Marsh case. To this we cannot agree. The disposition of the Marsh case was bottomed upon Richards' Law of Insurance, 4th Edition, and we quoted from § 342 thereof in part as follows: "And if with knowledge of the facts (referring to facts in reference to the breach of contract by the insurer) the insured elects to continue with the contract, he cannot subsequently exercise a second and inconsistent election to treat it as abrogated." In application of the rule of law thus stated to the facts as they appeared in the Marsh case, we stated: "In the instant case there was not a refusal to carry out the contract and a renunciation of the agreement, but, in the course of the correspondence between the parties, when default was first made in the payment, there was simply the contention that, under the existing facts, the insured for the time being was no longer entitled to the monthly benefits. Recognizing that there had been no repudiation of the contract, appellee paid the premium January 25, 1932, and testified that the policy was still in effect, and in his complaint alleged that the contract

had been put in force in January, 1922, and had remained in full force and effect thereafter, and was in full force and effect at the time of the filing of the suit. The appellant, in its answer, expressly disavowed any repudiation, but affirmed the contract, and merely contended that under its terms the appellee was not entitled to the monthly benefits. This makes this case unlike that of *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, relied upon by appellee. In that case the plaintiff was allowed to recover the present value of the future benefit installments because the court found that there had been a total repudiation of the contract in that the insurer, by letter, had in express words denied liability on the claim that the policy had lapsed. The court said: 'This letter evinced an intention on the part of the appellant not to be bound by the terms of the contract, and was equivalent to a renunciation thereof.' "

Thus it appears that the Marsh case was decided and disposed of upon the principle of estoppel. Marsh paid the January, 1932, premium upon his policy at a time when he had full knowledge that the insurer was denying liability for monthly installments. Marsh, by voluntarily paying the January, 1932, premium on his policy of insurance, thereby elected to waive the insurance company's breach of the insurance contract in failing to pay the monthly installments. As thus construed, the Marsh case is sound in principle and does not conflict with the rule as announced in the Phifer case and the many other cases decided by us upon this subject.

It is not necessary to undertake a defense of the doctrine as announced in the Phifer case, but in passing it may be said that it is supported by the great weight of American authority. Richards' Law of Insurance, expressly so states, and this authority was cited with approval by us in the Marsh case. Not only is a renunciation or repudiation of the contract inferred from the unlawful or unwarranted lapse of the policy, but the refusal of the insurance company to accept a premium thereon when due is a renunciation of the contract. Richards' Law of Insurance states the principle as follows:

"Especially is the rule clear where the insurer not only repudiates the contract by his declaration that he will not pay in the future, but also violates a present obligation under the contract by refusing to accept a premium when due."

Sometime subsequent to the Marsh case we again reviewed the authorities on this question, and expressly held that, where the insurer denies liability for disability benefits on the ground that the policy lapsed for default in payment of premiums, such renunciation of the contract authorized the insured to sue for gross damages and recover the present value of future installments. This holding gave full effect to the doctrine as announced in the Phifer case and other cases on the subject and clearly evinces the intentions of the court to adhere to its previous holding. *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912. The unlawful and unwarranted demand for payment of premiums when none is due in fact and the lapse of the policy on refusal to pay such demand is equally as reprehensible as the refusal to accept a premium when due and lapse the policy because thereof.

Appellant's second contention, that the verdict of the jury and the judgment of the court are excessive, is bottomed upon the argument that appellee, having been determined totally and permanently disabled, cannot be presumed to live the full expected time as measured by the American Experience Table of Mortality. This experience table of mortality was introduced in evidence along with other facts and circumstances as tending to show appellee's expectancy of life, and we have many times held this table competent testimony. In addition to this table, Dr. Tyson, a witness for appellee, testified that appellee's injuries would not necessarily shorten his life, and this evidence was corroborated by Dr. Kitchens. From the testimony thus adduced, the jury determined that appellee would live out the usual expectancy of life, and this finding of fact is supported by the evidence. Under long established rules of this court, we cannot substitute our judgment for that of the jury.

No error appearing, the judgment is affirmed.

SMITH, MCHANEY and BUTLER, JJ., dissent.

BUTLER, J., (dissenting). The dissenting opinion filed by Mr. Justice Smith in No. 3427, *Metropolitan Life Ins. Co.* v. *Harper, post* p. 170, in which Mr. Justice McHaney and I fully concur, in many essential particulars states the reason which governs the dissent in the instant case. But, in order that our views may be fully understood, it is necessary to state certain undisputed facts which appear in the record and which are not stated in the opinion of the majority.

The policy of insurance involved in this action is an ordinary life policy by which the sum of $1,000 is to be paid to a named beneficiary in the event of the death of the insured, included in which is a clause for the payment of certain monthly sums upon the insured's becoming totally and permanently disabled at a time when the policy is in full force and effect. It was upon this clause that this action is based. In 1932 a claim was made by the insured for monthly payments because of total disability. This claim was accepted by the insurance company and payments were made beginning with the month of January, 1932, and continuing to April, 1933. The clause relating to disability contained a provision by which the insurance company reserved the right to reexamine into the condition of the insured at stated intervals to determine whether the disability for which it was making payments still existed. Acting under this provision, in March, 1932, the company requested the insured to be examined by the company's physician, Dr. Youmans, in the town of Lewisville, Ark. The insured complied with this request, the examination was accordingly made, and the physician reported to the company that at that time the insured was normal and suffering from no disability. Thereupon, on April 18, 1932, the company addressed a letter to the insured, effective as of April 10, in which he was notified that it then appeared that he was no longer totally and permanently disabled, and that therefore no further premiums would be waived, and no further disability installments paid; it advised that the next premium would be due on June 27, 1933, and that this would have to be paid. On May 2, 1933,

J. F. Quillin, as attorney for the insured, wrote the company acknowledging the receipt of its letter of April 18, advising that, under the Arkansas decisions, "a breach of this kind of contract entitled the insured to immediately recover from the insurer the present value of future installments based upon his life expectancy. Mr. Pool's expectancy is now 28.18 years and the present value of the future installments commuted at 6 per cent. per annum is $1,620. The purpose of this letter is to make formal demand upon you for the payment of the amount of $1,620 as the sum now due under the contract following the breach by you as evidenced by your notice, and to inform you that, in the event of your failure or refusal to honor this demand, suit will be filed in the circuit court of Miller County, Arkansas, for recovery."

The company answered this letter on May 8, 1933, acknowledging receipt of the letter of May 2, taking issue with the attorney as to the effect of the Arkansas decisions and concluding with this paragraph: "There has been no breach of the contract as stated in the second paragraph of your letter, and, of course, the demand by you in your third paragraph is absolutely refused." The attorney for the insured answered this letter, stating that, in view of the expression contained in it to the effect that the contract had not been repudiated, formal demand was made for the monthly benefits since April 10, 1933, and inclosed a statement of Dr. J. E. Tyson to substantiate the claim that there had been no break in the disability of the insured, and that his payments had been wrongfully discontinued. The letter stated also that if it was desired that regular forms be filled out the insured would immediately have them completed by physicians who were disinterested, upon receipt of same.

On July 1, 1933, the insured's attorney addressed another letter to the company enclosing report of Dr. Tyson and again demanding immediate payment of the disability benefit. That letter was answered by the company on July 8, acknowledging receipt of the letter of July 1, and advising that the claim was receiving the attention of the company. On July 13 the cashier of the company wrote the insured calling attention to a

letter written on June 22 asking him to again call upon Dr. Youmans of Lewisville for an examination in connection with his disability claim, and asking that he do so at his earliest convenience.

It was agreed at the trial of the case that the plaintiff was examined by Dr. Tyson of Texarkana and reports of the finding on said examination furnished to the defendant company, together with demand for the payment of the benefits which had accrued; that the defendant requested the plaintiff to call at the office of Dr. Kittrell of Texarkana for an examination; that plaintiff did not find Dr. Kittrell at his office; that later on the defendant requested the plaintiff to return to Dr. Youman's office at Lewisville for further examination, which the plaintiff did not do on account of the reasons set out in his letter, as follows:

"Your letter of July 14 was received.

"In regard to my examination I was required to go to Dr. Kittrell at Texarkana. I went there last month but Dr. Kittrell was not in town. Dr. Youmans is at Lewisville. That is in another county. I do not feel able to make another trip over there. I have submitted statements from Dr. Beck's Clinic to the Home Office stating my condition. I do not feel it necessary for me to make another long trip to Lewisville before Dr. Youmans. If the company wants to do the right thing about my case they already have statements enough to carry out their contract."

It was further agreed that the defendant company thereafter requested the insured to call at the office of Dr. Kittrell, which he did on September 12, 1933, for further examination. It was also agreed that, upon the proof submitted to the defendant company by reason of the examination referred to by Drs. Youmans and Kittrell, the defendant company denied liability on the ground that the plaintiff was not totally and permanently disabled within the terms of the policy, and that it thereafter gave notice that the plaintiff, to keep the policy in force, must pay the premiums as provided therein; that the plaintiff did not pay the premiums, and that thereafter and subsequent to July 27, 1933, the company noti-

fied its agent, G. M. McKnight, at Lewisville, that the policy had lapsed for the failure to pay the premium of June 27, and that McKnight advised the insured of the receipt of the notice and that he secure a re-instatement of the policy, and that he write the company what would be necessary to secure the same.

On August 8 this suit was brought, the complaint alleging that, while the plaintiff was totally and permanently disabled, the insurer, on April 18, 1933, without cause ceased the payment of the monthly disability and on that date notified the plaintiff that on June 27, 1933, a premium would become due on said policy, which must be paid to prevent a lapse of said policy; that, immediately after the receipt of said notice, plaintiff made proof that his said disability continued to exist, and since then has continued to make proof thereof and has made repeated demands for the payment of the monthly disability; "and that the defendant, without authority and in violation of the terms of said contract, cancelled, repudiated and breached said contract of insurance, denied all liability thereunder for such disability, and notified the plaintiff that said policy was after said date no longer in force." In its answer the company denied that the plaintiff was totally and permanently disabled within the meaning of the policy in the year 1931, or thereafter, or that he was then totally and permanently disabled. It denied that it had without cause and without authority ceased payment of the monthly disability payments, alleging as a reason for the discontinuance of same the examination of Dr. Youmans and his report and denying that it had repudiated the contract, but, on the contrary, alleged that it had recognized that the policy was in full force at the time demand was made upon it for payment of the monthly benefits accruing after April 10, and admitted that if the plaintiff was totally and permanently disabled on April 10, 1933, at the time it served notice on the plaintiff as alleged in the complaint, said policy was then, and still is, in full force and effect. "It denies liability to the plaintiff solely on the ground that he was on April 18, 1933, and still is, able to engage in an occu-

pation and perform work for compensation of financial value."

From these undisputed facts it is clear that the insured based his claim that the contract had been breached on the ground of the failure and refusal of the insurer on and after April 18, 1933, to pay the monthly disability benefit at a time when his total and permanent disability continued. It is also manifest that this is the identical position taken by the insurer, both in its letters and in its answer.

The majority have improperly based the decision of this case on the letter of July 27 notifying the agent of the lapse of the policy for the nonpayment of the June premium. This was not the ground upon which the monthly payments were discontinued, but on the belief and contention that there was no longer any disability entitling the insured to further payments within the meaning of the policy. The rights of the parties are properly to be determined by this contention and were fixed when it was made. It was a question, (if the terms of the contract are not to be brushed aside as unimportant), which the insurer had a right to raise and to have a reasonable time in which to investigate. If the insurer was wrong in its assumption, then it would owe whatever payment might be in arrears, the premiums would not be due as claimed and there would be no lapse of the policy. In the event of suit to settle that question, if the jury should determine adversely to the contention of the insurer, it would be liable for the monthly payments in arrears and to a penalty and a reasonable attorney's fee. This I conceive to be the true and just measure of the liability of the insurer.

When the insured, without giving the insurer a reasonable opportunity to investigate his claim of continuing disability, filed this suit alleging a renunciation and breach of the contract, the insured answered expressly disavowing any renunciation, but interposed as a defense the same reasons it assigned to the insured in its letters and submitted that question for decision to the court. The retroactive effect assigned by the majority to the letter of July 27 advising of the lapse for nonpay-

ment of the June 27 premium is not to be justified by any logical process of reasoning, nor is it supported by authority. This court, in the recent case of *Missouri State Life Insurance Company* v. *Foster,* 188 Ark. 1116, 69 S. W. (2d) 869, said: "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 in definite and explicit terms so provides."

The doctrine announced in the case of *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, cited in the majority opinion, has no application to the case at bar. In that case there was a distinct renunciation of the contract of insurance because of nonpayment of premium occurring before the existence of the disability of the insured for which payment was demanded. This ground for refusal to make payments was reaffirmed in the answer of the insurer and pleaded as one of its defenses to the insured's action. This was identically the situation in the case of *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 388, 60 S. W. (2d) 912, cited and relied upon in the majority opinion. The issue tendered in those cases was to the effect that there was no contract of insurance in existence at the time the insured became disabled, and therefore there was not only a disavowal of liability but an absolute and explicit renunciation of the contract, which was held to bring the cases within the rule announced in *Roehm* v. *Horst,* 178 U. S. 1, 20 S. Ct. 780, and our own cases which follow and cite that case.

I submit that, in the discussion by the majority of the late case of *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433, both its letter and spirit are misunderstood and misinterpreted. As we understand the contention of the appellant, there is no contention that this case modifies the rule announced in the Phifer and Davis cases. Indeed, it does not, but is in harmony with and complements that rule. The majority opinion incorrectly assumes that the decision in the Marsh case was bottomed on the excerpt from Richards on the Law of Insurance set out in the opinion. It also erroneously states that it (the Marsh case) was "decided and dis-

posed of upon the principle of estoppel." These errors on the part of the majority will clearly appear from a casual inspection of the opinion in the Marsh case. The rule upon which the decision was based is found in the first paragraph of § 342 of Richards on Insurance as follows:

"By the weight of authority, if the insurer renounces the continuing contract of insurance, upon his part, and unequivocally refuses in advance of its maturity to perform it, the insured may at his option take the insurer at his word. The insured is then relieved of the duty of further performance on his part, and may maintain an action at law for damages, before the specified date of expiration." The remainder of that section, which is set out, and from which the excerpt quoted by the majority is taken, is merely explanatory and illustrative of the rule.

For the application of that rule reference was made to *Kirschman* v. *Tuffli Bros.*, 92 Ark. 111, 122 S. W. 239, approving the rule as announced in *Roehm* v. *Horst, supra.* The rule laid down in Richards on Insurance, *supra,* approved and applied in the cases cited, is identical to that applied in the Phifer and Davis cases, *supra,* and in many decisions of this court cited in the Marsh and Davis cases.

In *Mutual Life Insurance Company* v. *Marsh, supra,* the decision of the court was not based upon the doctrine of estoppel, as is perfectly apparent from an investigation of that case; it was placed upon the ground that there had been no repudiation of the contract but rather a reliance upon its terms, and that the conduct of the insured was not such as to estop him from pleading a renunciation, but, on the contrary, was a recognition that there had been no repudiation by the insurer of the contract.

The practical effect of the decision in the instant case and in the very recent case of *Metropolitan Life Ins. Co.* v. *Harper, supra,* is that an insurance company cannot question the claim made by an insured to the effect that he is totally and permanently disabled and have a reasonable time to investigate the same on pain

of being deemed to have renounced the contract and thereby subject itself to a judgment for a gross sum for anticipatory damages. On the facts of these cases, as I interpret them, that is just what this court is holding, and, to be consistent, it should overrule both cases cited and relied on in its opinion and all our other decisions dealing with anticipatory damages and restate the law on that subject.

Justices SMITH and MCHANEY authorize me to say that they concur in the views I have expressed and join in the dissent.

KAUFMAN *v.* CITIZENS' BANK.

4-3426

Opinion delivered April 23, 1934.

Claude V. Holloway, for appellants.

Trimble, Trimble & McCrary, for appellees.

JOHNSON, C. J. This proceeding is an attack by a creditor upon a deed conveying a 40-acre tract of land situated in Lonoke County and a certain transfer of 48 shares of common stock in a cotton gin plant. The con-

veyance and stock transfer were made by appellant, A. H. Kaufman, to his wife, Irvey Shifflett Kaufman. The evidence on behalf of appellee tended to establish the following facts:

That on and prior to March 30, 1932, A. H. Kaufman was indebted to appellee in a sum in excess of $9,000 and was otherwise indebted in a very large sum of money. On this date A. H. Kaufman appeared to be the owner of the 40-acre tract of land, same being in his name upon the records of the county, and the 48 shares of gin stock were also possessed and controlled by him. On December 23, 1932, there was filed for record in Lonoke County a deed from A. H. Kaufman to his wife, conveying this 40-acre tract. This deed purported upon its face to be executed April 15, 1928. On July 3, 1932, A. H. Kaufman caused to be transferred and assigned to his wife the 48 shares of gin stock. These conveyances denuded A. H. Kaufman of all his visible property. The testimony on behalf of appellants tended to establish that the deed dated April 15, 1928, from A. H. Kaufman to his wife was a valid gift, made and executed at a time when A. H. Kaufman was solvent; that the transfer of the gin stock on July 3, 1932, by Kaufman to his wife was the consummation of the previous intentions of the parties in that Mrs. Kaufman had furnished the purchase price of the gin stock and had always been the equitable owner thereof.

Upon the evidence thus adduced, the trial court rendered judgment in favor of appellee and against A. H. Kaufman for the sum of $10,441.72; determined that the deed from A. H. Kaufman to his wife of April 15, 1928, to the 40-acre tract of land was fraudulent and void and should be canceled in so far as it affects appellees' right as a creditor; and further adjudged that the transfer of the 48 shares of gin stock by Mr. Kaufman to his wife was fraudulent, but that the wife had in good faith advanced to her husband, as a loan, $450, which was used by Mr. Kaufman in the purchase of said gin stock and decreed a lien in favor of Mrs. Kaufman against the gin stock for this sum. No cross-appeal has been prosecuted

from this branch of the case. The chancellor was fully warranted in finding that the deed from A. H. Kaufman to his wife conveying the 40-acre tract of land was fraudulent. The validity of this deed, the intentions of the parties in reference to its execution and the facts and circumstances surrounding its execution and the parties thereto should be ascertained and determined as of date the deed was filed for record, and not of its purported date of execution. It is practically admitted by Mr. Kaufman that on December 23, 1932, the date on which this deed was filed for record in Lonoke County, he was notoriously insolvent, and all the testimony adduced tends to establish this fact. The rule of law, in reference to conveyances under the facts and circumstances here presented is well settled in this State, and is to the following effect:

"Conveyances made to members of one's household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; when voluntary they are presumed fraudulent, and when the embarrassment of the debtor proceeds to financial wreck such conveyances are conclusively presumed to be fraudulent as to existing creditors." *Wilkes* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107; *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124; *Fluke* v. *Sharom,* 118 Ark. 229, 176 S. W. 684.

Moreover, viewing this deed from the standpoint of the date of its purported execution—that is to say April 15, 1928—Mrs. Kaufman cannot succeed in this action. We have many times held that, where a wife permits her husband to possess and control her separate property as his own and creditors rely upon such apparent ownership in the husband and lend credit thereon, the wife is estopped to assert her superior rights. *Haffke* v. *Hempstead County Bank & Trust Co.,* 165 Ark. 158, 263 S. W. 395; *First Nat. Bank* v. *Herring,* 159 Ark. 317, 252 S. W. 37; *Bunch* v. *Empire Cotton Oil Co.,* 158 Ark. 462, 250 S. W. 530.

The doctrine just announced has full application to the transfer of the gin stock. Conceding that Mrs. Kaufman furnished the money for the purchase of this stock

in 1925, she thereafter permitted her husband to possess and control it as his own until July 3, 1932, and by these affirmative acts led creditors to believe that A. H. Kaufman was the true and lawful owner thereof. She will not now be heard to say otherwise.

The decree is correct, and must be affirmed.

WELLS *v.* COSTELLO.

4-3434

Opinion delivered April 23, 1934.

Harper E. Harb, for appellants.

John L. Sullivan, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Pulaski County, Second Division, upon a subscription contract filed as a claim in the probate court of said county against the estate of Ed Monahan, Jr., deceased, and allowed, from which allowance an appeal was duly prosecuted.

The subscription contract is as follows:

"Date, Nov. 18th, '31.

"Name, Ed Monahan, Sr.

"Address, 412 W. Markham.

"I promise to contribute for the erection of the memorial organ at St. Andrew's Cathedral the sum of $250, to be paid in annual installments of $50.

"It is understood that this donation is to be exclusive of my regular contribution for the support of my church.

"The Monahan Family

"(Signed) Ed Monahan, Jr.

"Witness: Thomas A. Costello.

"In memory of Ed Monahan, Sr."

The defenses interposed to the allowance of the claim were: First, that the contract on its face was for a gift, and that oral evidence was inadmissible to show that it was a subscription contract for a consideration; and, second, that Father Costello was not the proper person to make the affidavit to the claim.

(1) The contract, upon its face, shows that it was a contribution toward the erection of an organ at St. Andrew's Cathedral, and not a promise to give an organ. The mutual undertaking of the several contributors furnished the consideration for the contract and rendered it binding upon the estate of Ed Monahan, Jr. *Stone* v. *Prescott Special School District,* 119 Ark. 553, 178 S. W. 399; *David* v. *Chambers,* 123 Ark. 293, 185 S. W. 443; *Byington* v. *Little Rock Chamber of Commerce,* 132 Ark. 361, 201 S. W. 122. It appears by the undisputed testimony that St. Andrew's Cathedral accepted the subscription contract and erected the organ before the claim was filed.

(2) According to the undisputed evidence, Father Costello was duly appointed and authorized to take and collect subscriptions for the purpose of erecting an organ at St. Andrew's Cathedral, so he was the proper party to make the affidavit in proof of the claim filed with the probate court. It is provided by statute that the justice of the claim against an estate may be made by the claimant, an agent, attorney, or other person. In the presentation of the claim, §§ 100 and 101 of Crawford & Moses' Digest were fully complied with.

No error appearing, the judgment is affirmed.

MOORE *v.* PRICE.

4-3450

Opinion delivered April 23, 1934.

[redacted]

A. J. Johnson and *Clary & Ball,* for appellant.

R. W. Wilson, for appellees.

MEHAFFY, J. On April 11, 1932, the appellant, I. E. Moore, filed suit in the Lincoln Chancery Court, alleging that the appellees, J. P. Price, Lonie Price and A. J. Price were indebted to appellant in the sum of $13,111.67, evidenced by two promissory notes, one dated January 9, 1930, for $9,251.79, payable on November 1, 1931, bearing interest at 10 per cent. from date until paid and the other note dated May 22, 1931, due November 1, 1931, for the sum of $439.26 with interest at 10 per cent. from maturity, this last note being executed by J. P. Price; and a verified account for merchandise for the balance of the $13,111.67. To secure the payment of the indebtedness, J. P. Price and Lonie Price executed a mortgage on real estate and personal property.

Appellees had delivered to appellant 93 bales of cotton, worth approximately $3,000, to be credited on the indebtedness.

It was also alleged that practically all the personal property mentioned in appellant's complaint and covered by the mortgage sued on had been moved off the premises, and that the crops were being disposed of by appellees, and that all of the security was insufficient to pay the indebtedness.

It was also alleged that the appellees were insolvent and had no other property with which to meet their obligation; that they were fast exhausting their resources, making it entirely impossible for the appellant to collect his indebtedness. Appellant prayed judgment for the amount due him, for a foreclosure of his mortgage, and

that a receiver be appointed to take charge of the property covered in the mortgage.

Appellant also, on April 11, gave notice to the appellees that he would, on April 14th at 10 o'clock A. M., apply to the Lincoln Chancery Court for the appointment of a receiver. On April 14th the appellees filed a demurrer to that part of the complaint asking for the appointment of a receiver. The chancellor heard the application for the appointment of a receiver, and denied the petition, and refused to appoint a receiver, under the authority of act 253 of the Acts of the General Assembly of 1931.

Thereafter, on April 18th, while the suit to foreclose the mortgage on the property was pending in the chancery court, appellant brought a suit in replevin in the circuit court of Lincoln County, for the same personal property. A demurrer and answer were filed to the complaint in the circuit court. In the answer appellees moved that the cause in the circuit court be transferred to the chancery court and consolidated with the foreclosure suit. This motion of appellees was granted, and the cause transferred to the chancery court.

When the suit was brought in the circuit court, appellant gave bond, and an order of delivery was issued and served. The appellees executed a bond and retained possession of the property.

There is no dispute about the indebtedness, and it is unnecessary to set out the evidence. After a hearing, the chancery court gave judgment in favor of the appellant against the appellees for $10,787.18. This was the amount found by the court to be due after giving appellees credit for the 93 bales of cotton, and said judgment was declared by the court to be a first lien on the real and personal property described in the mortgage. The lands were ordered sold, and the personal property, at the value fixed by the court, was delivered to the appellant.

The appellant claimed that he was entitled to the usable value of the personal property or rent on the personal property during the time it was kept by appellees after the replevin suit was begun. A petition was filed by appellant, alleging that appellees had refused to de-

liver the following personal property: "First: 1 disc harrow and disc plows valued at $200. Second: Corn valued at $100. Third: Cotton seed valued at $20. Fourth: Hay valued at $30."

The chancellor then rendered a final decree, holding that at the time the property was rebonded there were 100 bushels of corn of the value of $50 and no cotton seed, and $30 worth of hay, making $80, and gave judgment for that amount. The chancellor also found that the disc harrow and plows were tendered to appellant, and that he declined to accept them.

The case is here on appeal, and the appellees prosecute a cross-appeal as to that part of the decree giving judgment for $80 for the corn and hay.

Appellant first contends that he had a right under §§ 7403, 7410 and 8654A of Crawford & Moses' Digest to prosecute his suit in replevin. He contends also that the mortgagee is the holder of the legal title and can maintain replevin on default. He cites and relies on *Perry County Bank* v. *Rankin,* 73 Ark. 589, 84 S. W. 725, 86 S. W. 279, and *Van Pelt* v. *Russell,* 134 Ark. 236, 203 S. W. 267. The statute itself settles this question. It reads as follows: "In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto and the right of possession."

The mortgagee has the legal title, and, because of that, may bring a suit in replevin, but that is not for the purpose of getting possession of and keeping the personal property, but it is only to get possession for the purpose of selling under the power in the mortgage. The mortgage contains a power of sale, and the mortgagee could, under that mortgage, have brought replevin, obtained possession of the property for the purpose of selling it under the power in the mortgage. He could have sold both the real property and the personal property under the power of sale in the mortgage.

Where a mortgagee brings replevin for personal property on which he has a mortgage, the only purpose of the replevin suit is to obtain possession for the purpose of selling it. This might have been done; the mortgagee might have pursued this remedy, but he elected to bring

his suit to foreclose not only on the real property, but the personal property also. When this suit to foreclose was brought, the chancery court acquired jurisdiction as to both the real and personal property. The appellant realized that the chancery court had jurisdiction as to all the property, and made application to the chancery court for the appointment of a receiver. If his petition for the appointment of a receiver had been granted, he, of course, would not contend that he could then go into circuit court and bring replevin for the property; and he could not do so when the chancery court denied his petition for a receiver.

A mortgagee has three remedies, either one of which he may pursue. He may bring a suit at law on the notes or accounts, or he may advertise and sell under the power of sale in the mortgage, or he may bring a suit to foreclose in chancery court. But when chancery court acquires jurisdiction, it has the right to conduct the matter to an end, and decide all matters involved in the chancery suit.

We recently said: "Circuit courts and chancery courts are of equal dignity; and in cases where there is concurrent jurisdiction, the court that first acquires jurisdiction has the right and jurisdiction to conduct the matter to an end without interference of another court of equal dignity." *Wright* v. *LeCroy*, 184 Ark. 837, 44 S. W. (2d) 355.

The rule is stated in Corpus Juris as follows: "Where two actions between the same parties on the same subject and to test the same rights are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of co-ordinate power is at liberty to interfere with its action. This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results." 15 C. J. 1134.

Bailey on Jurisdiction, page 61, states: "In the distribution of powers among courts it frequently happens that jurisdiction of the same subject-matter is given to different courts. Conflict and confusion would inevitably result unless some rule was adopted to prevent or avoid it. Therefore it has been wisely and uniformly determined that whichever court, of those having such jurisdiction, first obtains jurisdiction, or, as is sometimes said, possession of the cause, will retain it throughout to the exclusion of another." The same rule is announced in "Courts and Their Jurisdiction" by Works, pages 68 and 69.

There is no question here about the power of the chancery court being adequate to administer complete justice. If the chancery court had appointed a receiver, it would have been entirely satisfactory to the appellant. It had the power to do this, the power to give adequate and complete justice, and its jurisdiction was invoked for that purpose, but the chancery court decided that a receiver should not be appointed. It had ample means to protect the property, and appellant finally did get all the property through the order of the chancery court.

There is no dispute about the indebtedness and the mortgage. The appellant, however, contends that he is entitled to $25 for each of the mules retained by the appellees when they gave the bond to retain the property. This question of the right to the possession of the property, and the right to have a receiver appointed, were both questions properly before the chancery court, and decided by that court on the facts introduced in evidence, and we think the chancellor's finding is supported by the evidence.

Appellees prosecute a cross-appeal in which they urge that the judgment for $80, for corn and hay, be reversed. We think, however, that the finding of the chancellor on this question is also supported by the evidence.

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

CITY NATIONAL BANK *v.* RIGGS.

4-3451

Opinion delivered April 23, 1934.

James B. McDonough, for appellants.

Hill, Fitzhugh & Brizzolara, Watts & Wall, Daily & Woods and *G. L. Grant,* for appellees.

McHANEY, J. This is the second appeal of this case. For the former opinion see *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293. On the former appeal we held that the appellants had wrongfully satisfied the record as to certain property covered by a mortgage to it as agent to secure an indebtedness to appellees and others represented by notes which had been assigned by it, and that appellants became liable to the noteholders for their *pro rata* share of the sale price of the property so released from the record of said mortgage; that the inclusion of the homestead of appellee,

Jessie M. Johnson, in the new mortgage was induced by fraud, and that appellants became liable to her for whatever loss she might sustain in the foreclosure and sale thereof; and that the decree of the chancery court should be affirmed.

This proceeding involves the foreclosure of the new mortgage. The court entered a decree in accordance with the prayer of the complaint.

For a reversal of this decree it is first argued by appellants that the court should have granted a continuance on their motion. There are several answers to this suggestion. One is that the makers of the notes and mortgage have not requested a continuance. Another is that matters of continuance rest in the sound discretion of the court which will not be disturbed by this court unless an abuse of discretion is shown. The record discloses that one continuance was granted, from the April to the October term, 1933, and no abuse of discretion is shown.

It is next argued that, since the City National Bank, hereinafter called the Bank, purchased the two notes held by E. N. King, the Bank should be subrogated to all the rights of King as against Mrs. Johnson's homestead, which we held, on the former appeal, was included in the new mortgage through misrepresentation and fraud of the officers of the Bank. The court gave the Bank a judgment against the Johnsons on the King notes, but refused to permit it to participate in the security as to said homestead. This was manifestly correct. The general rule is that subrogation will not "be allowed where to do so would relieve a party from the consequences of his own wrongful or unlawful act." 60 C. J. 709. As said by Judge Cockrill in *Tribble* v. *Nichols,* 53 Ark. 271, 13 S. W. 796: "One who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act." See also *Roe* v. *Kiser,* 62 Ark. 92, 34 S. W. 534; *Hill* v. *Kavanaugh,* 118 Ark. 34, 176 S. W. 336; *Troyer* v. *Bank of DeQueen,* 170 Ark. 703, 281 S. W. 14; *Bank of Mulberry*

v. *Frazier,* 178 Ark. 28, 9 S. W. (2d) 793. So here, the Bank having induced Mrs. Johnson to include her homestead in the mortgage on the representation that it was a mere matter of form and that it would protect her from loss in event of foreclosure, it would necessarily follow that the Bank could not take advantage of its own wrong and be subrogated to the rights of an innocent noteholder whose note it purchased.

The only other argument appellant makes which we think necessary to consider in this opinion is the contention that the Bank should be subrogated to the rights of the Riggs and Mrs. Taylor, it having paid them the amount heretofore adjudged against it for the unlawful diversion of the $12,300 sale price of the property wrongfully released from the record of the mortgage. What we have heretofore said in answer to the contention for the right of subrogation on the King notes applies with equal force to this. We do not understand that the court refused to give the Bank a judgment against the Johnsons for the amount it paid to the Riggs and Mrs. Taylor. The decree did provide that, if the Bank paid said judgments to the Riggs and Taylor, such payments shall be credited *pro rata* on their notes, and the Bank was subrogated to the rights of the Johnsons in any surplus that remained from a sale of the mortgaged property after paying the noteholders, except as to the proceeds of Mrs. Johnson's homestead. Certainly the Bank is entitled to a judgment against the Johnsons for the amount of their indebtedness it is required to pay. The Johnsons owe $25,000 and interest which they do not deny. It cannot have satisfaction out of said homestead.

No error appearing, the decree is affirmed.

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

4-3447

Opinion delivered April 23, 1934.

[redacted]

John D. Shackleford, for appellant.

Carl E. Bailey and *Murray O. Reed,* for appellee.

BUTLER, J. The basis for appellant's petition for mandamus is set out therein and abstracted in an opinion of this court, *West Twelfth Street, etc., Dist.* v. *Kinstley,* 188 Ark. 77, 63 S. W. (2d) 980. Reference is made to that opinion for a statement of the facts, and such other facts as are necessary for an understanding of the issues involved will be hereafter stated.

In that opinion we said: "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."

In discussing that contention, it was held that the county court was dealing with a subject within its jurisdiction, and therefore it must be presumed, in an absence of a showing to the contrary, that all necessary steps were taken in the exercise of its jurisdiction; and, if an appropriation must have first been made by the levying court to confer jurisdiction upon the court to make the order giving aid to the Improvement District, that this was done where there was nothing in the record or proof adduced showing to the contrary. We also called attention to the allegation of the petition that the question involving the validity of the orders of the county court had been settled by a final judgment of the circuit court of Pulaski County.

One of the contentions in support of the action of the lower court on demurrer was that from an exhibit to the petition, which was a decree of the Pulaski County Chancery Court rendered October 30, 1931, there was then due by District No. 30 to Pulaski County the sum of $17,750 less $3,232.76, and adjudged a recovery by the county for that amount. This court held that the decree of the chancery court was conclusive only of the fact that the indebtedness named existed at that time, but not, as contended, that it remained unpaid.

We held that all the questions above mentioned were such as must be determined by the proof, and reversed the judgment sustaining the demurrer and remanded the case for further proceedings. On remand evidence was adduced by petitioners and respondent, upon considera-

tion of which the court rendered judgment, which, omitting formal parts, is as follows:

"(1) That the petition of the plaintiff, West 12th Street Road Improvement District No. 30, be, and the same is, hereby dismissed, to which action the plaintiff, West 12th Street Road Improvement District No. 30, saves its exceptions and causes same to be noted of record.

"(2) That the plaintiff, Annex No. 1 to West 12th Street Road Improvement District No. 30, Pulaski County, Arkansas, do have and recover of and from the defendant, Roy E. Kinstley, as treasurer of Pulaski County, Arkansas, a judgment in the sum of $1,475; that the defendant, Roy E. Kinstley, is hereby commanded and directed to pay said judgment, together with such portion of the costs as may hereinafter be adjudged to be due by the defendant as treasurer of Pulaski County, out of funds now in his hands to the credit of the Pulaski County Road District, to which judgment of the court for plaintiff, Annex No. 1 to West 12th Street Road Improvement District No. 30, the defendant saves his exceptions and causes same to be noted of record."

The parties have properly prosecuted their appeals to this court.

At the hearing, the petitioners introduced in evidence the original orders of the county court made by Judge Sibeck on May 18, 1931, granting aid to Improvement District Annex No. 1 of District No. 30, and on June 15, 1931, in aid of District No. 30; the orders of the county court made by Judge Lawhon, October 4, 1932, revoking and setting aside as invalid the aforesaid orders. Petitioners further introduced two judgments of the Pulaski Circuit Court, rendered May 26, 1933, on appeal from the order of the county court, revoking the orders made in May and June, 1931. The judgment relating to District No. 30, omitting the style, is as follows:

"On this day this cause comes on to be heard, and, the same having been reached upon call of the calendar, and the appellant, West 12th Street Road Improvement District No. 30, appearing by its attorney, John D.

Shackleford, and the appellee, R. A. Cook, County Judge of Pulaski County, Arkansas, successor to Ross L. Lawhon, appearing by his attorney, Carl E. Bailey, Prosecuting Attorney, and interveners, Austin-Western Road Machinery Company *et al.,* appearing by their attorneys, Barber & Henry, and all parties announcing ready for trial, the cause is submitted to the court *de novo* upon the pleadings, records, agreed state of facts, and oral testimony of John D. Shackleford, and county court records as exhibits to his testimony;

"And the court, being well and sufficiently advised as to all matters of fact and of law, and the premises being fully seen, doth find:

"(1) That on June 15, 1931, the county court of Pulaski County made an order pledging Pulaski County to the payment out of the county's road revenues of 25 per cent. of the principal and interest maturities on each of two bond issues of West 12th Street Road Improvement District No. 30, Pulaski County, Arkansas, one for $93,000 and the other for $66,000, which said order was in due course properly recorded by the clerk of the county court and a certified copy transmitted to the county treasurer of Pulaski County as provided for in said order;

"(2) That on October 4, 1932, the county court of Pulaski County made an order providing for the annulment of the order made by said county court on June 15, 1931;

"(3) That said order made by the Pulaski County Court on October 4, 1932, is *coram non judice* and therefore null and void and without force or effect.

"It is therefore considered, ordered and adjudged by the court that the intervention of the interveners be, and the same hereby is, dismissed, and the aforesaid order made by said county court on October 4, 1932, attempting to vacate and annul the aforesaid order of the county court made on June 15, 1931, be, and the same hereby is, annulled, set aside, and for naught held; and the clerk of this court hereby is ordered and directed to transmit a certified copy of this judgment to the clerk

of the county court of Pulaski County to be by said clerk entered upon the records of the county court of Pulaski County as and for judgment of said county court.

The judgment relating to Annex No. 1 is identical with that relating to District No. 30, except the first paragraph, which is as follows:

"(1) That on the 18th day of May, 1931, the county court of Pulaski County made an order pledging Pulaski County to the payment out of Pulaski County's road revenues of 25 per cent. of the principal and interest maturities on bonds issued by said Annex No. 1 to West 12th Street Road Improvement District No. 30, which said order was in due course properly recorded by the clerk of the county court, and a certified copy thereof transmitted to the county treasurer of Pulaski County as provided in said order."

On the part of the respondent there was offered in evidence the decree of the chancery court heretofore referred to and proof was made that the indebtedness therein adjudged to be due by District No. 30 to Pulaski County remained unpaid. It was further proved by respondents, and admitted by the petitioners, that there had been no appropriation by the levying court for the aid of the improvement district prior, or subsequent, to the orders of the county court of May 18, and June 15, 1931, granting aid to the same.

The defenses by respondents to the petition for mandamus set up in their answer and relied upon here are, (1) as to both districts, that no appropriation having been made prior, or subsequent, to the order of the county court which are relied upon by petitioners as the basis for the relief prayed, said orders were and are void and subject to attack in a collateral proceeding; and (2) as a further defense to the claim of District No. 30 that it is indebted to Pulaski County in a sum in excess of any funds in hands of the respondent due in any event to said District, and therefore, for that reason, it is not entitled to the relief prayed.

Referring to the first point raised by respondent as a defense to the petition for mandamus, the petition-

ers contend that the judgment of the county court, being of a court of superior jurisdiction having jurisdiction of the subject-matter, is entitled to the same credit as judgments of a superior court of general jurisdiction, and its judgments are conclusive on collateral attack where no want of jurisdiction is apparent of record. The respondent contends that the appropriation was the ground on which the jurisdiction rests, and, that being wanting, the judgment was a nullity, and that this might be shown as a defense to any action based on the void judgment.

We pass the questions presented in the first proposition above stated for the reason that these are not now properly before us. These matters have been concluded by the judgments of the Pulaski Circuit Court made on May 26, 1933, set out heretofore at length. No appeal was taken from those judgments, and they have now become final.

Appellee (respondent) makes the argument that these judgments do not make the question *res judicata,* because, in making the orders of October 4, 1932, revoking those formerly made, "no notice was given the petitioners * * * and the county court in 1932 simply had no jurisdiction," and that "the validity of the orders made by Judge Sibeck in 1931 could not be determined by Judge Lawhon. Respondent asserts that the merits of the case or the validity of the orders made in 1931 were not before the county court in 1932, and that the court was not a court of competent jurisdiction in passing upon those orders." The recitals of the judgments of the circuit court do not support the assertions made or the argument quoted *supra.* On the contrary, they show affirmatively that the court had all the parties interested before it and tried the questions *"de novo"* and determined the same on the "pleadings, records, agreed statement of facts, oral testimony of John D. Shackleford, and county court records as exhibits to his testimony." The validity of the Sibeck orders made in 1931 was properly a question within the issue, whether formally litigated or not.

The settled rule of this jurisdiction supported by the weight of authority is that a judgment of a court of competent jurisdiction is conclusive of all questions, legal or equitable, which were raised in the cause or which, being within the scope of the issue, could have been interposed. *Church* v. *Gallic*, 76 Ark. 423, 88 S. W. 979; *Fourche River Lbr. Co.* v. *Walker*, 96 Ark. 540, 132 S. W. 451; *Howard, etc. District* v. *Hunt*, 166 Ark. 62, 265 S. W. 517; *Newton* v. *Altheimer*, 170 Ark. 366, 280 S. W. 641; *Akins* v. *Heiden*, 177 Ark. 392, 7 S. W. (2d) 15.

The fact that the validity of the Sibeck orders (May and June, 1931) may not have been formally litigated in the cause resulting in the judgments of the circuit court does not prevent those judgments from being *res judicatae*. That proceeding was a direct attack upon the Sibeck orders in which each party was bound to make the most of his case or defense, "bringing forward all his facts, grounds, reasons or evidence in support of it on pain of being barred from showing such omitted matters in a subsequent suit." *Ederheimer* v. *Carson D. G. Co.*, 105 Ark. 488, 152 S. W. 142, and *Newton* v. *Altheimer, supra.*

As an additional defense to the petition for mandamus of District No. 30, respondent alleged and proved that the district was indebted to Pulaski County in a sum much greater than that demanded of the county in the present proceeding. The appellant district argues that this fact was no concern of respondent and could only be asserted by the county, and, since it did not intervene, that question cannot be raised. We do not agree to this. The treasurer is the custodian of the county's money and as such was clothed with the duty to see that the same was not improperly expended, and he therefore, with propriety, could raise the question as to whether or not he should be required to pay to the district the sum demanded when the district was in fact indebted to the county in a greater sum. To raise this question, the formal intervention of the county through its county judge was unnecessary, since for that pur-

pose the treasurer is to be deemed agent of the county and acting in that capacity.

From the views expressed it follows that the judgment of the trial court should be and is affirmed, both on appeal and cross-appeal.

HUMPHREYS, MEHAFFY and MCHANEY, JJ., concur.

PATTON *v.* STATE.

Crim. 3879.

Opinion delivered April 30, 1934.

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

SMITH, J. Three brothers, Cleadus, John and Chelton Fields, attended a dance in a hall owned and operated by Arthur Peck. Oral and Carrol Patton, who were brothers, also attended the dance. Cleadus Fields purchased a bottle of whisky, as he supposed, from a person whom he thought was one of the Patton boys. When opened it was found that the bottle contained urine, and not whisky, whereupon Cleadus Fields approached the Patton boys and demanded the return of his money, expressing, at the same time, in rather forcible, though

somewhat inelegant, terms, his opinion of the person who would play such a trick as had been played upon him. One of the Patton boys, after denying that he had made the sale, said to Fields: "If you want to live long, you had better keep your mouth shut." The parties commenced fighting. It was dark, and they were out-of-doors, and the testimony is in irreconcilable conflict as to who actually began the fight. At any rate, John Fields, who was standing by, jumped at one of the Pattons to seize a pistol which he saw the latter draw, but he failed in the attempt to seize it and was shot and killed. Peck, owner and operator of the dance hall, hearing the shooting, came to the front door to see what was happening, and was himself shot and killed as he appeared in the door. Peck lived long enough to make a dying declaration to the doctors who attended him, and they testified that in this declaration Peck stated that "When he opened the door, the Patton boy was standing just outside the door, and he just laid his hand on his shoulder and he told him to stop that, and he wheeled and shot him." Peck did not state which one of the Patton boys shot him.

Oral Patton escaped and has not been arrested. Carrol Patton was arrested the night of the shooting, and at the trial for killing Peck from which this appeal comes, the testimony offered in his behalf was to the effect that he was unarmed, and that he did none of the shooting, and that all of the shots were fired by his brother Oral. The sheriff testified that when he arrested Carrol he found him lying across a bed with his clothes on, and that he had a pistol and scabbard in the bed with him. This pistol was a .38 calibre revolver, and a deputy sheriff who assisted in making the arrest testified that he was an expert in fire arms, and that he examined the revolver at the time of the arrest and found that three chambers had been very recently fired—within less than twenty-four hours. Some .32 calibre shells were found at the place of the shooting. The deputy sheriff testified that an automatic pistol ejects the shells as fired, but that the shells must be removed from a revolver by

hand. One of the doctors who attended Mr. Peck testified that the wound received by him and which caused his death appeared to have been inflicted by a hard bullet, and not a lead bullet, because the wound was not jagged or irregular, and that the wound, from its appearance, could have been inflicted by either a .32 or a .38 calibre pistol. The deputy sheriff testified also that the pistol found in Carrol's possession was loaded with two lead bullets and two copper jacket bullets, and that the latter were harder than the former and would make a less jagged wound.

These facts appear to answer the assignment of error that the testimony is insufficient to support the verdict of the jury, which imposed a sentence of ten years in the penitentiary for murder in the second degree. The evidence is sufficient to sustain the conviction upon either of two grounds, (1) that appellant may actually have fired the fatal shot, or (2), if not, that he was present, aiding, abetting and encouraging his brother in firing it. It was not questioned that one or the other did fire the fatal shot, and that they were acting in concert is sufficiently established to sustain the conviction. This is made certain by testimony to the effect that the Patton brother who fired the first shot was advised by the other to "Shoot him!" *Simmons* v. *State,* 184 Ark. 373, 42 S. W. (2d) 549.

In support of the motion for a new trial testimony was offered to the effect that a member of the jury had failed to pay his poll tax, and because of this failure was not a qualified elector. The verdict and the judgment pronounced thereon were not void on this account. It was held, in the case of *James* v. *State*, 68 Ark. 464, 60 S. W. 29, (to quote the headnote) that: "Objection that a juror has not paid his poll tax, if available at all, comes too late after verdict," and that holding was reaffirmed in the case of *Teel* v. *State,* 129 Ark. 180, 195 S. W. 32.

A different question is presented where the juror is interrogated as to the payment of his poll tax, and falsely answers that he had paid, when, in fact, he had not. In such a case the juror, through his fraud and false tes-

timony, imposes himself upon the court as a competent juror, when he is, in fact, ineligible to serve as such. But if the defendant in a criminal case, or either party to a civil case, wishes to raise the question of a juror's eligibility, he must ask the specific question upon the *voir dire* examination, and, if he does not do so, the right to raise the question is waived, and cannot be raised after the jury has been sworn or a verdict has been returned. It appears that the juror, with certain others, was summoned as a bystander, all of whom were asked by the court the general question if they were qualified electors, but no specific question was asked by the court, or by counsel in the case, whether these special jurors had paid their poll tax. This being true, the objection that they had not done so comes too late and cannot now be raised. Section 6343 Crawford & Moses' Digest; *Fones Bros. Hdw. Co.* v. *Means,* 182 Ark. 533, 32 S. W. (2d) 313; *Lynch* v. *State,* 188 Ark. 831, 67 S. W. (2d) 1011.

It was assigned as error that the verdict had been arrived at by lot, and in support of this assignment of error the foreman of the jury testified as follows: All of the jurors had voted that defendant was guilty of murder in the second degree, and all had voted to fix his punishment at some term of years allowed by law, but they had not agreed on the punishment. The witness testified that, after agreeing that defendant should be found guilty of murder in the second degree, they first voted whether he should be given the maximum punishment of twenty-one years, and, the vote not being unanimous, it was then agreed that the vote should be taken on the question whether he should be given a sentence of seven years, and this vote was not unanimous. The witness then proceeded to say: "After these first two (votes) were taken, there was another one taken. Each one was going to put on a piece of paper how much they were going to give him; they were trying to get at how we stood. There were three for seven years; two for twelve; one for five; three for fifteen, and three for ten." There was offered in evidence the quotient of this verdict made in the jury room, which gave the result of

ten and one-half years. The witness was asked, however: "Did you agree beforehand that you would take that result?", and he answered: "No, sir, that would just give us an idea of how we stood." Another ballot was then taken, and all of the jurors voted, not for ten and one-half years, but for ten years.

It thus appears that the verdict was not even a quotient verdict. However, we prefer to put the decision upon the ground—and we do put it upon the ground—that it was not competent for the juror to thus impeach the verdict.

The statute (subdivision third of § 3219, Crawford & Moses' Digest) provides that a new trial may be granted "where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors." But the statute also provides that: "A juror can not be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot." Section 3220, Crawford & Moses' Digest.

In the case of *Speer* v. *State,* 130 Ark. 464, 198 S. W. 113, we said: "Lot involves an element of chance. The quotient verdict is not the result of a lottery." We there also said that: "Verdicts of juries cannot be impeached by the evidence of jurors except where the verdict was reached by lottery."

In the case of *Snow* v. *State,* 140 Ark. 9, 215 S. W. 3, it was insisted that the judgment, sentencing the defendant to a term in the penitentiary, should be reversed because it had been rendered upon a quotient verdict. In overruling that contention, we there said: "Again, it is urged that the judgment should be reversed because the jury fixed the verdict by the quotient method. This charge is not sustained by evidence, except by the affidavit of a juror, which is inadmissible to impeach the verdict. *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113."

There appears to be no error in the record prejudicial to appellant, and the judgment must therefore be affirmed, and it is so ordered.

BANKERS' TRUST COMPANY *v.* ARKANSAS RICE GROWERS' CO-OPERATIVE ASSOCIATION.

4-3448

Opinion delivered April 30, 1934.

[redacted]

Trieber & Lasley and *Frauenthal & Johnson,* for appellants.

Mann & Mann, for appellee.

SMITH, J. This cause was tried in the court below upon the following agreed statement of facts:

"Stipulation.

"It is hereby stipulated between the parties hereto, through their respective solicitors, that this cause may be submitted upon the following Agreed Statement of Facts.

"Agreed Statement of Facts.

"The Rice Growers' Co-Operative Association had a general deposit with the Bankers' Trust Company, and had maintained a general deposit in said bank for sometime prior to the transaction herein complained of, and on October 2, 1931, had on deposit $25,084.31, in the form of a general checking account.

"That the Rice Growers' Co-Operative Association deals in buying and marketing rice and, in making sales of rice, it was its custom to draw drafts on the consignees of the rice, with bills of lading attached, and would deposit these drafts, with the bills of lading attached, in the Bankers' Trust Company and take credit therefor on its general checking account.

"That the Bankers' Trust Company, through its officers, suggested to the Rice Growers' Co-Operative Association that some security or margin be placed with

said bank to protect the bank from any losses that might occur by reason of the bank giving immediate credit for such drafts and the consignees failing or refusing to pay the face value of the drafts.

"That, at the suggestion of the bank, the Rice Growers' Co-Operative Association authorized the bank to charge its general checking account with the sum of $3,000, for the purpose of securing the bank against loss on the draft collections. Thereupon the bank, of its own motion, made out the following charge ticket against the association's general checking account, to-wit:

"BANKERS' TRUST COMPANY,

"Little Rock, Ark., October 2, 1931.

"CHARGE

"Arkansas Rice Growers' Co-Operative Ass'n.,
"Stuttgart, Ark.

"Covering Certificate of Deposit payable to 'Ourselves Account Margin Arkansas Rice Growers' Co-Operative Assn. drafts.' $3,000

"Charge made by BB (Signed) BB.

"A copy of this charge ticket was transmitted, in due course, by the bank to the association, and the association accepted and retained the same.

"On the said October 2, 1931, the Bank issued a certificate of deposit, as follows:

"CERTIFICATE OF DEPOSIT.

"Little Rock, Ark., October 2, 1931. No. 3587
"BANKERS' TRUST COMPANY $3,000
81-25

"Ourselves account margin Arkansas Rice Growers' Co-Operative Assn. draft has deposited with the Bankers' Trust Company $3,000 & 00 cts. dollars in current funds, payable to the order of themselves, demand after date with interest to maturity only at the rate of 2 per cent. per annum, but subject to thirty days' prior notice of withdrawal and the return of this certificate properly indorsed. If at the request of the owner hereof and with the consent of said bank this certificate shall be paid before maturity, no interest shall be paid thereon.

"J. L. SPENCE, Tr.
"Assistant Cashier.

"Countersigned:
"D. Majors. Auditor.

"Not subject to check.

"On February 27, 1933, the Little Rock Clearing House Association, of which the Bankers' Trust Company was a member, took action, with the approval of the Governor and the Bank Commissioner, whereby all deposits of the members of the Clearing House Association were forthwith to be restricted, as to withdrawal thereof, so that the only part of any deposit thereafter withdrawable was 5 per cent. or $15, respectively, thereof, whichever was the larger, such action being taken pursuant to § 7 of act 60 of the Acts of Arkansas of 1933. The said restriction of withdrawals was validated by § 1 of act 96 of the Acts of 1933.

"On May 1, 1933, at the request of the board of directors of the Bankers' Trust Company, the Bank Commissioner duly took charge of its affairs, for purposes of management, under act 88 of the Acts of 1933. On said May 1, 1933, also pursuant to said act 88, the Bank Commissioner reorganized the said Bankers' Trust Company by the creation of a new bank at Little Rock, Bankers' Commercial Trust Company, to which certain of the assets of the Bankers' Trust Company were sold and transferred, in consideration of Bankers' Commercial Trust Company assuming 50 per cent. of the then remaining restricted balances of Bankers' Trust Company's deposits.

"All drafts of the Rice Growers' Association for which it had received credit from Bankers' Trust Company prior to the said May 1, 1933, were paid in full in due course, and the said $3,000 security has ceased to be necessary for the protection of the Bankers' Trust Company. The Rice Growers' Association was entitled to withdraw $150, as the 5 per cent. permitted to be withdrawn by the Clearing House Association action, and was furthermore entitled to 50 per cent. of the difference between $3,000 and said $150, by reason of the assumption of Bankers' Commercial Trust Company 50 per cent. of

such difference amounting to $1,425. The Rice Growers' Association has not, in fact, withdrawn the said $150 or the said $1,425, but both said amounts are available to it, so that the actual amount in controversy in the within suit is $1,425. The failure of the Rice Growers' Association to withdraw the $150 and the $1,425 assumed by the Bankers' Commercial Trust Company was due to the fact that some of its drafts were, until recently, outstanding.

"It is agreed that the Rice Growers' Association will not estop itself in this suit by accepting the $150 and $1,425 admittedly available deposit."

Upon this statement of facts it was ordered and decreed that the claim of plaintiff, Arkansas Rice Growers' Co-Operative Association "be and it hereby is allowed as a prior claim (against the Bankers' Trust Company and Marion Wasson, as Bank Commissioner in charge thereof) in the sum of $1,425, * * *."

This appeal is from that decree, and appellants state the sole issue in the case to be whether this $1,425 should be allowed as a common or general claim or should be allowed as a prior claim.

The question presented for decision involves a consideration and construction of a portion of § 1 of act 107 of the Acts of 1927, page 297, which, in our opinion, has previously been so construed as to require the affirmance of the decree here appealed from.

Section 1 of act 107 classifies the creditors of a bank of which the Bank Commissioner has taken charge as "secured creditors, prior creditors or general creditors," and proceeds to define each of these classifications. This section defines those creditors who are to be classed as "prior creditors."

Paragraph 4 of this section reads as follows: "The owner of a special deposit expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business."

Paragraph 5 reads as follows: "The beneficiary of an express trust as distinguished from a constructive trust, a resulting trust or a trust *ex maleficio* of which the said

bank was the trustee, and which was evidenced by a writing signed by said bank at the time thereof."

It is further provided in § 1 of this act that these prior creditors shall be paid in full, with certain exceptions not important here to consider, as the Bank Commissioner has in hand sufficient funds to pay the claim in question in full, notwithstanding the exceptions, if it is, in fact, a prior claim. As has been said, it has been stipulated that the only question for decision is whether the claim is a "prior claim," within the meaning of § 1 of act 107.

In our opinion, the case of *Royal Arch Benefit Association* v. *Taylor,* 187 Ark. 531, 60 S. W. (2d) 915, and the cases there cited and reviewed, are decisive of this question. In that case the facts were that a bank, having in hand a general deposit, issued a memorandum, reciting that it had set aside a sum from this general deposit to purchase government bonds for the depositor. The memorandum recited that the bank, which later became insolvent, had charged the depositor's account with the sum named as an advance payment on the bonds which the bank had undertaken to purchase for the depositor. Upon the failure of the bank, its assets were taken over for purposes of liquidation by the State Bank Commissioner, and the question arose whether the sum mentioned in the memorandum had become a prior claim within the meaning of act 107 of the Acts of 1927. It was held that the writing was a sufficient memorandum to evidence an "express trust," entitling the depositor to the preference given by paragraph 5 of the act, above quoted, and that it should be paid as such.

In so holding we said that the memorandum was not ambiguous, but clearly indicated the purpose for which the sum named had been withdrawn from the general deposit, and that the case was not altered because the money set aside for the purpose indicated was already in the bank at the time of the direction given for its use by the depositor and the application to be made of it by the bank. This statement was made upon the authority of the case of *Grossman* v. *Taylor,* 185 Ark. 64, 46 S. W.

(2d) 12, in which case we held that the instrument issued by the bank was as effectual to create an express trust as though the money had been checked out and redeposited. In the Royal Arch Benefit Association case, after stating the above holding in the Grossman case, we said: "There is no particular form of writing prescribed by the statute, nor any manner pointed out therein, in which the same shall be signed, and, while this might be called a 'charge ticket,' as contended for by the appellee, it was something more. It was both a charge ticket and a contract and entitled the appellant to a preference over the general creditors and to share with the other preferred or prior creditors *pro rata,* and to have the balance, if any, classed as a common claim." See also *Albright* v. *Taylor,* 185 Ark. 401, 47 S. W. (2d) 579.

We find it unnecessary to determine, under the facts as recited in the stipulation hereinabove copied, whether the $3,000 deposit was a special deposit under paragraph 4 of act 107, as defined in *Albright* v. *Taylor, supra,* or was an express trust under the provisions of paragraph 5, as interpreted in the Taylor case, *supra,* for, if not one, it was the other, and in either case it is given priority by the statute.

The $3,000 was a part of an existing deposit, but it was held in both the Grossman case and the Taylor case, *supra,* that this fact was unimportant and did not alter the character of the transaction. The $3,000 was withdrawn from and set apart from the general deposit. It was no longer subject to the check of the depositor, and his general deposit was reduced by the amount thereof. The memorandum accorded the right to the bank to hold this money for the use agreed upon, to-wit, its indemnification. The memorandum created either a special deposit for this purpose, or an express trust for that purpose, and as a right of priority is given by and exists under the statute in either case, the decree according priority is correct and must be affirmed, and it is so ordered.

HUMPHREYS, J., dissents.

REFUNDING BOARD OF ARKANSAS *v.* STATE HIGHWAY AUDIT COMMISSION.

4-3467

Opinion delivered April 30, 1934.

[redacted]

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

Paul E. Gutensohn, Horace Sloan and *Walter L. Pope,* for appellee.

Donham & Fulk, amici curiae.

SMITH, J. The State Highway Audit Commission filed a complaint in the Pulaski Chancery Court against the Refunding Board of Arkansas, which contained the following allegations: After alleging the creation of the Highway Audit Commission, and also that of the Refunding Board, and the functions of each, it was alleged that the People's National Bank had presented to the Refunding Board a certain Auditor's warrant in the sum of $2,500, which had been issued to a firm of contractors operating under the name of Altman-Rodgers Company. The warrant was dated April 30, 1932, and was directed to the State Treasurer. The complaint alleged that the warrant was issued to the contractors for construction work performed under a valid contract, upon a voucher

duly and legally issued by the Arkansas State Highway Commission, and was on the same date of its issuance indorsed and delivered to the People's National Bank, in the due course of business and for value.

It was alleged that, although the warrant constituted a valid obligation on the part of the State, it should not be refunded, because the State has a claim against the Altman-Rodgers Company, which arose as follows: On August 27, 1930, a contract was entered into between the said Altman-Rodgers Company and Dwight H. Blackwood, at that time chairman of the State Highway Commission, whereby said Altman-Rodgers Company undertook to do and perform certain road construction work there described. The Altman-Rodgers Company performed said construction work and furnished material at an actual cost of $801.13. That contract was alleged to be invalid and without legal and binding effect because it involved the payment of more than a thousand dollars, and was not advertised or let on competitive bidding, nor was it executed by at least three members of the Arkansas State Highway Commission, as required by law, nor was it attested by the Secretary of the Commission, as required by law, and for each and all of these reasons was unenforcable as a contract.

The Altman-Rodgers Company was paid by the State, upon voucher issued by the State Highway Commission and warrants issued thereon by the State Auditor, in the sum of $1,411.62. By reason of the fact that the fair and reasonable cost of the labor done and material furnished on said contract was only $801.13, the said Altman-Rodgers Company was overpaid in the amount of $610.49. Final estimate was made by the State Highway Engineer of the work on November 6, 1930, on which date the State Highway Commission approved the work and accepted it, and on said date paid the full amount of $1,411.62 under said irregular and invalid contract. By reason of this overpayment the Altman-Rodgers Company was indebted to the State in the sum of $610.49 on the date on which it received the $2,500 warrant, and is still so indebted, which said in-

debtedness the State is entitled to setoff against said $2,500 warrant.

It was alleged that, although the Bank had received the $2,500 warrant without actual knowledge of the facts here recited, it was charged with knowledge of the set-off in favor of the State and took said $2,500 warrant charged with all equities, defenses and set-offs in favor of the State against it.

It was alleged that the State Refunding Board is about to allow the full amount of said $2,500 warrant to the People's National Bank, under the provisions of act 11, passed at the Extraordinary Session of the General Assembly and approved February 14, 1934, and is about to authorize the payment of fifty per cent. of said warrant in cash and issue bonds, under the terms of said act, for the remaining fifty per cent. Special Session Acts 1934, page 28.

Complainants alleged that they constitute a Commission created by law and charged with the duty of detecting irregularities in connection with the operation of the State Highway Commission, and as such, and also as citizens and taxpayers, are interested in the action about to be taken by the Refunding Board, and that they have no adequate remedy at law to prevent the action the said Board is about to take.

Wherefore they pray that the Refunding Board be prohibited and enjoined from permitting said $2,500 warrant to be refunded until there is definitely decided by the Audit Commission, or by a court of competent jurisdiction, the amount of overpayment, if any, made by the State on the invalid and irregular contract entered into between the State Highway Commission and Altman-Rodgers Company on August 27, 1930.

A demurrer to this complaint was filed, upon the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the complainants to the relief prayed, or to any relief. The demurrer was overruled, and, respondent announcing that no further pleadings would be filed, it was ordered that the Refunding Board be prohibited and restrained from allowing the

$2,500 warrant until it is determined, either by the State Highway Audit Commission, or a court of competent jurisdiction, what amount, if any, the State is entitled to recover from Altman-Rodgers Company by reason of the irregular and invalid contract entered into between said company and the State Highway Commission on August 27, 1930.

It is unnecessary to review the legislation creating the State Highway Audit Commission and the Refunding Board of Arkansas, as their respective functions are not called into question. Other questions are decisive of the issue raised by the demurrer.

The recent case of *State of Arkansas* v. *Rogers & Jones,* cited and relied upon by appellant decided by the Supreme Court of Tennessee, does not appear to have yet been officially published. In that case the complaint alleged that a contract had been let to repair the approach to the Harahan Bridge over the Mississippi River, at the contract price of $393,706.57, whereas the actual and reasonable value of the work done and services performed under the contract was only $167,688.93. The complaint alleged that the contract had been let in violation of act 65 of the Acts of 1929, page 264, which act provided that all contracts in excess of a thousand dollars should be let on a competitive basis, after advertisement, to the lowest responsible bidder, and should be signed by at least three members of the State Highway Commission, whereas the contract there in question had been undertaken and signed by the Engineer of the Highway Commission alone, and had not been advertised for letting on a competitive basis to the lowest responsible bidder, as the act required should be done. An amendment to the complaint was filed which recognized the right of the defendant contractors to retain, by way of *quantum meruit,* the reasonable value of the services performed in the repair of the approach to the bridge.

The Supreme Court of Tennessee recognized and stated that the case was controlled by the law of this State, but interpreted certain decisions of this court, there cited, as holding that the contract, having been fully

performed, and the agreed consideration having been paid upon the work being accepted by the commission, there could be no recovery in the absence of specific allegations of fraud in letting the contract. The court said that: "To be regarded as a badge of fraud, the consideration for a contract must be so grossly excessive or so grossly inadequate as to shock the conscience of the court," and the allegation that $393,706.57 had been paid to perform work reasonably worth only $167,689.93, in the absence of other or specific allegations of fraud, was not regarded as sufficient to meet the test stated.

The court cited as the basis of its decision the following Arkansas cases: *Leonard* v. *State,* 185 Ark. 998, 50 S. W. (2d) 598; *Arkansas State Highway Commission* v. *Keaton,* 187 Ark. 306, 59 S. W. (2d) 481; *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891; *Shackleford* v. *Thomas,* 182 Ark. 797, 32 S. W. (2d) 810.

It was held by this court, in the case of *Forrest City* v. *Orgill, supra,* that, although a purchase by municipal officers of machinery for waterworks, which was not authorized by an ordinance, resolution or order of the city council, wherein the yeas and nays were called and recorded, and which was not ratified by any formal action of the city council, was not binding upon the city, yet, the city could not retain such machinery, which could have been purchased in a proper manner, and at the same time defeat a recovery for the contract price thereof.

In the case of *Shackleford* v. *Thomas, supra,* it was held that a school district, having made payments under a contract not executed in the mode prescribed by law, was estopped from recovering back such payments.

The other two cases will be later referred to and discussed.

It will be observed that, in the two cases first above cited and quoted from, the governmental agencies held to be estopped by the acceptance of services or the subject matter of the contract were, in one case, a city of the State, and, in the other, a school district, but the State itself was not a party to either case. We are of

the opinion that a wholly different rule is to be applied when the State itself is a party, for the reason that the doctrine of estoppel is not applicable to and cannot be applied against the State.

With all deference to the great court and the able members thereof who failed to recognize this distinction, we may say that all the members of this court are of the opinion that the distinction exists. Upon this point we are all agreed. Our difference arises out of the question to be later discussed.

At § 993 of Bishop on Contracts (Second Enlarged Edition), page 419, it is said: "The government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization. And this principle may extend to the agent of a municipal corporation and his contract, but it does not necessarily; as to which, the distinctions in the differing cases will be obvious."

The authorities on this subject were reviewed in the case of *State* v. *Chilton,* 49 W. Va. 453, 39 S. E. 612, in which it was sought to invoke the doctrine of estoppel against the State. It was there said: "A public officer cannot ratify expressly his own unauthorized act, and surely cannot do so by mere implication. *State* v. *Hays,* 52 Mo. 578; *Dalafield* v. *State,* 26 Wend. 192. Having no power to make credit sales, by his own knowledge that he did make them, neither he nor his predecessors could by that knowledge ratify the acts to protect themselves against the State demands. Estoppels do not generally bind a State; that is, estoppel by conduct of its officers. 'Clearly, the State cannot be estopped by unauthorized acts of its officers.' Bigelow, Estop. 341; *U. S.* v. *Kirkpatrick,* 9 Wheat. 735, 9 L. Ed. 199."

In the case of *Leonard* v. *State, supra,* a suit was brought to enjoin the State Auditor from issuing and the

Treasurer of the State from paying, certain vouchers issued by the State Highway Commission, in payment of contracts in excess of a thousand dollars, which had been let without advertising for bids, as required by act 65 of the Acts of 1929, volume 1, acts 1929, page 264. It was there held that the authority of the State Highway Commission to let contracts for construction or maintenance of highways is statutory, and any contract not let in the prescribed manner is unauthorized and voidable at the State's election. It was there also held, in a suit to enjoin the issuance and payment of vouchers based upon such illegal contracts, that relief might be granted without joining the claimants as parties to the suit.

Much of the relevant legislation was reviewed in the case of *Arkansas State Highway Commission* v. *Keaton, supra.* In that case a suit was brought and a judgment recovered against the State Highway Commission for the value of certain labor performed and materials furnished in the construction of bridges which were a part of the State highway system. The contract was similar to the one sued on in the case of *Leonard* v. *State, supra,* and upon the authority of that case we held that it was unenforcible as such, for the reason that it had not been let in the manner and form prescribed by law. We held, however, as had been previously held in the case of *State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71, that the State, having accepted and being in possession of the results of a performed contract, could be held liable, on a *quantum meruit* basis, for the value of the materials furnished or the services performed, this right being conferred by act No. 2 of the Special Session of 1928. Acts Special Session 1928, page 2.

It was pointed out in the Keaton case, *supra,* that at the time of the rendition of the opinion in the Dodge case, *supra,* it had not been decided whether § 17 of act No. 15, passed at the Second 1932 Extraordinary Session of the General Assembly (page 34), was valid legislation or not, as being within the call of the Governor convening that session. But, before the rendition of the

opinion in the Keaton case, it had been decided, in the case of *State Note Board* v. *State ex rel. Attorney General,* 186 Ark. 605, 54 S. W. (2d) 696, that the act 15 was within the Governor's call, and that § 17 thereof authorized the maintenance of these suits on a *quantum meruit* basis. But it was said in the Keaton case that: "This § 17 recognized that there were outstanding many claims against the highway commission which had not been adjudicated or paid, and authorized the State Note Board to issue notes in payment, with the proviso, however, that '* * * this act shall not validate any claim, voucher or warrant or other evidence of indebtedness issued under or pursuant to an illegal contract, and provided further, that no note or notes shall be issued in lieu of any such claim in excess of $150 where such claim is based on a cost plus contract or a contract not let on competitive bidding until such claim is approved and the issuance of such notes are [is] authorized by the State Highway Audit Commission, or until the validity of such claim is finally adjudicated and determined by a court of competent jurisdiction.' "

We there also said that we were unaware of any legislation which had repealed § 17, from which we quoted, either expressly or by necessary implication, although the provisions of that section, with respect to the manner of payment of those claims appear to have been changed by the provisions of act No. 167 of the Acts of the 1933 Session of the General Assembly, which was approved March 28, 1933, and, having an emergency clause, became a law on that date.

These cases—the Dodge and the Keaton cases—appear to decide very definitely that a recovery might be had on these various claims and warrants on a *quantum meruit* basis, but on that basis only.

It appears with equal clearness to the majority that the legislation there reviewed did not operate to waive the State's right to set-off against any claim, or voucher, or warrant, or other evidence of indebtedness, issued under or pursuant to an illegal contract, such as the one

here involved and sought to be set-off is alleged to be, a fact which the demurrer concedes.

Now, if the original contractors, to whom the warrant here in question was issued, had brought suit to enforce their demand, it is certain that § 1197, Crawford & Moses' Digest, confers the right to apply any set-off which the State might have against it. This section reads as follows: "A set-off may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort. Civil Code, § 119, as amended by act March 21, 1917, p. 1441."

In construing this section in the case of *Futrall* v. *McKennon,* 187 Ark. 377, 59 S. W. (2d) 1035, we said of it: "Act 267 of the Acts of 1917 (vol. 2, Acts 1917, page 1441) is the most comprehensive legislation on the subject of counterclaim and set-off of which we have any knowledge. It is there provided that a counterclaim 'may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them,' and that 'a set-off may be pleaded in any action for the recovery of money, and may be a cause of action arising either upon contract or tort.' We think this statute is sufficiently broad to admit a defense against one, not being the holder of a note in due course, that there were credits which should be applied against the note."

It will be observed that it was there held that the right of set-off, under this statute, was sufficiently broad to admit a defense against one, not being the holder of a note in due course, that there were credits which should be applied upon a note of which the holder thereof had not received the benefits.

The bank, which is alleged to be the holder for value of the warrant here in issue, is in no better attitude than was the holder of the note there sued on. Indeed, the concession is here expressly made that warrants, orders, and certificates of indebtedness issued by the State, or, for that matter, by a county or a municipality, are not negotiable in the sense of the law merchant so as to cut off, in the hands of a *bona fide* purchaser for value or holder in due course, any defense

which might have been made against them had they remained in the hands of the original holder. That this is the law is definitely settled. *Vale* v. *Buchanan*, 98 Ark. 299, 135 S. W. 848; *First Nat. Bank* v. *Whisenhurst*, 94 Ark. 583, 127 S. W. 968; *Harriman Nat. Bank* v. *Pope County*, 173 Ark. 245, 292 S. W. 133.

So, therefore, the bank has those rights—and those only—which Altman-Rodgers Company might now assert if they had never assigned the warrant or voucher, or if it were reassigned to them, and we conclude, therefore, that the right of set-off, which the State seeks to assert, exists and should be accorded.

It is insisted, however that the State may ratify, and has ratified, these unauthorized contracts to the extent that they cease to be the subject of a set-off and has directed its agents to pay all claims otherwise valid, and the correctness of this contention is the controlling point of difference between the majority and the minority of the court. The majority concedes that the State may ratify these contracts and direct the payments of warrants issued under them, but we insist that it has not done so.

It is the opinion of the majority that this has not been done, and that the State has only authorized the payment of valid claims. If it was intended that all claims, whether valid or not, should be paid, the Audit Commission has been deprived of one of its chief functions. Why audit a claim if it must be paid, whether valid or not? It appears that the legislation was not so construed in the Keaton case, *supra,* where we said, as has been stated, that § 17 of act 15 of the Special Session of 1932 recognized that there were outstanding many claims against the Highway Commission which had not been adjudicated or paid, which that section authorized to be adjudicated and paid, provided that "this act shall not validate any claim, voucher or warrant, or other evidence of indebtedness, issued under or pursuant to illegal contracts." And we there said also that we were aware of no legislation repealing that section, expressly or by necessary implication, except

only with respect to the manner of payment of such claims as were adjudged to be valid. We held, in the Keaton case, that the claim there sued on did not have to be presented to the Refunding Board, not because the State had ratified all such contracts and had ordered them all paid, whether valid or not, but because a court of competent jurisdiction had, prior to the passage of act 167 of the Acts of 1933, passed upon its validity, and for that reason—but for that reason only—the Refunding Board had only the ministerial duty to perform of certifying the claim for allowance and exchange for a State bond.

Later legislation on the subject, which, it is insisted, evidences the intention of the State to ratify and to authorize payment of this warrant excluding the right of set-off, are act 18 of the Special Session of 1933, page 69, and act 11 of the Special Session of 1934, page 28.

We do not so construe this legislation, and we think that construction is not authorized when these acts are read in their entirety. Section 2 of act 18 authorizes the payment to be made "to the legal holders of valid claims against the Highway Commission," but § 1 of this act authorizes the Refunding Board, created by act 16 of the Acts of 1933, "to compromise or settle any suit or claim, either on behalf of the Arkansas State Highway Commission or against the Arkansas State Highway Commission, growing out of any contract between the Highway Commission and any person, firm or corporation for work, labor, materials, supplies or services, or arising out of any transaction between the Highway Commission and any member or employee thereof." And, as indicating that the State had not relinquished its right to continue the prosecution of any such claims as the one here involved, and in anticipation that some of these cases might be decided in favor of the State, it was further provided, in § 1 of act 18, that "Any funds due the Highway Commission from any settlement or compromise shall be paid into the State Treasury to the credit of the Bond Refunding Fund." And, finally, as if to make certain what might otherwise be doubtful, it

was provided in § 4 of act 18 that: "This act shall not validate any claim, voucher or warrant, or other evidence of indebtedness issued under or pursuant to an illegal contract, and no note except as provided in § 2 hereof shall be issued in lieu of any claim of $100 or more where such claim is based on a cost plus contract or a contract not let on competitive bidding until such claim is approved and the issuance of the notes authorized by the Refunding Board or until the validity of such claim is finally adjudicated and determined by a court of competent jurisdiction."

The only other act cited as sustaining the contention that the State had ratified these illegal contracts and warrants is act 11 of the Special Session of 1934, page 28. This is a most comprehensive act, consisting of fifty-five sections, and supersedes much of the prior legislation. It is entitled: "A Bill for an Act to be entitled: 'An Act to Refund Highway and Toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Municipal Improvement Districts; to Provide for the Funding and/or Payment of Claims Against the State Highway Commission, and for Other Purposes.' "

This act deals in minutest detail with the various obligations arising out of the State's entire road-building program. Section 15 of the act authorizes the Refunding Board, "in cases in which in the judgment of the board the best interest of the State will be served thereby, to refer to the Highway Audit Commission any note, bond or obligation presented to it for refunding hereunder, or any account or claim against the Highway Commission growing out of any contract between said Commission and any person, firm, or corporation, for work, labor, material, supplies or services, or arising out of any transaction between the Highway Commission, or any member or employee thereof, presented to the Refunding Board for payment or refunding under the provisions of this act." It is there further provided that: "It shall be the duty of the Highway Audit

Commission to investigate and make a full and complete report as to the validity of any such item referred to it by said Refunding Board; provided, however, that when a court shall determine the validity or invalidity of any such note, bond, obligation, account or claim, or whether or not it comes within the provisions of § 2 of act No. 11 of 1927, or of § 19 of act No. 65 of 1929, such adjudication shall be final and conclusive."

But, before conferring the authority to investigate and adjudicate all such claims, it had been provided, in § 10 of act 11, that: "This act shall not validate any claim, voucher, warrant or other evidence of indebtedness issued under or pursuant to any illegal contracts; no payments thereon or notes or bonds therefor shall be issued until such claim, voucher or warrant is approved by the Refunding Board or until its validity is finally determined by the Highway Audit Commission or by a court of competent jurisdiction. Provided that this act shall not affect the full termination of any litigation now pending in any of the courts as to the validity of any bonds now in litigation."

Anticipating that the discharge of these duties would entail an expense, act 141 of the Acts of 1933, page 453, appropriated funds for protecting the State's interests in controversies arising by reason of the Highway Audit. In the preamble to this act it is recited that:

"WHEREAS, As a result of the Highway Audit there now exists a great many controversies between the State of Arkansas and contractors who dealt with the State Highway Commission prior to January 1, 1933, and a great many controversies growing out of payments of money on orders of the State Highway Commission to various and sundry persons, and

"WHEREAS, There are now pending suits brought by the State of Arkansas to recover such funds and other suits on behalf of contractors against the State Highway Commission, and

"WHEREAS, It is necessary for the State's interests to be properly protected that a fund be made avail-

able with which auditors and engineers may be used as witnesses, and

"WHEREAS, There is an unexpended balance to the credit of the appropriation made for the benefit of the State Highway Audit Commission in the sum of Thirty-three Thousand Nine Hundred Ninety-nine and no/100 ($33,999.00) Dollars."

In anticipation of this litigation, and in order that the State's rights might be fully protected, the sum of $33,999 was appropriated for these purposes.

We conclude therefore that while provision has been made for the payment of all valid demands against the State, the right of set-off has not been abandoned, and that the warrant here in suit is valid only to the extent of its face—as its validity is not questioned—less the State's right of set-off against it.

It is our opinion, therefore, that the decree of the court below is correct, and should be affirmed. It is so ordered.

MEHAFFY, MCHANEY and BUTLER, JJ., dissent.

BUTLER, J., (dissenting). The majority opinion erroneously states: "It is insisted, however, that the State may ratify and has ratified these unauthorized contracts to the extent that they cease to be the subject of set-off, and has directed its agents to pay all claims otherwise valid, and the correctness of this contention is the controlling point of difference between the majority and minority of this court. The majority concedes that the State may ratify these contracts and direct the payment of warrants issued under them, but we insist that it has not done so.

"It is the opinion of the majority that this has not been done and the State has only authorized the payment of valid claims. If it was intended that all claims, whether valid or not, should be paid, the Audit Commission has been deprived of its chief function."

Later on the opinion refers to the subject-matter of this suit and the supposed contention of the minority in this way: "The only other act cited as sustaining that the State has ratified these illegal contracts," etc.

It is upon this premise that the majority bases its contention and found its argument in support of the conclusion "that, while provision has been made for the payment of all valid demands against the State, the right of set-off has not been abandoned."

With deference, I submit that the opinion misstates the position taken by the minority, misunderstands the contention of the appellant and rests upon a wholly false premise. The minority do not contend that the State "has ratified unauthorized contracts and has directed its agents to pay them." Neither do we admit that the warrants should be classed with "other illegal contracts," as the opinion seems to imply. On the contrary, we insist that the State has not attempted to ratify unauthorized contracts or warrants issued thereunder, but has only protected *bona fide* holders for value of valid warrants properly issued for just claims on legal contracts. That it, acting through its Legislature, has done this four times, we maintain.

It is apparent that the excerpts from the several acts quoted in the majority opinion are not persuasive of the contrary view, but support and affirm our contention. The purpose for the creation of the Audit Commission, with respect to that part of its duties relating to demands against the State, was to inquire into and audit those which were questionable, either as to amount or validity. Surely its services are not required with respect to a warrant issued for the correct amount and based upon a claim arising out of a valid contract when there is no contention otherwise but which is expressly admitted.

Section 1 of act No. 18, p. 69, of the acts of the first extra session of 1933, quoted in the majority opinion, authorizing the Refunding Board "to compromise or settle any suit or claim, etc. * * * growing out of any contract between the Highway Commission and any person * * *," can only relate to disputed matters and clearly has no reference to those admittedly correct. How this provision, or the one in the same section referred to by the majority, providing that funds due the Highway

Commission on any settlement or compromise shall be paid into the State Treasury for credit of the Bond Refunding Fund, gives any support to the conclusion reached, I do not understand. The opinion, after citing these above provisions, cites as conclusive of the conclusion reached, section 4, act 18, *supra,* which provides that "this act shall not validate any claim, etc. * * * issued under, or pursuant to any illegal contract * * *." In what manner is this authority? I insist that, notwithstanding repeated intimations in the opinion to the contrary, the warrant involved is expressly admitted to be regular and valid in every particular, and therefore all the provisions quoted have no application, for they deal with claims, the validity of which are brought in question. What I have just said is apposite to section 15 of act No. 11, *supra,* quoted and relied upon by the majority opinion. The provisions quoted are those which empower the Refunding Board to refer claims to the Audit Commission growing out of any contract between the Highway Commission and any person, to the end that the Audit Commission may investigate and report "as to the validity of any such item." Later in the opinion, section 10 of act No. 11 is quoted and cited, this being in effect the same as the provisions of section 4 of act No. 18, which I have already noted. The majority cite and quote in full the preamble of act No. 14 of the Acts of 1933 as persuasive of the position taken. It will be seen from this preamble that the appropriation provided by the act relates only to the contest of invalid claims or those which may be thought to be such and which are being contested in the courts.

From the whole argument made in the majority opinion and from an examination of the provisions of the statute cited, it seems obvious that the majority have misconceived both the nature of the subject-matter of this suit and the view entertained by the minority. We emphasize again that there has never been any contention that the State has validated claims otherwise invalid, nor has any one ever thought, except the majority, that the warrant involved should be classed with "other illegal contracts." It is expressly admitted in the complaint,

as quoted in the majority opinion, that "the complaint alleged that the warrant was issued to the contractors for construction work performed under a valid contract upon a voucher duly and legally issued by the Arkansas State Highway Commission and was, on the same date of its issuance, indorsed and delivered to the People's National Bank in due course of business and for value."

The minority merely insist that, since the warrant was properly and regularly issued, based upon a valid contract, the State has on four occasions by legislative enactment guaranteed to the holders of that class of claims the right to have the same refunded in the manner prescribed by law. By section 17 of act No. 15 of the Acts of 1932, by sections 1 and 5 of act No. 167 of the Acts of 1933, by section 2 of act No. 18 of the Special Session of 1933, and by section 39 of act No. 11 of the Special Session of 1934, the settled policy of the State has been declared in unequivocal language to be (section 9, act No. 11, Special Session 1934, the latest expression of the legislative will) that "the legal holders of all valid claims against the Highway Commission growing out of contracts for the construction and maintenance of highways shall be entitled, upon presentation to the Refunding Board of such short term notes, State bonds, or other evidences of said claims, to receive in exchange therefor funding notes of the character hereinafter provided for in this section in an amount equal to so much of the face value of such short term notes, State warrants, or claims presented, payment of which is not otherwise provided for by this act." The language just quoted was but a re-enactment and re-statement of the privilege given to legal holders of valid warrants provided for in the acts cited, *supra,* dealing with that subject.

The overpayment under an invalid contract which is sought as a set-off to the warrant involved was made at least a year and six months before the issuance of the warrant held by the People's National Bank. The State therefore had ample opportunity to determine the amount of overpayment before the issuance of the $2,500

warrant, admittedly valid, which is sought to be refunded. The State ought not, by reason of the dereliction of its officers, to insist now on having the set-off against a valid warrant in the hands of an innocent purchaser. The moral obligation rests upon it, as well as individuals, to do justice. This obligation has been recognized by its Legislature in the provision of the acts last above referred to, and no judicial interpretation ought to refine away its express purpose. To do so, I submit, turns the law awry and violates principles of natural justice.

I am authorized to say that Justices MEHAFFY and MCHANEY join in the dissent, and concur in the views I have expressed.

LEECH *v.* MISSOURI PACIFIC RAILROAD COMPANY.

4-3385

Opinion delivered April 30, 1934.

W. R. Donham, for appellant.

R. E. Wiley, R. Ryan and *Henry Donham,* for appellee.

HUMPHREYS, J. Appellant brought suit in her representative capacity against appellee and L. N. Graham for damages in the sum of $45,000 for the benefit of herself as widow and her son and for $5,000 for the benefit of the estate of her deceased husband, Ivan E. Leech,

on account of his death caused by the collision of appellee's train and Graham's automobile at the road crossing between Owosso Manufacturing Company plant and the station at Benton, through the alleged concurrent negligence of Graham and appellee's employees. The alleged negligence on the part of appellee was its failure to blow its whistle and ring its bell as it approached said crossing and the failure of Graham to effectually look to see if the train was approaching as he drove upon the crossing.

Graham filed no answer. Appellee filed an answer denying the material allegations of the complaint and pleading that Graham's negligence was imputable to deceased, who was riding as a guest in his car.

The submission and trial of the cause resulted in the following verdict:

"We, the jury, find for the plaintiff against both defendants and assess her damages for the benefit of the estate of the deceased in the sum of $3,750.

"Jos. R. Curland, Foreman," and nine others.

A judgment was rendered in accordance with the verdict, and the amount thereof was declared a lien upon the railroad of appellee as provided by statute. The judgment contained the following paragraph: "It is further considered, ordered and adjudged that no finding was made by the jury upon the cause of action for the benefit of the widow and child of the deceased. It is therefore considered, ordered and adjudged that the plaintiff take nothing upon her cause of action for the benefit of the widow and child of the deceased."

Appellant appealed from that part of the judgment precluding a recovery by appellant for the benefit of herself as widow and the benefit of her five-year-old son.

No exception was filed to the judgment by appellee, no motion for a new trial was filed by it, and no appeal prayed from the judgment by it when the judgment was entered.

After the transcript of the cause was filed by appellant in the Supreme Court and more than six months

after the rendition of the judgment, appellee prayed and was granted a cross-appeal.

When the verdict was returned into court, the record reflects the following occurrence: "Mr. W. R. Donham: Is that for the benefit of the estate and nothing for the benefit of the wife at all? A Juror: No, sir. The Court: The jury will be discharged and be back in a few minutes; we want to start another case. Mr. W. R. Donham: Let the record show that, upon returning the verdict and upon the verdict's being read by the foreman of the jury, W. R. Donham, counsel for the plaintiff, arose and propounded the following question: 'Did the jury not intend to find any amount of damages for the benefit of the widow and child of the deceased?' To which the foreman replied in the presence of all the jury and in open court, 'No, sir.' Mr. R. M. Ryan: Let the record show no exceptions were saved in the presence of the jury. Mr. W. R. Donham: I am saving them now. I want the record to show I object and except to the form of the verdict. The Court: All right. Mr. W. R. Donham: The plaintiff requests that the jury be recalled and sent back to the jury room for further deliberations and that they be instructed that if they return a verdict against the defendants jointly for the estate they must necessarily also return a verdict for the benefit of the widow and child of the deceased. The Court: Motion overruled. To which ruling and action of the court the plaintiff at the time excepted and asked that her exceptions be noted of record, which was accordingly done."

Appellant contends that two causes of action were alleged, which is conceded by appellee, and that she was entitled to a verdict as well upon her cause of action for the benefit of herself and son as upon her cause of action for the benefit of the estate, and that it was error not to require the jury to return a verdict for a substantial amount for the benefit of herself and son. It is argued that in order to find a verdict for the benefit of the estate it was necessary for the jury to find that appellee and Graham were negligent and that deceased was not. This is true, and the verdict on behalf of the estate is sup-

ported by sufficient evidence, as there was testimony tending to show these facts. It does not follow, however, that because two separate and distinct causes of action are tried by the same jury the finding of facts in one cause is binding on the jury in the other cause of action if there is a dispute in the testimony. Although there was evidence tending to show concurrent negligence on the part of Graham and appellee and no negligence on the part of deceased, yet there was evidence tending to show no negligence on the part of appellee, and the jury was at liberty to so find in the cause of action on behalf of appellant for the benefit of herself and son, as much so as if the two causes of action had been tried separately instead of together. Notwithstanding the causes of action may be tried together under the provisions of the statute, they are wholly independent of each other, and the finding of the jury in one is not binding upon the jury in the other if the facts are in dispute, as they were in this case.

The main contention of appellant, however, is that, according to the judgment and record made, the jury returned no verdict either for or against her on her cause of action for the benefit of herself and son. A majority of the court, not including Mr. Justice MEHAFFY and the writer, are of opinion that the questions propounded to the jury and answered by the foreman, elicited the information and verdict to the effect that the jury intended to find appellant was entitled to nothing on her cause of action for the benefit of herself and son.

Mr. Justice MEHAFFY and the writer are of opinion that the queries and answers elicited the information that the jury made no finding at all on appellant's cause of action for the benefit of herself and son, which view is supported by the above quoted recital in the judgment appealed from.

There being no proper cross-appeal or appeal by appellee, the questions raised thereon are not before us for determination.

No error appearing, the judgment is affirmed.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY
v. THRELKELD.

4-3431

Opinion delivered April 30, 1934.

Barber & Henry, for appellant.

John L. Sullivan, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the policy of insurance was avoided because the insured in his application therefor wilfully and knowingly made misrepresentations with the intent to deceive the company as to his physical condition. There is no evidence here, however, directly tending to show any such representations, or that such misrepresentations had been wilfully and knowingly made as to his physical condition. Three witnesses, two of them disinterested, testified that insured was in apparent good health both

at the time the application for insurance was made and at the time of the delivery of the policy; that the insured weighed at that time from 165 to 170 pounds. The agent of the company who delivered the policy also stated that insured was in apparent good health at that time.

A misrepresentation will not avoid the policy unless wilfully or knowingly made with intent to deceive. *Wilbon* v. *Washington Fidelity National Ins. Co.,* 182 Ark. 57, 29 S. W. (2d) 680; *Metropolitan Life Ins. Co.* v. *Johnson,* 105 Ark. 101, 150 S. W. 393.

The burden was upon appellant to show that false and material representations, which induced the issuance of the policy, were made to it by the insured knowingly and wilfully and with the intent to deceive the insurer; but appellant not only failed to discharge the burden, but the preponderance of the testimony appears to support the proposition that insured was in good health at the time of the making of the application and the delivery of the policy.

No error was committed in excluding the testimony of Helen Robinson of the general hospital and Elizabeth Kellogg of the county hospital about the records of deceased in both these hospitals. Both testified that they were merely custodians of the records in the respective hospitals; that the records were made by the doctors and nurses; and that their duty consisted in placing them in the files. No reason was given why the doctors and nurses were not able to testify, and they were the proper parties to do so, and the records were properly excluded. The excluded evidence, if admitted, would have been merely cumulative to the testimony of Drs. May and Whitehead, whose testimony was introduced, and would have served merely to bolster it up. If the records were admissible, they should have been introduced by the parties who made them, so that appellee could have the opportunity to cross-examine the witnesses upon the items therein. *Roberson* v. *Roberson,* 188 Ark. 1018, 69 S. W. (2d) 275.

The waiver signed by the insured, relative to the production of testimony by physicians and nurses, did

not remove the restrictions imposed upon the above witnesses under § 4149, Crawford & Moses' Digest, since they were neither physicians nor nurses and made no records of any kind in the case.

There is no testimony or evidence showing that the insured knew that he had tuberculosis before making the application and receiving the policy from appellant company; and it was a question for the jury to determine whether fraud was practiced on the appellee in securing the release, and same has been decided against the appellant. *Harper* v. *Bankers' Reserve Life Co.,* 185 Ark. 1082, 51 S. W. (2d) 526.

The settlement was obtained by taking the beneficiary by surprise and requiring her to act at once, without having the policy in her possession or learning its provisions and without an opportunity to take legal advice or ascertain the facts. *Order of Commercial Travellers* v. *McAdam,* 125 Fed. 358, 61 C. C. A. 22.

The case was submitted under instructions to which there were no objections; the testimony is amply sufficient to support the verdict; and, finding no error in the record, the judgment is affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* HARPER.

4-3427

Opinion delivered April 30, 1934.

Leroy A. Lincoln and *Streett & Streett*, for appellant.

Powell, Smead & Knox, Lawrence E. Wilson and *J. F. Quillin*, for appellee.

MEHAFFY, J. On June 1, 1923, the appellant, Metropolitan Life Insurance Company, issued and delivered to the International Paper Company of New York, in said State, its group policy No. 1864G, insuring and agreeing to insure the lives of certain employees of the said International Paper Company. The employees of the Southern Kraft Corporation were eligible for insurance under the group policy.

On December 1, 1928, appellant, Metropolitan Life Insurance Company, executed a certificate, No. 15,881, and delivered same to the International Paper Company to be by it delivered to the appellee, Curtis Harper, this certificate evidencing that the said Curtis Harper was then insured under the group policy above mentioned.

This policy provided, among other things, that, upon receipt at the home office in New York City, of due proof that the insured had become, while insured thereunder, and prior to his 60th birthday, totally and permanently disabled, as a result of injury or disease, so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit, it would

pay the insured a stipulated sum per month for a certain number of months.

The appellee, Curtis Harper, continued in the employ of the Southern Kraft Corporation at Camden until April 7, 1933, on which date he received an injury as a result of being kicked by a mule, which caused his permanent and total disability.

Suit was brought by the appellee in the Ouachita Circuit Court on July 14, 1933. The appellee alleged the execution and delivery of the certificate to him, and the execution and delivery of the group policy to the International Paper Company, and that appellee was in the employ of the Southern Kraft Corporation at the time of his injury, and that the certificate was in full force and effect. He alleged that he was injured prior to his 60th birthday, by being kicked on his head and other parts of his body by a mule; that, as a result of said injuries, his skull was fractured, and there was a severe injury over his right eye, one over his left eye, injury to his left ear, and severe injury to his back and kidneys, and that he became totally and permanently disabled; that he duly notified the appellant of his injuries and disability, and requested blank forms upon which to make proof; and that the appellant refused to furnish such forms. It was further alleged that he was entitled, under the certificate, to recover 20 monthly payments of $71.45 each, aggregating $1,429, for which sum he prayed judgment. The group policy and the certificate were attached to the complaint as Exhibits A and B, and the total and permanent disability clause was copied in his complaint.

On October 3, 1933, the appellant answered, admitting that it is a corporation chartered under the laws of New York and authorized to do business in Arkansas; denied that the certificate contained the provisions alleged in the complaint; denied that appellee, from the date that the certificate was issued, was continuously in the employ of the International Paper Company until April 7, 1933; denied that on that date the insurance in force was $1,400, or any other sum; denied that appellee was in the employ of the International Paper Company;

denied that appellee was required to drive and feed certain mules; denied that he was kicked on the head and other parts of the body by one of the mules; denied that he was permanently injured. It specifically denied the injuries mentioned in the appellee's complaint; denied that appellant was notified and requested to furnish blank forms on which to make such proof; denied that it refused to furnish forms; denied that it denied liability prior to the filing of the suit; denied that appellee is entitled to recover $71.45 for 20 months or any other sum; denied that it is liable to appellee in any sum. It further denies any repudiation of the contract, but expressly affirms the contract as expressed in the policy sued on.

Appellant then pleads certain paragraphs of the group policy as a defense, and denies that appellee received injuries while he was insured under said group policy. Appellant further states that the contract was made in New York, is not an Arkansas contract, and that appellee cannot recover 12 per cent. penalty or attorney's fees.

Appellee introduced the group policy and the certificate above mentioned, and he testified about his age and about working for the International Paper Company and his injuries.

Physicians were also introduced who testified as to the injuries. The appellant also introduced physicians who testified. Their testimony was in conflict, and it would serve no useful purpose to set it out.

The following stipulation was introduced: "It is stipulated and agreed by and between counsel for plaintiff and defendant that: The first and only notice, claim or proof that plaintiff had become totally and permanently disabled as defined in the policy was by letter of June 20, 1933, written by Lawrence E. Wilson, as attorney for plaintiff, and addressed to the Metropolitan Life Insurance Company, New York City. (Original of said letter hereto attached as part of this stipulation.) That defendant company replied to said letter under date of June 27, 1933, and on same date wrote the assured, International Paper Company, requesting information as to

the status of plaintiff's claim. (Copies of said letters hereto attached as part of this stipulation.) That on July 6, 1933, the defendant again wrote the attorney for plaintiff sending him the forms GH 24-C on which to make claim as requested, and on the same date and on July 11, 19 and 21 it wrote other letters seeking information as to the status of plaintiff's insurance claim. (Copies of said letters hereto attached as part of this stipulation.) That, without further notice or time, this suit was filed on July 14, 1933, and summons issued. That shortly thereafter notice of summons was received by the defendant. That prior to the filing of this action no denial of liability had been made by the defendant.

It is further stipulated and agreed that Master Insurance Policy No. 1864-G, pleaded in the complaint, was made, executed and delivered in the State of New York, between the defendant and the International Paper Company, both New York corporations, and dated June 1, 1923. That the certificate, exhibited with the complaint, was executed and delivered to said International Paper Company in New York for the use and benefit of plaintiff and by said paper company delivered to plaintiff in Camden, Arkansas, on December 1, 1928. That at the time of such delivery to plaintiff he was a citizen and resident of Arkansas, and defendant was authorized to do business in said State."

Certain correspondence was introduced, which will be referred to hereafter. The case was tried before a jury, and a verdict for appellee was returned for $1,429. The case is here on appeal.

It is first contended by the appellant that the action was prematurely brought. It is contended that the action could not be brought until proof of disability was received by the home office in New York City. The policy provides that the first monthly installment will be paid upon due proof of total and permanent disability. There is nothing in the contract as to the character of proof required. The injury occurred on April 7, 1933, and on June 20 the attorney for appellee wrote a letter to the appellant, stating that appellee was insured under the

group policy, giving the number, and stated to the appellant in this letter that he had made an effort to procure blanks upon which to file claim under the policy, but had failed to receive them; and said further: "This is to advise you that he expects to assert his rights under the total and permanent disability benefits provided for in the said policy. I will appreciate you writing me at your earliest convenience advising me the proper person to communicate with, in the event you have a State representative."

This letter was written on the 20th of June. Thereafter, on June 27, the appellant wrote the attorney that it had received his letter of the 20th, and that it was necessary that it know the present status of claimant's insurance, and that it was writing to the group policyholder for this information.

Although appellant was informed on June 20th that appellee had made an effort to get blanks to make proof, the appellant, seven days thereafter, wrote to him, not sending him blanks to make proof or requesting any proof, but stating to him that they were writing the group policyholder. They introduced a letter which the evidence shows that they did write to the group policyholder.

On July 6th, the evidence shows a letter was written, in which the statement was made that they were attaching two forms, SH 24 C, on which claim was to be made. Three months had elapsed since the accident to appellee, before this letter was written, and the company had been informed on June 20th that the appellee intended to assert his rights under the total and permanent disability benefits provided for in the policy. While the letter states that blanks to make proof of claim were attached, Mr. Wilson testifies that they were never received, and presented papers, and said that that was all that he had ever received from the company.

This evidence was admitted without objection. Of course it was competent for the appellee to prove that he never received the blanks, although it might be admitted that they were mailed. But in their first letter in response to Wilson's letter of the 20th, appellant not only

did not furnish blanks, but it did not ask for any information or proof, but manifested an intention to get its information from the group policyholder. Appellant was then in the attitude of either treating Wilson's communication as proof, or of refusing to send him blanks to make the proof; but in either event he would have a right to bring his suit.

The policy provides that the first installment will be paid upon receipt of due proof of disability. Appellant either accepted Wilson's communication as proof, or declined to furnish him blanks at that time, and did not at that time ask for any additional proof or information. Appellee had a right to treat this as a breach of the contract. If he was entitled to recover at all, liability attached on the 7th of April, and the suit was not brought until July 14th. Immediately on the bringing of the suit, the appellant was again advised of appellee's claim and the facts he relied on.

When one party to a contract breaches it, the other party may immediately bring suit to recover damages for the breach. It is true that appellant, in its answer, expressly disavows any repudiation of the contract, but it is also true that it denies that appellee was continuously in the employ of the International Paper Company until April 7, 1933; it denies that on that date appellee had any insurance in force; and also denies that appellee was in the employ of the paper company on April 7th. It might very well say that it admitted issuing the group policy, and at the same time say that the appellee was never in the employ of the paper company, and never had any policy, and this would be a repudiation of the contract with appellee, notwithstanding it states in its answer that it does not repudiate the contract.

Insurance policies, as we have frequently said, are liberally construed in favor of the insured, and strongly against the insurer. *National Life & Acc. Ins. Co.* v. *Whitfield,* 186 Ark. 198, 53 S. W. (2d) 10.

The next contention of appellant is that the verdict is not supported by the evidence, and is contrary to the law and the evidence. The evidence was in conflict as to

the extent of appellee's injuries, and that question was settled by the jury under proper instructions, given both at the request of the appellee and the appellant.

There was sufficient evidence to submit the question of total and permanent disability to the jury. This court has frequently decided what constitutes total and permanent disability, and we do not deem it necessary to discuss this question here. Among the cases discussing this question are the following: *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Mo. State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 407; *Guardian Life Ins. Co.* v. *Johnson,* 186 Ark. 1019, 57 S. W. (2d) 555; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Travelers Prot. Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 61, 56 S. W. (2d) 433.

It is next contended that the verdict of the jury is excessive. The policy provided for the payment of 20 monthly installments of $71.45 each. At the time of the suit, there were four installments due. The other installments were due, one every thirty days.

"The breach of the contract, the appellant company's refusal to pay under its terms, and denial of any liability thereunder, gave the insured the right to sue for gross damages for such breach of contract, and the court has held that the measure of such damages is the present cash value of the past and future installments of the weekly indemnity, based on the life expectancy of the insured." *Nat. Life & Acc. Ins. Co.* v. *Whitfield, supra; Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335.

The recovery was for $1,429, the aggregate amount of the monthly installments. It should have been for the present value of the installments. As we have said, four installments were already due, and that left 16 installments that were to become due, one every 30 days. The four installments which were already due, together with the present cash value at the time of the trial of the 16 other installments, aggregate $1,382.92. The verdict should therefore have been for this amount, instead of

$1,429, and it is modified so as to give judgment for $1,382.92.

It necessarily follows that the 12 per cent. damages should be 12 per cent. of $1,382.92, instead of 12 per cent. of $1,429, and the judgment will be modified accordingly.

In this case the policy or certificate was delivered to appellee in Arkansas, and it was not effective until delivered. The statute as to damages and attorney's fees is therefore applicable.

We do not deem it necessary to set out the instructions, but we have carefully examined the same, and have reached the conclusion that the jury was fairly instructed. All questions of fact were settled by the verdict of the jury, and the jury's finding of facts is conclusive here.

The judgment will be modified as above indicated, and, as so modified, affirmed.

SMITH, McHANEY and BUTLER, JJ., dissent.

SMITH, J., (dissenting). The judgment here appealed from should, in my opinion, be reversed.

I give fullest assent to the rule, many times applied by this court, that the verdict of a jury is conclusive of all disputed questions of fact, and, in recognition of the rule, agree that the disability of the insured has been established, although the physician who attended him expressed the opinion that the insured's recovery was complete.

But, while the verdict of the jury concludes the question that the insured is permanently and totally disabled, the testimony of this doctor, substantiated by other testimony in the case, would appear also to be conclusive of the question that it was not a repudiation of the contract to demand proof of the disability, and that the insurer was not required to accept the letter of the insured's attorney as being conclusive of that fact.

The contract gave the insurer the right to make this demand for proof of disability; in fact, the insurer's policy or certificate makes the furnishing of this proof a condition precedent, upon the performance of which suit may be brought. Can it be considered a repudiation of a contract to demand a right which the contract expressly confers?

Now, the verdict of a jury is not necessarily, and in all cases, conclusive of the issues in the case. It is conclusive only of disputed questions of fact. The rule is well settled, and has been many times applied, that, where there are no disputed questions of fact, the case becomes one of law for the decision of the court. See *Catlett* v. *Railway Co.*, 57 Ark. 461, 21 S. W. 1062, and the numerous cases citing and following it. There are certain controlling questions in this case which are either established by the undisputed evidence or are covered by the stipulation of the parties, which, under rules of practice long accepted and always followed, we must assume to be true.

There is first no question about the obligation which the insurer agreed to perform, nor as to the conditions under which performance could be demanded. These are so plain that it is impossible to construct an ambiguity to becloud them or to leave their meaning in doubt.

The master policy reads as follows: "Total and Permanent Disability Benefits. Upon receipt, at the home office in the city of New York, of due proof that any employee, while insured hereunder, * * * has become totally disabled, * * * the company will, in lieu of the payment at death of the insurance on the life of said employee, * * * pay monthly installments as hereinafter described. * * *. Such monthly installment payments shall be made during the continuance of said disability. Provided, however, that in no event shall more than sixty monthly installments be payable hereunder. * * * The first monthly installment will be paid upon receipt of due proof of total and permanent disability, in which event the insurance herein provided for under this policy on the life of said employee shall cease to be in force, and no further premiums will be payable on account thereof. During the period of total and permanent disability, the said employee shall not have the right to receive in one lump sum the commuted value of any unpaid monthly installment, but, if the said employee dies during such period, any installment provided herein remaining unpaid at the date of death shall be commuted at rate of

three and one-half per cent. per annum, compound interest, and paid in one sum to the beneficiary."

The plain meaning of this language appears to be that, upon receipt of proof of disability, that is, when and after proof has been received at the home office of the insurer in New York City, payments will be made as agreed, upon the conditions stated. These payments are to be made monthly over a period not exceeding sixty months, except in the case only of death, in which case they shall be commuted at the rate of three and one-half per centum per annum, compound interest, and paid in one sum to the beneficiary. It is an undisputed fact that the insured was not dead when this case was tried in the court below.

The certificates which are given to the employees, and one of which was given to appellee, contain nothing to becloud the meaning of these conditions. The group or master policy and the employee's certificate, together, constitute the contract. There being nothing in the latter which conflicts with the former or renders its meaning doubtful, the two instruments must be construed together to arrive at a correct knowledge of the actual contract. *Ætna Life Ins. Co.* v. *Dunkin,* 266 U. S. 389, 45 S. Ct. 129. The certificate given the employee conforms to the group policy, and provides that the benefits shall be payable upon receipt of due proof of loss, in equal monthly installments as shown in a table made part of the insured's certificate, with the proviso that in case of death the present value of any unpaid installments shall be paid in one sum. According to this table, made a part of the certificate here sued on, the number of the installments of payments and the amount of each is made dependent upon the amount of insurance carried, increasing automatically each year the certificate is kept in force. Appellee's certificate has been in force long enough for the twenty installments for which it provides to be increased from $51.04 to $71.45, so that the twenty installments to be paid as they matured and without commutation would amount to $1,429, and that is the exact amount of the verdict and judgment in this case.

Now, it was held, in the case of *Ætna Life Ins. Co. v. Phifer,* 160 Ark. 98, that, in a suit based on the permanent disability clause of a life policy, where the insurer had renounced the obligation and binding effect of the contract, as we held had been done in that case, the insured, if permanently and totally disabled, could treat the contract as breached and sue for the present value of the monthly payments agreed to be paid during disability, based on his life expectancy, to which, under the contract, he would have been entitled but for its repudiation by the insurer. It will be observed that the sum to be sued for and recovered was not the total amount of all the installments, but the present value thereof, and this upon the theory that the insurer had renounced the contract.

Has there been any renunciation of the contract in the instant case? It must be answered, under the undisputed evidence, that there has not been, unless the demand for the proof of disability, which the contract of insurance gives the insurer the right to ask, and upon the making of which the right to sue was conferred, constitutes renunciation.

The answer here filed contains a general denial of the allegations of the complaint, and specifically denied the allegation of disability. It must be remembered that it is not contended that any proof of disability was ever furnished. Lacking this proof, which the insurer had the contractual right to demand, was it not justified in denying disability and liability therefor? The insurer had not been furnished with the evidence thereof to which it was entitled, and it ought not to be expected that it would admit this material fact of which it had been kept in ignorance.

After denying facts of which it had no information, the defendant insurance company answered as follows: "Further answering, defendant expressly disavowing any repudiation but, on the contrary, affirming the contract as it is expressed in the policy sued on by the plaintiff," admits the issuance of both the group policy and the certificate of appellee and their binding effect, but alleges that the conditions are non-existent under which

liability may be asserted thereon. This answer, like all pleadings to be correctly interpreted, must be read as a whole, and, when so read, a fair interpretation of it is that, having no information on the subject, a general denial of its allegations was made, following which it is alleged that the contract was a binding obligation if plaintiff was an employee at the time of his injury and had become totally and permanently disabled. However, it is undisputed and stipulated that there had been no denial of any fact prior to the institution of the suit. Therefore, if this case is to be predicated upon a denial of liability, the cause of action was prematurely brought, and should be abated for that reason. *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533; *Metropolitan Life Ins. Co.* v. *Gregory,* 188 Ark. 516, 67 S. W. (2d) 602.

I most respectfully, but very earnestly, insist that no one can be justly held to have repudiated or renounced a contract which he insists shall be employed to determine the relative rights of the respective parties.

A written stipulation was prepared and signed by the attorneys for the respective parties, which was offered in evidence, and the authority of the attorneys to enter into this stipulation and to file it is not questioned. It reads, in part, as follows:

"It is stipulated and agreed by and between counsel for plaintiff and defendant that:

"The first and only notice, claim or proof that plaintiff had become totally and permanently disabled as defined in the policy was by letter of June 20, 1933, written by Lawrence E. Wilson, as attorney for plaintiff, and addressed to the Metropolitan Life Insurance Company, New York City. (Original of said letter hereto attached as part of this stipulation.) That defendant company replied to said letter under date of June 27, 1933, and on the same date wrote the assured, International Paper Company, requesting information as to the status of plaintiff's claim. (Copies of said letters hereto attached as part of this stipulation.) That on July 6, 1933, the defendant again wrote the attorney for plaintiff sending him the forms GH 24-C on which to make claim as re-

quested and on the same date and on July 11th, 19th and 21st it wrote other letters seeking information as to the status of plaintiff's insurance claim. (Copies of said letters hereto attached as part of this stipulation.) That without further notice or time, this suit was filed on July 14, 1933, and summons issued."

The letters referred to are made exhibits to the stipulation, and it will be observed that the first information which the insurer had of the existence of the claim was contained in the letter which was dated—not received but dated—on June 20, 1933. It is not contended, and the contention could not be sustained if made, that the obligation to pay arose or matured upon the receipt of this letter. The contract does not so provide. On June 27 a letter was written to the employer at its New York office asking it to "be good enough to consult your records and let us know present status of Mr. Harper's life insurance," and asking whether he was an employee. On July 6 a letter was written to the insurer's attorney which reads as follows: "In accordance with your request, we are attaching two forms, GH 24C, on which claim is to be made. When presenting this, please see that all questions are fully answered so as to avoid any delay. We will then, upon receipt of the claim, be glad to review it without prejudice." Now, Mr. Wilson admitted receiving this letter, but he denied receiving the blanks to which it referred, although it is recited in the stipulation "That on July 6, 1933, the defendant again wrote the attorney for plaintiff sending him the forms GH 24-C on which to make claim as requested." It is stipulated also that on July 11th, 19th and 21st the insurer wrote other letters to said attorney, seeking information as to the status of the plaintiff's insurance claim. Without answering any of these letters, and without furnishing this information, in fact, before the receipt of the two last-mentioned letters the suit was filed "without further notice," on July 14, 1933, and summons issued. Do these undisputed and stipulated facts support the contention that the insurance contract had been repudiated?

We held, in the case of *Missouri State Life Ins. Co. v. King,* 186 Ark. 983, 57 S. W. (2d) 411, that "the proof of disability furnished by the insured was not conclusive of that fact. The company had the right to make an investigation. Disability is not a fact, like that of death, which either exists or does not exist. It may be, and frequently is, a question about which there is a doubt, and, if the company had the right to investigate this fact, it was, of course, entitled to a reasonable time within which to exercise the right." We there also said that this investigation should be made expeditiously and in good faith, and that the insurer's approval thereof was due when, acting expeditiously and in good faith, it had been afforded a reasonable opportunity to investigate the proofs submitted.

Does not the undisputed testimony and the stipulated facts in the instant case show the greatest expedition and the utmost good faith? The attorney was advised to fill in the blanks carefully, so that delay might be avoided, and it was urged in other letters to submit this proof promptly.

Now, it being undisputed that no proof was ever made, and it being also undisputed, in my opinion, that the insurer was not responsible for this failure, it follows that the suit was prematurely brought.

The case of *Smith* v. *Mutual Life Ins. Co. of New York,* 188 Ark. 1111, is too recent to again review the question. We there said: "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 accrues 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, 60 S. W. (2d) 912; *W. O. W.* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335."

The majority, in the Smith case, also reviewed the case of *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230, and drew a distinction between it and the case there under review, which the writer and Mr. Justice McHaney thought did not exist and we therefore dissented.

The opinion of the Supreme Court of the United States in the Bergholm case recites the provisions of the policy there sued on in regard to notice, which read as follows: "Upon receipt by the company of satisfactory proof that the insured is totally and permanently disabled, as hereinafter defined, the Company will, * * *," etc. After quoting this provision the Supreme Court of the United States distinguished it from the provision as to notice appearing in the case of *Minnesota Mutual Life Ins. Co.* v. *Marshall,* 29 Fed. (2d) 977, and proceeded to say: "Here the obligation of the contract does not rest upon the existence of the disability, but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof.* The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy."

The similarity of the language in regard to notice in the instant case to that quoted from the Bergholm case, *supra,* is such that, if we are to follow the Bergholm case, as we professed to do in the Smith case, *supra,* we should give it the same construction. In the Smith case the majority said: "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." If it is, I submit that the instant suit is prematurely brought, and, if so, it should be

abated. It was so expressly held in the case of *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533. This Wells case cited the Bergholm case as authority for the holding there made that "liability attaches when the disability accrues and proof of loss was made."

Numerous objections of a specific nature were made to the instructions given in this case. Instruction numbered 1 contained the declaration of law under which the judgment was recovered. It reads, in part, as follows: "And if you further find that plaintiff has furnished due notice of such disability and requested blanks upon which to furnish due proof of such disability, and if you further find that defendant failed or refused to furnish such blanks within a reasonable time after such request, and denied liability for such disability, if any, then you are instructed that the total amount collectible by the insured monthly, for such disability, has matured, and your verdict will be in the sum equal to the total monthly payments under the said certificate, if you find plaintiff is entitled to recover."

I think this instruction was erroneous for reasons already stated, and for other reason hereinafter stated. It required only notice of the disability, whereas, as has been shown, the insurance contract required proof of disability, the furnishing of which was the condition precedent upon which the suit might be maintained. The instruction apparently dispenses with this requirement if the fact be found that a demand was made for blanks upon which to make the proof, if it was further found that the defendant failed or refused to furnish such blanks within a reasonable time after such request and denied liability for such disability. Specific objections were made to the instruction raising the questions here discussed. The instruction was wrong, if for no other reason, because, as we have pointed out, the undisputed and stipulated facts show there was no failure or refusal to furnish such blanks within a reasonable time after such request, and there had been and was no denial of liability, and certainly, none of any kind prior to filing suit.

It is very earnestly insisted that the judgment is excessive, and I think this contention is well taken. It

was held, in the Phifer case, *supra,* that where there was total and permanent disability, accompanied by a renunciation of the contract, the person who had made due proof might recover the present value of all installments to which he was entitled, and this holding was reaffirmed in the case of *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364. The facts in the Stephens case, as found by the verdict of the jury, were that the insured had sustained an injury which rendered him totally and permanently disabled. The disability was such that it would necessarily continue beyond the time during which benefits would be payable. The insurer contended that the disability had arisen from participation in a fight, and that it had expressly exempted itself from any liability arising "(2) from fighting or wrestling," in other words, that there was no contract covering the insured's disability. This was regarded as a repudiation of the contract and an immediate recovery of all the installment benefits was permitted.

It was recognized in the case of *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433, that there was some uncertainty and difference of opinion as to the effect of our cases, and we there attempted to clarify them and to remove this uncertainty. To that end the previous cases were reviewed and cited. It was stated in the Marsh case that the insurer, in its answer, "expressly disavowed any repudiation but affirmed the contract, and merely contended that, under its terms, the appellee (the insured) was not entitled to the monthly benefits." This is what the answer, when fairly construed, does in the instant case.

We held in the Marsh case that a mere denial of liability under the policy was not a repudiation of the policy, and was therefore distinguishable from the cases where recovery of damages had been allowed for an anticipatory breach. These cases were named, and the Stephens case was included in that number, it being classed along with the Phifer case as one in which the contract had been renounced. This interpretation of the Stephens case and the others is emphasized by the state-

ment, there appearing, that: "We have made diligent search and have been unable to find any case holding contrary to the rule announced in Richards on the Law of Insurance, expressly approved by this court in *Kirchman* v. *Tuffli Bros., supra,* and followed in subsequent cases."

This Marsh case was thought to represent the deliberate and unanimous view of the members of the court, as there was no dissent from it, and I assert, most respectfully but very earnestly, that unless its authority is to be impaired, this case should be reversed.

It was said, in the recent case of *Equitable Life Assurance Society* v. *Pool, ante* p. 101, that it was *obiter* to hold in the Marsh case that a denial of liability under the policy was not a renunciation of the contract, for the reason that Marsh had estopped himself to assert that fact, because, after disability had accrued, he had paid a premium which he was not required to pay if he was in fact disabled. That cannot be, as the reasoning in that case and the discussion of the authorities there cited and the distinction made between them leave no room for any reasonable doubt that we were deliberately holding that a mere denial that liability had accrued under a policy was not a renunciation of the policy, especially so where it was alleged, as it is in the answer in this case, that the contract is affirmed as a subsisting obligation, and it is prayed that the rights and obligations of the parties be adjudged in accordance with its provisions. This proposition is so elementary and so just that we would not hesitate to apply it in an ordinary contract, and there is no valid reason why the same rule should not be applied to an insurance contract. I submit it was the rule properly applied in the Marsh case and controlled that decision.

We said nothing in the Marsh case about estoppel, and I do not understand how that doctrine could have been invoked. Certainly it was not applied against the insurer, for we held it was not liable for anticipatory damages because it had answered that it was not liable at all. That is the exact point decided in the Marsh case. The payment of a premium by the insured after he had

become disabled and which he was not required to pay would not have worked an estoppel against him to later assert that he was disabled. It would have been evidence having some probative value that he was not disabled and was admissible in evidence for that reason. The payment of a premium which could not have been required could work no prejudice to the insurer, and, therefore, could not estop the insured. The injection of the question of estoppel into the Marsh case appears as strained as other contentions appear to be which I have discussed.

In my opinion, the judgment should be reversed, and I am authorized to say that Justices McHaney and Butler share the views here expressed.

Sparling *v.* Refunding Board.

Denison *v.* Wiseman.

Rodgers *v.* Wiseman.

Lowden *v.* Wiseman.

Nos. 4-3496, 4-3504, 4-3505, 4-3512

Opinion delivered April 30, 1934.

Barber & Henry, (for Sparling),

Daggett & Daggett, (for Denison and Rodgers),

Thos. S. Buzbee, E. L. Westbrooke and *R. E. Wiley,* (for railroads), for appellants.

Hal L. Norwood, Attorney General, *Trieber & Lasley* and *Walter L. Pope,* for appellees.

McHaney, J. While separate appeals have been taken in these several cases and separate briefs filed, except in the Denison and Rodgers cases, which were consolidated and briefed together, we are treating them as one case for the purpose of this opinion, since the same or similar questions are involved in all of them. The Sparling case, No. 3496, brings into question the constitutionality of act No. 11 of the first Extraordinary Session of the General Assembly of 1934, which act was approved February 12, 1934, as a whole and as to certain sections thereof. The other appeals question the right of the State lawfully to levy and collect a tax on gasoline sold or used in this State for agricultural and industrial purposes. In other words, that only such gasoline as may

be used in propelling motor vehicles over the highways of this State may be lawfully taxed. Further contentions are that, "even though the act (act 11) be held to apply to and impose a tax on gasoline bought or sold within the State, regardless of the character of use, such holding would not necessarily impose a tax on gasoline bought without, transported within, and thereafter used" for agricultural and industrial purposes; that said act does not impose a tax on gasoline except such as may be used in motor vehicles on the highways; and that, if it does, it contravenes § 5 of article 16 of the Constitution of this State. The chancery court sustained a demurrer to the complaint in each case, and judgments of dismissal were entered.

Turning now to a consideration of the attack made on the constitutionality of the act in the Sparling case, we find a number of grounds argued in support of the allegations of the complaint seeking to enjoin the "Refunding Board" from proceeding under the act. Section 1 thereof creates a "Refunding Board" composed of the Governor, Lieutenant-Governor, Treasurer of State, Secretary of State, State Auditor, Attorney General and State Bank Commissioner. It is argued that this section contravenes § 6 of article 19 of the Constitution, which provides: "No person shall hold or perform the duties of more than one office in the same department of the government at the same time, except as expressly directed or permitted by this Constitution." And further that it violates § 10 of article 5, which provides: "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State." A sufficient answer to the first part of this contention is that the members of the Refunding Board are not holding or performing the duties of more than one office, membership on said board not being an additional office, but only additional duties imposed by the act on the holders of the respective offices. A sufficient answer to the second part of this contention is that the Lieutenant-Governor is neither a Senator nor a Representative. By express provision of § 1 of amend-

ment No. 6 to the Constitution, the Lieutenant-Governor is an executive officer—a member of the Executive Department of State. Section 5 of amendment 6 provides that he shall be president of the Senate, and may vote in case of a tie, but this does not make him a Senator. Moreover the creation of this board was not the creation of a new office, nor are its members new officers. As heretofore stated, new duties are imposed on existing executive officers. The executive State officers are now members of various boards and have, for a long period of time served thereon, such as the State Board of Election Commissioners, State Burning Board, State Printing Board, etc., and many others in the past which have been abolished. See *Bruce* v. *Matlock,* 86 Ark. 555, 111 S. W. 990; *Russell* v. *Cone,* 168 Ark. 989, 272 S. W. 678.

The second contention is that § 22 of the act is violative of § 5, article 15 of the Constitution. This will be considered later in this opinion in connection with the Denison and other cases.

It is next contended that § 51 of the act is violative of § 1, article 5, of the Constitution which provides that "the legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives." Section 51 of the act provides that when the net revenue credited to the State Highway Fund in any fiscal year shall exceed $10,000,000 and the Refunding Board finds that a reduction of the tax on gasoline during the succeeding year could be made without reducing the net revenue below that sum, said board may, "in its discretion," determine the amount of possible reduction, and make an order to that effect, not to exceed one-half of one cent a gallon. It is said this is a delegation of legislative power, because it vests a discretion in the board. This is not a delegation of legislative power, as we have many times held. In *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92, this court quoted with approval from *Cincinnati, etc., Rd. Co.* v. *Commissioners,* 1 Ohio State 77, as follows: "The true distinction * * * is between the delegation of power to make the law which necessarily involves the discretion as

to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." And in *State* v. *Martin & Lipe,* 134 Ark. 420, 204 S. W. 622, it was said: "It is a well-established rule of law that legislative bodies have no right to delegate the law-making power to executive officers or administrative boards, but it is settled in this State that the Legislature may delegate 'the power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' *Boyd* v. *Bryant,* 35 Ark. 69." Many other cases might be cited to the same effect. Section 51 therefore does not delegate a legislative function, but confers authority or discretion as to its execution to be exercised under and in pursuance of its provisions.

Other contentions are that the act is void because § 55 gives the Governor the power within 30 days after its approval to direct the board not to issue any bonds; in other words, to suspend the act, in violation of § 12 of article 2 of the Constitution; that it attempts to suspend the statute of limitations with respect to actions on road improvement district bonds; that the bill for the act was not properly passed in both houses; that the exchange of direct State obligations for those of road improvement districts is violative of § 1 of article 16 of the Constitution; and that the tax on gasoline may not be used to pay road district bonds. We have carefully considered all these questions and find them without substantial merit. To discuss them in detail would unduly extend this opinion. However it may be said that the Governor has not suspended the act and that the 30 days time for doing so has elapsed; that limitation of actions is subject to control by the Legislature; that the records of both Houses, of which we take judicial notice, show the act was properly passed; and that the payment of road district bonds with State bonds is not violative of § 1 of article 16 of the Constitution. *Tapley* v. *Futrell,* 187 Ark. 844, 62 S. W. (2d) 32; *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121; *Hays* v. *McDaniel,* 130 Ark. 52,

196 S. W. 934; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

We now come to a consideration of the points raised and argued on the other appeals. In the Denison and Rodgers cases the gasoline sought to be taxed was purchased in Tennessee in large quantities, shipped into Arkansas and stored in tanks adjacent to the levees which they were engaged in constructing, and was to be used in such construction work. No part of it was to be used in propelling motor vehicles over the highways. In the Lowden *et al.* case, the trustees in bankruptcy of three railroad companies—the Rock Island, the Missouri Pacific and the Frisco—seek to enjoin the Commissioner of Revenue from collecting the tax on gasoline used in propelling motor cars over their respective railroads. The contentions of all these appellants are substantially the same.

Prior to the passage of the "Refunding Act" (act No. 11 now under consideration), such gasoline as was used by these appellants for purposes other than use on the State's highways was not taxable. In actual practice, except where bond was given, the tax on gasoline used for agricultural, industrial, domestic, railroad, levee, counties, cities, towns and miscellaneous purposes was paid by the consumer but the State refunded such tax on refund claims properly made and filed. During the calendar year 1933, out of a total tax collection of $6,542,024.79, refunds were made by the State in the sum of $553,596.38, or approximately 8 per cent. of the total collection. Perhaps from 50 per cent. to 90 per cent. or more of that amount was fraudulent. At any rate, based on past experience, the Legislature in § 24 of the "Refunding Act" repealed all prior provisions of statute authorizing refunds in the following language: "Section 44 of act No. 65 of the General Assembly, approved February 28, 1929, as amended: Paragraphs 3, 4 and 5 of § 39 of said act No. 65; paragraphs A and B of § 52 of said act No. 65, Act 127 of 1933, § 6 of act 36 of 1933, and paragraph (f) of § 24 of said act 65, are hereby repealed, provided however that refunds of the

tax collected under this act on motor vehicle fuel used for industrial purposes as now provided by law in carrying out contracts entered into for public works and *quasi*-public works prior to the first day of January, 1934, shall be made in the manner provided for by the sections and paragraphs hereby repealed."

Now, in the face of this section, it is seriously contended that the Legislature did not mean or intend to tax gasoline other than that used on the highways. The act further provides in § 22: "There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this act, sold or used in this State or purchased for sale or use in this State." Motor vehicle fuel is defined in § 19 (b) of the act as follows: "(b) 'Motor Vehicle Fuels' are those fuels known as gasoline, benzine, naphtha, and such other volatile and inflammable products produced or blended for the purpose of operating or propelling motor vehicles as defined in paragraph (a), provided the product commonly known as 'Kerosene Oil,' and fuel having an anti-knock rating of not less than eighty octane when tested in a series 30 knock testing engine at a jacket temperature of three hundred and seventy-five degrees Fahrenheit, known as aircraft fuel, and the product known as distillate, as defined in the following sections, are not motor vehicle fuels." Section 25 provides: "The purpose of this act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable. The tax levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State for use herein." Again it is provided in § 29 that: "The intent of this act is to provide for the collection at the source within this State of a tax on the sale or use of motor vehicle fuel." It then defines "the

source'' as to the manufacturer and the wholesaler. Section 30 provides as to refunds the following: ''Refunds of taxes on motor vehicle fuel used for industrial purposes and domestic purposes as now provided by law shall be made where such uses were made of such fuel before the passage of this act and where such uses shall be made in carrying out existing contracts for public works and *quasi*-public works, entered into prior to January 1, 1934, but all claims for refunds shall be filed within thirty days from the effective date of this act as to such uses heretofore made and within thirty days after such uses hereafter made in carrying out existing contracts for public works.''

These provisions of the act appear to us to be clear and unambiguous. Section 22 undoubtedly levies a tax of six and one-half cents a gallon on motor vehicle fuel as defined in the act, and § 19 defines ''motor vehicle fuels,'' naming them, as those ''produced or blended for the purpose of propelling motor vehicles as defined in paragraph (A).'' The word ''purpose'' as therein used means suitable for, adapted to or susceptible to. Therefore it was the clear intent of the Legislature, when these various provisions are considered together, from the language used, to tax all motor vehicle fuel sold or used in this State, regardless of the purpose to which it is put. This intention is further reinforced by the fact that the journals, of which we take notice, show that numerous amendments to exempt gasoline used for agricultural, industrial and domestic purpose from the levy of the tax, were offered, but defeated. Appellants Denison and Rodgers insist that, since their gasoline was purchased out of this State and brought into this State for use here, it is not taxable. It is difficult to follow the reasoning of these appellants in this regard. We think the fact it was bought in another State can make no difference, as the tax is also levied on the use of it in this State wherever it may have been purchased, and when brought here for use here, it loses its interstate character and becomes taxable.

But all appellants say that, if act 11 be so construed as to levy a tax on gasoline used for agricultural and industrial purposes, it is unconstitutional and void as being in violation of § 5 of article 16 of the Constitution. This is by far the most vital point raised and the one that has given us most concern, when viewed in the light of former decisions of this court. The germane part of this constitutional provision follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time the tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper." This court has had occasion to consider this provision in a great variety of cases. See annotation to this section in Crawford & Moses' Digest, (page 104).

It may be well to state at the outset that the fact that the act designates the tax as "a privilege or excise tax" does not necessarily make it so, for, as said in *Dawson* v. *Kentucky Dist. Co.,* 235 U. S. 288: "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents." We are of the opinion, after so considering the act, that it is a privilege tax—a tax on the privilege of selling and using gasoline in this State, payable at the source as defined in the act, for substantially the only available use to which it may be put, for highway travel. While it is true that gasoline is used for other purposes than propelling vehicles over the highways, still the percentage of gasoline so used is comparatively negligible. Since the tax is levied and paid at the source, there is no way for the manufacturer or wholesaler to know when a sale is made, the use to which it will be put, whether for road purposes or otherwise. It is also true that the right to tax gasoline was sustained in *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753,

on the theory that it was a tax for the use of the highways, and that such use was a privilege subject to tax. There it was contended that the only available use of gasoline was for propelling motor vehicles over the highways and that a tax on the only available use to which the article is susceptible is in effect a tax on the article itself. The court refused to accept such contention as sound and said: "It may be conceded that a tax on gasoline for its only available use would, in effect, be a tax on the commodity itself, but such might not be the case as to other articles, and we are unwilling to subscribe unqualifiedly to the doctrine that a tax on the only available use of an article is in every instance a tax on the article itself. In fact, this court repudiated the doctrine in the case of *City of Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 Am. St. Rep. 100."

While it is true that it has been generally considered, since the decision in *Standard Oil Co.* v. *Brodie, supra,* that the State is without power to levy and collect a tax on agricultural and domestic gasoline, it is also true that, prior to that time (1921), it was generally doubted that such a tax could be levied for road purposes or any other purpose. It was also thought and seriously contended that a severance tax could not be imposed, and this court had great difficulty in arriving at the conclusion that such a tax was within Legislative power. See the different opinions in *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473, 275 S. W. 741. See also *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720, for doubts about the validity of an income tax law. The Constitution of this State was adopted in 1874. It was not made for those times alone. It was intended to be, and is, a living, growing instrument, yielding to the necessities of the people in the advancement of civilization. This court has for nearly 100 years so regarded it and former Constitutions and has broadened and expanded its construction of them to meet the necessities of the people of this State. It is true that this court has always held that the Legislature cannot lay a tax for State revenue on the theory that it is a privilege tax on occupations that are of com-

mon right. The State is not taxing the right to sell or the right to use gasoline, but only the sale and the use for highway purposes, as only a negligible per cent. is used otherwise. To this we perceive no constitutional objection. It is in accord with *Standard Oil Co.* v. *Brodie, supra.* See *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, 54 S. Ct. 575. Nor can we see why appellants should raise the question. None of them can be hurt by the imposition of the tax. Appellant contractors will take it into account in bidding for contracts. Appellant railroads are forever relieved of the road improvement district taxes which they formerly paid in annual sums largely in excess of the tax now paid. Agriculture is relieved in the same way as the railroads.

Let it be definitely understood that the tax imposed is not a property tax, but is a privilege tax for the use of the highways, and that the Legislature has declared the public policy of the State to be to tax all gasoline sold or used in this State for such purpose in order to prevent fraud and imposition on the State in the sale or use of a comparatively negligible quantity for other purposes.

Let the decrees in all cases be affirmed. It is so ordered.

Mr. Justice SMITH and Mr. Justice BUTLER dissent from so much of the opinion as holds the tax on gasoline for industrial, agricultural, etc., purposes is not a property tax.

SMITH, J. (dissenting). In the Denison case gasoline purchased in Tennessee was transported into this State for the purpose of supplying motive power for stationary engines and for trucks and tractors used in the performance of a contract with the United States Government to move earth from borrow pits adjacent to the St. Francis Levee and place it on the levee, and no part of the gasoline was used in the operation of a vehicle, movable engine or machine operated or propelled or used on the public highways and roads of the State. Such is the allegation of the complaint in that case, the truth of which is admitted by the demurrer, which was sustained by the court.

In the case of the Missouri Pacific Railroad it was alleged that the Commissioner of Revenue was attempting to collect the tax of 6½ cents per gallon on 31,731 gallons of gasoline used by the Railroad Company in the month of February, 1934, in the operation of motor cars and locomotives wholly on the rails of the Railroad Company, no part of which had been used for operating vehicles of any character on any of the highways of the State. This tax, amounting to $2,062.51, for the shortest month in the year, does not appear to be *de minimis* and of inconsequential importance.

The complaints of the Frisco and Rock Island railroads contain similar allegations, the truth of which is, of course, admitted by the demurrers filed and sustained to those complaints.

The effect of the majority opinion appears to be, not that the gasoline thus used could be taxed if the gasoline was used for no other purpose, but rather that the amount thus used in comparison with all gasoline used is too small to be of importance, and that it is necessary to tax all gasoline used for any purpose whatsoever to prevent fraud being perpetrated in the collection of the tax which may lawfully be imposed. In other words, a tax not authorized by the Constitution may be collected to facilitate the collection of a tax which the Constitution does authorize. I submit that this is an innovation in taxation which finds no support in any of the cases cited in the majority opinion.

It is said that gasoline taxes refunded in the year 1933 amounted to $553,596.38, of which from 50 to 90 per cent. was fraudulently refunded. This is a very serious indictment of the efficiency of the State officials charged with this duty. The statement appears to be *dehors* the record, but, even though true, I submit that this inefficient administration of the law affords no justification for the collection of a tax contrary to the provisions of the Constitution. A more appropriate remedy would be to administer the law efficiently.

The question here presented is of vast importance, but the legal principles which should control the decision are simple and have been often stated, and have been

applied under various circumstances, beginning with the early case of *Stevens* v. *State,* 2 Ark. 291, and continuing down to the late case of *Hixon* v. *School District of Marion,* 187 Ark. 554, 60 S. W. (2d) 7027. Many of these cases were cited and reviewed in the case of *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720, where the right of the State to levy and collect a tax on net incomes was upheld. The opinion of Justice WOOD on the rehearing granted in that case became and is the law, and it would be a work of supererogation to again review the various cases there cited and reviewed in the original majority opinion and in the opinion of Judge Wood which superseded it and became the majority opinion. The controlling point in that case is reflected in the second headnote, which reads as follows: "An income tax is neither a property tax nor an occupation tax, within the provisions of art. 16, § 5, of the Constitution." It was apparently the opinion of all the judges that the tax would be void if it were either. Without reviewing that case, it will suffice to say that the State's authority to tax and the sources from which that authority is derived were given the most extensive and deliberate consideration, as is reflected by the several opinions of the judges. The one point upon which there appeared to be entire accord was that section 5 of article 16, of the Constitution should be construed to mean what it plainly says, that: "All property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State," and that: "No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value," provided that certain named occupations and privileges might be taxed as such, and certain named property should be exempt from taxation. It is unnecessary to consider these exceptions from the rule of uniformity, as they have no application to the facts of this case.

The tax sought to be collected from the levee contractor and the railroads appears to be void, I think, from the unanimous opinion of the court in the case of

Standard Oil Co. of La. v. *Brodie,* 153 Ark. 114, 239 S. W. 753, as being unauthorized and violative of our Constitution. That case construed our first legislation providing for the collection of a tax upon the sale of "gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways." Acts 1921, p. 685.

It was there very earnestly insisted that the legislation was void as imposing a tax upon gasoline as property, and upon that question we there said: "It is conceded in all quarters that, if the imposition is, in effect, a property tax, it is void." The legislation was upheld, not because the right to tax the sale or use of gasoline as property existed under the act, but because it had not been taxed as such. We said: "If it had been intended to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the bases of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself." And, to make it perfectly clear that the gasoline could not be and was not taxed as property, it was said: "In the final analysis of this language (of the act) it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured." Nothing could make plainer what was then thought to be the constitutional limitation on the right to tax gasoline.

It was said by the Supreme Court of the United States in the case of *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 41 S. Ct. 272, that the name by which a tax

is designated in a statute is immaterial, and that its character must be determined by its incidents.

Here it is not even contended that the gasoline sought to be taxed in the case of the levee contractor and the railroads had any relation to the privilege of propelling vehicles or machines of any character on the highways of the State. The facts admitted by the demurrers negative that idea. It is sought to tax this gasoline used for other and different purposes because not to do so might enable gasoline which should be taxed to escape taxation.

The right of the contractor to use gasoline as a fuel to place earth upon the levee, or of the railroads to use it as a fuel to propel their cars, is no more a privilege than would be the right to use wood or coal for the same purposes, and it could not be contended that the right existed to tax the use of wood or coal not used on public highways. A common right cannot be made a privilege by merely designating it as such either by the General Assembly or by this court.

The 1933 session of the General Assembly sought to levy a tax of one per cent. of the face value of all State and county warrants, to be deducted by the State treasurer in one case and by county treasurers in the other, to provide a fund for old age pensions. This legislation was held to be violative of § 5 of article 16 of the Constitution, above quoted. The taxation of the warrants was held to be a taxation of property, and not a privilege tax, although it was so called. In that connection, it was said that no definition of property could be framed which did not include the right of ownership, and that the essential attributes of ownership are the rights of dominion, possession, enjoyment and disposition, and that these rights are included within the protective provisions of the Constitution to the same extent as the physical things to which they pertain.

I conclude, therefore, that the tax sought to be collected from the contractor and the railroads is not a privilege tax, but is in fact a property tax, and is unauthorized for that reason. For the same reason I am of the opinion that so much of the act as attempts to tax

gasoline used exclusively for agricultural or industrial purposes is void.

The unconstitutionality of so much of the act as authorizes the collection of the tax against the contractor and the railroads, under the facts herein existing, does not affect the remainder of the act, as it provides that, "if, for any reason, any sentence or provision of this act shall be held to be unconstitutional, it shall not affect the remainder of this act, but this act, in so far as it is not in conflict with the Constitution of this State or the Constitution of the United States, shall be permitted to stand, and the various provisions of the act are hereby declared to be severable for that purpose."

Finding no valid objection to any other portion of the act, I dissent only from so much of the majority opinion as is herein indicated.

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

[redacted]

JAMISON *v.* HENDERSON (1).

3408

AND

ARKANSAS BAPTIST COLLEGE *v.* ARKANSAS MISSIONARY BAPTIST CONVENTION (2).

3459

[redacted]

Booker & Booker and *Charles B. Thweatt,* for appellants in No. 3408, and for appellees in No. 3459.

John A. Hibbler and *R. W. Wilson,* for appellees in No. 3408, and for appellants in No. 3459.

JOHNSON, C. J. These consolidated cases arose under the following circumstances:

On June 5, 1933, J. H. Henderson *et al.,* purporting to represent the Arkansas Baptist College, filed in the Pulaski Circuit Court their petition, alleging facts from which a benevolent association might be inferred, and praying that such be declared by the court, under authority of §§ 1788 to 1795, inclusive, of Crawford & Moses' Digest. On the same date the petition was presented to the court, and the prayer thereof was granted declaring said incorporation for benevolent purposes as follows:

"It is therefore considered, ordered and adjudged by the court that the petitioners be, and they are hereby, created a body politic and corporate, under the name and style of 'Arkansas Baptist College,' with all the powers, privileges and immunities, and subject to all the liabilities and exemptions granted in the law thereunto appertaining."

Thereafter, on June 13, 1933, J. R. Jamison *et al.* in their own behalf, and as purported trustees for the Arkansas Baptist College for the Arkansas Missionary

Baptist Convention, filed their petition of intervention in said cause, in which it was alleged that the Arkansas Baptist College is a corporation organized under the laws of this State in 1887, and that the Arkansas Missionary Baptist Convention was and is the parent body thereof; that the order and judgment made and entered in said cause was erroneous and void, because the name assumed by the incorporators is in conflict with the statutes of Arkansas, and that the Arkansas Baptist College had not been previously dissolved as a corporation. To the intervention thus filed, petitioners responded, denying the allegations of the petition of intervention and alleging affirmatively that, at a meeting of the Arkansas Missionary Baptist Convention held at Helena, Arkansas, in November, 1931, a resolution was duly presented and passed by said convention which had the effect of dissolving and surrendering the charter of said Arkansas Baptist College and transferring all its properties to petitioners as trustees. It was further alleged in petitioners' response that, prior to December, 1931, there had existed two branches of the Arkansas Baptist Convention, namely, Arkansas State Missionary Baptist Convention and the Arkansas Missionary Baptist Convention Progressive; that on December 9, 1931, the two branches, in conformity to proper resolutions theretofore passed, met in joint session and then and there, by proper resolutions, effected a permanent merger and consolidation of said conventions, thereafter to be known and designated as the Consolidated Missionary Baptist Convention of Arkansas; that said joint meeting, then assembled, adopted a constitution and bylaws for its government and elected permanent officers, who thereafter assumed their duties as such and have since managed and controlled the business and affairs of the Negro Baptist in Arkansas; that interveners are without right or authority in the premises, and that they and each of them should be restrained and enjoined from intermeddling in the affairs of the consolidated convention.

Upon the issues thus joined, a trial was had in the Pulaski Circuit Court on June 20, 1933, which resulted in a judgment dismissing interveners' petition as follows:

"The court finds that the petition for incorporation filed in this case on June 5, 1933, was duly authorized by resolutions of the Arkansas Missionary Baptist Convention and the Arkansas Missionary Baptist Convention Progressive; and the court further finds that neither the Arkansas Missionary Baptist Convention nor the Arkansas Missionary Baptist Convention Progressive was a party to this case."

The appeal in case number 3408 brings into question the validity of these circuit court judgments, but the evidence adduced upon trial in the circuit court has not been brought before us by bill of exceptions or otherwise.

On June 22, 1933, the Arkansas Missionary Baptist Convention, through its purported trustees, J. R. Jamison *et al.* filed its complaint in the Pulaski Chancery Court, which is case number 3459 in this court, in which a permanent injunction was prayed against the agents, officers and trustees of the Arkansas Baptist College restraining and enjoining them from interfering with the possession and control of all properties then and theretofore held or controlled by the Arkansas Missionary Baptist Convention.

The Arkansas Baptist College, as incorporated by the circuit court judgment of June 5, 1933, answered this complaint for injunction by alleging its incorporation and affirmatively pleaded that the proceedings had and done in the Pulaski Circuit Court were *res judicatae.* A demurrer was interposed to the answer thus alleging *res judicatae,* which was sustained by the chancery court, upon the theory that the circuit court judgment declaring the merger and consolidation of the Arkansas Missionary Baptist Convention and the Arkansas Missionary Baptist Convention Progressive was void. Defendants declining to further plead, a permanent injunction was granted in behalf of petitioners, and against the trustees of the Arkansas Baptist College, and this appeal is therefrom.

From the foregoing recitals, it definitely appears that the Pulaski Circuit Court acquired jurisdiction of the subject-matter and parties in the litigation presented in

case number 3408, and its judgment in the premises is conclusive and binding upon all parties thereto. Sections 1788 to 1795, inclusive, Crawford & Moses' Digest, vests in the circuit courts of this State exclusive jurisdiction in the determination whether an association of individuals should be incorporated, and necessarily draws into question all necessary legal prerequisites thereto. Moreover, jurisdiction was conceded and invoked by the trustees of the Arkansas Missionary Baptist Convention when they voluntarily appeared therein and affirmatively requested and procured a temporary injunction pending the litigation. *Organ* v. *Memphis & L. R. Rd. Co.*, 51 Ark. 235, 11 S. W. 96; *Morton* v. *Miller*, 25 Ark. 108. The contention is, however, that the circuit court judgment declaring the incorporation and the merger of the old conventions is void, which appears upon the face of the judgment. It is argued that a merger of two or more corporations is not authorized by statute in this State, and for this reason the circuit court judgment so declaring appears to be void upon its face. All necessary intendments should be invoked in aid of the jurisdiction of this circuit court judgment. Certainly, it must be conceded that any corporation organized or existing under the laws of this State may surrender its corporate charter and existence and cease to do business as such by proper resolutions of its stockholders, officers and agents. Such procedure is expressly authorized by § 1823, Crawford & Moses' Digest. When such procedure is invoked and accomplished, no creditors being involved, the property of such corporation reverts to the stockholders. The circuit court was warranted in finding that the legal effect of the resolutions adopted by the various conventions was to dissolve the corporate existence of the respective conventions and corporations and thereby vesting their respective properties in the parent bodies. 7 R. C. L. Cor., § 745. In the absence of a bill of exceptions, we must conclusively presume that legal evidence was heard which warrants the judgment entered.

Since the circuit court was warranted in finding that the corporations had dissolved by consent of their stock-

holders and that the property had reverted to the parent bodies, it was fully justified in holding that a merger and consolidation could be effected by the owners. This procedure was expressly recognized by us in the case of *Sanders* v. *Baggerly,* 96 Ark. 117, 131 S. W. 49, wherein we stated the rule as follows: "In Christian thought, unity is more desirable than division. All denominational church organizations have as their primary object the propagation of the Christian religion. The individual advancement of each separate organization is looked upon as a contribution that far to the general cause. A union with another church organization having the same purpose may be regarded therefore as a step forward in the consummation of the work in which all are engaged. For this reason the general analogy of any secular corporation or association is misleading. The purpose of such an organization is self-aggrandizement, the advancement of its own interests, its increase in power, in wealth, in strength, without regard to any other organization, to the prosperity or purposes of any other association of individuals. Such organizations have no common purpose, no common head, no invisible cords of union. Each stands alone. Each has property devoted to the special individual purposes of the society, and each has stockholders. A business corporation is organized for profit; and if its life is not limited by its charter, it is regarded as perpetual unless sooner ended for breach of law or duty, or inability to discharge its functions. In case of a termination of corporate rights by efflux of time, or for either of the causes last mentioned, the business is wound up, the property is sold, and the proceeds, after payment of debts, if any, divided among the stockholders. But with church organizations it is different. They are not created for either profit or pleasure, but to do good. They have property, but no stockholders. The possession of all churches are [is] devoted to the same broad, general purpose, likewise the efforts of all of their members acting within the organizations. * * *

"There must be in every church organization an implied or inherent power of union with other church organizations, growing out of the purpose for which all are constituted, *viz.*, the dissemination of the Christian religion. If any two organizations reach the conclusion that they can better subserve this great and fundamental purpose by uniting with each other, and if they can agree, within their constitutional limits, upon the points of difference previously dividing them, there can be no reason, in law, why they should remain apart. There is no soundness in the view that church divisions, once made, must ever continue. If divisions in the Christian church were intended to be perpetual, then the argument for the defendants, on this head, is unanswerable; if there be such a thing as a universal church of which all the divisions are members or branches, if there be a tendency to unity in Christendom, and if this tendency is in accord with the spirit and purpose of Christianity—then the argument referred to can avail but little. * * *

"The power exists by implication. It exists from the very nature of the case, not only in the Cumberland organization, but in every other Christian society in whose standards there is not an explicit pronouncement to the contrary, because they are all parts of one whole, all engaged in the same work, seeking the same end, and animated by a common purpose."

It definitely appears from the rule just stated that we are committed to the doctrine that ecclesiastical associations and conventions may merge and consolidate without statutory sanction or authority, as the power so to do exists by implication in the very nature of the subject.

It follows from what we have said that the circuit court judgment of June 5, 1933, and as amended subsequent thereto does not appear to be void upon its face, but on the contrary is a valid and binding judgment and order upon all parties thereto and must be affirmed.

In case number 3459, which is an appeal from the Pulaski Chancery Court, it appears that the chancellor was of the opinion that the circuit court judgment heretofore discussed appeared to be void upon its face, therefore

a demurrer was sustained to appellants' answer therein pleading said circuit court judgment as *res judicata.* It suffices to say that the chancery court erred in sustaining said demurrer. The plea of *res judicata* was well pleaded, and was and is a complete bar and defense to the complaint in said cause. It is the well-settled doctrine in this jurisdiction that a judgment of a court of competent jurisdiction is conclusive of all questions within the issue, whether formally litigated or not. It extends, not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense, which might have been, but were not, presented. *Howard-Sevier Road Imp. Dist. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517; *Road Imp. Dist. No. 4* v. *Burkett,* 167 Ark. 176, 266 S. W. 930; *Coleman* v. *Mitchell,* 172 Ark. 619, 290 S. W. 64; *Prewett* v. *Water Works Imp. Dist. No. 1,* 176 Ark. 1166, 5 S. W. (2d) 735; *Akins* v. *Heiden,* 177 Ark. 392, 7 S. W. (2d) 15.

For the reason stated, cause number 3459, is reversed, and remanded with directions to overrule appellees' demurrer to appellants' answer, and to enter a decree sustaining appellants' plea of *res judicata.*

BEASON *v.* WITHINGTON.

4-3457

Opinion delivered May 7, 1934.

Henry J. Burney and *O. W. (Pete) Wiggins,* for appellants.

Floyd Terral, for appellee.

SMITH, J. This suit was brought by appellants to recover damages to compensate personal injuries alleged to have been occasioned by the reckless and negligent driving of an automobile by appellee in which appellants were riding as guests of appellee at the time of their injury. During the progress of the trial the answer was amended, over the objection and exception of appellants, to allege that the plaintiffs, appellants here, were guilty of contributory negligence, and in the submission of that question to the jury an instruction numbered 13 was given over the objection and exception of appellants. This instruction reads as follows: "You are instructed that, if you find from all the evidence that the plaintiffs, Dovie Beason and Homer Beason and the deceased, Ruby Gerlain Beason, were of such age as to appreciate danger, and in possession of all their mental faculties, and that, at the time of the accident complained of, they were riding in an automobile driven by the defendant at a dangerously high rate of speed and being zig-zagged from one side of the highway to the other, and that they had been riding in said automobile for a sufficient distance prior to

the time of the accident for them to know, and they did know and realize, that said automobile was being driven at a high and dangerous rate of speed and in a careless and negligent manner, and knew defendant persisted in so doing, and, after possessing that knowledge, they had a reasonable opportunity to abandon said car without injury to themselves, but, instead of so doing, continued to ride with the defendant while the automobile was being operated in that manner after such discovery, if any, had been made by them, then they were guilty of contributory negligence, and they cannot recover in this action."

There was a verdict for the defendant, upon which a judgment was rendered, from which is this appeal, and for the reversal of that judgment error is assigned in permitting the answer to be amended and in giving the instruction set out above.

Appellee insists that the errors assigned are such as may be brought upon the record only by a bill of exceptions, and he filed a motion to dismiss the appeal for the want of a bill of exceptions, which was overruled. Now that the case has been submitted on its merits, this motion was renewed.

It is true, as contended by appellee, that a bill of exceptions is necessary to bring the alleged errors into the record, and that they may not otherwise be considered; but we think it is also true that a sufficient bill of exceptions was prepared and filed to present the questions later discussed. The bill of exceptions as filed does not purport to set out all the testimony heard at the trial from which the appeal comes, and, this being true, the presumption must be indulged, in accordance with well-settled rules of practice, that the verdict and judgment accorded with the testimony.

Neither the statute nor the rules of this court require a transcription of all the oral testimony into a bill of exceptions. It is not essential that we be furnished all the testimony to consider specific assignments of error.

The statute provides (§ 1318, Crawford & Moses' Digest) that the party objecting to a decision must ex-

cept at the time the decision is made, but may be given time to reduce the exception to writing, but not beyond the next succeeding term of court. No particular form of exception is required, except that: "The objection must be stated, with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible." Section 1319, Crawford & Moses' Digest. It is further provided that: "Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing and present it to the judge for his allowance and signature. If true, it shall be the duty of the judge to allow and sign it; whereupon, it shall be filed with the pleadings, as part of the record, but not spread at large on the order book. * * *" Section 1321, Crawford & Moses' Digest.

Rule XV of this court (163 Ark., page XXXII) reads, in part, as follows: "Bills of exceptions, except in cases of felony, shall be so prepared as only to present to the Supreme Court the rulings of the court below upon some matter of law; and shall contain only such statements of facts as may be necessary to explain the bearing of the rulings upon the issues or questions involved; and, if the facts are undisputed, they shall be stated as facts, and not the evidence from which they are deduced; and if disputed, it shall be sufficient to state that evidence was adduced tending to prove them instead of setting out the evidence in detail, but if a defect of proof be the ground of ruling or exception, then the particulars in which the proof is supposed to be defective shall be briefly stated, and all the evidence offered in any wise connected with such supposed defect shall be set out in the bill of exceptions."

In the ordinary trial many exceptions are saved, during its progress, to various rulings of the presiding judge, and the practice has become quite general to have trials reported stenographically and to have transcriptions made of all the stenographic notes. This is done to more fully reproduce and reflect the incidents of the trial in their continuity so as to more fully explain the

objections to the overruling of which the exceptions were saved. But neither the statute nor the rules of court require this to be done, as appears from the rule and the statutes from which we have quoted. An appeal might be taken upon a bill of exceptions which presented only a single exception saved at the trial, provided so much of the proceedings at the trial were recorded as was necessary to sufficiently explain it.

Chief Justice COCKRILL discussed the functions of a bill of exceptions in the case of *McKinney* v. *Demby,* 44 Ark. 74. In that case the bill of exceptions did not show that it contained all the evidence adduced at the trial, and for that reason he said that the sufficiency of the evidence to support the verdict would not be considered. In that case he said also that an objection that a certain instruction should not have been given would not be considered for the reason that there might have been testimony which made the instruction proper, and that in the case stated every intendment would be indulged in favor of the action of the trial court, and that this court would presume that every fact susceptible of proof that could have aided appellee's case was fully established, the salutary rule being applied that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it affirmatively appear that it is erroneous.

Pleadings may be amended, and in some cases will be treated as amended, even during the progress of a trial, proper conditions being imposed to prevent surprise and injustice in the particular case, but, as there is no showing of the conditions under which the answer of appellee was amended, it will be conclusively presumed that no error was committed in permitting that action.

Now a judgment would not be reversed where the bill of exceptions showed only the refusal of the court to give a proper and correct instruction. This is true because the presumption would be indulged that other and correct instructions were given which made the giving of the particular instruction unnecessary or superfluous. But a judgment would be reversed when the bill of exceptions showed only the giving of an erroneous instruction,

and its relevancy to the points in issue, provided it was so inherently erroneous that it could not be cured by other instructions explanatory of it. If it could be, the presumption would be indulged that it had been.

Applying this well-known rule to instruction numbered 13, set out above, we conclude that the instruction is not so inherently erroneous as to require the reversal of the judgment. We said, in the case of *Graves* v. *Jewell Tea Co.,* 180 Ark. 980, 23 S. W. (2d) 972, that while the negligence of the driver of an automobile cannot be imputed to one riding with him as a guest, it is the duty of the guest to exercise ordinary care for his own safety, and that the failure to exercise such care which contributed to his injury constituted contributory negligence and defeated a recovery. See also *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; *Pine Bluff Co.* v. *Whitlaw,* 147 Ark. 152, 227 S. W. 13; *Miller* v. *Ft. Smith L. & T. Co.,* 136 Ark. 272, 206 S. W. 329; *Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535; *Arkansas P. & L. Co.* v. *Heyligers,* 188 Ark. 815, 67 S. W. (2d) 1021.

Instruction numbered 13 declared the duty of the guest to leave the car where the driver had ignored protests to cease his reckless driving, and stated this duty to be to leave the car if afforded reasonable opportunity to do so. Other instructions may have defined reasonable opportunity.

In the chapter on Guest and Passenger, vol. 5-6, of Cyclopedia of Automobile Law (Huddy) (9th ed.), § 145 subhead, "Remaining in machine after protest," it is said: "The circumstances may be such as to charge the occupant with negligence as a matter of law, where he unreasonably remains in the machine after adequate opportunity is offered for alighting, or, at least, where he fails to insist on leaving the car. But this duty is not absolute, the question whether a failure to leave the vehicle is a want of ordinary care being dependent on the circumstances of the particular case."

It is easily conceivable that cases might arise where it would not be negligence for the guest to remain in the car after making futile protest against the recklessness

or negligence of the driver. The case of *Krause* v. *Hall,* 195 Wis. 565, 217 N. W. 290, was such a case, and the Supreme Court of Wisconsin there said: "The jury might well have believed that the ordinary person would have taken chances on remaining in the car rather than be let out on a highway many miles from home on a dark night. It seems fairly plain that in every respect the question of plaintiff's contributory negligence was for the jury, and that their finding with reference thereto cannot be disturbed." See also *Klopfenstein* v. *Eads,* 143 Wash. 104, 254 Pac. 854; *Archer* v. *Bourne,* 222 Ky. 268, 300 S. W. 604; *Shields* v. *King,* 207 Cal. 275, 277 Pac. 1043; *Trotter* v. *Bullock,* 148 Wash. 516, 269 Pac. 825.

Other instructions may have explained when it was the duty of the guest to leave the car, reasonable opportunity being afforded to do so, and we cannot therefore say that the instruction was so inherently erroneous as to require reversal of the judgment.

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

BIEARD v. STATE.

Crim. 3881

Opinion delivered May 7, 1934.

Tom Harper and *John P. Roberts*, for appellant.

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

MEHAFFY, J. Appellant was indicted by the grand jury of Sebastian County for the crime of murder in the first degree, for the killing of Elmer Best. Upon a trial of the case in the circuit court, he was found guilty of murder in the second degree, and his punishment fixed at 12 years in the penitentiary. To reverse this judgment of conviction, this appeal is prosecuted.

The evidence is in conflict, but there is no contention that the evidence was not sufficient to justify the jury in returning a verdict of guilty. It would therefore serve no useful purpose to set out the evidence as to the manner of the killing. The killing was admitted.

The appellant contends for a reversal of the judgment, first, because he alleges that the court erred in giving instruction No. 8, given at the request of the State. Instruction No. 8 reads as follows:

"If you find from the evidence in this case, beyond a reasonable doubt, that at any time from the beginning of a difficulty between the defendant and deceased on the square at Greenwood in which the deceased was shot and killed by the defendant, if you find there was such a difficulty, that the defendant could have reasonably withdrawn from or avoided the difficulty with safety to himself, but failed to do so, he could not justify the killing on the ground of self-defense."

It is urged by appellant that there was no testimony introduced to show that the defendant was the aggressor in the difficulty in which deceased was killed. To support his contention he cites several cases, but we do not think these cases are in point.

An instruction similar to instruction No. 8 was given in the case of *Crews* v. *State,* 179 Ark. 94, 14 S. W. (2d) 261. The court in that case gave the following instruc-

tion: "You are instructed that, although you may believe that the defendant, Jim Crews, fired the first shot in necessary self-defense, still, if you believe that the second shot was fired at a time when the defendant, as a reasonably prudent person, acting on the facts and circumstances, without fault or carelessness on his part, did not honestly believe that it was reasonably necessary to further defend himself, then the defendant would be guilty of murder in the first degree, or murder in the second degree, or manslaughter, provided you believe that the second shot contributed in any manner to the death of the deceased."

In other words, no matter who the aggressor may be, if the time comes in the difficulty when the slayer could reasonably withdraw, with safety to himself, he cannot thereafter kill his antagonist and claim self-defense. Every one has a right to repel force with force, but he does not have the right to use more force than is necessary. Therefore the court correctly told the jury that, if the defendant could have reasonably withdrawn from or avoided the difficulty with safety to himself, but failed to do so, he could not justify the killing on the ground of self-defense.

In one of the cases cited and relied on by appellant, the court said: "He was not bound to retreat if deceased first assaulted him, with an intent to murder, but might have stood his ground, and, if need be, killed his assailant." *LaRue* v. *State,* 64 Ark. 144, 41 S. W. 53.

You will observe that the court stated he could kill his assailant if need be, if it were necessary in his self-defense. But, no matter who the aggressor is, one cannot justify a killing if he could have reasonably withdrawn with safety to himself. One assaulted is not required to retreat unless he can do so with safety to himself, but, if he can withdraw with safety, and refuses to do so, but kills his antagonist, he cannot justify the killing on the ground of self-defense.

Appellant next contends that the court erred in permitting the State to prove the general reputation of appellant three or four years prior to the difficulty. This

court has said: "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." *Curtis* v. *State,* 188 Ark. 36, 64 S. W. (2d) 86.

This court said: "Appellant was asked all sorts of questions about having been a gambler and about other offenses and immoralities. This was merely for the purpose of testing his credibility and was admissible as such. This court so decided in the case of *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41. This was with regard to a witness other than the accused himself, but we have since then frequently held that the same rule applies to a defendant in a criminal prosecution when he takes the witness stand in his own behalf." *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636.

It is next contended that the court erred in not setting aside the verdict of the jury because of misconduct of the jurymen. The appellant contends that some of the jurors at different times left the jury room and went to the toilet or rest room, and that some citizen was in the rest room at the same time.

Section 3187 of Crawford & Moses' Digest provides: "The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate, or be kept together in the charge of proper officials."

Section 3190 of Crawford & Moses' Digest provides: "After the cause is submitted to the jury they must be kept together in the charge of the sheriff, in the room provided for them, except during their meals and periods for sleep, unless they be permitted to separate by order of the court."

The record is silent as to whether the court made any order, but we said in a recent case: "Where the court permits the jurors to separate, or where there has been no order keeping them together, the burden rests upon the complaining party to show that prejudice resulted. There is no evidence in the record tending to show that anything was done by the juror or any one else while he was absent from his fellow jurors that resulted in any

prejudice to the appellant." *Wallace* v. *State,* 180 Ark. 627, 22 S. W. (2d) 395.

There is nothing in the record in the instant case tending to show that any prejudice resulted or that anything wrong was done by any of the jurors.

The appellant does not abstract the instructions, but we have carefully examined them, and find no error either in giving or refusing to give the instructions. We find no error in the record, and the judgment of the circuit court is affirmed.

SCRAPE *v.* STATE.

Crim. 3883

Opinion delivered May 7, 1934.

Coulter & Coulter, for appellant.

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

McHANEY, J. Appellant was convicted of the crime of robbery of a filling station in Little Rock on November 9, 1933, and sentenced to five years in the penitentiary. The deputy prosecuting attorney, in his opening statement to the jury, said: "I think the testimony will show that this was one of a series of robberies in which this boy was engaged." An objection was made to this statement, which was overruled by the court. During the trial, L. R. Biggs, a witness for the State, and the operator of another filling station in Little Rock, was permitted to testify, over appellant's objections, that appellant and

two others attempted to rob him on November 10, 1933, the day following the date of the robbery for which he was on trial, and that appellant later admitted to him that he was one of the three boys that attempted to hold him up. In this connection, the court gave to the jury, over appellant's objections and exceptions, instruction No. 5, which reads as follows: "The defendant is being tried alone for the crime of robbery. The State has attempted to show by testimony that this defendant engaged in an attempted crime of robbery on the night following the date of the crime for which he is now being tried is alleged to have been committed. If you should believe from the evidence that the defendant did attempt to commit robbery on the night following the alleged crime for which he is being tried, it might be considered by you as showing, if it does so show, a scheme and a design on the part of the defendant in the commission of crime, and for no other purpose; and, even though you should believe him guilty of attempted robbery committed on the day following the day of the robbery for which he is now being tried, yet that would not be sufficient to warrant his conviction on the charge for which he is now being tried unless you believe he was guilty on this particular charge beyond every reasonable doubt." These matters are urged here for a reversal of the judgment of conviction.

A number of decisions of this court are cited to the effect that evidence of other crimes is not admissible to prove guilt of the particular crime for which the accused is on trial, for the reason that the State cannot resort to proof of his bad character as a circumstance from which guilt may be inferred. On the other hand, we have many times held that evidence of similar crimes closely connected with the crime charged, is admissible, not only to show knowledge or intent, but to show a system, plan or scheme of conduct on the part of the accused. Many such cases might be cited. They are collected in Crawford's Digest under Criminal Law, § 92. Two of the recent cases on the subject are *Wilson* v. *State,* 184 Ark. 119, 41 S. W. (2d) 764, and *Sibeck* v. *State,* 186 Ark. 194, 53 S. W. (2d) 5.

We are therefore of the opinion that the testimony of the witness, Biggs, was properly admitted and properly limited in instruction No. 5, above set out. It follows that the judgment must be affirmed, as these are the only assignments of error relied upon.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* CASE.

4-3458

Opinion delivered May 7, 1934.

Allen May, J. R. Burcham, Dene H. Coleman, Charles Frierson, Jr., and *Chas. D. Frierson,* for appellants.

Ernest Neill and *Shields M. Goodwin,* for appellee.

BUTLER, J. On November 12, 1920, the Missouri State Life Insurance Company issued its policy in favor of Dr. William Byers Case, under the terms of which, in consideration of the payment in advance of the sum of $200.25 and the further payment of like sums on or before the 12th day of November of each year thereafter, his life was insured in an amount of $5,000. The policy provided for total and permanent disability benefits in the sum of $50 per month, in consideration of which the insured paid, on the dates aforesaid, an annual premium of $16.45. The annual premiums were paid each year up to and including the policy year ending November 12, 1929. Notice of the maturity of this premium was given Dr. Case, and at the expiration of the thirty-day grace period, a letter was addressed to and received by him, advising that the policy was forfeited and at an end for the nonpayment of the premium falling due on the last-mentioned date. He was also advised of his right to reinstatement

of the policy upon the performance of certain conditions. Dr. Case did not answer these letters.

In February, 1932, Dr. Case was committed to the State Insane Asylum, and on August 25, 1932, the attorney for the appellee notified the insurance company that the insured had been totally and permanently disabled from permanent insanity; that he had been so disabled since sometime in the summer of 1929, and was at that time a patient in the State Hospital for Nervous Diseases in the city of Little Rock. Demand was made for the payment of disability benefits at the rate of $50 per month and a request that the company furnish forms on which proof could be made. On September 6, 1932, the company, answering the notice and claim, advised that the policy had lapsed for the nonpayment of premium and interest due November 12, 1929. Shortly after this Dr. Case died in the State Hospital. Notice of his death was immediately given the company with demand for the payment of the death claim. In due time this claim was also declined by the company for the same reason assigned in its answer to the demand for monthly benefits made during the lifetime of the insured.

On the 13th of March, 1933, Miss Robert Ella Case brought suit as administratrix of the estate of Dr. Case to recover disability benefits at the rate of $50 per month from May 1, 1929, to October 18, 1932, the date of Dr. Case's death, less the amount of a certain policy loan of $955 and interest due thereon, on the allegation that, while the policy was in full force and effect, the insured was, from May 1, 1929, until the date of his death, totally and permanently disabled by reason of permanent insanity, to the extent of preventing him from engaging in any gainful occupation. It was also alleged that, because of the permanent insanity, no notice of the disability was given the company.

The General American Life Insurance Company, having assumed the liabilities of the Missouri State Life Insurance Company, was made a party defendant. The latter company filed its separate answer, admitting that it would be bound if a judgment was rendered against

the Missouri State Life Insurance Company, which company answered denying the material allegations of the complaint except that all premiums had been paid on the policy to November 12, 1929, which it admitted, and defended on the affirmative ground that the policy had lapsed for the nonpayment of the premium due November 12, 1929, and certain other affirmative defenses.

The case was tried and the jury found that Dr. Case was totally and permanently disabled from permanent insanity from July 1, 1929, to October 18, 1932, and returned a verdict in favor of the plaintiff in the sum of $872.04, the amount of the monthly benefits accruing between those dates, less the policy loan and interest. From that judgment is this appeal.

Here, as in the court below, the appellant insists there can be no recovery because of insufficient proof to show permanent and total disability at a time prior to the maturity of the premium due in 1929. It may be first stated that the insured, at the time of his death, was 61 years of age and had been for many years a popular and successful country practitioner, that being the only profession or vocation in which he had ever engaged except in 1920 when he abandoned it for a few months and attempted to write life insurance. He soon gave this up, however, and returned to his practice of medicine. He appeared to be fairly happy and successful, except for a short period in 1920, up and until 1927. From that time on it seems he began to slip. Early in his practice he was located in Cleburne County where he was popular and had a considerable practice. In the early spring of 1919 he returned to that county, and it is from that time until his commitment to the State Hospital with which the testimony has principally to deal relative to his mental condition.

The appellant calls attention to the testimony to the effect that during that period Dr. Case discussed with some of the witnesses current subjects with apparent intelligence; that he spoke of his insurance and said that he was fearful it would lapse because of his in-

ability to meet the premiums; that he discussed with some of them his method of bookkeeping and his success in making collections for the practice he had done. Also that he made calls on patients and some witness who had called the doctor in his professional capacity testified that his services were satisfactory. This evidence, it is argued, was sufficient to show that Dr. Case was not incapacitated for any reason, or prevented from following his usual occupation, and therefore was not totally and permanently disabled to the extent that he could not pursue any gainful occupation as provided for in the policy.

In construing provisions in policies relating to total and permanent disability sufficient to prevent the insured from engaging in any gainful occupation, the rule has been often stated to the effect that we do not give to these provisions a strict and literal interpretation, on the theory that a fair intention of the parties to the contract of insurance is that the insured shall receive indemnity when he is disabled to the extent that he is unable to carry on any business which, without the disability, he would be able to do or capable of engaging in. Therefore, to come within the meaning of the contract of indemnity, it is not required that the insured shall be absolutely helpless, but he is totally disabled when the infirmity from which he suffers renders him unable to perform all the substantial and material acts of his business or the execution of those acts in the usual and customary way. *Aetna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433, and cases there cited.

When we consider the testimony to which reference has been made in connection with all of the testimony in the case, we think the evidence preponderates in favor of, and sustains, the finding of the jury. Several of Dr. Case's old friends, on his return to Cleburne County where he had formerly resided and practiced his profession, were scarcely able to recognize him because he was so changed. Formerly he had been a man careful

of his personal appearance, amiable and loving the society of his fellows. Now he was unkempt, morose and retiring. He was unable to recall incidents of his young manhood which were likely to stand out in his memory. Those who called him in professionally, remembering his former skill, were greatly disappointed; he seemed to be uncertain what to do and neglectful of his patients. This was his condition as far back as April, 1929, and there is evidence to the effect that it continued throughout that year into 1930, when he became so helpless that his sister, Miss Case, took him to the home of his brother Ed Case, a farmer living near Heber Springs, where he was cared for, Miss Case paying her brother a reasonable amount for his care. Dr. Case remained there until he was committed to the State Hospital totally insane, where he remained in that condition until he died a few months after his admission. It was in testimony that he was suffering from a physical ailment which affected his brain, and in the opinion of the superintendent of the hospital this condition had lasted for several years. It is true that other expert witnesses testified that in their opinion Dr. Case was not insane in 1929, but, as we have stated, there is substantial evidence to sustain the finding of the jury.

The principal contention, however, is that urged in the second section of appellants' brief that the proof of disability constituted a condition precedent to liability, and the failure to give such proof before the lapse of the policy would prevent a recovery. To sustain this contention, appellants rely chiefly on the case of *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230, conceded by them to be out of harmony with our decisions in the cases of *Pfeiffer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847; *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366; and *Mo. State Life Ins. Co.* v. *Holt,* 186 Ark. 672, 55 S. W. (2d) 788. But the argument is made that our later cases seem to modify the rule announced in the cases above cited and evidence a feeling of this court "to get back into the line of authority following the Bergholm decision in the Supreme Court of the United States." The cases thought to be a

modification of our previous decisions are: *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912; *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533; *N. Y. Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520; *Business Men's Assur. Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. (2d) 640; *N. Y. Life Ins. Co.* v. *Jackson,* 188 Ark. 292, 65 S. W. (2d) 904; *Pac. Mutual Life Ins. Co.* v. *Dupins,* 188 Ark. 450, 66 S. W. (2d) 284; *Home Indemnity Co.* v. *Banfield Bros. Packing Co.,* 188 Ark. 683, 67 S. W. (2d) 203; *Mass. Protective Ass'n* v. *Jurney,* 188 Ark. 821, 68 S. W. (2d) 455.

We are asked to read these cases, especially to refresh our memory by reading the opinion in the Farrell case, which, it is claimed, puts our court directly in line with the Bergholm case. We have re-examined these cases and fail to find anything which modifies or impairs the case of *Pfeiffer* v. *Mo. State Life Ins. Co., supra,* or the cases following and approving that decision; nor, indeed, in our opinion, is the Bergholm case in conflict with the doctrine of those cases for the reason, as stated in the case of *Mo. State Life Ins. Co.* v. *Foster,* 188 Ark. 1116, 69 S. W. (2d) 869: "In the case referred to (the Bergholm case) by plain and definite language the payment of premiums up to the filing of proof of disability was made a condition precedent to the right of recovery." Such was not the provision relative to proof of disability in the Pfeiffer, Julian and Holt cases, *supra.* Nor, as pointed out by the appellee, was there any question of the insanity of the insured involved in the Bergholm case.

In *Ætna Life Ins. Co.* v. *Davis, supra,* the court, when considering the contention that the failure of the insured to make proof to the insurer as required by the policy ninety days prior to the expiration of the policy defeats recovery, had before it the language of the contract. In that connection we said: "In order to sustain the contention of the appellant, something must be read into the policy which the appellant company failed to incorporate therein. The only restriction we find in the contract is that no recovery can be had for a period of

time greater than six months previous to the date the proof of disability is made and received by the company where it is not made and received within ninety days after the disability has commenced. There is no mode specified by which the proof of loss is required to be made or how it is to be transmitted to the insurer. From a fair consideration of the contract, the right to recover must be based on the total and permanent disability occurring during the life of the contract and not on any particular time when proof is made and received." The point decided was that the failure to make the proof ninety days prior to the expiration of the policy did not defeat the right to recover for the reason that the proof was intended to give the insurer an opportunity to investigate the facts affecting the question of liability and the extent thereof, and that the end is served when the complaint is filed where no claim is made for benefits accruing before the filing of the complaint, or any claim made for penalty or attorney's fee.

In *Atlas Life Ins. Co.* v. *Wells* and *New York Life Ins. Co.* v. *Farrell, supra,* suits were brought, not for breach of contract, but were based upon it. In the Farrell case the provision was: "Whenever the company receives due proof before default in the payment of premiums that the insured * * * has become wholly disabled by bodily injury or disease, etc. * * *," and then provided "that beginning with the anniversary of the policy next succeeding the receipt of such proof, the company will waive payment of the premiums, and one year after the receipt of the proof the company will pay the insured a sum equal to one-tenth of the face of the policy and a like sum annually thereafter during the life and continuing disability of the insured." These provisions were wholly unlike those involved in the cases which it is thought are modified by the Farrell case, and it will be noted, as stated by the court that the case being considered "is not a suit for breach of contract, but a suit on the policy, and the policy expressly provides when payment shall begin."

An examination of the case of *Business Men's Acc. Ins. Co.* v. *Selvidge, supra,* where it was held that the failure to give notice as provided in the policy barred recovery, shows that it was because by the express terms of the contract the giving of notice was made a condition precedent to the right of recovery.

In the Jackson case, *supra,* it was alleged and proved that the insured became totally disabled in 1926 when the policy was in full force and effect; that the policy was extended until May, 1928, when it expired. Jackson died four years later and after his death suit was instituted. The court found that the permanent disability clause in the policy was identical with that in the Farrell case and controlled by that case.

In none of these cases, however, was the sanity of the insured brought in question, whereas in the case at bar the jury found on sufficient proof that the insured was totally and permanently disabled on account of insanity during the life of the policy. This finding, under the rule announced in *Pfeiffer* v. *Mo. State Life Ins. Co., supra,* obviated the necessity of making proof by the insured. The court there said: "If the insured has become permanently insane at the time that permanent disability attaches, it is evident that he is in no condition of mind to give the notice or make proof of his disability. * * * It should be said that permanent insanity, which causes, in whole or in part, permanent disability should operate to excuse the insured from giving the required notice. The very object and purpose of the policy, in a large part, would be defeated where the company inserted in the policy a condition which it knew that the insured could not perform in person and would not be in a state of mind to obtain its performance at the hands of others. There is nothing in the terms of the policy from which it might be said that it was the duty of the beneficiary to give the notice."

In *Old Colony Ins. Co.* v. *Julian, supra,* the doctrine announced in the Pfeiffer case was reaffirmed and also in the later case of *Mo. State Life Ins. Co.* v. *Holt, supra.* In the Pfeiffer case the clause of the policy with

respect to giving notice of permanent disability was identical with the language of the policy in the case at bar. It was there held that the clause relating to notice was a condition subsequent and should be construed liberally in favor of the beneficiary.

In connection with the contention that the failure by the insured to make proof barred recovery, it was argued that, that not having been done by him, it became the duty of the beneficiary under the facts in this case to give notice and make proof of the existence of the disability, and that her neglect in this regard precludes recovery. It is insisted that she knew, or ought to have known, of the mental derangement of her brother, Dr. Case, in 1929, or at least in 1930, and that the evidence makes it plain that she had ample opportunity to ascertain his condition. It is argued that she was favored by him beyond his other kinsmen, and that the ties between them were particularly close. She was named the beneficiary in the policy, and doubtless Dr. Case rightfully preferred her to the other members of his family for the evidence is clear that she was the burden bearer of them all. It is also apparent, however, that she saw her brother infrequently and was never associated with him a sufficient length of time to arrive at a just conclusion as to his mental state. She knew he had had family troubles and business reversals; she knew that he was frequently discouraged, but there were no facts under her observation which might be rightfully said to be sufficient for her to know that he was insane. It is also contended that she knew all along that the policy carried disability benefits and that she had, herself, stated that she had been familiar with the policy for a good many years. We are referred to the pages of the transcript wherein it is claimed this evidence is to be found, but we fail to find any evidence to show that she was familiar with the terms of the policy or that she knew that it contained the disability clause and had knowledge of the provision regarding the notice and proof of disability. The most that can be said is that she knew that her brother carried a policy of life in-

surance; that she knew that she was the beneficiary in such policy, for on occasions she was called on to join with her brother in the execution of notes to procure loans. But this was a matter to which she gave but little attention. It is fairly inferable that the loans were to continue the policy in force and that she received none of the proceeds of such, although there is no definite evidence to this effect. She paid so little attention that she had entirely forgotten about the execution of one of these notes until it was called to her attention during the progress of the trial of the case. The first time she became aware of the deterioration of her brother was when she carried him to the home of Ed Case, and then she was not aware of the cause of his condition. About that time she asked Dr. Case about his life insurance, and he told her that the policy had lapsed.

The evidence leads to the reasonable conclusion that Miss Case did not know that her brother was insane until a short time before he was committed to the asylum. Just when she came into possession of the policy is not shown, but it is likely that it was about that time, and it was then she had the first intimation of what the rights of her brother might be under the policy. She wrote a letter in her brother's name asking when the last premium had been due and how the policy might be reinstated. She is criticized because, in this and in subsequent letters to the insurance company, she did not inform it of the insanity of her brother. Whatever her reasons might have been for not conveying this information, it could certainly work no prejudice to the insurer, for it had renounced the policy long before.

Attention is also called to the fact that Miss Case did not offer to reinstate and did not reply to the appellant's letters regarding reinstatement. There was no reason for her taking any action in this regard, for the requirement for reinstatement was that the insured must be in good health, and, of course, she knew that her efforts to reinstate would be futile. As soon as she became aware of a possibility of liability to her brother for disability benefits, she began to investigate as to his men-

tal condition during 1929 and 1930. Based upon this investigation a letter was written by her attorney notifying the insurer of the insanity of Dr. Case and making demand of payment of disability benefits. It seems to us, assuming, but not deciding, that it was her duty as beneficiary to give notice of the disability, this duty could only arise when she became aware that the insured was not in a mental condition to give notice himself or to make the proofs, and then not until she had had a reasonable opportunity to inform herself in regard to the facts on which claim of disability would be made.

In the third section of appellant's brief it is contended that the plaintiff and the insurance company interpreted the contract as having lapsed, and that this interpretation is binding upon the plaintiff and prevents recovery. Of course, if Dr. Case was insane, he was in no condition to interpret the contract, and his interpretation that it had lapsed was not binding on him or any one else. Miss Case knew what her brother had told her as to the lapse of the policy, but at that time she was not aware of his mental condition, nor of the terms of the policy. We see nothing in the letters written by Miss Case to the insurer that would be a basis for the contention that she had interpreted the policy as contended for by the insurer, or that she acquiesced in its interpretation. There can be no doubt that, if Dr. Case had been possessed of sufficient mentality to realize the extent of his disability, he would have made proof, but it is not often that an insane man realizes he is such, and surely in this case, had Miss Case known of the provisions of the policy and been aware of the rights of her brother thereunder, she, too, would have given notice.

The fourth contention is that the court erred in construing the policy as having been extended thirty-one days after November 12, 1929, and in so instructing the jury. No prejudice resulted for the reason that the court, in subsequent instructions, told the jury that before returning a verdict for the plaintiff, it must find

that Dr. Case was totally disabled from permanent insanity at all times after October 1, 1929.

The fifth ground for reversal is that the amount of recovery was excessive. To support this contention we are again referred to the cases of this court thought to modify the rule relating to proofs of loss not being conditions precedent to attachment of liability. As we have observed, the Farrell and Wells cases were suits based on contracts, whereas in the case at bar there was a repudiation of the contract by the insurer—first, by a letter written to Dr. Case and later reaffirmed in a letter to the attorney for the appellee. Therefore, the rule in *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, controls, in which a contention like that in the instant case was rejected, the court saying: "Appellant next contends for a reversal of the judgment because nothing was due appellee under the terms of the permanent total disability clause when this suit was commenced, claiming that liability under the clause did not begin until six months after the final proof of the injury and disability was made. In other words, that liability did not begin when the injury and consequent disability occurred. The correct construction of the clause is that liability began with the disability. As stated above, and for the reasons given, the purpose of the policy was to compensate the insured during the period of permanent and total disability."

The case of *Smith* v. *Mutual Life Ins. Co.,* 188 Ark. 1111, 69 S. W. (2d) 874, in no wise alters the doctrine of *Ætna Life Ins. Co.* v. *Phifer, supra.* In that case the court held that the furnishing of proof of disability is not a prerequisite to the maintenance of suit for recovery, that right only being postponed until proof is furnished.

There is another reason why the contention of the appellant that the Bergholm case and recent cases of this court that a recovery under the provisions of the policy involved is limited to the payment of $50 six months after the proofs are received, and $50 each month thereafter during the life of the insured, etc., is not

sound. That is not the language of the policy, nor is the language susceptible only of that construction. It is unlike the provision in *Smith* v. *Mutual Life Ins. Co., supra,* that the "first monthly payments being due on receipt of said due proof." The provision there explicitly states not only when the company should commence the payments, but also the amount that would be first due which was a monthly payment. The disability clause in the case at bar provides that "the company will pay to the insured a life income of $10 each month * * *. The first payment of such income shall be made six months after receipt by the company of due proof of total and permanent disability."

This court has often held that, unless it is inescapable from the language of the policy that notice of disability and proof thereof are conditions precedent to recovery, it is the existence of disability that fixes liability and not the proof thereof. The liability then, under the finding of the jury, began on July 1, 1929, and continued until the date of the death of the insured, October 18, 1932. Therefore, the income would be the total of the monthly payments, the right to recover which (had the insured not been insane) would be deferred until six months after the receipt of proof by the insurer. *Smith* v. *Mutual Life Ins. Co., supra.*

The assignment of error argued in the sixth section of appellant's brief is that the court erred in directing the jury to deduct from the amount of its finding the loan of $955 with interest. If this was error, it was one of which the appellant cannot complain for the effect of it was to give to the plaintiff less than the amount to which she was entitled.

The seventh section of appellant's brief is a contention that the court erred in its rulings on the admissibility of evidence: first, in permitting the plaintiff to go into detail concerning the financial circumstances of the family and her expenditures in aiding Dr. Case; in permitting her to speak of the old age and feeble health of her mother and to recite certain calamities which had happened to the family. It must be remembered that

appellants urged the contention that plaintiff had been negligent in asserting the rights of her brother, and this testimony was brought out to in part excuse her delay. It was shown that just about the time she discovered her brother's insanity, another sister had died, and Miss Case was forced to take charge of her little children and care for them; that her mother was old and infirm and demanded her care; that her brother, Ed, died of pneumonia about the time that Dr. Case was removed to the asylum, and that her sister, a returned missionary, was dying of cancer in a hospital at Nashville. It is small wonder, under these circumstances, that Miss Case did not neglect many things of vital importance, and certainly these facts were admissible to excuse in part her seeming neglect. It is argued that the court erred in permitting Miss Case to state that she did not realize the mental and physical condition of her afflicted brother prior to August, 1930, but that, looking back, she realized that he was mentally incapable of practicing medicine in 1929, and that he was insane. She had stated the facts upon which this opinion was grounded, and, though she was not an expert witness, having given the facts upon which her opinion was based, that opinion was not incompetent.

Judge Reed testified that he considered Dr. Case practically an idiot. He referred to a time in the early part of 1929. This testimony is argued to be incompetent as Judge Reed was not an expert witness, but, as in the case of plaintiff, his opinion was founded on facts and circumstances which he narrated to the jury. This is applicable also to the testimony of witness Ellison, complained of, to the effect that, if he had had occasion to use a doctor, he would not have called on Dr. Case.

Error is also assigned to the refusal of the court to permit Dr. Brown to state on cross-examination whether or not, in his opinion, Dr. Case was mentally incapable of knowing that his insurance premium was due; also to the refusal of the court to permit defendant to elicit from Dr. Ponder the same information sought to be proved by Dr. Brown on cross-examination; also the refusal to permit the physicians to answer a question as to whether or

not Dr. Case had mental capacity sufficient to realize that his premium was due and his policy would be forfeited unless he gave proof of disability. The question before the jury was whether Dr. Case was totally and permanently disabled from insanity within the meaning of the policy, and it would be immaterial whether or not he was able to perform occasional acts relative to his business or to have an understanding of some of the matters relating thereto if his condition was such that he was unable to perform the duties of his profession, or those of any other vocation for which he might be fitted, in the usual and customary way. This testimony also was irrelevant for the reason pointed out in the case of *Pfeiffer* v. *Missouri State Life Ins. Co., supra,* where the court said: "It seems that the lay-witnesses for appellees thought that Pfeiffer was sane at times because he was able to talk rationally about the matters which were presented to his mind. This was not sufficient. He must have been able to carry on the ordinary affairs of life, and this meant that his mind must be capable of sustained effort so that he would comprehend such affairs as needed his attention, and not merely that he might talk with seeming intelligence upon a subject brought directly to his attention by some one."

Certainly, from the evidence, it is inescapable that, whereas Dr. Case might have had sufficient mentality, when his attention was called to it, to know that he had not paid his insurance premium, and that this would lapse the policy, his mind was not capable of sustained effort or such that he could comprehend his own condition or the effect of the provisions of his policy, and give that attention to them which would be expected of an ordinarily sane person.

Finally, it is insisted in the eighth section of appellant's brief that the court erred in the giving of certain instructions and in overruling certain others requested. We do not set out or comment upon these at length for the reason that the instructions given embodied the views we have expressed, and those requested were in conflict therewith.

On the whole case, we find no prejudicial error. The judgment of the trial court is correct, and it is therefore affirmed.

DENISON *v.* DENISON.

4-3436

Opinion delivered May 14, 1934.

Chas. F. Cole and *Jones & Wharton,* for appellant.

Coleman & Reeder, for appellee.

SMITH, J. Appellee filed suit for divorce against his wife in the Independence Chancery Court, alleging, as grounds therefor, that her treatment of him and her conduct towards him were such as to render his condition as her husband intolerable, and from a decree awarding him a divorce is this appeal.

Appellant filed a motion, in which she alleged that she had a good and valid defense to the suit, but that she was without funds to employ counsel to properly present it. She alleged that she and appellee were the parents of a six-year-old son, and she prayed that an allowance be made her with which to defend the suit, and for the support and maintenance of herself and the child during its pendency. Upon hearing this motion the court ordered appellee to pay $50 per month for the support of appellant and the child, and to pay her attorney $50 as a fee, and to pay $25 as court costs. Later an answer was filed,

which denied that either appellant or appellee were residents of this State, and the allegations of misconduct on appellant's part were specifically denied.

We think the residence of appellee was sufficiently shown to confer jurisdiction on the Independence Chancery Court to grant the divorce, as was done. Appellee was engaged in business as a general contractor, and moved about from the place of one contract to another, the performance of several of which required him to reside in a tent at his camp, where his wife lived with him. Appellee appears, in some contracts, to have been employed by his father, who was the principal contractor, and in other contracts to have been in partnership with his father and a brother, who was also interested in some of these contracts. The headquarters of the contracting firm appear to have been at Cushman, in this State, where the permanent records of the contracting firm were kept and where final settlements were made of the transactions growing out of the contracts, and to which place appellee returned at irregular intervals. He testified that Cushman was his home, and that he had no other, and had never acquired any other residence; that he had always paid his poll tax and had voted in that county, and had never voted elsewhere, and that it was in fact his home.

Upon the merits of the case, it may be said that the testimony is voluminous and conflicting, but, after carefully considering it, we are unable to say that the allegations of appellee's complaint are not supported by a preponderance of the testimony. No attempt was made to show that appellant was guilty of conduct involving moral turpitude. The testimony relates to the infirmity of her temper, which, according to appellee's testimony, was irascible and ungovernable.

It is argued that the more violent outbreaks were condoned, because the parties continued to cohabit as man and wife after their occurrence. But not so. One indignity might not—and usually would not—afford ground for divorce. It is the persistence of one spouse in a course of conduct which becomes intolerable to the

other of which the law takes cognizance and grants relief by way of divorce, and the doctrine of condonation has no application under the facts of this case. *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41.

The decree does not appear to be contrary to the preponderance of the evidence, and it is therefore affirmed.

FIREMAN'S FUND INSURANCE COMPANY *v.* FIRST NATIONAL BANK OF FORT SMITH.

4-3460

Opinion delivered May 14, 1934.

John E. Coates, Jr., for appellant.

M. A. Hathcoat and *S. W. Woods,* for appellee.

HUMPHREYS, J. On the 25th day of January, 1932, appellee obtained a judgment for $10,000 against Joe McCracken in the circuit court of Marion County, and on the 20th day of January, 1933, caused a writ of garnishment to be issued thereon against appellant, upon the allegation of appellee that it had reason to believe that appellant was indebted to Joe McCracken.

After due service of the writ, appellant filed an answer on the 25th day of January, 1933, admitting that it issued a fire insurance policy to Joe McCracken and

E. L. Huddleston, doing business under the firm name of Joe & Hud, on their stock of goods and fixtures, protecting them against loss in the sum of $2,250, and that they suffered a fire loss, but stating that no adjustment of the claim had been made, and for that reason it did not then know whether it was indebted to them in any sum, and that, when the adjustment was completed, further answer to the garnishment would be made. It further answered that a previous garnishment had been served upon it by the Little Rock Tent & Awning Company.

Appellant filed no additional answer, and appellee filed no reply to what purported to be the original answer of the garnishee.

About a year afterwards, and at a regular term of court, appellee obtained a judgment against the garnishee (appellant) in the full amount of the policy, from which is this appeal.

Appellant contends for a reversal of the judgment and a dismissal of the garnishment on the ground that it denied any liability in its answer, and that it was incumbent upon appellee to file a reply contravening the issue tendered and to establish its liability before judgment could have been rendered against it. Had appellant denied liability on the policy, it would have been the duty of appellee to file a denial in accordance with the statute (Crawford & Moses' Digest, § 4912), and the rule announced in the case of *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646, and cases therein cited. Appellant did not deny liability, but, on the contrary, stated in its original answer that the claim was under adjustment, and that, as soon as completed it would file an additional answer. This it neglected to do for a year or more, and by its silence admitted liability to the partnership in the full amount of the policy.

It was the duty, however, of appellee before taking a judgment for the full amount to have made his partner, E. L. Huddleston, a party and to have shown that he was not entitled to any part of the claim; also to have made the Little Rock Tent & Awning Company a party and to have shown it was entitled to no part thereof, or, if

entitled to any part, what part; and to have shown there were no partnership debts. If there were any partnership creditors, they were entitled to be paid out of the claim before McCracken was entitled to any part thereof. Appellee's right to any part of the claim depended on whether McCracken had any share therein, or, in other words, its right must have been worked out through McCracken's interest in the claim.

The judgment is reversed, and the cause is remanded with directions to the circuit court, when all necessary parties are brought in, to render judgment against appellant in favor of appellee for the amount it owes McCracken after the partnership debts are paid and after the claim, if any, of the prior garnishee is paid and the partner, E. L. Huddleston, is awarded his share, in case he is entitled to any part thereof. The appellant can protect itself from double payment by paying the entire amount of the claim into the registry of the court and getting a discharge.

SHANK *v.* STATE.

Crim. 3878

Opinion delivered May 14, 1934.

[redacted]

[redacted]

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W. T. Pate, Jr., Jehu J. Crow, Ben M. McCray and *N. A. McDaniel,* for appellant.

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

KIRBY, J., (after stating the facts). There are eighty-three assignments of error in the motion for a new trial, many of which are unimportant, and we only notice such as are insisted upon by appellant.

First, it is insisted that the trial court erred in calling jurors who had been summoned to serve on a previous case after the regular panel had been exhausted, it being claimed that the prospective jurors should have been summoned from the bystanders in accordance with the statute, § 3154, Crawford & Moses' Digest. An accused person has no right to the services of a particular

juror but only to a trial before a fair and impartial jury. The trial court has wide discretion in summoning special veniremen, and the fact that these particular eight jurors had been summoned before the appellant's trial began did not constitute error. *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27; *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643.

It is next insisted that the examination of the juror, J. R. Haynes, disclosed that he was incompetent, having answered the question: "Q. Would the fact that he is charged with this sort of crime have any effect on you? A. It would to some extent." The record of this juror's examination on his *voir dire* showed that he stated several times that he could and would go into the jury box with an open mind and free from prejudice and try the case solely upon the evidence and the law. The fact that the juror might have been prejudiced against the particular type of crime of which appellant stood charged did not in itself disqualify him. *Tong* v. *State,* 169 Ark. 708, 276 S. W. 1004; *Cabe* v. *State,* 182 Ark. 49, 30 S. W. (2d) 855.

The assignment that error was committed in admitting portions of depositions of certain witnesses, naming them, taken in Ohio on appellant's behalf, is without merit. The depositions were introduced by appellant, and the court was not asked at the time to rule upon their admissibility. It is true that at the beginning of the trial appellant asked the court to rule on the admissibility of certain of the depositions after they were introduced, and the court refused to do so at the time. During the course of the trial appellant introduced the depositions in full without asking for any further ruling and without any being made. There must, however, be a ruling of the court and an objection before error can be predicated. *Howell* v. *State,* 180 Ark. 241, 22 S. W. (2d) 47.

It is next urged that it was error to permit Dr. Hodges to testify concerning the condition of the little boy whose life was saved. The doctor testified that the boy had been poisoned with strychnine about the same time and place as the others, and described the symptoms; and it was competent to show that he had been poisoned at the same time and place as the others as merely a

part of one transaction. *Banks* v. *State,* 187 Ark. 962, 63 S. W. (2d) 518.

It is urged that the admission of the testimony of Mrs. Elsie Fox constituted error. No objection was made to her direct examination. It developed, however, on cross-examination that her testimony was largely hearsay, and the court, at the request of appellant, instructed the jury not to consider that part of her testimony which was hearsay. The appellant had brought out part of the incompetent testimony and made no objection to that part elicited by the State. His motion to exclude that part of the testimony was addressed to the discretion of the court, and there was no abuse of discretion in the ruling thereon. *Bell* v. *State,* 120 Ark. 530, syllabus 12, 180 S. W. 186.

Neither was it error to allow the witness, Crutchfield, to answer the question asked by the prosecution as to whether or not he had information that appellant was implicated in the theft of certain papers from his office. Crutchfield was the prosecuting attorney of Wayne County, Ohio; and appellant stated in his confession that he was being implicated in that theft; and the State was contending that the implication of appellant in the crime in Ohio was the moving cause or factor in appellant's trip to Arkansas, and the poisoning of the Colley family. It was only asked for the purpose of affording an explanation as to why an official was following a certain line of investigation and is admissible both as such and as tending to show a motive for the homicide. *Turner* v. *State,* 155 Ark. 443, 277 S. W. 727; *Sexton* v. *State,* 155 Ark. 441, 244 S. W. 710; *March* v. *State,* 183 Ark. 1, 34 S. W. (2d) 767.

Neither was error committed in refusing to allow the witness, Dr. Brown, to answer the question giving an explanation that appellant was suffering with such mental disease as rendered him irresponsible. The question was not a proper one to ask an expert witness. Underhill on Criminal Evidence, 3 ed., §§ 267-68. Neither was it necessary that the question asked this witness by the prosecuting attorney on cross-examination contain all the undis-

puted facts essential to the issue. Underhill on Criminal Evidence, (3 ed.) § 191.

No error was committed in allowing the witness, Joe Wakelin, to testify relative to a conversation with Dr. Echols, an expert witness, who had detailed his examination of appellant upon which he based an opinion that he was insane. It appears that Dr. Echols had been asked concerning this conversation with Wakelin, and he testified that appellant was insane. Wakelin's testimony was competent to show that the doctor had made a previous contradictory statement indicating that he thought appellant was sane. *Floyd* v. *State,* 181 Ark. 185, 25 S. W. (2d) 766.

No error was committed in overruling appellant's motion for a continuance on account of the absence of two witnesses whose testimony it was alleged was essential to a proper defense of the cause. The names of the witnesses were not set out in the motion, and it was not indicated how or when their attendance might be procured and they were to be used as nonexpert witnesses concerning appellant's insanity. Such evidence was merely cumulative to the evidence already offered, conceding that the witnesses would testify as set out in the motion. The motion, however, was not in statutory form, it not being stated therein that appellant believed the testimony of the absent witnesses to be true. Sections 1220 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; *Lynch* v. *State,* 188 Ark. 831, 67 S. W. (2d) 1011.

It is urged that the court erred in giving instructions numbered 11, 11½ and 12, it being claimed there was no evidence in the record to support same. There is evidence in the record to support these instructions found in appellant's confession; and they are correct declarations of law. *Bell* v. *State,* 120 Ark. 530, at page 555, 180 S. W. 186. Instruction No. 13, objected to, is also a correct declaration of law. *Id.* page 553. Instruction No. 14, complained of, was not erroneous, the jury having the right to consider appellant's actions before and after the crime and his appearance at the trial in determining his sanity, that question being before the jury. Underhill on Criminal Evidence, 3 ed., §§ 261-62. Appellant's requested instruction No. 13 was properly refused. *Payne* v. *State,* 177 Ark. 413, 6 S. W. (2d) 832; *Wawak and Vaught* v. *State,* 170 Ark. 329, 279 S. W. 997.

Appellant's requested instruction No. 16, relative to the weight to be given the testimony of the officers testifying, was fully covered by instruction No. 22, given; and the credibility of particular witnesses and the weight to be given their testimony should not be emphasized in separate instructions, any way. *Nichols* v. *State,* 182 Ark. 309, 31 S. W. (2d) 527. Both instructions No. 16 and No. 22 should have been refused; and instruction No. 17 was fully covered by instructions No. 12 and No. 20, given, all of which should have been refused for the same reason as assigned for the refusal to give appellant's requested instruction No. 13 already discussed. Appellant's requested instruction No. 17B was fully covered by instructions No. 15 and No. 19, given. No error was committed herein under the familiar rule that instructions should be considered as a whole, and that the trial court is not required to repeat instructions.

It is finally insisted that certain remarks of the prosecuting attorney herein constituted error. The prosecuting attorney in his argument said: "He is guilty. I know it, and you know it, and the defendant knows it." The cases of *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70, and

Sanders v. *State,* 175 Ark. 61, 296 S. W. 70, are cited in support of this contention. These cases are sharply differentiated from the present case, the Hughes case being reversed because of the statement of the prosecuting attorney that he knew that the defendant was guilty because he had information that no one else had; and the Sanders case was reversed for the same reason. No inference of the kind can be drawn from the statement of the prosecuting attorney herein complained of. He also said directly to the jury that he based his opinion upon the evidence introduced in the trial, and told them that they had the same opportunity as he had to reach the conclusion, and, if he had reached the wrong conclusion, they could disregard it. He was not concealing anything from the jury or indicating that he had any knowledge or evidence in the case which was not before them. The expression of an opinion by a prosecuting attorney on the evidence does not constitute a reversible error. *McGraw* v. *State,* 184 Ark. 342, 42 S. W. (2d) 373.

Objection was made to the introduction of appellant's confession on the ground that it was not freely and voluntarily made. No exceptions were saved to the ruling on this question, nor was it made a ground in the motion for a new trial. The question of its admissibility, however, was properly raised in the lower court, and it must be considered here without regard to whether exceptions were saved to its introduction and the ruling thereon. *Harding* v. *State,* 94 Ark. 65, 126 S. W. 90. The confession was introduced during the examination of Congressman D. D. Glover, who, together with witnesses Wakelin, Rucker and Buckalew, testified that the confession was made of appellant's own free will and accord, that it was entirely voluntary and made without any threats, intimidation or hope of reward. There is, in fact, no conflict in the evidence as to whether the statement was voluntarily made, and it was properly admitted over appellant's objection. *Allen* v. *State,* 175 Ark. 264, 298 S. W. 993.

The evidence in this case is conclusive that appellant administered poison to the Colley family in Saline County, Arkansas, on the 15th day of August, 1933, which act

caused the death of Alvin Colley, his wife and two of his children. Much testimony was introduced on appellant's part tending to show his insanity; but evidence was introduced on the part of the State tending to prove his sanity; and the question was settled by the jury upon substantial evidence, and their finding cannot be disturbed on appeal.

There are many other assignments of error which are not considered here, as reversible error could not be predicated upon any of them. The issues appear to have been fully and fairly presented to the court and appellant to have received a fair and impartial trial. We find no reversible errors in the record, and the judgment is affirmed. [redacted]

CENTER *v.* OLDHAM.

4-3461

Opinion delivered May 14, 1934.

[redacted]

Vol T. Lindsey, James Ptak, Suzanne C. Lighton and *Carmichael & Hendricks,* for appellant.

Kavanaugh Oldham and *Oscar E. Williams,* for appellee.

MEHAFFY, J. Mrs. Willie Vandeventer Crockett died in Tulsa, Oklahoma, in June, 1933, leaving surviving her the appellee, Elizabeth Crockett Oldham, and the appellant, Charles Crockett III, a grandson, the only child of Charles Crockett, who was the son of deceased.

A petition was filed in the Pulaski Chancery Court by Elizabeth Crockett Oldham in July, 1933, to establish what was alleged to be the lost will of deceased. The petition alleges that the will was made on January 3, 1932, and that it was the intention of the deceased to distribute her property as provided in said will; that is, $100 to Charles Crockett III, and the entire remainder of the estate to the petitioner, Elizabeth Crockett Oldham.

There was attached to the petition a form of will prepared by Dwight L. Savage, an attorney of Fayetteville, Arkansas. There was considerable evidence on the question of where the deceased resided, but no contention is now made as to her residence, and it is therefore unnecessary to set out this evidence.

After hearing the evidence, the chancery court found that Mrs. Willie Vandeventer Crockett did make a last will and testament, which was a holographic will, and that same was lost, and that it was in words and figures the same as the form prepared by Mr. Savage. The court also found and decreed that Mrs. Willie Vandeventer Crockett was a resident of Little Rock, Arkansas, before and at the time of her death, and that Elizabeth Crockett Oldham, as executrix, is entitled to act according to law, and ordered that the property belonging to the estate that is in the hands of the administrator, Earl Shook, be turned over to Elizabeth Crockett Oldham, executrix under said will, and that the restraining order theretofore made be made permanent. To reverse this decree, this appeal is prosecuted.

This is a proceeding to restore a lost or destroyed will. The law provides: "Whenever any will shall be lost, or destroyed by accident or design, the court of chancery shall have the same power to take proof of the execution of such will, and to establish the same, as in the case of lost deeds." Section 10,542, Crawford & Moses' Digest.

Section 10,545 reads as follows: "No will of any testator shall be allowed to be proved as a lost or detroyed 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."

Appellant first contends that there is no evidence that the will was in existence at the time of the death of Willie Vandeventer Crockett.

Mrs. Elizabeth Crockett Oldham testified that she was the daughter of the deceased; that she knew Mrs. Esther Smith Center, and had written several letters to her while this suit was pending. One of the letters stated that the original copy of her mother's will had been lost, and that she had to ask the court to establish the will from a copy which was drawn up by Mr. Dwight Savage. She asked Mrs. Center in the letter to tell Mr. Donham, who had been appointed guardian *ad litem* for the child, that she, Mrs. Center, knew of no other will, and to let this copy of Mr. Savage's go on, and they could settle the whole matter in a few days. When asked if she ever saw the will that her mother was purported to have made, witness said: "No; it was destroyed." This witness never saw the will, never saw the handwriting. The copy prepared by Mr. Savage was found at witness' house by Mrs. Ed Vandeventer, who is the wife of witness' uncle.

Deceased told witness that she had made a will, but there was never anybody who claims to have actually seen the will in writing. Witness said there was no fraud or collusion, but that deceased wanted her to have all her property.

Mrs. Dollie M. Storey, a Christian Science practitioner, whose advice was frequently sought by deceased, who was a member of the same denomination, testified that deceased consulted her relative to making a will some time in January or February, and that she was positive as to what deceased's wishes would be; that she wished all her property left to Elizabeth, her daughter. Deceased told this witness that she would make a will and leave everything to her daughter, Elizabeth Oldham. When asked if deceased ever talked to her afterwards about the will, she said that they talked about it for 10 days or two weeks, and one day she came to the office and said: "Well, I have attended to that business. I am thoroughly relieved that I have done the right thing."

This witness testified that she never read the will and never saw it. Deceased said that the will should be in her own handwriting, but witness does not know whether she did that or not. Witness testified that deceased was a

truthful woman, and she would believe absolutely anything she said. Witness said she did not know whether the will was in existence, but knows that deceased talked to her about its being in existence.

Mrs. Bernice Ratcliffe testified that she could not give the date or even the proximate date, but when she had called to see Elizabeth, they got on the topic of wills, and Mrs. Crockett stated that she had made a will, and she also told witness the same that Elizabeth had testified to. She said everything went to Elizabeth. She never showed witness any will, but just stated she had made her will. Witness does not know whether it was in existence at the time of her death.

Mr. Dwight L. Savage, attorney at law of Fayetteville, Arkansas, testified that he prepared a tentative copy of a will for Mrs. Willie Vandeventer Crockett, which Mr. Frankel had mailed to him with certain questions, and which instrument he returned.

The following letter, written by Mr. Savage, was introduced in evidence:

"July 15, 1933.

"Mrs. Elizabeth Crockett Oldham,
"1512 Prospect Avenue,
"Little Rock, Arkansas.
"Dear Mrs. Oldham:

"I have your letter of July 13, in which you expressed the hope that your mother's will might be established. As I recall, the facts involving my connection with the transaction were as follows:

"Mrs. Crockett decided to write a holographic will. She told me, substantially, what disposition she desired to make of her property following her death. I dictated to my stenographer Mrs. Crockett's desires in the matter, so framed as to effectuate her intentions. The stenographer wrote this dictation upon a sheet of long white paper.

"When I handed the paper to Mrs. Crockett to read, I suggested to her, if she so desired, in copying it in her own handwriting, she could substitute language less cold and formal, and still obtain the same effect. Mrs. Crock-

ett replied that the phraseology was agreeable to her except in one instance, to-wit, that which excluded her grandson, Charles Crockett, from any participation in her estate. She said that such was her desire, but that she preferred to soften the expression thereof. "I then suggested to her that I should furnish her the paper, pen and blotter, withdraw from the office, and thus afford her an opportunity to write the will then and there. This offer she declined, however, saying that she would write it in her room at the hotel. I then gave her several sheets of paper upon which to write, and she left the office. I am unable to recall any further reference by her to the will in our subsequent conversations. I do not know whether or not she actually wrote the will.

"I made no charge for my services, as I always remembered your mother's kindness to me when I was a student in the University; and it was a pleasure to me to try to reciprocate.

"I should willingly testify to the above facts. Unfortunately, however, such testimony would fall short of the requirement for establishing a will, as I understand the law. With the single exception of wills, it is my practice to keep carbon copies of all instruments I prepare. Many testators, however, from time to time, execute new wills in which they change beneficiaries, or bequests, or both. Because of this fact, I regard it as contrary to the interest of the testator that there should be in existence copies of earlier wills, later revoked. I assure you that I will willingly assist you in the matter of your mother's affairs in any way that I shall be able.

"Expressing to you my deep sympathy because of the death of your mother, to whom I was devoted, and sending personal regards to Kavanaugh, I am,

"Sincerely yours,

"Dwight L. Savage.

There was also introduced a photostatic copy of the form prepared by Mr. Savage. There was considerable evidence introduced showing that it was the intention of the deceased to make a will leaving everything to her daughter, but there is no evidence that she ever executed

the will, except that numbers of witnesses testified that she said she made the will. No one ever saw it, and no one knew that she ever executed the will, and there is no evidence anywhere in the record that the will, if she did execute one, was in existence at the time of her death.

The appellee says that she thinks § 10,545 of Crawford & Moses' Digest means that the will must not have been revoked by the testator, but that is not what the statute says. The statute says that 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 shown to have been fraudulently destroyed in the lifetime of the testator.

There is no evidence that the will was fraudulently destroyed, and it is not contended that the will was fraudulently destroyed, and there is no evidence that the will was in existence at the time of her death. No will was ever found, and the parties interested had access to all of deceased's papers, and certainly, if the will had been in existence at the time she died, it seems that somebody would have found it, especially when several of them say that they knew she intended to make a will, and that she had told them that she had done so.

Appellee cites and relies on the statement of the law in 28 R. C. L. 380. It is there stated that a will lost or destroyed previous to the testator's death may, if unrevoked, be established, etc. But, if it were destroyed before her death, unless the evidence showed that it was fraudulently destroyed, it could not be probated. It could not be in existence at the time of her death if it was destroyed before her death, and the evidence must show, under § 10,545, that it was in existence at that time. The section relied on by appellee also states as follows: "It seems that the fact of loss or destruction may be proved by circumstantial or direct evidence." But if it were proved by direct evidence that a will was made, it would still have to be shown by the evidence that it was in existence at the time of the death of the testator. It is alleged that the will here involved was a holographic will. The

fifth subdivision of § 10,494 of Crawford & Moses' Digest describes a holographic will in this State.

It is stated in 1 Page on Wills, p. 584: "Since the Legislature has made specific provision for attested wills, and for holographic wills which are executed in accordance with certain specified formalities, holographic common-law wills which do not comply with the statutory formalities are invalid. The statutes providing for the execution of holographic wills are mandatory and not directory, and a holographic will is invalid unless it complies therewith."

Our attention has not been called to any case construing our statute or a like statute of another State. There are many cases, however, construing somewhat similar statutes, and these statutes are generally held to be mandatory and not directory. In order to probate a holographic will, it must, under our statute, be shown to be in existence at the time of the death of the testator. If it be conceded that a holographic will was made, it could not be probated unless the evidence showed that it was in existence at the time of the death of the testator.

Under the North Carolina statute, certain requirements as to the place of finding of a holographic script, testamentary in its nature, must be satisfied in order that it may be established as a will. Our statute does not provide that it must be found among valuable papers, but it does provide that the evidence must show it was in existence at the time of the death of the testator.

The North Carolina Supreme Court said: "One alternative requisition of the statute is that it must 'be found among the valuable papers or effects' of the alleged testator. The provisions of the statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holographic script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably." In re Will of W. T. Jenkins, 157 N. C. 429, 72 S. E. 1072,

37 L. R. A. (N. S.) 842. The same court in another case held that the statutory provisions must be followed in all the essential respects. In re Bennett's Will, 180 N. C. 5, 103 S. E. 917. See also *Hooper* v. *McQuary,* 45 Tenn. (5 Cold.) 129.

These cases hold that the statute with reference to the finding of the will after the testator's death must be complied with. Under our statute, as we have said, it must be shown that the will was in existence at the time of the death of the testator. There is no evidence, either direct or circumstantial, tending to prove that the will was in existence at the time of the death of the testator. If the proof had been clear and explicit, or if it had been admitted that the will was made, still it could not be probated unless it was shown to be in existence at the time of the death of the testator.

Our statute, § 10,494, provides that a holographic will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator. In order to restore a lost or destroyed will, it must not only be shown by the evidence that the will was in existence at the time of the death of the testator, but its provisions must be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness.

There is abundant evidence that the deceased intended to make a will, but no evidence, except her statement, that she had ever made one. So there is a complete failure of proof as prescribed by statute, either that she made a will or its provisions. The copy introduced in evidence is nothing more than a copy of a form prepared by Mr. Savage, and no evidence in the record anywhere that the deceased ever copied this. It is true several witnesses say that she told them that she had made her will, and told them what its provisions were, but the statute requires the provisions to be clearly and distinctly proved by at least two witnesses. If the proof showed that she made the will by copying the form given her by Mr. Savage, then this copy might be introduced and be deemed equivalent to one witness. But there is

no evidence that she copied this; and there is no evidence in the record at all that she made a will, except evidence of witnesses who testify that she told them she had.

We do not deem it necessary to discuss at length the question of whether she made a will, because we have already said that there was no evidence that it was in existence at the time of her death.

Appellee, however, says that, if she is correct in her contention that Mrs. Crockett prepared her will according to the draft she had Mr. Savage prepare for her, then the contents are clearly shown; but we have already said that there is no evidence tending to show that she prepared her will according to the draft that she had Mr. Savage prepare. On the contrary, the evidence shows that after Mr. Savage had prepared the form he gave her some paper, and told her that he would retire and leave her in his office to copy the will. She declined to do this, but said she would take it to her room at the hotel and copy it; but there is a total lack of evidence that she copied it at her hotel or anywhere else.

The decree of the chancery court is therefore reversed, and the cause remanded with directions to dismiss the petition.

ILLINOIS BANKERS' LIFE ASSURANCE CO. *v.* LANE.

4-3470

Opinion delivered May 14, 1934.

Huie & Huie, for appellants.

J. H. Lookadoo, for appellee.

McHaney, J. Ezra C. Lane, now deceased, husband and father of the appellees, on March 1, 1917, took out an insurance certificate or policy with appellant, Illinois Bankers' Life Association, a mutual assessment company, for $1,000. The other appellant, in 1929, reinsured the business of the association, and, if liability exists on this policy, is indebted to appellees in said sum. Premiums were payable quarterly in advance with thirty days of grace. All premiums were paid prior to that which became due October 1, 1932, but it was not paid within the grace period or at all, and, by the terms of the policy, it lapsed and became void, but for the matters hereinafter set out.

The policy contained in § 9 a disability provision that: "Upon receipt of satisfactory proof to the Association that the insured has been totally and permanently disabled by accident * * * and will be thereby continuously prevented for life from doing labor, or the prosecution of any kind of business, then the association will pay, upon due and sufficient proof, one-half of the face of this policy, and the remainder to the beneficiary at the death of the insured, the policy having been continued in force." Section 10 reads as follows: "Proof of Death or Disability.—Proof of death or disability of the insured must be furnished the association at its home office upon forms furnished by the association within six months after the death of the insured or the commencement of the total and permanent disability. No action at law or in equity shall be maintained on any policy of insurance issued by this association or recovery had un-

less such proof be so filed or unless the action be commenced within one year after the death of the insured."

The insured died February 25, 1933. To excuse the failure to pay said premium due October 1, 1932, appellees alleged and proved, to the satisfaction of the trial court, that in August, 1932, the insured, who had for five or six years suffered from a shin ulcer on his right leg, ran into some barbed wire which re-injured the old sore on his right leg and also injured his left leg, from which he became totally and permanently disabled; that on September 14, 1932, the daughter, Mrs. Huggs, wrote and mailed to appellant a letter, of which the following is a copy kept by her:

"Arkadelphia, Arkansas, September 14, 1932.

"Illinois Bankers' Life Assurance Co., Monmouth, Illinois.

"Gentlemen: I am writing you in regards to Ezra C. Lane, who holds policy No. 73137. He was injured on or about the 11th day of August, 1932, when he was driving up some calves and ran into some barb wire and hurt his legs, and has not been able to work to amount to anything since, and the doctors say he will never be able to work. So I want you to mail to me at once the form for Ezra C. Lane to fill out making his proof according to policy.

"Yours truly, Mrs. Hila M. Huggs."

She received no reply to that letter and appellants say it was never received, and that the first they ever heard of a disability claim was when this suit was filed. On February 24, 1933, the day before her father's death, Mrs. Huggs wrote appellant the following letter: "Times has been so hard with us that we neglected to pay my father's (E. C. Lane) dues, and now that we have work, would like to take them up. Please let me know what I can do about them." This letter was answered by appellant on March 1, advising that the policy had lapsed on October 1, 1932, and that it could be reinstated by payment of back premiums and furnishing proof of insurability. Suit was filed on April 17, 1933. Trial resulted

in a decree for appellees for the amount sued for, with penalty and attorney's fees.

For a reversal it is first urged that total and permanent disability was not shown by a preponderance of the evidence. Appellants seem to concede that, if the insured became totally and permanently disabled within the provision of the policy before October 1, 1932, and gave notice thereof, then the failure to pay the premium due October 1 ($4.38) would not justify it in lapsing the policy, because it held in its hands at that time $500 belonging to the insured. As to the disability, we think the evidence sufficient to support the court's finding. It is undisputed that the insured had suffered from a chronic sore leg for five or six years; that the old sore had practically healed; that on August 11, 1932, he injured both legs by accidentally coming in contact with barbed wire; that his legs became very bad thereafter, his physician saying that he was permanently disabled thereby. It is true he continued to perform the duties of night watchman at a sawmill until October 14, when he was apparently discharged for going to sleep while on watch, and that some of his neighbors did not know of his condition, but this does not conclusively negative total and permanent disability. We cannot say the court's finding in this respect is against the preponderance of the evidence.

It is next argued that, even though the insured became disabled, still appellees cannot recover because no notice and no proof thereof were furnished appellants. Mrs. Huggs testified very positively that she wrote the letter of September 14, 1932, asking for forms to make the proof, and that she wrote a second time later, but received no answer. The assistant secretary of appellant testified that said letters were not received. The policy required proofs to be made on forms furnished by the company, and if in fact, as the court found, appellee did notify it of the disability and asked for forms which it failed or refused to furnish, it is in no position to complain because no proofs were made. As said by this court in *Eminent Household of Columbian Woodmen* v. *Gaunt,* 128 Ark. 626, 194 S. W. 700: "The company had the right to require formal proof on blanks to

be furnished for that purpose, but it was the duty of the company to furnish the blanks, and it did not do so. This formal proof could have been furnished only on the blanks of the company, and, as it did not furnish them for that purpose, it can not now complain of its own omission to demand a form of proof which it could have secured only by doing something which it failed to do." While there is some doubt that any notice of disability was ever given, we are unwilling to say that the finding of the court is against the weight of the evidence, even though the letter of February 24 failed to mention the fact that the former letter had not been answered.

It is next urged that there should have been an administrator of the insured's estate, and that he was a necessary party. We think not. It is not shown that there are any debts. The complaint alleged that appellees are the sole heirs at law. There was no proof that such is the fact, but it is shown that Della Lane is the widow and that Mrs. Huggs is the daughter of the insured. As such, they had the right to maintain this action. Section 1, Crawford & Moses' Digest; *Masson* v. *Woodmen of Union,* 164 Ark. 568, 262 S. W. 648; *Metropolitan Life Insurance Company* v. *Fitzgerald,* 137 Ark. 366, 209 S. W. 77.

Other contentions are that the decree should have designated the amount each was entitled to, and that no penalty and attorney's fee should have been allowed. The first was not raised in the court below. Appellees recovered the full amount sued for, so the penalty and fee were properly allowed.

Affirmed.

GLENN *v.* KILLOUGH.

Opinion delivered May 14, 1934.

Marvin P. Watkins, Charles Q. Kelly and *Melbourne M. Martin,* for petitioner.

Donham & Fulk, for respondent.

BUTLER, J. On the 7th day of February, 1934, Mrs. H. V. Glenn filed a suit against Studebaker Corporation of America and others, the same being case No. 96 in the first division of the circuit court of Poinsett County, Arkansas. Subsequent to the filing of this suit, and after certain preliminary matters were attempted to be had in the second division of the circuit court of that county, Mrs. Glenn filed her petition in this court for a peremptory writ of mandamus in which the Hon. Neil Killough, one of the judges of the circuit court of Poinsett County, was made respondent. The petition alleged the filing of the suit and, in effect, that on March 3, 1934, the defendants gave notice to the plaintiff that on March 5, 1934, there would be presented to the Poinsett Circuit Court defendants' petition and bond for the removal of said cause to the United States District Court; that said cir-

cuit court convened on March 5, 1934, in regular session, and on that date counsel representing the defendants appeared and announced that he desired to be heard upon the petition and bond for removal which he had on that day filed in said court, having given notice to opposing counsel of such intention; that thereupon the Hon. Neil Killough, the presiding judge, advised Marvin P. Watkins, one of counsel for plaintiff, and Martin Fulk, counsel for defendant, that he had no jurisdiction to take any steps in the cause pending in the first division of the Poinsett County Circuit Court, which position was maintained by the court despite the insistence of Fulk that the court should rule upon his petition. Thereupon, the defendants, through said counsel, moved the court for permission to strike from the files of the cause the petition and bond for removal; that the court then directed the clerk to hand to the defendants' attorney said bond and petition, and, pursuant to defendants' motion, took his pen and struck the filing marks from said petition and bond and directed the clerk to permit the withdrawal of the same and surrendered them to defendants' counsel. The petitioner further alleged that the docket and record in said cause do not reflect the motion of the defendant Studebaker Corporation to strike said pleadings and for leave to withdraw their bond and petition for removal, nor do they reflect the order of the court made upon said motion. It is alleged that the motion aforesaid and the order of the court made pursuant thereto results in the entry of the general appearance of the defendants in that cause. The petitioner further alleged that, subsequent to the aforesaid proceedings, to-wit, on March 13, 1934, she presented to the Poinsett Circuit Court, still functioning in regular session, her motion to enter upon the docket in said cause its order made on March 5th permitting the defendants to withdraw the petition and bond for removal and to reflect upon the said docket that the order sought to be entered was made upon motion of defendants for leave to withdraw said petition and bond, and that the same were withdrawn and delivered to defendants' counsel pursuant to his motion. The petitioner further alleged that the docket in the action failed to reflect

the proceedings had by the defendants in said court and that she is entitled to have the facts reflected by the record and to have the Poinsett County Circuit Court take jurisdiction for the purpose of trial; that, while in regular session as aforesaid, she presented to the Hon. Neil Killough, presiding judge of the court and the respondent named in her petition, her motion for judgment by default in said case No. 96, being entitled thereto for the reason that more than twenty days had elapsed since the issuance of the summons and that defendants had appeared generally in the cause, and, having failed to file any pleadings, she was entitled to the judgment prayed and the impaneling of the jury to assess her damage; that said presiding judge refused to take jurisdiction in the cause and neither granted nor denied said motion, although, as above stated, petitioner was entitled to her judgment by default.

Petitioner further alleged that the said presiding judge refused to take jurisdiction in the premises and refused to make any order whatsoever on the motion filed by her, and "she therefore prays a peremptory writ of mandamus to require said Hon. Neil Killough, judge of the second judicial district and judge presiding over the Poinsett County Circuit Court, to enter the motion of defendants for leave to withdraw their bond and petition for removal to the United States District Court and the order of said court heretofore made permitting the withdrawal of said pleadings and to enter upon the docket in said cause No. 96, styled Mrs. H. V. Glenn v. Studebaker Corporation of America et al., to the end that her cause of action may be properly heard in said Poinsett County Circuit Court"; and in the final prayer further relief was prayed "that this court direct the respondent herein, as judge presiding over said Poinsett County Circuit Court, to grant petitioner, as plaintiff below, in said cause a default judgment, and to require the said respondent herein to impanel a jury for the purpose of assessing plaintiff's damages; for costs and all other proper relief."

As an exhibit to the petition, the petitioner filed a copy of her motion for judgment by default made on

March 13, 1934, and the vacation order made and signed on that date by the Hon. Neil Killough, the presiding judge. That order, signed by the judge, is as follows:

"At 9 o'clock A. M. on March 5, 1934, the second division of the Poinsett County Circuit Court convened pursuant to statute, in regular session, at which time the business of said division of court was entered upon and the grand and petit jurors impaneled. At some time during the said day, Hon. Martin K. Fulk, of Little Rock, advised the undersigned as judge presiding at said court that he wished to be heard on a motion filed in the cause of Mrs. H. V. Glenn *v.* Studebaker Corporation of America et al., number 96, then pending and docketed in the first division of the said Poinsett County Circuit Court, said motion being for a removal of said cause to the United States District Court on the ground of diversity of citizenship and severability of causes; Mr. Fulk at that time advised the undersigned that he had filed his said petition and bond in proper form and had notified the Hon. Melbourne Martin, of Little Rock, opposing counsel, that the said petition for removal would be presented on that date. Mr. Melbourne Martin was not present in person, but it was stated by Hon. Marvin Watkins, of Harrisburg, that he, the said Mr. Watkins, was associated with Mr. Martin in the case, and that Mr. Martin could not be present on the said 5th day of March, but asked that the hearing on the petition be set for another day in the future, and suggested Friday of the same week. Mr. Fulk then stated that he had given proper notice to Mr. Martin and presented to the undersigned the said notice and objected to a continuance of the hearing. The undersigned then suggested to Mr. Watkins and Mr. Fulk that the first division of the Poinsett County Circuit Court was not in session, and that in his view the second division had no jurisdiction to take any step in a cause pending in the first division, unless said cause was transferred to the second division either by agreement of counsel on consent of the judge or court or by an order to that effect by the judge of the court, and that, if Mr. Martin had no objection to the transfer of said cause filed by him in the first division, it could and would be

transferred to the second division by agreement of counsel, and that the petition for removal could then be heard on the said Friday of the first week, or at any other time while the said second division was in session suitable and convenient to counsel. Mr. Watkins then stated that he was not authorized to say whether or not such transfer would be agreeable to Mr. Martin and could make no statement whatever about the matter. The discussion was then continued approximately two hours in order to enable Mr. Watkins to get in touch with Mr. Martin over the telephone. This he was unable to do. The matter was then called up again by Mr. Fulk, and the undersigned advised Mr. Fulk that it was the universal practice in this district that civil causes should not stand for trial or disposition of any sort by the second division of the circuit court unless said cause had been originally filed in said second division, or unless they had been transferred, after filing, from the first division to the second division. The undersigned then suggested to Mr. Fulk that the apparent dilemma in which he was placed could be solved by the removal of the petition, bond and notice from the files of the said first division of the Poinsett Circuit Court, and that under the circumstances the clerk would be directed by the undersigned to permit the said withdrawal of said papers. At that time the clerk had made no docket entry of any sort in regard to the filing of said papers, but the said papers were actually in the file of said cause No. 96, and had been stamped by the clerk with his filing stamp. Upon this suggestion being made and the statement to Mr. Fulk, whether the undersigned was in error in that statement or not, that that would have the same effect as if the petition, bond and notices had not been filed at that time, Mr. Fulk did act upon the suggestion related to him, and the clerk, by direction of the undersigned, removed from said file and cause number 96, the said petition, bond and notice and delivered them to Mr. Fulk in the presence of the undersigned.

"Nothing else in this matter transpired until the 13th day of March, 1934, at which time the said second division of said circuit court was still in session. At that time

Mr. Melbourne Martin, in person, presented his motion to enter the order of the court permitting defendant to withdraw upon its motion the petition and bond for removal to the Federal court, and this motion for default judgment in said cause number 96, at which time it first appeared that the clerk had entered on the civil docket in said cause the following notations:

" 'March 5-34. Petition for removal to Federal court filed. March 5-34. Bond for removal to Federal court filed. March 13-34. Motion to enter order of court permitting defendant to withdraw upon its motion the petition and bond for removing to Federal court filed. March 13-34. Motion for default judgment filed'; that none of said entries were made by the court or by the court's direction or by the undersigned.

"The said undersigned, being of the opinion that the second division of the Poinsett County Circuit Court now in session has no jurisdiction whatever in this civil case, and, under the circumstances outlined above, has refused to either sustain or deny the said motions filed by the plaintiff on this 13th day of March, 1934, as a court, but does, at the request of plaintiff's counsel, make this statement and explanation of his refusal in the form of a vacation order, and, for the reasons stated, refuses to take any jurisdiction of said cause. The defendants were not represented, either in person or by attorney, in any of these matters, except those outlined and detailed on the 5th day of March, 1934, nor was any notice given to defendant or counsel in regard to the motion to enter order or motion for default judgment. During all of the discussion had on this, the said 13th day of March, 1934, the plaintiff was present in person and by her attorneys, Hon. Melbourne Martin and Hon. Marvin Watkins, and also present Dr. A. L. Jobe, of Little Rock, a witness for the plaintiff.

"The clerk of the Poinsett County Circuit Court is directed to enter this order as a vacation order of the Poinsett County Circuit Court, First Division."

To this petition the respondent filed a response by his attorney, admitting the allegations of the petition except denying that the said petition and bond were with-

drawn from the files on motion of defendants' attorney in action No. 96, but alleged that the same were withdrawn on the initiative of the court for the reason that the case had been filed in the first division of the Poinsett Circuit Court, the division in which, pursuant to law, civil actions are due to be filed, and it was the practice that such civil actions were not due to be disposed of by the second division of the court unless said cause had been originally filed therein, or unless it had been transferred after filing, from the first to the second division. The respondent denied that any action had been taken on the 5th of March, 1934, or any orders made, or any notations authorized by the court to be made on the docket or record thereof, and that none of the entries copied in the petition for mandamus were made by the court or by its direction or by the respondent as judge thereof; that it was the opinion of respondent that the second division of said circuit court had no jurisdiction in cause No. 96, and, under the circumstances set out, refused to sustain or deny the motions filed by the plaintiff on March 13, 1934, as a court, but made a written statement and explanation of his said refusal in the form of a vacation order which appears in the transcript.

Supporting this motion was the affidavit of Martin K. Fulk, the attorney, who appeared in the Poinsett Circuit Court on March 5, 1934, and supporting the petition is the affidavit of the deputy circuit clerk, which is in effect that the withdrawal of the bond and petition and their delivery to the defendants' counsel were made upon motion of said counsel.

The affidavits of Fulk and of the deputy circuit clerk are in conflict, but we think the facts are settled by the formal written findings of the presiding judge made and signed by him on March 13, 1934, which had been copied herein, and that these findings sustain the contention made by the respondent, to-wit, that the court refused to entertain the petition and bond for removal for the reason that the case was pending in the first division of the Poinsett Circuit Court, and that he, while presiding over the second division of that court, had no jurisdiction to hear and determine any proceedings in cause No. 96 filed in the

first division except in accordance with the procedure pointed out by the statute governing the practice in the second judicial circuit; that this practice was that, where a case was filed in one division, it might be transferred by the judge of that division to the other division, or might be heard by the judge of the division other than the one in which the cause was filed on consent of the parties. It also appears from the response and the written findings of fact made by Judge Killough that on March 5, 1934, both the plaintiff and defendants in cause No. 96 were present and represented in the court by counsel; that the court called the act governing the practice in that circuit to the attention of counsel and announced, upon the defendants' request that he hear the petition for removal, that he would do so if the plaintiff (petitioner) would agree that the cause be lifted from the first division and heard by him in the second division, but to this proposition plaintiff's counsel would not agree.

The majority of the court agree that the prayer of the petition should be denied for the following reasons:

1. The refusal of the plaintiff (petitioner) to agree that the cause be transferred from the First to the Second Division of the circuit court is the reason why this was not done and why Judge Killough did not proceed to determine the question presented by the petition and bond for removal and such as might subsequently follow, and that it would now present an anomalous situation for this court to mandamus the circuit judge and compel him to do those things on petitioner's request, which he would have done had the petitioner, in the first place, agreed that he might. The refusal of the court to take any action in the cause while presiding in the Second Division was brought about by the action of petitioner, herself, and she is therefore in no position to complain of the failure of the court to act, and for that reason her prayer for mandamus should be denied.

2. We judicially know that the court will sit in the First Division on May 14, 1934, and at that time petitioner's case No. 96 is due to be called for trial or other proceeding, whereas the Second Division over which

Judge Killough presides (unless by agreement between himself and Judge Keck he presides over the First Division), will not be in session until a time subsequent to the convening of the court in its First Division. For these reasons whatever order this court might make would serve no useful purpose and courts are not called upon to do vain things. *International Shoe Co.* v. *Wagner,* 188 Ark. 59, 64 S. W. (2d) 82.

3. The majority are also agreed that the petitioner is not entitled to that part of the relief prayed which asks this court to direct the trial court to render a judgment in her behalf by default and to impanel a jury to assess her damage. The ground on which the prayer for this relief is based is that the defendants entered a general appearance when they filed their motion for leave to withdraw the petition and bond for removal from the files of the court for the purpose of refiling in the First Division. In the first place, the finding of the presiding judge negatives this contention and clearly indicates that the filing marks on the petition and bond were stricken out and the papers returned to defendants' counsel on the court's initiative, and not by reason of any motion having been made for that purpose.

In the next place, if, under the circumstances narrated in the petition, response, and in the "vacation order" signed by Judge Killough, defendants had made the motion to withdraw their petition, it is certain that this was for the purpose of presenting it in the First Division, the one in which the cause was pending, their right to have the same heard in the Second Division having been denied without the agreement of plaintiff having been obtained, that agreement being refused by her counsel. So, all that was done was in furtherance of the assertion of the defendants' right to have the case removed, and it was for that purpose that all the proceedings were had.

It is well settled that the filing of a petition to remove a cause from a State to a Federal court does not amount to the entry of a general appearance, and it is especially the case where, as in the case at bar, the peti-

tion recited that appearance was made only for the purpose of presenting the petition; and, as we have seen, if it be granted that the petition was withdrawn on defendants' motion, this was an act, in view of the position taken by Judge Killough, essential to secure a removal of the cause to the Federal court. The special purpose for which the petition was filed would still remain, during all the proceedings, to secure the relief prayed in the petition, and such proceedings would not amount to a general entry of appearance as contended by the petitioner. We have been cited to no authority to sustain her view, but the authorities cited by the respondent support our conclusion and comport with sound reason. In 4 C. J., § 34, p. 1344, the general doctrine is thus stated: "Where a petition for removal does not amount to a general appearance, a motion for leave to withdraw such petition is not a general appearance." As authority for the text the author cites the case of *Bryan* v. *Norfolk, etc. Ry. Co.,* 119 Tenn. 349, 104 S. W. 523. In that case the court notices the argument that the motion to withdraw the petition, not being in pursuance of any federal statute, was a voluntary abandonment of a right under that statute, and amounted to a voluntary appearance, and answered that argument thus: "We do not think this contention is sound. The defendant company, having the acknowledged right to make a special appearance for the purpose of filing a petition for the removal of the cause to the Federal court, might properly appear and withdraw that petition without being charged with a general appearance. It was at least an appearance for a special purpose, whether for the filing of the petition for removal in the first instance or the withdrawal of that petition in the last instance." See also *Flint* v. *Coffin,* 176 Fed. 872; *Coffin* v. *Flint,* 217 U. S. 602, 30 S. Ct. 693.

Mr. Justice SMITH, Mr. Justice MCHANEY and the writer are of the opinion that the petition should be denied, not only on the grounds stated above but for reasons which will appear in a concurring opinion. The Chief Justice, Justices HUMPHREYS and KIRBY dissent.

The writ is denied.

SMITH, J., (concurring). I concur in the opinion written by Mr. Justice BUTLER, and agree that the writ of mandamus was properly denied for the reasons there stated. I am also of the opinion that the circuit judge properly construed the practice under act 138 of the Acts of 1911 (General Acts 1911, p. 110), this being the act to provide an additional circuit judge for the Second Judicial Circuit and to regulate the practice in such court.

The Constitution has defined the jurisdiction of circuit courts, and, this being true, the General Assembly may neither increase nor diminish that jurisdiction. But it is equally true that the General Assembly may enact, and should enact, and does enact, legislation regulating the practice in such courts. It is perfectly proper for the General Assembly to provide when and where such courts may sit, and to enact the procedure pursuant to which their jurisdiction may be exercised (*Belford* v. *State,* 96 Ark. 278, 131 S. W. 953), and it has never been questioned that it is the duty of all courts, from the lowest to the highest, to exercise their jurisdiction in conformity with appropriate practice acts. If this were not true, there would be neither uniformity nor certainty in the practice before, and the practice of, the courts, and all procedure would be subject to the caprice of the presiding judge or judges.

Two judges being provided under the act of 1911 in the Second Circuit, instead of one, some recognition of that fact was necessary, and the direction as to procedure there found is proper and valid and indispensable, and constitutes no encroachment upon the jurisdiction of either judge in that circuit. Regulating the practice in and before a court is no encroachment upon or interference with its jurisdiction.

The practice under this act was defined in the case of *Blackstead Mercantile Co.* v. *Bond,* 104 Ark. 45, 148 S. W. 262. There a civil case had been docketed in the second or criminal division without any order of the judge to that effect, and a judgment was rendered for the want of an answer. It was there said that the act provides that the circuit clerks of the counties in that circuit shall assign all civil cases to the first division, and

all criminal cases to the second division, unless "the judges shall deem it expedient to divide said business into other than civil and criminal divisions," which may be done by written order of said judges, but that "it shall not be reversible error that any case is tried in the division to which it has not been specially assigned, and by consent of parties any case pending in any county, or district thereof, may be tried in either division of said court." It was said that the jurisdiction of the court did not depend upon the proper assignment of a case to either division, and that it was not reversible error for any case to be tried in the division to which it had not been assigned. It was said, however, that the fact that a case is assigned to the wrong division, and a litigant was misled thereby to his prejudice, might be sufficient ground for vacating the judgment under the statute which provides that a judgment may be vacated after the lapse of the term "for unavoidable casualty or misfortune preventing the party from appearing or defending." (Section 4431, Kirby's Digest). Section 6290, Crawford & Moses' Digest. That relief was asked in that case, but was denied for the reason that the defendant was advised of facts which put it on notice that a civil case had been docketed in the criminal division, and no surprise was occasioned because of the appearance of the civil case on the criminal docket.

Here the facts are the exact opposite. The case of *Glenn* v. *Studebaker Corporation* did not appear on the docket of the second division then in session. It had not been assigned to that division by consent of parties, nor through the order of the judges, nor through the action of the clerk. The case had been assigned to and properly appeared on the docket of the first division. The presiding judge stated, in his vacation order, copied in the opinion of Justice BUTLER, what the uniform practice had been in that circuit, which was that: "It was the practice that such civil actions were not due to be disposed of by the Second Division of the court unless said cause had been originally filed therein, or unless it had been transferred, after filing, from the First to the Second Division." This practice, said by the presiding

judge to be universal, accords with § 4 of the act of 1911, which requires the circuit clerks to assign all civil cases to the first division and all criminal cases to the second division as soon as docketed unless the judges, by their option and agreement, had otherwise directed, or had, by their written order, provided for a different assignment.

Now, the presiding judge offered to hear and pass upon the defendant's motion to remove the case to the Federal court provided the plaintiff would consent. But the plaintiff did not consent. The court then properly declined to hear and dispose of the motion for the reason that no such case appeared on his docket, the judges had not ordered it assigned there, and the clerk had not assigned it there.

There can be no question about the power of the judge presiding in one division to transfer a case pending in that division to the other division. This is true because he has such a case before him and on his docket. It is, however, a wholly different proposition to say that the judge presiding in one division may reach over and transfer a case not pending before him nor appearing on his docket but in fact pending in the other division, over which the other judge will preside, and remove the case from that docket, or make any order relating to the case while it is pending on the docket of the other division.

It must be remembered that this case was not on the docket of the division over which Judge Killough was presiding, and it could get there only in some manner authorized by law. The transfer could have been made by consent of parties, but the plaintiff refused to consent. Can it be contended that Judge Killough could have made any order in the case until it had in some manner reached his division, whether by order of the judges, the consent of the parties, or the action of the clerk?

A circuit court might transfer a case to the chancery court, or the chancery court might transfer a case to the circuit court, but would it be contended that, because either court then in session had the jurisdiction to try a case pending on the docket of the other, this jurisdiction to try the case conferred the right to reach over to the

docket of the other and, without its consent, transfer a case there pending? Has the practice not always been, and should it not always be, to ask the court where the case is pending to transfer it to the other court? The respect due by one court to another, and the preservation of any semblance of orderly procedure, suggests and requires the practice to be followed of having the court before which the case is pending to first make an order transferring it before the other court assumes jurisdiction.

Pulaski County has a circuit court consisting of three divisions, and each of the three judges have identical jurisdiction under the Constitution, but must, or may, the judge sitting in the first or criminal division of that court, hear and dispose of a motion to remove to Federal court a case pending in either the second or third division without having the cause, in some manner known to the law, transferred to the first division? I submit that the act of 1911 contemplates no such practice, and that Judge Killough properly refused to take any action relating to a cause not pending before him.

The practice is well defined that a party, to be entitled to a writ of mandamus, must show a clear legal right to the subject-matter and a lack of other remedy, and it is as equally well defined that where an inferior court has a discretion, and proceeds to exercise it, the discretion cannot be controlled by mandamus; but, if he refuses to act or to exercise such discretion, mandamus lies to put it into motion. *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389. The circuit court did not refuse to act when called upon to do so. The court proposed to pass upon the motion to remove to the Federal court if the cause were transferred to the division over which the judge was presiding, but the plaintiff did not consent. Can the plaintiff now have mandamus to compel the court to act after declining to consent that it might act?

Of course, mandamus will not lie to control the court's discretion. To obtain the relief here asked it must be shown that the court should have acted, but declined to do so, and, as that showing has not been made, the writ

should be denied for that reason. *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002.

At § 154 of High's Extraordinary Legal Remedies, (3d ed.) p. 171, it is said: "The writ will be refused when its purpose is to compel a court to alter its record, so that it may correspond with the state of facts disclosed by affidavits filed with and made a part of the application for mandamus. And the action of a court in denying a motion to correct the record of its judgment in a cause is so far judicial in its nature, that mandamus will not go to review or to control such action. Nor will it be granted to compel a court to receive a particular plea offered by a party to a cause pending therein, even though the court may have erred in rejecting such plea." For the reasons stated in this standard text, the right of mandamus should be denied.

It is my opinion that the writ should be denied for the reasons here stated, as well as for those stated in the opinion prepared by Justice BUTLER, and I am authorized to say that he and Judge McHANEY concur in the views here expressed.

JOHNSON, C. J., (dissenting). The effect of the majority opinion is that there are two separate and distinct circuit courts in existence in Poinsett County having separate and distinct jurisdictions to be exercised at the will and pleasure of the circuit judge who may happen to preside in these respective circuit courts. If the opinion of this court in *State* v. *Martin,* 60 Ark. 343, wherein the letter "a" was construed to mean "many" was thought to be novel, then I wonder and ponder what the bench and bar will think when we assert that: "The circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution." Section 11, article 7, of the Constitution of 1874, also provided: "each circuit to be made up of contiguous counties," etc. Section 13, article 7; "also a judge of the circuit court shall be a citizen of the United States," etc. Section 16, article 7, Constitution, provided also: "The judges of the circuit court shall be elected," etc. Section

17, article 7, of the Constitution also: "whenever the office of judge of the circuit court of any county," etc. Section 21, article 7, Constitution also: "the qualified electors of each circuit shall elect a prosecuting attorney," etc. Section 27, article 7, Constitution also: "the circuit court shall have jurisdiction," etc. Section 27, article 7, Constitution also: "appeals from all judgments of the county courts or courts of common pleas when established may be taken to the circuit court under such restriction and regulation as may be prescribed by law." Section 33, article 7, Constitution also: "the judge of the county court shall be the judge of the court of probate and * * * have jurisdiction in matters * * * as is now vested in the circuit court," etc. Section 34, article 7 also: "that in all cases of allowances made for or against counties, cities or towns an appeal shall lie to the circuit court of the county," etc. Section 51, article 7 also: "that in all cases of contests for any county, township or municipal office an appeal shall lie * * * to the circuit court," etc. Section 52, article 7, Constitution, means two or more circuit courts instead of "the circuit court," as appears from a casual reading of the Constitution? It occurs to me that but one construction can be placed upon the language employed in the Constitution as hereinbefore quoted. "The circuit court" does not and cannot be consistently or logically construed to mean two or more circuit courts. The view that the Legislature may create two or more circuit courts to operate in the respective counties of the State is abortive of constitutional mandate. The mere fact that this court held in *State* v. *Martin, supra,* that two or more circuit judges might be provided by the General Assembly to preside in or over a certain circuit court in the State is neither decisive nor persuasive of the question here discussed. The indefinite article "a" which precedes "judge" in the Constitution of 1874 was there determined to be no definite limitation upon the legislative branch of the State government in providing additional judges to preside over the respective circuit courts of the State. Whether the opinion in *Martin* v. *State, supra,* be sound or unsound, logical or illogical,

is not now open for discussion, but the indefinite extension of the doctrine therein announced should be condemned in no uncertain terms. Certainly, no member of the Constitutional Convention of 1874 ever conceived or dreamed that in 1934 this court would hold, in effect, that "the circuit court," as used so many, many times in article 7 of the Constitution of 1874, would be construed to mean more than one circuit court. Just how this construction of the Constitution may be made to fit into other provisions of the instrument is not readily conceivable. How appeals from the county courts, probate courts, justice of the peace courts and municipal courts may be affected is thrown into utter confusion. Will such appeal be prosecuted to the first or second division of these circuit courts? Will prohibition, *quo warranto,* mandamus, injunctions and other remedial writs be returnable to the first or second division of these newly created courts? These questions can not be answered by saying that the Legislature may determine and settle them. Primarily, and until now, jurisdiction of subject-matter has been conferred by the Constitution, and, when so conferred, the Legislature is without power to change or modify it. The circuit court jurisdiction is conferred by § 11, article 7, of the Constitution of 1874, but the jurisdiction of this newly created circuit court is nowhere mentioned or referred to in the Constitution. Just which of these circuit courts will be said to have and hold the great residium of jurisdiction conferred upon the circuit court by constitutional mandate is not pointed out by the majority opinion. *Martin* v. *State, supra,* does not impair the reasoning here set out. There this court expressly said: "The act creates no new office and confers no new jurisdiction, nor does it in any manner change or take away any jurisdiction already conferred by the Constitution." In contradiction of the doctrine thus announced, the majority is now holding that a new office is created; that a new jurisdiction is conferred which changes and takes away the jurisdiction conferred by the Constitution of 1874. The legislative act creating a second judge for the first judicial district is of no

greater importance than that which creates the judge for the sixth judicial district, which was construed in *Martin* v. *State, supra,* and I cannot conceive the importance or necessity for this apparent distinction.

It certainly and definitely appears from article 7 of the Constitution of 1874 that but one circuit court was created for Poinsett County, but by subsequent acts of the Legislature, as construed in *Martin* v. *State, supra,* it may be presided over by more than one judge. This construction not only meets the exigencies of prevailing conditions, but fits into constitutional mandate. If there is but one circuit court in Poinsett County, which is presided over by one or more circuit judges, then it inevitably follows that Judge Killough erred in refusing to exercise jurisdiction over the subject-matter of the suit pending in the Poinsett Circuit Court while presiding there on March 5, 1934. In the response filed here by Judge Killough, he asserts that the suit pending in the Poinsett Circuit Court and here under consideration was pending in the first division of the Poinsett Circuit Court and that he was presiding over the second division of the Poinsett Circuit Court on March 5, 1934, therefore, he had no jurisdiction of the case. Upon this response, we should direct the issuance of the peremptory writ of mandamus.

This court expressly held in *Gilbert* v. *Shaver,* 94 Ark. 234, 120 S. W. 833, that jurisdiction of subject-matter was purely a question of law, and the chancellor, having decided he had no jurisdiction, should be required to exercise jurisdiction by mandamus in this court. The rule as stated by us in *Gilbert* v. *Shaver, supra,* is not only supported by the great weight of authority on the subject, but I assert, without fear of contradiction, that no authority can be found holding otherwise. See Merrill on Mandamus, §§ 36 and 203. Wood on Mandamus, p. 20.

The majority endeavor to avoid the jurisdictional question here presented by saying: "First, the refusal of the plaintiff (petitioner here) to agree that the cause be transferred from the first to the second division of the circuit court" estops petitioner invoking the jurisdiction of this court. It has ever been the settled law

in this State that jurisdiction of subject-matter can not be conferred by agreement of the parties; therefore, any agreement of the parties would have been vain, useless and futile.

Moreover, no agreement of the parties was necessary because Judge Killough, then presiding, had jurisdiction of the subject-matter of petitioner's suit then pending in the Poinsett Circuit Court. Thus it appears that this "agreement gesture" is without plausibility.

Next, the majority say that "we judicially know that the circuit court will sit in first division on May 14, 1934, etc." Therefore, the issuance of the writ would have no useful purpose and because thereof should be denied. This assertion is palpably erroneous. On the same assumption the writ should never be granted. On the same assumption the writ in *Gilbert* v. *Shaver, supra,* should have been denied, because Judge Shaver might have died, voluntarily retired, or been removed from office before the writ could become effective. The test is and should be, what are the facts at the time the application for the writ is made? In the instant case, when petitioner's application for the writ was made, Judge Killough was asserting his lack of jurisdiction in the premises and, when we judicially determine that he was in error in this assertion, the writ should follow as a matter of right.

The peremptory writ of mandamus should be awarded in the instant case commanding and directing the presiding circuit judge of Poinsett County to assume and exercise jurisdiction over the subject-matter of petitioner's suit pending in the Poinsett County Circuit Court.

DENTON *v.* STATE.

Crim. 3882.

Opinion delivered May 14, 1934.

J. H. Black and *H. J. Denton,* for appellant.

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

BUTLER, J. The appellant, Roy Denton, was indicted in the Marion Circuit Court charged with the crime of murder in the first degree, the offense alleged to have been committed on November 25, 1932, by wilfully, with malice aforethought, after premeditation and deliberation, killing one Coy Aday, by shooting him with a pistol. No objection has been raised to the indictment. The trial resulted in a conviction for murder in the second degree and punishment fixed at seven years' imprisonment in the State Penitentiary.

We have examined the record in this case and find substantial legal evidence to support the verdict of the jury. We do not detail this evidence because no point is made by the appellant that it was not legally sufficient to warrant the verdict.

The contentions made by appellant for reversal of the judgment of the trial court are:

1. That the court erred in permitting a witness for the State to testify to the effect that the defendant drank a great deal—gets drunk and fights a lot. On this contention it is pointed out by the appellee that

this error was invited by the defendant, he having first brought out this testimony on the cross-examination of the witness. The question asked by his attorney was: "Why was Roy so bad," and the answer was: "He drank, and was out with girls." On redirect examination the witness was asked if Roy did not drink a good deal, get drunk and fight. On objection interposed, the court said: "You brought that out yourself—you asked the witness why he was so bad." The witness answered the question in the affirmative. The character of the defendant, not being put in issue, it would have been improper for the prosecuting attorney to have elicited the evidence complained of, but defendant, himself, having invited the error, he is now in no position to complain. *Crawford* v. *State,* 132 Ark. 518, 201 S. W. 784; *Beck* v. *State,* 141 Ark. 102, 216 S. W. 497; *Harper* v. *State,* 151 Ark. 338, 236 S. W. 263; *Yelvington* v. *State,* 169 Ark. 498, 276 S. W. 498; *Withem* v. *State,* 175 Ark. 455, 299 S. W. 739.

2. The next contention for reversal is raised by assignment of error No. 5 in the motion for a new trial which complains of error of the court in permitting the State's attorney to cross-examine the defendant regarding other offenses than that with which he was charged. It is well settled that, when a defendant in a criminal proceeding waives his privilege of silence by electing to become a witness in his own behalf, he subjects himself to the rules governing the examination of any other witness, and the court has the discretion within reasonable bounds to permit the defendant to be questioned on those matters which, in his opinion, are proper to assist the jury in judging the present veracity of the witness. It has been often held that the trial court does not abuse its discretion in permitting inquiry to be made of a defendant witness on cross-examination regarding his personal habits, associations, and other offenses committed by him, for this tends to inform the jury of the degree of credit which may be attached to his statements and their probative worth. We do not think there was any abuse of discretion. *Holliday* v. *Cohen,* 34 Ark. 711;

Bergstrand v. *Townsend,* 70 Ark. 602, 70 S. W. 307; *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41; *Bullen* v. *State,* 156 Ark. 148, 245 S. W. 493.

3. The next assignment of error presented is the court's refusal to give to the jury instructions Nos. 8 and 12, requested by the defendant. Instruction No. 8 called to the attention of the jury the distinction between direct and circumstantial evidence, and that crime may be proved by either or both kinds of evidence; but, where circumstances are relied upon to establish guilt, they should be consistent with each other and with the guilt of the defendant and inconsistent with any reasonable theory of innocence. Instruction No. 12 required that the prosecution prove the defendant guilty as charged and beyond a reasonable doubt, and the jury was told that it should acquit unless the evidence measured up to the standard required.

This was not a case where the State relied wholly upon circumstantial evidence to establish the guilt of the defendant. The killing was proved by defendant's own admission, and the law imposed upon him the burden of proving such facts and circumstances as would excuse or justify the homicide. Then, too, the court had presented to the jury the defendant's plea of self-defense and fully and fairly instructed it respecting such plea. The jury had also been fully instructed as to the presumption of innocence, the credibility of witnesses, and the necessity for the State to establish defendant's guilt as charged beyond a reasonable doubt, and that upon the whole case, if it should have a reasonable doubt as to the guilt or innocence of defendant, it should find him not guilty, requiring the jury to weigh all of the evidence, both direct and circumstantial. Where the court has instructed the jury, as in the case at bar, the rule is that refusal to give further instructions on circumstantial evidence, even where the case depends wholly upon evidence of that character, is not error. *Griffin* v. *State,* 141 Ark. 43, 216 S. W. 34; *Jordan* v. *State,* 141 Ark. 504, 217 S. W. 788; *Payne* v. *State,* 177 Ark. 413, 6 S. W. (2d) 832. In *Ridenour* v. *State,* 184 Ark. 475, 43 S. W. (2d) 60, it is said:

"This court has ruled that the refusal to give any instructions on circumstantial evidence where the case depends wholly upon such evidence is not error if he had already fully and correctly instructed the jury on the credibility of witnesses, the weight of evidence, the presumption of innocence, and reasonable doubt."

Instruction No. 12, *supra,* was properly refused because it was fully covered by instructions already given relating to presumption of innocence and reasonable doubt.

4. It is also insisted that the giving of instructions Nos. 3, 4 and 5 constituted error because they omitted reference to defendant's plea of self-defense. These instructions related to the degree of proof necessary to warrant the jury in determining the degree of homicide, and each began with the expression, "If you do not find the defendant not guilty under his plea of self-defense, etc." Instructions given at the request of the defendant correctly and fully presented to the jury the defendant's plea of justification, and, with instructions Nos. 3, 4 and 5, made a harmonious whole. We find no reversible error, and the judgment is therefore affirmed.

FRANCIS *v.* STATE.

Crim. 3885

Opinion delivered May 21, 1934.

M. Rountree, for appellant.

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

JOHNSON, C. J. The grand jury of Hot Spring County, Arkansas, returned the following indictment against appellant at the regular January, 1934, term thereof:

"The grand jury of Hot Spring County, in the name and by the authority of the State of Arkansas, accuses Dewey Francis of the crime of assault with intent to kill, committed as follows, to-wit: The said Dewey Francis in the county and State aforesaid, on the 7th day of August, 1933, in and upon one J. R. Sirratt, then and there being, with a dangerous weapon, to-wit: a knife, with which the said Dewey Francis was then and there armed and which was then and there had and held in the hands of him, the said Dewey Francis, unlawfully, wilfully and of his malice aforethought, did make an assault with intent to kill the said J. R. Sirratt, then and there with the knife aforesaid, feloniously, wilfully and of his malice aforethought to kill and murder the said J. R. Sirratt by cutting and stabbing him with said knife aforesaid, against the peace and dignity of the State of Arkansas."

Upon trial, appellant was convicted of assault to kill as charged in said indictment and his punishment fixed at five years in the State penitentiary.

Because of the views hereinafter expressed, it will be unnecessary to review the evidence in detail; it suffices to say that the evidence produced in behalf of the State was amply sufficient to sustain the charge of assault to kill.

Among other instructions given on behalf of the State, over appellant's objections, the trial court gave to the jury instruction number 5 as follows: "You are further instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant

cut J. R. Sirratt with a knife, that the burden of proving circumstances of mitigation that justify or excuse the cutting is placed on the defendant."

Appellant contends that the giving of this instruction No. 5 was reversible error, and we agree with this contention. Section 2335, Crawford & Moses' Digest, provides: "Whoever shall feloniously, wilfully and with malice aforethought, assault any person with intent to murder or kill, or shall administer or attempt to give any poison or potion with intent to kill or murder, and their counsellors, aiders and abettors, shall, on conviction thereof, be imprisoned in the penitentiary not less than one nor more than twenty-one years."

Since the pronouncement in *Lacefield* v. *State,* 34 Ark. 275, we have consistently held, to sustain an indictment for assault with intent to kill, the evidence must be such as will warrant a conviction for murder if death had resulted from the assault. *Allen* v. *State,* 117 Ark. 432, 174 S. W. 1179; *Deshazo* v. *State,* 120 Ark. 494, 179 S. W. 1012; *Davis* v. *State,* 115 Ark. 566, 173 S. W. 829; *Alford* v. *State,* 110 Ark. 300, 161 S. W. 497; *Jones* v. *State,* 100 Ark. 195, 139 S. W. 1126.

Moreover, we have many times held that the evidence to warrant a conviction for assault with intent to kill must not only be such as to warrant a conviction for murder if death had resulted from the assault, but must further show a specific intent to take the life of the person assaulted. *Chrisman* v. *State,* 54 Ark. 283, 15 S. W. 889; *Chowning* v. *State,* 91 Ark. 503, 121 S. W. 735; *Allen* v. *State, supra.*

We have always held that the burden of proof was upon the State to establish the guilt of the accused as charged in the indictment beyond a reasonable doubt. 5 C. J., § 302, p. 778. The instruction heretofore quoted ignores this well-planted rule of law. It tells the jury, in effect, that, if appellant cut the prosecuting witness with a knife, the burden of showing mitigating circumstances devolves upon the accused.

Neither can the above instruction be justified under § 2342, Crawford & Moses' Digest, which provides: "The

killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.''

By the plain language of this section of the digest, it is only applicable in homicide cases. From a casual reading of the statute, just quoted, it definitely appears that this statute cannot be invoked in assault cases. The language, ''The killing being proved,'' is amply sufficient to sustain this position.

Moreover, we expressly determined in *Parsley* v. *State,* 148 Ark. 518, 230 S. W. 587, that it was reversible error for the trial court to invoke this statute in assault cases.

Other errors are pressed upon us for reversal, but we deem them not of sufficient importance to here discuss. It is entirely possible that these alleged errors will not recur upon another trial.

For the error indicated, the judgment of conviction is reversed, and the cause is remanded for a new trial.

MARTIN *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

4-3463

Opinion delivered May 21, 1934.

J. Ford Smith and *W. J. Dungan,* for appellant.

Frederick L. Allen and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

JOHNSON, C. J. This appeal involves the construction of the following exemption contained in the double indemnity clause of a life insurance policy issued by appellee as insurer upon the life of George W. Martin, deceased, in which Susie J. Martin, appellant, was designated as beneficiary, to-wit:

"The double indemnity will be payable upon receipt of due proof that the insured died as a direct result of bodily injury effected solely through external, violent and accidental means, independently and exclusively of all other causes, and of which, except in the case of drowning or asphyxiation, there is evidence by a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days after the date of such injury; provided that the double indemnity shall not be payable if death resulted from self-destruction, whether sane or insane, or from military or naval service in time of war, or from any act incident to war, or from engaging in riot or insurrection, or from committing an assault or felony, or from participation in aeronautics, or directly or indirectly from disease or bodily or mental infirmity."

The insured was instantly killed when the airplane, in which he was an invited guest, crashed and struck the ground while navigating the air between Augusta, Arkansas, and St. Louis, Missouri.

The facts and circumstances of the crash and the death of the insured are identical with those narrated in *Missouri State Life Insurance Company* v. *Martin,* 188 Ark. 907, 69 S. W. (2d) 1081, and reference is here made thereto.

The exemption here employed by the insurer "or from participating in aeronautics" differs only from the exemption contained in *Missouri State Life Ins. Co.* v. *Martin, supra,* as follows: "Or for participation in

aviation or submarine operations'' by the elimination of the word ''operations.''

It is true that the opinion in *Missouri State Life Ins. Co.* v. *Martin, supra,* was put upon the ground that the use of the word ''operations'' limited the meaning and effect of the word ''participation'' which preceded it, and, when thus construed, conveyed the definite meaning and effect of not exempting the insurer from liability as against an invited guest riding in an airplane. The opinion as thus construed is not in conflict with any other case which has been called to our attention in briefs. When the word ''operations'' is eliminated, however, a very different case is presented and must be decided as of first impression by us. In *Missouri State Life Ins. Co.* v. *Martin, supra,* although stated as *dictum,* we said as a concurring basis of the opinion and the conclusion thereafter determined that: ''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 manage-

ment 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, sometimes use the words 'engaged' and 'participate' or 'participation' as conveying a similar idea. In the case of *Peters* v. *Prudential Ins. Co., supra,* [233 N. Y. S. 500] in discussing the word 'engaged,' the court said: 'It gives the impression of participation as an occupation.' In *Benefit Ass'n* v. *Hayden, supra,* [175 Ark. 565, 299 S. W. 995] 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, 463, 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 and Phrases, First Series, 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 would actually pilot a plane himself, or, as in the case of *First National 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."

After the most careful consideration of all the cases cited, we now conclude that the reasoning employed by us in *Missouri State Life Ins. Co.* v. *Martin, supra,* although *dictum* when pronounced, is sound and logical and is aptly applicable to the language employed in the exemption clause in the instant case.

We grant that our conclusion thus announced seems to be in conflict with respectable authority on this question, but such must be the inevitable result so long as courts think and act independently of each other. The insurer had full power and opportunity to exempt itself from liability beyond any question, cavil, or doubt had it elected so to do. It must have known that the average purchaser of life insurance would not expect exemption from liability merely because he took passage as an invited guest upon one isolated trip by airplane. As stated by us in *Missouri State Life Ins. Co.* v. *Martin, supra,* "participate" does not connote to the average person the meaning that his mere presence is sufficient to participate or engage in such art or occupation. On the contrary, he would be warranted in concluding that the word "participate" has the meaning and effect of "engage in" and other words of similar import and meaning.

In this view of the situation here presented, 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, 53 S. W. (2d) 10; *Gits* v. *N. Y. Life Ins. Co.,* (C. C. A.) 32 F. (2d) 7; *Charette* v. *Prudential Ins. Co.,* (Nov. 11, 1930) 212 Wis. 470, 232 N. W. 848.

For the error indicated, the cause is reversed and remanded.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* DOWDLE.

4-3455

Opinion delivered May 21, 1934.

Frederick L. Allen, W. P. Strait and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

E. A. Williams, J. H. Reynolds and *R. W. Robins,* for appellee.

SMITH, J. This is a suit on an insurance policy to recover disability benefits, and this appeal is from a verdict and judgment in favor of the insured.

The most difficult question in the case is the one of fact, whether the insured was totally and permanently disabled; but in the decision of that question we are required to give the testimony tending to establish disability its highest probative value.

The business of the insured is that of a farm manager, and as such he has charge of a farm owned by himself, another by his wife, and a third by the R. A. Dowdle estate, in which he was interested as executor and as an heir. For his management of this last-named farm he has been paid $600 a year for the past several years. He has complete control of all these places, pays the taxes thereon, prepares the chattel mortgages which the tenants execute, and makes all other contracts relating to the management of these farms. These facts being undisputed, it is insisted that the court should have declared, as a matter of law, that the insured was not totally disabled. The disabilities from which the insured suffers are conceded to be permanent. The insistence is that they are not total.

The testimony on the part of the insured is that prior to 1930 he gave these farms a most active and efficient management, but that since that time he has become less active, so that his management is much less efficient. The contention is that, whereas the insured formerly gave to his duties as farm manager the detailed attention which efficient management required, he is now able to give only supervisory attention, for the reason that his physical disabilities have disqualified him from doing and performing all the duties which his employment require.

The insured has become anemic and has lost much flesh and now weighs only 122 pounds. Formerly he rode horseback to and over his farms. He is now unable to do so, although he does occasionally make short trips on horseback, but it requires much fortitude to do this, and that exercise occasions great pain in the manner hereinafter stated. The proper discharge of his duties requires much walking over the farms, and this he is now unable to do at all.

The insured has a fractured coccyx, and the doctors who have attended him believe this was caused by an injury sustained while riding horseback. It was not questioned by any of the doctors who testified, some on behalf of the insured and others on behalf of the insurer, that this condition caused pain, even in sitting quietly, and much more pain when riding horseback. The insured testified that horseback riding caused excruciating pain; that he rarely rode, and that for all practical purposes he had become unable to ride. It was conceded also that the insured could not remain seated, even at his home, for any length of time without suffering much pain, and to alleviate this condition as far as possible he used a circular rubber pad, filled with air, as a cushion, upon which he sat. He did not carry the air cushion around with him, as it was not convenient to do so, but he used one so constantly at his home that he had worn out two of these cushions and was now using a third.

The testimony shows that the insured has a bad case of fallen arches, and a foot specialist testified that this condition was permanent, and that no brace or arch support could be prepared or worn which would give material relief. It was testified that the anterior metatarsus in each foot had slipped down and out of place, and that this condition caused pain upon walking even for short distances; in fact, is painful if insured stands for any length of time. The insured's feet were exhibited to and were manipulated before the jury, and it is said that the grating of the bones caused by such manipulation not only could be seen but could be heard. It was shown that the tendons had stretched and had permitted the bones to drop down, causing the condition commonly spoken of as fallen arches or flat feet, and that to walk or stand caused pain, which increased in intensity the longer the insured stood or the farther he walked, and became so great that he could not stand for any length of time or walk any considerable distance, although it was admitted that he could, and did, walk about town.

These conditions were aggravated by varicose veins in both legs, the existence of which condition was admit-

ted by all the doctors who testified in the case. The insured's legs would swell and throb if he stood long or walked far, and the insured testified that if he did either a feeling of numbness appeared and his legs became cold, and he would go home and wrap them in blankets to partially relieve the discomfort and pain.

The insured also testified that these complications caused such pain and suffering that he was frequently unable to sleep at night, and caused him to spend much time lying down during the day. He admitted that he went to the bank and other places in the discharge of his duties, but he stated that if he could not be served promptly he was required to sit down until he could be waited on.

Three doctors testified that, through the concurrence of these ailments, the insured was permanently and totally disabled from performing any duties which required him to walk or stand for any considerable period or to ride for any considerable distance, and that he was not able to perform all the duties of a farm manager. One of the doctors was asked to "state whether or not, in your opinion, after the examination you made, he is capable of doing ordinary work of any kind?" and he answered: "That brings you again to the question of his intestinal fortitude or endurance." All the doctors agreed that slight physical effort caused some pain, and their differences all related to the extent to which this pain would disqualify and incapacitate the insured from performing the ordinary duties of his employment.

It is pointed out by the appellant that the policy sued on contained no agreement to compensate the insured for any pain suffered by him. And this is true. But the real question in the case is whether the insured's condition is such that he can perform, and should continue to perform, his work. Insured admitted that he had performed numerous acts relating to his duties, and he stated that this was done because he had to earn a living and felt compelled to do so notwithstanding the pain and suffering occasioned by their performance, but that he had to forego many of the activities essential to the proper discharge of his duties because some of them he

could not perform at all, and that he partially performed such other duties as his necessity and fortitude enabled him to bear.

For instance, it was shown on behalf of appellant that the insured drove to his farm in his car, and that he was able to do this without injury to himself. But the tenants by whom this showing was made testified that the insured would not leave his car, and did not walk about the farm as its proper supervision required that he do, and he had formerly done.

It is argued that the instant case is sufficiently similar to the recent case of *Ætna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. (2d) 1007, as to be controlled by it, and that the application of the principles there announced requires the reversal of the judgment here appealed from. It is true that Person, the insured in that case, was a plantation manager, and that the use of a light car enabled him to manage his farms in the usual and customary manner without being required to ride horseback. But the evidence in the instant case is not to the same effect. The evidence in the Person case was summarized in the statement: "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." As appears from what has already been said, there is such testimony in the instant case. Person had an arrested case of tuberculosis, and the testimony was to the effect that his condition had become practically normal. Not so in the instant case. The insured's condition was very abnormal, and all the duties of his employment which he did perform entailed pain and suffering.

The extent and consequences of this condition were submitted to the jury under an instruction given at the request of appellant, reading as follows: "You are instructed that the plaintiff is not entitled to recover merely by showing that he is afflicted with some disease or condition which causes pain. In order to recover under the policy upon which he sues, the plaintiff must show by a preponderance of the evidence that his diseases disable

him to the point where he is unable to perform all of the material and substantial duties of his occupation."

Appellant requested another instruction which reads as follows: "If you believe from the evidence that the plaintiff is executor of the R. A. Dowdle estate, and that he can perform some of the material and substantial duties of such executorship, that he is manager of his wife's farm, and that he can perform some of the substantial and material duties of such management, that he is the owner of a farm, and that he can perform some of the material and substantial duties of operating his farm, then the court instructs you that he is not totally disabled as the term is used in the insurance policy, and your verdict should be for the defendant."

The court gave this instruction after substituting the word "all" for the word "some" wherever it appears, and this action is assigned as error. This question has been considered so frequently and so recently that it need not be again reviewed. The most recent of these cases is that of *Missouri State Life Ins. Co.* v. *Case, ante* p. 223, where it was said: "Therefore, to come within the meaning of the contract of indemnity, it is not required that the insured shall be absolutely helpless, but he is totally disabled when the infirmity from which he suffers renders him unable to perform all the substantial and material acts of his business, or the execution of those acts in the usual and customary way." (Citing cases.)

Another recent case, citing others, is that of *Missouri State Life Ins. Co.* v. *Brown,* 188 Ark. 1136, 69 S. W. (2d) 1075, which is to the same effect. See also *Equitable Life Assurance Society* v. *Bagley,* 188 Ark. 1009, 69 S. W. (2d) 394; *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 407; *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812.

In the case of *Standard Acc. Ins. Co.* v. *Bittle,* 36 Fed. (2d) 152, it was held by the Circuit Court of Appeals for the Fifth Circuit (to quote the second headnote) that "disability, within the meaning of a combined health and

accident insurance policy, is total, if it prevents party from performing acts necessary to prosecution of his business in substantially the usual and customary manner, and does not mean state of absolute helplessness or inability to perform, at peril to health, some of acts required in conduct of business or occupation." See also *Metropolitan Life Ins. Co.* v. *Bovello,* 12 Fed. (2d) 810.

One is ordinarily able to perform the duties of his employment, or he is unable to do so; and the fact that indulgent relatives might continue compensation for partial performance is not the final test of capacity, but is only a circumstance to be considered along with all other testimony. Nor does the law require one to perform duties at the peril of his life or health, nor to perform them if their performance entails pain and suffering which a person of ordinary prudence and fortitude would be unwilling and unable to endure.

Appellant requested an instruction numbered 5, reading as follows: "If you believe from the evidence that the plaintiff can, notwithstanding his illnesses, drive his automobile back and forth between Ozark and Morrilton, can drive his automobile over the plantations which he manages, can sit at his desk and transact his banking business, can walk about the streets of Morrilton and sell cotton, can make rental contracts with the tenants on his own place and other places which he manages, can collect the rents from such tenants, can take chattel mortgages, and that such activities, if any, on his part, will not aggravate his condition or make it imprudent for him to continue such activities, if any, then the court instructs you that the plaintiff is not totally disabled, and your verdict should be for the defendant."

This instruction was properly refused as constituting a charge upon the weight of the testimony (*Holmes* v. *Metropolitan Life Ins. Co.,* 187 Ark. 388, 60 S. W. (2d) 557), and leaves out of account certain duties which the testimony shows the insured would be required to perform to properly discharge his employment, but which he is wholly unable to perform, and takes no account of the extent to which performance might be excused by

reason of the pain and suffering which their performance would entail.

The judgment is affirmed.

[redacted]

BARTON *v.* BARTON.

4-3462

Opinion delivered May 21, 1934.

[redacted]

E. W. Mead and *Carmichael & Hendricks*, for appellant.

Coleman & Reeder and *Williamson & Williamson*, for appellee.

HUMPHREYS, J. William Barton, a resident of Stone County, died testate on the 26th day of January, 1933, having provided in his will of date February 16, 1926, that, after payment of his debts and certain bequests, the

residue of his estate, real, personal, and mixed, should be divided equally among his eight heirs with the following proviso relative to appellee's one-eighth interest in said estate, to-wit: "Provided my son Frank (appellee) shall receive only the sum of one dollar unless he shall have at the time of my death paid or otherwise satisfied all his indebtedness to me."

E. E. Barton, one of the legatees, was designated in the will as executor, and, after the probation of the will and the appointment of E. E. Barton as executor, he paid his brother, the appellee herein, one dollar and took the following receipt from him:

"4-10-1933.

"Received of E. E. Barton, administrator, one dollar & no/100 dollars for settlement in full of estate of Wm. Barton.

"$1.00 "Marshall, Ark."

Later, appellee demanded his one-eighth interest in said estate, and, when the executor refused to pay same, he filed a petition in the probate court of said county for his distributive share, alleging that the other heirs had then been paid $1,400 each by the executor. He prayed for a full one-eighth share in said estate.

Appellant filed a motion to require appellee to particularly set out and specify upon what grounds and conditions he claimed to be entitled to the share petitioned for.

Appellant also filed an answer alleging that appellee was indebted to Wm. Barton at the time of his death in sums evidenced by four promissory notes as follows:

"Note dated February 27, 1915, $360, 10 per cent. interest; note dated January 7, 1925, $240, 10 per cent. interest; note dated April 21, 1926, $135, interest 6 per cent.; note dated September 24, 1926, $55, interest 10 per cent."

Also alleging that, on account of appellee's failure to pay the notes, he was only entitled to one dollar under the terms of the will and that on account of the execution of the receipt set out above, he was estopped to claim a full one-eighth distributive share in said estate.

Upon a hearing of the cause, the probate court sustained the motion to make the petition more definite and certain and dismissed the petition of appellee for the allowance of the claim.

Saving his exceptions to the order of the court, appellee prayed and was granted an appeal to the circuit court.

In the circuit court on trial *de novo,* the motion to make the petition more definite and certain was overruled, over the objection and exception of appellant. The cause was then submitted to the court, sitting as a jury, upon the pleadings and testimony, resulting in a finding that appellee was not indebted to the testator at the time of his death, and that he was not estopped to claim his one-eighth interest in said estate by the execution of the receipt, and he was entitled to recover under the will a one-eighth part of the estate less a credit of $401, which had been paid him from the estate.

A judgment was rendered in accordance with the finding, from which is this appeal.

Appellant contends the court committed reversible error by not requiring appellee to make his petition more definite and certain by stating whether he was indebted to the testator, and, if so, when and how he had paid same. We think appellee stated a good and sufficient cause of action when he alleged that under the will he was entitled to a one-eighth interest in the estate. The burden did not rest upon him to state and prove that he had been indebted to the testator in his lifetime but that he had paid same. If he was not entitled to take a one-eighth part under the will because he had not paid his indebtedness to the testator, it was a matter of defense, the burden of which must have been assumed by appellant. The court therefore did not err in holding that the burden of proof was on appellant, and in overruling his motion to make the petition more definite and certain.

The appellant also contends that the trial court committed reversible error in admitting proof of statements made by the testator as to what he proposed to do with

the notes executed by appellee to said testator. C. K. Goddard testified that the testator when living told him that he considered the notes of appellee paid, that is, that the indebtedness had been satisfied; that he had made an advancement of $400 to each of the other heirs, and that instead of giving appellee $400 in money, he just gave him credit on his indebtedness. Lecil Brown testified that he was tax assessor for Stone County for the years 1929, 1930, 1931 and 1932 and that, when he assessed the property of the testator in those years, the notes executed by appellee to the testator were not assessed because he said the notes had been paid or satisfied. These statements were against interest and were made to third parties after the execution of the will; hence not hearsay. *Kirby* v. *Wooten,* 132 Ark. 441, 201 S. W. 115; *People's Savings Bank* v. *McInturff,* 147 Ark. 296, 227 S. W. 400. Neither do they offend against the rule forbidding the varying of written instruments by oral evidence. *Bromley* v. *Atwood,* 79 Ark. 357, 96 S. W. 356.

Appellant also contends that the court committed reversible error in finding that appellee was not bound and estopped by the receipt executed to appellant releasing all claim against the estate for $1. Estoppel in this case was a question of fact, and there is substantial evidence in the record tending to support the finding that appellee signed the receipt under the belief that it was necessary for him to do it in order for him to get his share of the estate. He testified to that effect himself, and the evidence indicates he was feeble minded. In addition, he was before the court, who had the opportunity to see, observe, and hear him testify. The letter appellee wrote in which he inclosed the receipt was not especially intelligible.

There is ample evidence in the record to sustain the verdict and judgment.

The judgment is therefore affirmed.

LEA *v.* LEWIS.

4-3466

Opinion delivered May 21, 1934.

Walter M. Purvis, Marshall Purvis and *Dan Purvis,* for appellant.

Cooper B. Land and *William G. Bouic,* for appellee.

MEHAFFY, J. The appellant was the owner and in possession of lots 4, 5 and 6 in block 156 in the city of Hot Springs, Garland County, Arkansas. She failed to pay the taxes assessed against said property, which were due and payable in the year 1930. Said property was sold for the taxes, penalty and cost to the State of Arkansas.

On August 16, 1933, the appellees, W. E. Lewis, Sr., and W. E. Lewis, Jr., purchased said property from the State of Arkansas, paying the Land Commissioner therefor the sum of $744.51, and received a deed from the State Land Commissioner.

Immediately after receiving the deed, appellees served notice on the appellant and also on the caretaker in possession of the property, notifying them to vacate said property immediately, stating that they had purchased said property and intended to enter upon immediate possession.

The appellant filed this suit in the Garland Chancery Court to cancel appellees' deed as a cloud on her title. A demurrer was filed, alleging that the complaint did not state facts sufficient to constitute a cause of action, and, second, that the complaint does not set forth specifically facts to show the invalidity of appellees' deed, and third, that there is no strength of title shown in the appellant that would entitle her to relief.

The court heard argument on the demurrer, and made an order that the demurrer should be treated as a motion to make the complaint more definite and certain, and sustained it as such motion, and gave appellant 15 days in which to amend her complaint. This hearing and order were on August 25, 1933. Thereafter the court entered another order striking out that part of the order of August 25th which treated the demurrer as a motion to make the complaint more definite and certain, and struck out that portion giving appellant 15 days in which to answer.

On October 10, 1933, the court made an order sustaining the demurrer and dismissing the complaint. The complaint seems to have been reinstated, and on December 15, 1933, the appellees filed motion to dismiss for noncompliance with §§ 3708 and 3709 of Crawford & Moses' Digest. This motion was by the court sustained, and the complaint was dismissed and appellant denied the right to amend.

There were several motions, and an injunction granted and receiver appointed, but it is not necessary to discuss them here. The court finally sustained the demurrer because appellant had not complied with § 3708 of Crawford & Moses' Digest.

The above section requires the affidavit of tender of taxes only when the suit is for the recovery of lands or for the possession thereof. This suit was not a suit for the recovery of lands, nor a suit for the possession of lands. The appellant was in possession, and the appellees had never acquired possession. If the purchaser of a tax title is in possession of lands, there would be some reason for tendering the taxes and filing the affidavit before any writ was issued. He should be given the opportunity to accept the taxes and deliver the possession. But where the original owner is in possession and the suit is merely to remove a cloud from his title, § 3708 has no application. Of course the original owner is required to tender and pay the taxes, but he is not required to file an affidavit of tender.

This court, in referring to the above section, said: "The effect of that section is that, before any suit for the

recovery of lands held by virtue of a purchase at tax sale, and in some other cases, the claimant shall file, in the office of the clerk of the proper court, an affidavit to the effect that he had tendered the full amount of all taxes and costs paid on account of said lands, with interest on the same at the rate of 100 per cent. upon the amount first paid for said lands, and 25 per cent. upon all taxes, and costs paid thereafter, etc. This is neither an action for the recovery nor possession of lands. The provisions of the law are severe, and will not be extended beyond the letter." *Hare* v. *Carnall,* 39 Ark. 196.

"If such an objection could in suits of the nature of the present, the object of which is not the recovery of the land or the possession thereof, but simply to clear the title from doubt and clouds, in any manner avail, it certainly could not by demurrer, which will only lie for objections apparent upon the face of the complaint, either from the matter inserted or omitted therein, or from defects in the frame or form thereof. But it will plainly be seen, by a reference to the statute, that such an affidavit is required only in actions for the recovery of the land, or for the possession thereof." *Chaplin* v. *Holmes,* 27 Ark. 414; *Burgett* v. *McCray,* 61 Ark. 456, 33 S. W. 639; *Hodges* v. *Harkleroad* 74 Ark. 343, 85 S. W. 779.

Since this is not a suit for the recovery of land nor for the possession thereof, the affidavit provided for in § 3708 was not required, and the court erred in sustaining the demurrer and dismissing the complaint.

The decree of the chancery court is reversed, and the cause remanded with directions to overrule the demurrer and proceed with the trial of the case.

McCarty *v.* Cook.

4-3472.

Opinion delivered May 21, 1934.

C. V. Holloway, for appellants.

Price Shofner, for appellee.

McHaney, J. Appellee sued appellants, McCarty and wife, in replevin, for the recovery of an automobile or its value which was laid at $250, in the justice of the peace court, on May 25, 1931. Proper affidavit and bond were filed to obtain immediate possession of the automobile. Retaining bond was filed in apt time with the other appellants as sureties. On June 15, 1931, on motion of appellants, the case was removed to the common pleas court, where, on December 21, 1931, judgment was rendered in favor of appellee for the possession of the car or its value in the sum of $154.13. The car was delivered to appellee December 29, 1931, in a practically worthless condition, and same was sold by appellee to J. M. McKinny, a used car and junk dealer for $20, the best price he could get, which amount was credited on the judgment. This sale was not advertised, nor was McCarty notified thereof. There is no dispute regarding the condition of the car or its value when delivered to appellee who refused to accept delivery in that condition in settlement of the judgment. On June 19, 1933, appellants filed a motion in the court of common pleas to require appellee to satisfy the judgment, which motion was granted and an appeal taken to the circuit court where judgment was entered reversing the lower court and reinstating the execution issued on the judgment, and appellants bring the case here for review.

The question is: Can appellant McCarty wrongfully retain possession of the property pending decision as to title, so use it during such time as to practically destroy its value, then satisfy the judgment against him for the property or its value by delivering the property in its damaged condition? We have answered this question in the negative many times in recent cases. *Conlee* v. *Love,* 178 Ark. 238, 10 S. W. (2d) 372; *Commercial Investment Trust* v. *Forman,* 178 Ark. 695, 10 S. W. (2d) 897; *Love* v. *Hoff,* 179 Ark. 381, 16 S. W. (2d) 12; *Commercial Investment Trust* v. *Miles,* 181 Ark. 77, 25 S. W. (2d) 3. The rule is thus stated in the case last cited: "The view we have adopted and the conclusions reached by us bring the case squarely within the principles announced in *Commercial Investment Trust* v. *Forman,* 178 Ark. 695, 10 S. W. (2d) 897, where it was held that, in cases like this, the seller or holder of the installment notes in a conditional sales contract was entitled to judgment against the sureties on the retaining bond as well as against the buyer for the balance due on the sales contract, against which the present value of the car should be credited. In that case it was held that where the buyer, in an action of replevin to recover an automobile sold with reservation of title, gave bond and retained possession of the car until it was worn out and then returned it to plaintiff the latter was entitled to judgment against defendant and the sureties on his bond for the balance due under the sales contract, against which the present value of the car should be credited.

"But for the retaining bond, the car would have been returned to the seller when the suit was brought, at which time value as found by the court was equal to the balance due on it. By virtue of the execution of the retaining bond, the buyer was enabled to keep the car until it was worn out, and he cannot now satisfy the judgment by returning a worthless car. The court in its judgment in the replevin suit fixed the value of the car as it was at the time the plaintiff was entitled to recover possession of it, which was at the commencement of the suit; and the defendant could not keep and use the car

until it had become worthless, and then return it in satisfaction of the judgment.

"This principle was also recognized in *Love* v. *Hoff*, 179 Ark. 381, 16 S. W. (2d) 12, and applied in a case where the plaintiff in the replevin suit had kept possession of an automobile and had used it until it had become worn out. The court said the plaintiff in execution was entitled to have restored an automobile of undepreciated value, and that the plaintiff in the replevin suit could not satisfy a judgment against himself by returning a depreciated car in satisfaction of the judgment."

The value of the car as fixed in the judgment referred to the value at the time suit was brought, and no doubt represented the balance due under a conditional sales contract, and this amount is the proper measure of its value in the absence of proof to the contrary. *Commercial Investment Trust* v. *Miles, supra.* Therefore the value of the car as fixed by the common pleas court referred to its value at the beginning of the action and not seven months later when the case was tried.

We think the testimony in the circuit court as to the value of the car at date of delivery to appellee was proper, and that the proceeding in the circuit court was not a collateral attack on the judgment of the common pleas court as contended by appellants. It was a direct attack by appeal on the order of the common pleas court directing the satisfaction of the original judgment entered in December, 1931. No attack is made on the original judgment.

No error appearing in the record, the judgment of the circuit court is affirmed.

STATE EX REL. BAILEY *v.* TAYLOR.

4-3432

Opinion delivered May 21, 1934.

Carl E. Bailey and *Lawrence C. Auten,* for appellant.

Coleman & Riddick, for appellee.

BUTLER, J. The State, on relation of the prosecuting attorney of the sixth judicial circuit, brought this action against Walter E. Taylor as disbursing agent for the State Banking Department, and the Massachusetts Bonding & Insurance Company as surety on the bond of Walter E. Taylor as such disbursing agent. Both Walter E. Taylor and the defendant surety company filed their several and separate demurrers, that of Walter E. Taylor being overruled, and that of the defendant surety company sustained. The plaintiff elected to stand on its complaint, and a decree was entered dismissing the same, from which this appeal is prosecuted.

The complaint alleged that Taylor was the disbursing agent of the State Banking Department, and, as such, executed a bond with the Massachusetts Bonding & Insurance Company as surety; that among the duties of the Bank Commissioner was the supervision of building and loan associations; that the salary of the Bank Commissioner under act No. 46 of the Acts of 1927 was fixed at $5,000 per year, and that by act No. 128 of 1929 an additional salary of $1,000 per annum was allowed him for the additional duties entailed in supervising building and loan associations; that the General Assembly for

each of the years 1929 and 1931 appropriated the sum of $5,000 per annum to pay the annual salary of the Bank Commissioner and an additional salary for said Bank Commissioner in the sum of $1,000 for each of said years as provided by act No. 128 of 1929 aforesaid; that the bond executed provided for the payment by Taylor as principal and the surety company of $5,000 upon the following conditions: "The conditions of the above bond is such that if the said Walter E. Taylor, as such disbursing agent, or any one he may designate to act for him, shall well, truly and faithfully disburse appropriations of said office according to laws governing same and especially act 781 of the 1923 General Assembly. At the expiration of his term of office he shall render unto his successor in office a correct account of all sums of money, books, goods, valuables and other property which shall be in his possession as such disbursing agent of said office. And shall further pay and deliver to his successor in office, or any other person authorized to receive same, all balances, sums of money, books, goods, valuables and other property, which shall be in his possession and due by him, then the above obligation shall be null and void; else the same to remain in full force and virtue."

The complaint further alleged that the Bank Commissioner, as disbursing agent, procured warrants on vouchers issued by him for the salary of $5,000 per annum as Bank Commissioner and also for the $1,000 per annum additional salary for his services in relation to building and loan associations; that the amounts so drawn on the last-named salary from and after the execution of the bond amounted to $2,125; that the disbursement of said sum to the said Taylor was unauthorized and unlawful because the act granting additional salary was in violation of § 23 of art. 19 of the Constitution and therefore void.

The statute under which the aforesaid bond was required and given is act No. 781 of the Acts of 1923. Section 3 of said act provides: "Each disbursing agent shall be required to give bond in such a manner as shall be deemed necessary by the Auditor of State, and said bond shall be protection to the State or any of its creditors in

case of losses sustained by reason of the acts of said person." And § 4 of said act provides that: "Any such person (disbursing agent) incurring an obligation which cannot be paid because of no appropriation or the lack of sufficient appropriation shall be liable on his bond as hereinbefore mentioned for the amount of such obligation."

It is the contention of the appellant that, when these sections are read into the bond, it would cover the alleged unlawful payment of additional compensation by the disbursing agent to any employee of his department, and especially where the employee and disbursing agent are one and the same. The surety in this case was a corporation conducting its business of writing fidelity bonds for a profit, and, as it is such, it is insisted that the rule *strictissimi juris* has no application, but that its contracts of surety will be construed most strongly against it and in favor of the indemnity which the surety has reasonable grounds to expect, and that, where the bond is open to two constructions, one of which will support, and the other defeat, the surety's liability, that which will support liability will be adopted. There can be no doubt of the correctness of this rule, but, when the allegation of the complaint and the provisions of the bond are considered, it appears that in any view of the case there was no violation of the conditions of the bond, or the insurance company liable for any indemnity which it had reasonable grounds to expect from the language of the act and bond. It appears that the Legislature regularly passed acts appropriating the money which the disbursing agent disbursed to himself which is sought to be recovered in this action. The obligation which the surety undertook was to indemnify the State where money was disbursed for which there had been no appropriation or a lack of appropriation and the losses referred to in § 3, *supra,* necessarily relate to those incurred by reason of the unlawful acts of the disbursing agent in incurring an obligation where no sufficient appropriation was made therefor.

The Legislature in 1923 passed the act requiring the bond and stating its conditions. Afterwards, by act No.

128 of the Acts of 1929, it authorized the expenditures which are complained of here. The funds were disbursed by the disbursing agent in accordance with the appropriations made by the Legislature, and this is all that the insurance company, by its bond, undertook that he should do.

It follows that the trial court correctly sustained the demurrer of the Massachusetts Bonding & Insurance Company, and its judgment is hereby affirmed.

JOHNSON, C. J., (dissenting). The majority opinion presents the anomalous situation of the principal being held liable for unlawful and unauthorized acts during the paid life of his surety bond and his paid surety being determined not liable for the same expenditures.

Taylor, who was held liable by the trial court, was the duly qualified and acting Bank Commissioner of this State, and as such executed a bond which was signed by appellee surety company in the principal sum of $5,000, conditioned that Taylor "shall well, truly and faithfully disburse appropriations of said office according to laws governing same, etc." Apparently, Taylor unlawfully withdrew, as salary, the aggregate sum of $2,125 during the life of appellee's suretyship; therefore should be held liable therefor.

The majority holding is anomalous in that it holds that the act of the Legislature appropriating $1,000 per annum as extra salary to Taylor as supervisor of building and loan associations is void, when applied to Taylor, being prohibited by § 23, article 19, of the Constitution of 1874 as follows:

"No officer of this State, nor of any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites more than five thousand dollars net profits per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation;" and yet it determines that the surety is not liable because of the protection of said appropriation act. Just how or why an act of the Legislature may be unconstitutional and void as to one person

and valid and binding as to others, is not pointed out in the opinion. My conception of the law is that an act of the Legislature which is determined to be unconstitutional and void is so even when applied to a paid surety company. Apparently Taylor cannot deny his liability for the withdrawals because the appropriation act awarding it is unconstitutional and void; he is in the same position he would have been had there been no appropriation act. *A fortiori* the surety company is likewise liable because the appropriation act is unconstitutional and void and can not be pleaded in defense or as lawful authority for such acts or in justification of such unlawful disbursements.

The crux of the majority opinion seems to be that, since § 4 of act 781 of 1923 provides for liability against the surety only when "no appropriation," has been made by the Legislature; that, when such appropriation is made, even though unconstitutional and void, it is full protection to the paid surety. No authority is cited in support of the holding thus stated. The majority overlooked the fact that there has been no valid appropriation in this case; therefore "no appropriation." The Legislature of this State is without power or authority to make such appropriation because in conflict with the constitutional provision heretofore quoted. The status is just this: This money was disbursed by and to Taylor without a valid appropriation authorizing it. Therefore, there is "no appropriation" in the eyes of the law. It is an elementary principle of law that ignorance thereof excuses no man, and I know of no authority to the contrary. Until now, it has had full application by this court. It ought to be now said that ignorance of the law excuses no man or corporation. Under this view the Surety Company knew these disbursements were being made by and to Taylor without valid appropriation therefor. It is almost the universal rule that an unconstitutional statute is no law and is wholly void. *Cohn* v. *Virginia,* 6 Wheat. 264. And that in legal contemplation it as ineffectual as if it had never been passed. *Louisiana* v. *Pillsbury,* 105 U. S. 78. And such unconstitutional statute affords no protection to any one. *Huntington* v.

Worthen, 120 U. S. 97, 7 S. Ct. 469. And no courts are bound to enforce it. *United States* v. *Realty Co.,* 163 U. S. 427, 16 S. Ct. 1120. For authority generally on the subject, see 6 R. C. L., page 117.

In conformity to the law, this case should be reversed and remanded.

I am authorized to say Mr. Justice HUMPHREYS agrees with the views here expressed.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* FELTON.

4-3475.

Opinion delivered May 28, 1934.

D. S. Plummer and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Daggett & Daggett, for appellee.

JOHNSON, C. J. On the threshold of this case we are confronted with the contention, advanced by appellee, that appellant's contentions, as evidenced in the motion for new trial, cannot here be considered for the reason

that said motion was filed without the time given by § 1314, Crawford & Moses' Digest, of the laws of Arkansas. Although this contention presents a very serious question, it relates to this case only. Therefore we pretermit consideration or determination thereof, because the case must be affirmed on its merits.

In 1924 appellant issued and delivered its contract of insurance to one William F. Felton, by the terms of which it agreed to pay the sum of $5,000 in the event of death and, in addition thereto, agreed:

"TOTAL AND PERMANENT DISABILITY

"(1) Disability benefits before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the insured became totally and permanently disabled by bodily injury or disease, after this policy became effective and before its anniversary upon which the insured's age at nearest birthday is 60 years, in which event the society will grant the following benefits:

"(a) Waive payment of all premiums payable upon this policy falling due after receipt of such proof and during the continuance of such total and permanent disability; and

"(b) Pay to the insured a monthly disability-annuity, as stated on the face hereof; the first payment to be payable upon receipt of due proof of such disability and subsequent payments monthly thereafter during the continuance of such total and permanent disability, provided, that, if this policy is continued under the endowment conversion option, the disability-annuity shall continue only during such total and permanent disability until the maturity of the endowment."

The insured died on March 19, 1933, and the death benefit, as provided in said contract, has been paid. The controversy here arises under the total and permanent disability clauses heretofore quoted.

It is admitted by appellant that William F. Felton, the insured, became totally and permanently disabled, in the purview of the contract of insurance, in May, 1930.

Therefore there is no contention of no liability on this account.

However, it is earnestly contended by appellant that liability should be restricted to the sum of $48.06, same being the amount which accrued after the filing of proof of total and permanent disability, which occurred on March 10, 1933, and the death of the insured.

By invitation of the plaintiff in the court below, and appellee here, the case was tried upon the theory that the insured became mentally incompetent or insane in May, 1930, upon the occurrence of total and permanent disability, and was therefore excused from giving notice or filing proof of such disability with the insurer during the period of such disability. Much evidence was adduced upon this branch of the case. Even so, appellant contended below and contends here that the evidence offered was not sufficient to warrant submission to the jury of the issue of insured's mental condition. The evidence tended to establish the following facts:

That prior to May, 1930, insured was strong and alert in body and of robust health; that he was mentally sound and alert; that suddenly he was beset with vertigo, blindness, dizzy spells and frequent lapses of consciousness which continued up to his death; that he ignored advice of attending physicians to desist from all labor, and, on the contrary, continued his efforts though resulting in a waste of time and energy; that he assumed an attitude of coolness and indifference towards his family which had not existed prior to May, 1930; that he advised his son that his mind was impaired and directed him to remove and hide the firearms from their accustomed places; that he could not carry on an intelligent conversation, in that he would suddenly leave the subject and jump to another; that he seriously objected to his son submitting his policies of insurance to an attorney for legal advice because he feared that it might destroy his insurance. The attending physician testified, in effect, that during the period from May, 1930, up to the death of the insured his mind was confused, and when asked: "Q. Would you say from your association with Mr. Felton, and your

treatment and observation of him, that the mental impairment was such that he could not transact the ordinary affairs of life?" stated: "A. I don't believe I could answer that question yes or no, because the question of his judgment and the question of his reason would come into it; he could transact it but he might transact it wrong."

On the evidence thus adduced, appellant requested a directed verdict in its behalf, which was refused by the trial court, and thereupon the cause was submitted to the jury under the following instructions. For appellee, request No. 2, as follows: "If you find from a preponderance of the evidence that during the period between May, 1930, and the date on which the said William F. Felton died, he was, by reason of disease and illness, mentally impaired to the extent that he was incapable of carrying on the ordinary affairs of life; and was incapable mentally of such sustained effort as would enable him to comprehend such affairs as needed his attention, then you are instructed that his failure to give the defendant notice of such disability would not bar the right of the plaintiff to recover in this action."

For appellant, the following requests:

"No. 3A. You are instructed that proof of the inability to perform the ordinary affairs of life does not entitle the plaintiff to recover. In order to recover more than the amount admitted to be due, the plaintiff must show that the insured did not have mentality enough to understand the ordinary things and affairs of life.

"No. 4. If you find from the evidence that in May, 1930, the insured, William F. Felton, became disabled by physical disease, but that his mind was not continuously impaired from that date until the time of his death, but on the contrary he had during a substantial portion of that time sufficient mental capacity to understand the ordinary affairs of his life, then he would not be entitled to recover disability benefits except for the month which intervened between the receipt of the proofs of disability and his death.

"No. 5. You are instructed that an intermittent inability to comprehend the ordinary affairs of life would not excuse the insured from furnishing proofs of disability. If at intervals he had control of his faculties for considerable periods to such an extent that he could understand the ordinary affairs of life, then the plaintiff would be entitled to recover only for the period which commenced with the time when he became continuously unable to comprehend the ordinary affairs of life.

"No. 7. You are instructed that the plaintiff would not be entitled to recover the disability benefits for the period during which he was capable of exercising the sustained mental effort which would enable him to understand and comprehend the ordinary affairs of life. If he did not reach this stage of mental impairment until sometime subsequent to May 30, 1930, then your verdict should in no event be for an amount which would exceed the amount of the premiums paid, if any, the disability benefits which accrued during such period of mental impairment as above described."

In reference to the status of mentality, which would excuse an insured from giving notice to the insurer or filing proof of such total and permanent disability, we stated the rule in *Pfeiffer* v. *Missouri State Life Ins. Co.*, 174 Ark. 783, 297 S. W. 847, as follows:

"He must have been able to carry on the ordinary affairs of life, and this meant that his mind must be capable of sustained effort, so that he would comprehend such affairs as needed his attention, and not merely that he might talk with seeming intelligence upon a subject brought directly to his attention by some one."

Appellee's requested instruction No. 2 conformed to the rule as announced above, and we think it is a correct guide in cases of similar import.

Neither can we agree that the evidence was not sufficient to submit the mental condition of the insured to the jury. Under the settled practice in this court, it is our duty to sustain the jury's findings when supported by substantial evidence. When thus considered, we cannot

say that the verdict of the jury is without substantial evidence to support it.

The contention that the instructions given upon request of appellant are in conflict with those given upon request of appellee is likewise without merit. Appellee's instruction No. 2 is easily harmonized with appellee's requests 3A, 4, 5 and 7. These instructions, when read together, conform to previous decisions of this court even though they present different theories as reflected by the evidence. Lastly, it is contended that appellee's instruction No. 3 is in conflict with appellant's requested instruction No. 7 heretofore quoted. Appellee's requested instruction No. 3 is as follows:

"If you find for the plaintiff under instruction No. 2, you will find a verdict for disability benefits at the rate of $48.06 per month from June, 1930, to March, 1933, inclusive, a period of thirty-three (33) months, an aggregate sum of $1,585.98; and you will also find a verdict in favor of plaintiff for premiums paid by plaintiff's intestate on August 14, 1932, and February 14, 1933, in the aggregate sum of $1,222.40."

Viewed from appellee's theory of the case, this instruction was a correct declaration of law, and, conceding that it is in conflict with appellant's instruction No. 7, it avails appellant nothing, because, if error, it was invited. *St. L.-S. F. Ry. Co.* v. *Cole,* 174 Ark. 10, 294 S. W. 357.

Moreover, if we are in error in all the conclusions heretofore stated, this case must be affirmed for still another reason. Appellant admits that William F. Felton, the insured, became totally and permanently disabled in the purview of the contract of insurance in May, 1930, and that this total and permanent disability continued until his death in March, 1933.

We have repeatedly held, in cases arising under contracts of insurance not dissimilar to the one here involved, that liability against the insurer and in favor of the insured attaches and comes into being upon the happening of total and permanent disability. *Smith* v. *Mutual Life Ins. Co.,* 188 Ark. 1111, 69 S. W. (2d) 874.

Also *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335. See especially *Missouri State Life Ins. Co.* v. *Case, ante* p. 223, wherein all our previous decisions are reviewed on this subject. Under the plain terms of the contract here under consideration, recovery is not limited or postponed to or by any certain contingency, as was the contract in *Smith* v. *Mutual Life Ins. Co., supra,* and other cases there cited. In the contract here under consideration liability attached in May, 1930. The requirement for proof of loss or notice under this contract, being a condition subsequent, suit might be maintained for the liability at any time until barred by the statute of limitations. *Ætna Life Ins. Co.* v. *Davis, supra; Missouri State Life Ins. Co.* v. *Foster,* 188 Ark. 1116, 69 S. W. (2d) 869. Under the view as thus stated, the trial court might have directed a verdict in favor of appellee for the amount sued for.

The judgment is affirmed.

STATE *v.* NEIL.

Crim. 3872

Opinion delivered May 28, 1934.

Hal L. Norwood, Attorney General, and *John W. Nance,* for appellant.

Blansett & Holyfield and *Duty & Duty,* for appellee.

SMITH, J. Appellee was placed on trial, under an indictment charging him with the commission of the crime of grand larceny, alleged to have been committed by

stealing an electric lighting plant, the property of the National Old Line Life Insurance Company. The theory upon which the insurance company claimed title to the articles alleged to have been stolen was that they were a part of the realty, the title to which had been secured through purchase under a decree foreclosing a mortgage upon which land the light plant was located. The mortgage described only the real estate, and contained no reference to the light plant.

At the conclusion of the testimony, the jury returned a verdict of not guilty under the direction of the court, and it is said that the reasons inducing this action were: (1) that the property alleged to have been stolen was not annexed to the realty in such a way as to become a part of it and subject to the lien held by the mortgagee, and (2) that, if said property was so annexed to the realty as to become a part of it, it was not the subject of larceny. It is apparent that the decision of these questions would involve a consideration of questions of fact. The decision of these interesting questions is foreclosed because they are not properly presented for our review.

A motion for a new trial was filed on the ground "That the court erred in its judgment in directing the jury to return a verdict in favor of the defendant." It appears, however, that this motion was not pressed to a ruling thereon, and that the court adjourned without disposing of the motion.

A motion for a new trial is essential to the review of an alleged error which does not appear upon the face of the record, and is essential in this case to a review of the action of the court in directing the jury to return a verdict of not guilty. The purpose of a motion for a new trial is to call the alleged errors occurring during the trial to the attention of the court, and to afford an opportunity for correction by granting a new trial if the errors may not otherwise be corrected. *Nordin* v. *State,* 143 Ark. 364, 220 S. W. 473.

In the case of *Incorporated Town of Corning* v. *Thompson,* 113 Ark. 237, 168 S. W. 128, a judgment was entered imposing a fine upon the defendant pursuant to

the verdict of the jury returned in that case. A motion for a new trial was filed, but the court adjourned without disposing of the motion, and, at the succeeding term of the court, the motion was sustained, upon the ground that there was not sufficient evidence to support it, and the judgment was set aside and the defendant discharged. An appeal was duly prosecuted and that judgment was reversed. Section 2421, Kirby's Digest, which now appears as § 3218, Crawford & Moses' Digest, was quoted. That section reads as follows: "The application for a new trial must be made at the same time (term) at which the verdict is rendered unless the judgment is postponed to another term, in which case it may be made any time before judgment." It was there said that this statute contemplates that the motion for a new trial should be made at the same term of the court at which the verdict was rendered, and should be acted upon at that term unless the rendition of the judgment is postponed to another term. It was further said that, inasmuch as the judgment was entered at the term of court at which the trial was had, and the term of court had adjourned without setting the judgment aside, the judgment became final, as the order of the court continuing the cause after the motion for a new trial was filed did not have the effect of setting aside the judgment. Further construing this statute, it was there said that, when the motion for a new trial was filed, the court might have postponed entry of the judgment until the next term of the court, and have continued hearing of the motion, which action would have operated as a continuance of the cause, in which event the motion could have been passed on at the subsequent term, but as this was not done, the defendant lost the benefit of his motion when the term of the court, at which the trial was had and the judgment entered, was adjourned until court in course. See also *Thomas* v. *State,* 136 Ark. 290, 206 S. W. 435; *Collatt* v. *State,* 165 Ark. 136, 262 S. W. 990; *American Ins. Co.* v. *Dutton,* 183 Ark. 595, 37 S. W. (2d) 875.

The motion for a new trial in this cause was not acted upon, nor was the judgment set aside at the term

at which it was rendered. It therefore became final with the adjournment of the term; and as no error appears upon the face of the record, the judgment must be affirmed, and it is so ordered.

EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES *v.* FELTON.

4-3476

Opinion delivered May 28, 1934.

D. S. Plummer and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Daggett & Daggett, for appellee.

HUMPHREYS, J. Appellee instituted this suit on the 29th day of June, 1933, against appellant in the circuit court of Lee County to recover $3,040.64 on a life insurance policy issued by appellant to her husband in October, 1924, in which she was the beneficiary, together with the statutory penalty and attorney's fee provided by § 6155 of Crawford & Moses' Digest for refusal to pay same.

The cause was submitted to the court, sitting as a jury, upon the pleadings and testimony adduced, which resulted in a judgment against appellant for $3,040.64, the amount admitted to be due after deducting the loan

on the policy, and the sum of $364.80 statutory penalty, being 12 per cent. of the amount recovered, and $350 as attorney's fee, from which is this appeal.

Appellant has paid in partial satisfaction of the judgment $3,108.72, being the amount admitted to be due on the policy, together with interest thereon, so the only question presented by this appeal is whether appellee was entitled to recover the statutory penalty and attorney's fee.

The record reflects the facts to be that the policy sued upon provides an indemnity of $5,000 payable to the beneficiary in case of the death of the insured, William F. Felton, and for an indemnity payable to the insured in case of his disability; that, prior to his death, he presented a claim for about $3,000 to the appellant under a disability benefit in the policy, which was being investigated at the time of his death; that, upon proof being made of his death, appellant admitted its liability on that account and offered to pay same to appellee if she would surrender the policy; that appellee refused to surrender the policy until her claim on account of the disability of her husband was allowed or settled, but offered to receive the amount tendered and execute an acquittance on account of the death claim; that appellant refused to accept the acquittance and pay the death claim, but demanded a surrender of the policy before it would pay the amount admitted to be due; that the policy provides that appellant "agrees to pay at its home office in the city of New York $5,000 to his wife, Sarah E. Felton, beneficiary, with the right of the insured to change the beneficiary or assign this policy upon receipt of due proof of death of the insured, provided premiums have been duly paid and this policy is then in force and is then surrendered properly released." Section 6155 of Crawford & Moses' Digest, relative to a failure to pay insurance claims, is as follows:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall

be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected."

The purpose of this suit was to force the payment of the admitted death claim and as an incident thereto the recovery of a penalty and attorney's fee for failure to pay same. The right to maintain the suit for the recovery of the death claim depends upon a correct construction of the clause in the policy providing for a surrender of the policy upon payment of the claim. The policy contains two contracts, one covering the death of the insured, and the other covering his disability. Where the disability of the insured is a matter in dispute and the subject of an existing claim at the time of his death, to require the surrender of the policy as a condition precedent to the payment of the admitted death claim would take from the beneficiary or claimant the evidence of the disability contract or the instrument upon which to base a suit for the recovery on account of the disability. It seems to us in such a contingency the only reasonable construction to give the policy surrender clause is that the surrender or delivery of the policy must be postponed until the claim for disability is adjusted or paid. Of course, there could be no reason for withholding the policy if no disability claim had arisen prior to the insured's death, but where such a claim exists, there is good reason for retaining the policy, and the clause should be construed in accord with reason. The insurer could suffer no injury by paying the admitted death claim and taking a receipt therefor pending the adjustment of the disability claim. According to the record, the beneficiary offered to execute such a receipt upon the payment of the death claim. Appellant embraced both contracts in the same policy or instrument, and, if inconvenience results therefrom, it (the insurer) should bear the burden of such inconvenience.

The right existed to bring suit to enforce payment of the death claim under the circumstances without surrender of the policy, so the 12 per cent. penalty followed the judgment. We cannot reduce it. The amount of the attorney's fee is not fixed by the statute, but is dependent upon the value of the services rendered. This suit involved the question of enforcing the payment of an admitted liability and not that of a disputed liability, and for that reason we have reduced the fee allowed to $175, and the judgment, as modified, is affirmed.

BUTLER, J., dissents.

HANNA *v.* MAGEE.

4-3364, 4-3469

Opinion delivered May 28, 1934.

J. D. Cook, Sr., J. D. Cook, Jr., and *B. E. Carter,* for appellants.

Shaver, Shaver & Williams, for appellees.

MEHAFFY, J. J. O. Magee died on July 17, 1932. The record shows that in 1918 J. O. Magee made a will, which was left with the bank in Texarkana, Arkansas.

On January 23, 1924, J. O. Magee made another will. This will made in 1924 was written by Judge Pratt P. Bacon, who was at that time practicing law in Texarkana, Arkansas. At Judge Bacon's suggestion, Mr. Magee gave him $1 to pay to the clerk and the will was deposited with the county clerk of Miller County.

After the death of J. O. Magee, this will was probated and F. F. Magee, the executor named in the will, took charge of all the property of the deceased. F. F. Magee was a brother of J. O. Magee. On November 18, 1932, F. F. Magee died, and his widow, Mallie Magee, was appointed administratrix of the estate of J. O. Magee.

The will made in 1924 was identical with the will made in 1918, except the will in 1918 did not mention the brothers and sisters of J. O. Magee, and the will of 1924 gave them $1 each. All of the estate of J. O. Magee, except $1 each to his brothers and sisters, was bequeathed to F. F. Magee. In the will of 1918, all the property was bequeathed to F. F. Magee.

After the death of F. F. Magee, on April 21, 1933, the appellants filed suit in the Miller Chancery Court, alleging that prior to the death of J. O. Magee, on or about the last day of March or the first day of April, 1932, he executed his last and final will and testament, and by its terms revoked all former wills; and that said will, alleged to have been executed by J. O. Magee, had been lost, destroyed or suppressed, and that a former revoked will had been probated. It was alleged that F. F. Magee, a brother of J. O. Magee, was named as practically the sole beneficiary in the will alleged to have been revoked; that he had caused the same to be pro-

bated, and letters testamentary issued to himself, by virtue of which he took possession of all the property of J. O. Magee, deceased; that either Fleet F. Magee, who had since died, suppressed, lost or destroyed said will during his lifetime, or the same at his death fell into the hands of his successor in administration, Mallie Magee, or into her hands as administratrix of the estate of F. F. Magee, and said administratrix had suppressed, lost or destroyed said will; that said last will was written entirely in the handwriting of J. O. Magee, and was declared by him to be his last will and testament, and the written terms thereof revoked any and all former wills made by him.

The complaint then set out the provisions of said lost, suppressed or destroyed will. It further alleged that Mallie Magee was appointed administratrix of the estate of J. O. Magee, and also administratrix of the estate of Fleet F. Magee; that Mallie Magee as administratrix has made no report of the property that came into her hands, and that she was at that time asking for an order of distribution. It was also alleged that the estate was of the value of $120,000.

The complaint prayed that they be permitted to prove the existence and possession of said will and contents of same, and the legal execution; that said lost will be restored and caused to be probated, and that the will already probated be canceled and set aside. The appellees filed answer denying all the material allegations in the complaint. The appellants prosecuted an appeal from the probate court to the Miller Circuit Court, and there filed the complaint, which was substantially the same as the complaint in the chancery court.

On May 16, 1933, the chancery court heard the case in the suit to restore the lost will, and dismissed the complaint for want of equity. On November 29, 1933, the case was tried in the circuit court, and judgment entered admitting the will executed in 1924 to probate as the last will and testament of J. O. Magee, and approving and confirming the judgment of the probate court admitting said will to probate. The chancery case is here

as No. 3364 and the appeal from the circuit court is here as No. 3469. The two cases are consolidated and briefed together.

It is admitted that the will probated, the one executed in 1924, was duly made and published, but appellants contend that it was revoked by a later will, which is alleged to have been lost, destroyed or suppressed.

Mrs. Will Green testified that she had known Mr. J. O. Magee the last six years of his life; that she and her husband lived about one-half mile from Magee's house; that Magee talked to her about making a will several times before he made it; that there were some he felt he should leave things to; that she and her husband witnessed the will made some time the last of March or first of April; that Jake Davis, a negro boy, came to their house and took them over to Mr. Magee's, and he said he wanted them to witness a will for him; he had not prepared the will at the time; he prepared it in the presence of witness and her husband; they went to his house about ten o'clock, and he sat down and got some paper and said he had a general form to go by; he said that the donations and gifts he was going to make he had on a slip of paper; said he had made two former wills, but this one revoked all other wills; the will said J. O. Magee declared it to be his last will and testament, and something about sane and disposing mind; said he revoked all former wills; this was in the will; that he wanted Paralee Brown to have $500 and 60 acres of land; gave a description of the land, but witness does not remember it; he gave I. D. Miller $500 and Jake Davis $250 and any car he would have at his death; and Mrs. Bettie Dodson at Garland $5,000 and a brick store building; witness does not know the description of the property, but testified that he gave it to Bettie Dodson before the will was made; that he gave to Fleet Magee $1, and a $5,000 life insurance policy and forgave Fleet Magee all his debts; he said he wanted the balance of his property to be divided among his brothers and sisters; said he wanted it distributed according to the laws of inheritance; that Magee signed the will and read it to

witness and Mr. Green; there was a little paragraph after he signed it, and witness and her husband signed it at his request and in his presence and in the presence of each other; witness read it before she signed it; his mental condition was normal; the will was dated at the top; she saw the will again on Sunday before Magee went to Texarkana sick, and read the will at that time; Magee took the will out of a wallet where he kept it in the right-hand drawer of a dresser locked; he kept money and other papers there; some insurance and receipts and some notes; he wrote the will with an indelible pencil; made his will in March or April, 1932, using large sheets of heavy writing paper; it took one and one-half sheets; this was the first will witness ever saw; no one was present except Magee, witness and her husband; she does not think her husband read the will over; she said Magee told them he had made two other wills; she remembers that because she asked him; his mental condition was all right; she testified that the occasion of Magee's showing her the will was, she asked him about some notes he had of theirs; she asked Magee to let her see their notes, and he did, and it was then she saw the will again and read it.

Will Green, husband of Mrs. Will Green, testified to substantially the same facts as Mrs. Green about the writing and the bequests and the signing of the will. He never saw the will again; he testified that he read the will and just signed on one page, the last one; this was the only will witness ever saw or had anything to do with.

Several witnesses testified that J. O. Magee, during his lifetime, told them he had made a will.

Numbers of witnesses testified for the appellees that Magee had talked to them during his lifetime and told them that he intended for his brother, Fleet Magee, to have all of his property.

Judge Pratt Bacon testified that he had known J. O. Magee and Fleet Magee all their lives, and had represented them both for probably 25 years. He prepared the will made in 1924. There was a prior will made in 1918. He testified that the will made in 1924 was the

last will made by J. O. Magee. Witness testified that the last time he saw Mr. Magee he was very sick, and that his right arm was paralyzed; he was there in February, 1932, and ate dinner there, and Magee could not use his right arm to cut his food; he fed himself with his left hand; the relation between J. O. Magee and his brother, Fleet, was the very best; it was always stated by him in all their conversations that at his death he wanted Fleet to have all his property; he testified that the Greens owed J. O. Magee $3,000 and it was evidenced by three notes; that he drew the notes and mortgage and kept them; turned them over to Fleet Magee after J. O. Magee died. Since the death of Fleet Magee, a payment has been made on the Green notes, and new notes have been made, and witness has possession of them; he prepared the papers; they never were down in the wallet of Jake Magee; were always in witness' possession until J. O. Magee died; one note was past due, and J. O. Magee had been talking about foreclosing when he became sick; that Mrs. Green, on February 17th, paid $250 cash and signed new notes; witness returned to Mrs. Green the $3,000 notes and mortgage; witness went down to the farm with Mrs. Magee after Fleet Magee died to get an inventory of the property; Paralee Brown had been Magee's cook for some time; witness asked her if she ever heard Mr. Magee say anything about the disposition of his property; she said Mr. Magee always said Fleet was to get it; she did not say anything about $500 and 60 acres of land; and when Will Green executed the notes, he did not say anything about having seen the draft of another will.

The undisputed evidence shows that J. O. Magee had a stroke of paralysis about December, 1931, and he died July 17, 1932. There is some conflict in the testimony as to his ability to write after the first stroke of paralysis. He could sign his name, but after the stroke he did not write checks nor other instruments, but, when necessary, he would sign his name. This condition continued up until May or June, at which time he arranged with the bank for Mrs. Mallie Magee to sign all his checks, because his handwriting became so bad that the bank would not pay checks signed by him.

Section 10,545 of Crawford & Moses' Digest reads 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 equivalent to one witness."

The Greens, husband and wife, testified that about the last of March or the first of April, 1932, J. O. Magee wrote with an indelible pencil his will, and that he signed it, and they signed it as witnesses. They then undertake to give the provisions of the will. Each of them testifies that this was the first will they ever saw; they have no knowledge about such instruments at all.

While there is some conflict in the eivdence as to J. O. Magee's ability to use his hand, we think the evidence as a whole clearly shows that he could not have written the will with all the provisions testified to by the Greens in the manner in which it is alleged to have been written. The preponderance of the evidence shows that Magee kept his valuable papers in a bank at Texarkana, and the Greens testify that he wrote this will, signed it and they signed it, and that he put it in a wallet and put it in a dresser drawer. The key to this drawer, as shown by the undisputed evidence, was kept by Magee's negro cook. After it is alleged that this will was written, nothing was said about it by either of the Greens, except one witness testified that the Greens told him immediately after it was done. Magee died, and the will that was in the custody of the county clerk was probated, Fleet Magee made executor, and no claim was made that a will had been made and lost until November 18, 1932. The suit was filed in chancery court April 12, 1933, more than a year after it is claimed the will was made.

There is a total lack of evidence that either Fleet or Mallie Magee destroyed the will. When all the circumstances are considered, we think the proof fails to establish that the will claimed to be lost was ever made.

"The policy of the law has thrown around last wills and testaments as many, if not more, shields to protect them from frauds, impositions and undue influence than any mode of conveyance known to the law. Can there be a doubt that, in cases like the present, where the object is to establish the contents of a paper which has been destroyed, as and for a last will, that policy does require the contents of such paper to be established by the clearest, the most conclusive, and satisfactory proof? We think not." *Allnutt* v. *Wood,* 176 Ark. 537, 3 S. W. (2d) 298.

"The burden of proof to establish the execution and contents of the lost will is upon the party who claims under it. The petitioner is usually required to prove the execution and the contents of the lost will by evidence which shall be strong, cogent and convincing. It is sometimes said that the evidence must be clear, full and satisfactory, though he is never required to produce evidence sufficient to remove all reasonable doubt from the mind of the court." 1 Underhill on Law of Evidence, § 275.

"To support a recovery upon or under a lost instrument, the evidence must be clear and satisfactory that the instrument once existed, but has been lost, and, though diligent search for it has been made, cannot be found, and as to its contents it must be proved in all its substantial parts." 8 Enc. of Ev., 359.

"On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and, while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear, and convincing." *Clark* v. *Turner,* 38 L. R. A. 433; 14 Enc. of Evidence, 465.

We think the circumstances introduced in evidence are sufficient to overcome the evidence of the Greens as to the execution of the will. The persons testifying to the execution of the will, as we have already said, had never seen a will before, knew nothing about instruments of that kind, and were called to testify about a year afterwards. We think the circumstances also show that

Magee could not have written the will in the manner in which it is alleged to have been written.

"The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions." *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 167, 46 S. W. (2d) 798; 23 C. J. 48.

There are other circumstances tending to disprove the execution of the will. All of the evidence shows the good feeling between the brothers, J. O. and Fleet Magee, and the evidence also shows that when J. O. Magee would come to Texarkana, he always stayed at Fleet Magee's house; that after it is alleged this will was executed he authorized the bank to accept checks signed by Mrs. Magee. He told many people that all of his property would go to his brother, Fleet Magee. He had made two wills, one in 1918 and one in 1924, and in each of them Fleet Magee was the beneficiary. We think therefore, when all the evidence is considered, that appellants have not established the execution of the will by that kind of evidence required under the law. Having reached the conclusion that the evidence fails to show the execution of the will that is alleged to have been lost, it becomes unnecessary to decide the other questions discussed by counsel.

The judgment of the circuit and decree of the chancery courts are affirmed.

W. P. Brown & Sons Lumber Company *v.* Oaties.

4-3473

Opinion delivered May 28, 1934.

W. W. Sharp, for appellant.
H. P. Smith, for appellee.

McHaney, J. Appellant owns and operates a narrow-gauge railroad in connection with its sawmill, over which it hauls logs to its mill. Appellee was employed by appellant as tong-hooker in loading logs onto its cars in the woods. On August 24, 1933, after having worked all day in the woods, appellee and the other employees were transported back to the mill on the log train. All the employees, except the engineer, fireman and appellee, left the train before reaching the mill, but these latter continued for the performance of other duties, one of which was to place the other engine at the water tank, spot it to go out next morning. The log cars were coupled to the engine and to each other by the link and pin system. After cutting the engine loose from the cars, appellee, as he says, under direction of the engineer, attempted to couple the live engine to the dead one for the purpose of spotting it as aforesaid. The engineer obeyed his lantern signal (darkness having overtaken them) to back up, but negligently failed to obey his stop signal when he attempted to make the coupling, and his hand was caught between the draw-bars of the two engines and severely injured. Trial resulted in a verdict and judgment in his favor for $500.

For a reversal of the judgment, appellant insists that there was no negligence on its part established; that

appellee himself was negligent; and that he was a mere volunteer at the time he was hurt. In other words, that the evidence is insufficient to support the verdict. We cannot agree, but are of the opinion that the evidence was sufficient to take the case to the jury, considering it in the light most favorable to appellee, as we must do. He had been working for appellant since 1925 as a tong-hooker, except the time the mill had not been in operation because of depressed business conditions. Operations had only recently been renewed. During all his work he had frequently made couplings of cars in the woods to the knowledge of all the officials and other employees. He was a kind of handy man, doing whatever he was told to do. He says he was instructed by the engineer to make the coupling at the time he was injured. He attempted to obey this order, and the engineer knew he was doing so, as he responded to his signal to back up slowly. Appellee stepped between the engines to make the coupling and gave the stop signal. The engineer obeyed the first and failed to obey the second. The drawbars came together with such force as to knock the dead engine about one foot, and appellee's hand was injured. Under these facts we think it a question for the jury as to whether this was negligence and was the proximate cause of the injury.

Contributory negligence would not bar a recovery, even though it be conceded he was contributorily negligent. Sections 7144, 7145, Crawford & Moses' Digest. In this respect appellee's instruction No. 1, given by the court, was more favorable to appellant than the law justified.

Whether appellee was a mere volunteer and acting without the scope of his employment was a question of fact, and was submitted to the jury under instructions requested by appellant. We cannot say as a matter of law that he was a mere volunteer.

No error prejudicial to appellant appearing, the judgment must be affirmed.

OGDEN *v.* PULASKI COUNTY.

4-3474

Opinion delivered May 28, 1934.

Brickhouse & Brickhouse, for appellants.

Carl E. Bailey and *Murray O. Reed,* for appellee.

BUTLER, J. On January 9, 1933, plaintiffs in the court below filed a claim with the Pulaski County Court for $13,-299.31, and asked that the same be paid out of the county turnback fund accruing to the county under the provisions of act No. 63 of the Acts of 1931. This is the identical claim that was before this court in the case of *Ogden* v. *Pulaski County,* 186 Ark. 337, 53 S. W. (2d) 593. The county court disallowed the claim, and, on appeal to the circuit court, the action of the county court was sustained, the court finding that the action was founded on the same contract and for the same debt involved in a former action between the same parties which was adjudicated on appeal to the Pulaski Circuit Court in favor of the defendant, Pulaski County, and affirmed by this court; that in the said former action it was found that the contract and claim was valid, and there was a subsisting indebtedness

for the amount claimed, but that the expenditures by the county for the year in which the claim was filed were in excess of the income for said year, and the claim was therefore void because within the inhibition of amendment No. 10 of the State Constitution; that at the time of the former trial there existed in the county treasury a fund known as the county general road fund, and another known as the county highway turnback fund in which was deposited only gasoline taxes accruing to the county by virtue of the provisions of act No. 63, *supra,* and that the claim of plaintiffs is *res judicata.*

It is insisted by the plaintiffs on appeal that, while this action is between the same parties as was the former, it is upon a different demand or cause of action; that the present claim was not within the issues of the former action, and that there was no judgment on the merits of the cause. In developing this contention, and in support thereof, appellant argues that the improvement made was on a farm-to-market road, payment of which was proper to be made out of the county turnback fund under the provisions of act No. 63, *supra,* and especially so because the contract for the improvement made between the appellants and the county did not specify any particular fund out of which payment was to be made.

They insist that the only question raised and settled in the former suit was whether or not payment of the money due out of the county general road fund would violate Amendment No. 10 to the Constitution, and that this suit, unlike the former, is not a suit against the county general road fund, but one against the turnback fund, and presents a different question than the one formerly adjudicated.

We are cited to a number of cases of our own court and to those of courts of other jurisdictions to sustain the doctrine that a former judgment, to be a bar to a later proceeding, must have been a decision on the merits of the cause between the same parties or their privies and the point of controversy in the latter case must have been within the issues in the former. We think this rule well established, but cannot agree with the appellant that the

point involved in the instant case was not within the issues raised in *Ogden* v. *Pulaski County, supra,* or that the merits of the case were not there considered.

It appears that the court found upon the testimony adduced that the contract was valid, and that the claim represented a subsisting indebtedness, but was uncollectable because of constitutional inhibitions. The agreed statement of facts discloses that at the time of the institution of the first suit all the revenue accruing to the county for road purposes was carried in one fund, denominated the county general road fund, a part of which was a donation from the State to the county commonly known as "turnback fund." While the suit was still pending, however, the turnback fund was taken out of the general road fund and carried on the books of the county in a separate account. The turnback fund was capable of being segregated at any time, and, as we have seen, this was actually done during the pendency of the suit, and the question whether the claim could be paid out of this fund was a matter properly belonging to the controversy, and therefore was within the scope of the issue. Although this question was not formally litigated in the first action, it might have been, and the judgment holding that the question was *res judicata* was correct. It is the general rule, which has been frequently announced by this court, that the parties to an action are bound to make the most of their case or defense and that a judgment of a court of competent jurisdiction operates as a bar to all questions in support of the cause or the defense, either legal or equitable, which were, or could have been, interposed in the case. This rule was reaffirmed in the recent case of *West Twelfth Street Road Imp. Dist. No. 30* v. *Kinstley, ante* p. 126, in which a number of cases supporting the rule were cited.

It is therefore ordered that the judgment of the trial court be affirmed.

WASSON *v.* MOOSE.

4-3481

Opinion delivered June 4, 1934.

[redacted]

Edward Gordon, for appellant.

Henry Donham, R. E. Wiley and *Cooper Jacoway,* for appellee.

JOHNSON, C. J. On January 10, 1931, the People's Bank & Trust Company, of Morrilton, Arkansas, by and through its president, J. S. Moose, and its cashier, Benton Garrett, executed, acknowledged and delivered its warranty deed by which it conveyed to Howard and Melbourne Moose, sons of J. S. Moose, real estate of the book value of $13,500 belonging to it. The deed reciting a consideration of $13,500 cash in hand paid. Thereafter on January 20, 1931, the grantees in said deed executed, acknowledged and delivered their real estate mortgage upon all lands described in said deed to H. M. Jacoway. This mortgage was conditioned for the due and prompt payment of a recited indebtedness aggregating $12,400. Immediately after the execution and delivery

of the mortgage and accompanying notes the mortgagee and payee therein transferred and assigned the same to the Harvey Investment Company of El Paso, Texas.

After the transactions heretofore recited, the People's Bank & Trust Company became insolvent and was taken over for liquidation by Walter E. Taylor, then Bank Commissioner of this State. Thereupon this suit was instituted by Taylor, as Bank Commissioner, against J. S. Moose, Howard and Melbourne Moose and H. M. Jacoway, seeking the recovery of the real estate conveyed by said bank and to recover judgment against H. M. Jacoway for a 100 per cent. stock assessment against $2,400 in par value of the bank stock owned by the said Jacoway.

In reference to the real estate transaction, it was alleged that the conveyance by the bank to Howard and Melbourne Moose was without consideration and therefore void. In reference to the stock transaction, it was alleged that Jacoway, prior to November 30, owned $2,400 par value of the capital stock of the said People's Bank & Trust Company and that on November 17, 1930, said bank became insolvent and remained so thereafter; that in January, 1931, said Jacoway transferred his stock to J. S. Moose, who was and is insolvent; that said transfer and pretended sale was made with intent to avoid his stock assessment.

The Harvey Investment Company intervened in said cause and alleged that it purchased for value and before maturity the notes and mortgage securing same from Jacoway, and was therefore an innocent purchaser and holder; that default had been made in payments as provided in said mortgage and notes; that it therefore prayed for judgment and foreclosure.

The Mooses answered by admitting the execution of the deed, the mortgage and notes, but otherwise denying the material allegations of the complaint.

H. M. Jacoway answered by pleading purchase for value of the notes and mortgage and the transfer and assignment thereof to the Harvey Investment Company for value. Jacoway further answered that in January, 1931, when he sold his bank stock to J. S. Moose,

said bank was solvent and a going institution; and that the sale and transfer was in all things approved by the State Banking Department.

Upon the issues thus joined, a voluminous amount of testimony was taken which was not in all particulars responsive to the issues joined. The following is a concise resumé of the testimony:

Prior to November 30, H. M. Jacoway owned $2,400 par value of the capital stock of the People's Bank & Trust Company of Morrilton; that J. S. Moose and his sons, Howard and Melbourne Moose, were also stockholders in said bank, J. S. Moose being the president of said bank and in the actual charge and management thereof; that on November 17, 1930, said bank became insolvent and closed its doors to business, which condition continued until December 30, 1930, when it was opened for business under the following circumstances: More than 90 per cent. of the depositors in said bank executed stipulations by which they agreed to not withdraw any amount of their respective deposits for a period of three years; a great majority of the stockholders, including Jacoway, signed a stipulation agreeing to not sell or transfer any of their respective stock holdings in said bank until all depositors were paid in full or for a period of three years. Upon the execution of the agreements aforesaid, the State Bank Department authorized and permitted the reopening of said bank for a restricted banking business. This restricted banking business was in progress and being pursued when the stock sale was effected and when the deed to the real estate was executed. Practically uncontradicted testimony shows that the Harvey Investment Company purchased the mortgage and accompanying notes before maturity and paid full value therefor without notice of defects therein. The evidence further discloses that Walter E. Taylor, State Bank Commissioner, was advised of the stock sale by Jacoway to Moose prior to its consummation and gave his consent and approval thereto.

The evidence further shows conclusively that the bank did not receive the consideration expressed in the

deed or any part thereof. The proceeds from the sale of the mortgage to the amount of $10,000 was used by Howard and Melbourne Moose to liquidate their personal indebtedness to the bank.

The chancellor determined that the Harvey Investment Company was an innocent purchaser for value of the notes and mortgage, and decreed judgment and foreclosure accordingly; that the stock sale by Jacoway to Moose was in good faith and valid, and this appeal is therefrom.

Appellant's most serious contention for reversal is that the People's Bank & Trust Company, of Morrilton became insolvent on November 17, 1930, and continued in such condition thereafter; therefore that in January, 1931, when the stock sale and transfer was effected by Jacoway to Moose and when the deed to the real estate was executed by the bank to Howard and Melbourne Moose, the liability for the stock assessment had previously accrued against Jacoway and for the same reason the deed was void being executed subsequent to insolvency.

By act 113 of 1913 and amendments subsequent thereto, the State Banking Department was created and vested with full power and authority to authorize and supervise the opening, closing and the administration of all banks created under the laws of this State, and the State Bank Commissioner is designated as the administrator thereof. So it was when the People's Bank & Trust Company was authorized and permitted to open for business on December 30, 1930, with the assent and approval of the State Bank Commissioner, all persons dealing with said bank had a right to presume that the institution was solvent and that the officers in charge thereof were vested with authority to transact its business as authorized by law.

It follows therefore that the Harvey Investment Company is an innocent purchaser for value of the mortgage and notes, if the sale of the lands was authorized by the board of directors of said bank. See § 34, act 113, 1913, as amended by act 627, 1923. On this branch of the case it suffices to say that a great pre-

ponderance of the testimony shows that at a meeting of the board of directors held on January 10, 1931, a sale of this land was authorized. It is true the purchasers thereof may not have been designated in the authorizing resolution and said resolution may not have been in writing but these are of little significance. The minutes of the meeting should have reflected the authorizing resolution and the action of the board thereon, and this necessarily would have been a substantial compliance with the statute. At any rate, equity treats that as done which should have been done. It appears therefore that the sale of these lands was authorized by the board of directors in substantial compliance with the statute and a valid title passed by reason thereof.

Neither can appellant's contention of liability for stock assessment against Jacoway be sustained. Although a stockholder in this institution, Jacoway was not a member of the board of directors and had only such superficial knowledge of its affairs as other stockholders and citizens. He had a right to presume that the bank was solvent when it was permitted to open by authority of the State Banking Department. The stock which he owned in this bank was property and subject to sale and transfer as other property except for such restrictions as may appear in the law or be created by his own acts. Section 2 of act 102 of 1929 restricts the right of sale and transfer of bank stock by its owner by requiring the approval of such sale and transfer by the State Bank Commissioner. This approval was obtained by Jacoway prior to the sale therefore the only statutory restriction on the sale and transfer of bank stock was effectually removed. It is urged, however, that Jacoway signed a stipulation with other stockholders not to sell or transfer his stock for a period of three years or until "frozen deposits" were paid in full, and that his stipulation estops him in now asserting the validity of such sale and transfer. The first answer to this contention is that the State Bank Commissioner by his act of approving the sale and transfer waived enforcement of this stipulation. Secondly, Jacoway testified that he signed the stipulation on the express condition that all

other stockholders would do likewise. According to the chancellor's finding, this condition was never performed, and we can not say that his finding of fact in this regard is against a clear preponderance of the testimony.

It follows from what we have said that the decree must be affirmed.

COMMERCIAL CREDIT COMPANY, INC. *v.* RAGLAND.

4-3484

Opinion delivered June 4, 1934.

Barber & Henry and *M. F. Elms,* for appellant.

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

SMITH, J. On July 2, 1931, H. S. Ragland purchased from C. D. Conrey Company, a domestic corporation domiciled at Stuttgart, a new automobile for $610, of which $260 was paid in cash. The balance was to be paid in 12 monthly installments, evidenced by promissory notes,

each for $33.46, the first of which matured on August 2, 1931, and one on the second day of each month thereafter until all had been paid. A sales contract or agreement was entered into, to which the notes referred, and the title was retained until all the notes and the interest thereon had been paid in full. It was provided that in case of default to make payments promptly the possession of the car might be retaken, wherever found, without notice to or demand upon the purchaser, and the car sold, either publicly or privately, and the proceeds of sale applied to the notes, which also recited the retention of the title. On the day of the execution of the contract of sale and the notes the Conrey Company, for a valuable consideration, assigned them to the Commercial Credit Company, Inc., hereinafter referred to as the Credit Company, a domestic corporation domiciled at Little Rock, and having no place of business or agent elsewhere. Installment payments were made as follows: The August 2d payment was made August 11; the September 2d payment was made October 7; the October 2d payment was made November 7; the November 2d payment was made November 30; the December 2d payment was made January 9, 1932; and the January 2d payment was made February 5. The Credit Company, the assignee and holder of the contract of sale and the notes, insists that no other payments were made. Ragland insists that a seventh payment was made to an agent of the Credit Company to whom other payments had been made and which had been remitted by the agent to his principal.

The last payment which the Credit Company admits receiving was made by a check, which was first dishonored by the bank upon which it was drawn, but was later redeposited for collection and was paid upon its second presentation.

The car had been converted into a truck, and Ragland testified that this added to the actual and to the usable value thereof.

About the last of December, and before the payment due on the 2d of that month had been paid, a representative of the Credit Company went to Ragland's place of

business in Stuttgart to make collection of the payment then due. Ragland proposed to give a check, which the agent declined to receive, because of the trouble over the last check, and because it was then after banking hours. Ragland stated that he did not have the cash, but insisted that the check be taken and went into his office to draw the check. While Ragland was thus engaged the agent went to the car and removed the ignition key and departed with it before the check could be delivered. Ragland thereupon mailed the check to the Credit Company at Little Rock, and requested the return of the key. This check was deposited for collection, and was duly paid, but the key was not returned. The Credit Company admits receiving an additional payment on February 5, covering the note due January 2. The return of the key was demanded at the time this payment was made, but the key was not returned. Ragland testified that he made other demands for the return of the key, but it was not returned, and he finally stated that he would make no more payments until the key had been returned. Ragland sought to acquire a key to the car from various sources without success, and he was unable to operate the car without it until he finally "wired around the ignition," a method of operating the car which was suggested to him by the machinist and foreman of the Conrey Company garage. This proved unsatisfactory, and largely destroyed the usable value of the truck, as "it would cause the ignition points to short out and the motor backfired, and the pistons kicked through the block." This happened in the latter part of January, and the car was hauled to the Conrey Company's garage, where repairs were made costing slightly more than $75. Payments on the repairs were made in installments of $25 each, the first payment being made March 1, the second March 16, and the last March 19. The testimony shows this damage was occasioned by the removal of the key and the attempt to run the truck by "wiring around the motor." While the car was in the garage for repairs, a purchase-money note matured and was not paid. According to the credit company's contention, there were two of these

notes. The Credit Company advised the Conrey Company, as indorser, that notes were in default, and the latter advised the former that the truck was in its possession, and, pursuant to directions so to do, the Conrey Company drove the truck to Little Rock and delivered it to the Credit Company. It is not seriously questioned that the conversion was the joint act of the two corporations. The Credit Company sold the car for $215.

Thereupon suit was brought against both corporations for the alleged wrongful conversion of the truck, its value being alleged to be $500. Judgment was also prayed for the cost of the repairs and for the usable value of the car.

A number of motions were made which questioned the jurisdiction of the court. As suit had been brought for the value of the car at the time of its conversion, the court sustained a demurrer to so much of the complaint as prayed judgment for the cost of the repairs and the usable value of the truck, whereupon the motion to dismiss was renewed as to the Credit Company, it having been served with process in Little Rock, but that motion was overruled.

Although the court sustained a demurrer to the action for repairs and for usable value, it permitted proof thereof to be made, as it was shown that both the repairs and the usable value of the car exceeded the two notes which the Credit Company claimed were due and unpaid at the time of the conversion of the truck. The theory upon which this testimony was admitted was that it tended to show that the Credit Company had no right to declare a forfeiture of the contract of sale, because, at the time it did so by converting the truck, damages had been sustained by Ragland which exceeded the notes then due, even though neither of them had been paid, that is, that the damages which had been sustained were greater than the notes claimed to be due.

It is true, of course, that the Credit Company, as the assignee of the sales contract, had the right to demand that the payments be made promptly as agreed, and to repossess the car in case of default. But it is true also

that none of the payments were made when due—they were all made out of time—yet they were all accepted when made. Even the payment which was made by the check which Ragland was engaged in drawing when the ignition key was removed was accepted.

Having extended indulgences, which it was not required to do, by accepting the delayed payments, the Credit Company should, before taking possession of the truck, have advised Ragland that the practice would no longer be continued. *General Motors Acceptance Corporation* v. *Hicks, ante* p. 62. Indeed, Ragland was attempting in good faith to pay the only note then due when the truck was put out of commission by the removal of the ignition key, and that payment was actually received, as was also another payment, before the conversion occurred, and subsequent payments were not made only because of the continued refusal of the Credit Company to return the key. There appears to be no question—at least the jury was warranted in so finding—that the Credit Company took the key for the purpose of preventing appellee having the use of the car. We conclude therefore that the jury was warranted in finding that the conversion was wrongful, and, as it was the joint act of both defendants, Ragland had the right to bring suit against both defendants in any county where either was domiciled and could be served. The suit was brought in the county in which the Conrey Company was domiciled, and the service was therefore valid on the Credit Company in another county. Section 1176, Crawford & Moses' Digest.

The case of *Ames Iron Works* v. *Rea*, 56 Ark. 426, 19 S. W. 1063, affords authority for the holding of the trial court that the damages for the repairs to the truck could be considered in determining whether anything was due the Credit Company at the time of the conversion. In the case cited a suit in replevin was brought to recover a cotton gin which had been sold under a reservation of title. The vendor had failed to deliver the property at the time and in the manner required by the contract of sale, and the vendee set up the damages thus occasioned

as a counterclaim against the debt for the purchase money. It was there held that the purchaser had the right to recoup these damages and hold the property upon paying the balance of purchase money, less the damages.

So here, if, as the jury has found, the Credit Company was responsible for damages exceeding the debt then due, the right did not exist to retake the truck without allowing credit for the damages, and the conversion was therefore wrongful. When the additional wrong of conversion was added, the purchaser then had the right to sue for the value of the truck, less the purchase money due thereon.

Upon this issue the court, at the request of the defendants, charged the jury as follows: "You are instructed that, if you find that plaintiff is entitled to recover in this case, then the measure of his damage would be the market value of the automobile taken at the time it was taken, less the balance he is indebted to the defendant on the purchase price of the same, plus interest at six per cent. per annum on the difference of net balance from the time it was taken."

The verdict of the jury for the sum of $223.45 was responsive to this instruction, and is fully sustained by the testimony. The judgment pronounced on this verdict appears to be correct, and it is therefore affirmed.

WASSON *v.* AMERICAN CAN COMPANY.

4-3471

Opinion delivered June 4, 1934.

J. H. Black, for appellant.

S. W. Woods, for appellee.

HUMPHREYS, J. This was a suit brought by appellee against appellant on two acceptances or drafts with bills of lading attached, drawn by appellee on W. H. Burford for cans shipped by appellee to him for the purpose of canning tomatoes, etc., the payments of which acceptances were guaranteed in ninety days by "Citizens' Bank" and "The Citizens' Bank," in Marion County, which failed before the payment of the drafts and which were taken over by the appellant for the purpose of being liquidated as insolvent concerns.

The record reflects that the cans were shipped by appellee to W. H. Burford and delivered to him upon guarantees of said banks executed on the 26th day of July, 1930, and the 1st day of December, 1930, respectively, through their officers at the time they were going concerns; that the custom had been for the banks to accommodate their customers by guaranteeing the payment for the cans so they could get and fill them and sell same to the trade in time to take up the drafts or acceptances before they became due, and to enable them, as well, to pay the banks a part, or all, of what they might owe them when they disposed of the tomatoes and other canned products; that Burford was a regular customer of the banks and owed them about $3,000 when the guarantees were made; that the officers of the banks guaranteed payment of the acceptances or drafts, without any written authority from the boards of directors of said banks, but that the boards of directors had turned the business of the banks over to the presidents and the cashiers and knew said officers were hypothecating and pledging the credit of the banks by guaranteeing the payments for the cans and had been conducting the business in this manner for several years.

The trial court rendered a judgment against appellant for the amount of the drafts or acceptances, from which is this appeal.

Appellant contends for a reversal of the judgment on the ground that since the passage of the amending statute of act 252 of the Acts of 1931, to act 113 of the Acts of 1913, that the officers of the banks were without authority to hypothecate the credit of the banks by guaranteeing the payment of said drafts. Under act 113 of the Acts of 1913, this court ruled in the case of *Bank of Morrilton* v. *Skipper, Tucker & Co.,* 165 Ark. 49, 263 S. W. 54, that the bank had authority to guarantee payment of a debt or to make a contract of guaranty, where same was made in connection with its own business or for its own protection or benefit. This ruling was confirmed in the case of *Citizens' Bank of Booneville* v. *Clements,* 172 Ark. 1023, 291 S. W. 439.

The court found in the instant case that the guaranties were for the benefit of the banks. The evidence detailed above was sufficient to support the finding. The amendatory statute has no application in the instant case because it was not passed until after the guaranties were made.

No error appearing, the judgment is affirmed.

HARVELL *v.* MATTHEWS.

4-3435

Opinion delivered June 4, 1934.

O. H. Sumpter, for appellants.

James R. Campbell and *Murphy & Wood,* for appellees.

MEHAFFY, J. The appellees brought suit in the Garland Circuit Court against appellants, alleging that they were the owners of the property described in the complaint, and that on July 19, 1932, the Arkansas Trust Company, one of the appellees, rented said real estate to the appellants at a rental price of $40 per month, payable monthly in advance; that the appellants agreed on said date to lease the property and to pay $40 a month rent.

The appellants filed a demurrer, which was overruled, and then filed answer denying all the material allegations in the complaint, and alleged that the Arkansas Trust Company was never at any time in the actual and peaceable or exclusive possession of the property described in the complaint, nor any part of said property; and appellants specifically deny that the other appellees were at any time in the actual, peaceable or exclusive possession of said property. They deny that they are indebted to appellees, Matthews, in any sum. They specifically deny that the relation of landlord and tenant has

ever existed between appellees or either of them, and appellants or either of them. They allege that they are the owners of the property described and every part of it, and that they have had more than three years uninterrupted possession of the same and every part of the property, immediately preceding the filing of the complaint.

The undisputed evidence shows that the appellants were indebted to the Arkansas Trust Company in the sum of $3,500, and that the property here involved was mortgaged to the Arkansas Trust Company to secure the payment of this debt. The debt was past due, and the officers of the bank told appellants they would have to do something about collecting the debt. Finally appellants were told that proceedings to foreclose would be begun. A decree of foreclosure was entered, the property sold under said decree, the Arkansas Trust Company became the purchaser, and a commissioner's deed was made to it. The appellants contend, however, that the officers of the bank agreed to take care of appellants and look after their interests, and that for that reason this suit cannot be maintained, because they say that the bank bought the property at the foreclosure sale for the benefit of the appellants.

There is no claim that there was any fraud practiced in obtaining the decree; in fact, the undisputed proof shows that appellants were notified when the decree was entered, and were notified when the bank obtained the Commissioner's deed.

If there were any agreements or promises made with reference to the foreclosure suit that would in any way affect the foreclosure suit or the deed, this would have to be corrected in the chancery court. As we have already said, there is no claim that any fraud was practiced.

At the time of the foreclosure and sale of the property, the debt, with interest, was more than $4,300. The evidence on the part of the appellees is to the effect that after the bank had received the deed, it made an agreement with the appellants, by which it rented to appellants the property described, for the sum of $40 per

month, payable in advance, and that appellants agreed to pay this amount of rent.

Appellants' testimony on this issue is to the effect that they did not rent the property, but that they agreed to pay $40 a month interest, and intended to pay the entire debt. However, there never was but one payment made, and it was about $42.

The sole question therefore for our determination is, whether the relation of landlord and tenant existed, and this was a question of fact.

The appellants contend that the court erred in permitting the appellees to introduce in evidence the Commissioner's deed, and quoted: "Title not being involved in the action of forcible entry and detainer, it is the general rule that no evidence can be introduced pertaining to title."

The above quotation is from Encyclopedia of Evidence, vol. 5, 782, and as supporting the text, several Arkansas cases are cited.

Section 4857 of Crawford & Moses' Digest is as follows: "In trials under the provisions of this act, the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession, and the extent thereof."

The only purpose therefore for which the Commissioner's deed could have been introduced, was to show the right to the possession and the extent thereof. It was, however, competent for this purpose. Appellants had owned this property for a long while, and appellees had foreclosed a mortgage and purchased the property at the foreclosure sale, and a Commissioner's deed was made. It was necessary in this case to introduce this deed to show the right of possession.

"While deeds cannot be introduced as evidence of title, they are sometimes admitted as proof of the right of possession." Encyc. of Evidence, vol. 5, 786.

The Commissioner's deed was not introduced for the purpose of showing title, but only for the purpose of showing the right to possession, and was proper for that purpose.

It is next contended by the appellants that the decision of the court is contrary to law because "the action of forcible entry and unlawful detainer can be sustained only by proof of an actual possession of the premises sued for, held by the plaintiff prior to the unlawful entry made by the defendant."

Of course, there would not have to be an unlawful entry. The statute provides that every person who shall willfully hold over any lands, tenements or possessions without right, or a person who may peaceably and lawfully obtain possession and hold same willfully and unlawfully, etc.

The appellants are correct in their contention that the relation of landlord and tenant must have existed, and on this question the evidence is in conflict. After the purchase of the property by appellees, the evidence on the part of the appellees shows that they entered into a contract with appellants, by which they rented the property to appellants, and that appellants agreed to pay the rent, and thereby became tenants of the appellees. On the other hand, it is contended that the appellants never did agree to rent or to become the tenants of appellees, but they agreed to pay $40 a month interest. This is really the sole question in the case.

A verdict supported by substantial evidence will not be set aside on appeal, as the Supreme Court does not pass on the credibility of witnesses or the weight of the testimony. *Home Sewing Machine Co.* v. *Westmoreland,* 183 Ark. 769, 38 S. W. (2d) 314; *Lofton* v. *King,* 185 Ark. 421, 47 S. W. (2d) 578; *Powers* v. *Wood Products Corp.,* 184 Ark. 1032, 44 S. W. (2d) 324; *Kansas City Fiber Box Co.* v. *F. Burkart Mfg. Co.,* 184 Ark. 704, 44 S. W. (2d) 325.

This case was by agreement, tried by the court sitting as a jury, and his finding is as conclusive as the finding of a jury. *American Ins. Co.* v. *Brannan,* 184 Ark. 978, 44 S. W. (2d) 346.

The court, in this case, after hearing the evidence, found that under the evidence the appellants were the tenants of appellees from month to month that they had

paid approximately one month's rent under the contract, and had defaulted in the payment of rent for one year. This finding of fact by the circuit court is conclusive on appeal, and the fact that the finding of a jury or a court sitting as a jury appears to be against the preponderance of the evidence does not authorize this court to reverse the judgment if there is any substantial evidence upon which to base it. These are matters within the province of the jury or the court sitting as a jury, and we are not authorized to pass on the credibility of the witnesses or the weight to be given to their testimony.

There was substantial evidence to support the finding of the court, and the judgment of the circuit court is affirmed.

BEAUCHAMP *v.* JERNIGAN.

4-3495

Opinion delivered June 4, 1934.

Wm. F. Kirsch and *Maurice Cathey,* for appellant.

Jeff Bratton, for appellee.

MEHAFFY, J. Hugh McConnell, who lived in Paragould, Arkansas, died on April 24, 1933. He was between the ages of 80 and 90. The appellee, Mary E. Jernigan, went to McConnell's house nine years before his death, and did the work in keeping and managing the home and also waiting upon McConnell. After McConnell's death, the appellee filed in the probate court of Greene County the following claim:

"Mary E. Jernigan v. Estate of Hugh McConnell, deceased.

"Mary E. Jernigan states that the estate of Hugh McConnell, deceased, is justly indebted to her in the sum of three thousand ($3,000) dollars for services rendered by her in keeping house, nursing, caring for and waiting upon the said Hugh McConnell for 9 years next preceding his death:

"From March 1, 1924-March 1, 1925...	$200
"From March 1, 1925-March 1, 1926...	200
"From March 1, 1926-March 1, 1927...	200
"From March 1, 1927-March 1, 1928...	200
"From March 1, 1928-March 1, 1929..	200
"From March 1, 1929-March 1, 1930...	500
"From March 1, 1930-March 1, 1931..	500
"From March 1, 1931-March 1, 1932...	500
"From March 1, 1932-April 5, 1933....	500
"Total	$3,000

"I, Mrs. Mary E. Jernigan, do hereby state that the above and foregoing claims made by me against the estate of Hugh McConnell, deceased, is just, true, correct and unpaid; and that nothing has been paid or delivered toward the satisfaction of the demand herein made by me against said estate.

her
"(Signed) Mary X E. Jernigan."
mark

The claim was presented to the administrator of the estate of Hugh McConnell, and disallowed. The claim was then presented to the probate court of Greene County. A hearing was had before a jury, and the jury returned a verdict in favor of appellee for $3,000.

The administrator prosecuted an appeal to the circuit court of Greene County, and the jury in the circuit court returned a verdict for $3,000 in favor of appellee. Motion for new trial was filed and overruled, and judgment entered for $3,000, and the case is here on appeal.

The undisputed evidence shows that appellee stayed at McConnell's house continuously for approximately nine years; that she was there at the time of his death.

The appellee testified that she was going on 71 years old and lived in McConnell's house for 9 years; no one else lived there except Sammy McDaniel, who lived there for a little while, and Enzie Thomas, witness' son-in-law, who boarded there the first four years. The only other members of the McConnell family who were there were visitors who stayed a week at a time. McConnell had six spells of sickness, and the sixth one took him away.

Mrs. Lena Fisher testified that she and her husband had operated the Fisher Drug Store, which adjoined the McConnell residence, for 23 years; she saw McConnell every day; Mrs. Jernigan lived there for 9 years most of the time, and performed services for him; she took care of the house, cooking, washing and ironing, and looked after him when he was sick, without help, except during the last illness, when there was a man there to help her. Witness said she could not say how much the services were worth in dollars and cents but they were worth a lot; she was the only one who pleased him, and her services were worth more than the services of anybody else. When he was sick, she waited on him, stripped beds, and washed quilts and blankets practically every day; heard McConnell say that he wanted Mrs. Jernigan to put in a claim at his death to take care of her as long as she lived; he would say to Mrs. Jernigan: "You will never lose anything by this. You will get your pay." Witness did not know of Mrs. Jernigan's getting any pay. Dr. Majors and Dr. Ellington waited on him. Prior to McConnell's last illness, Mrs. Jernigan would often take his breakfast to the bed; during his last illness Thomas was there night and day and did some of the disagreeable work, but Mrs. Jernigan did most of it. McConnell made a will and left his real estate to witness. During McConnell's last illness he and Mrs. Jernigan had a misunderstanding, and she threatened to leave him; witness went over to McConnell's house, and an agreement was made that he was to pay her $3.50 a week if she would stay on. This was

a short time before he died. Mrs. Jernigan lived with McConnell and got her board. McConnell paid for the medicines which he bought for Mrs. Jernigan. The only money witness ever saw him give to her was checks for household expenses during his last illness. This witness heard McConnell on several occasions say he wanted Mrs. Jernigan to get her pay.

Dr. Majors testified that he was McConnell's physician during his lifetime; did not know when Mrs. Jernigan came there, but it had been a long period of time; had several spells of sickness; Mrs. Jernigan did the housework, gave him his medicine and baths.

Enzie Thomas, son-in-law of Mrs. Jernigan, heard McConnell say he wanted her paid well. Mrs. Jernigan's work consisted of washing, scrubbing, giving him medicine, cooking, and general housework. Mrs. Jernigan waited on McConnell all the time that witness and his wife lived at McConnell's. Thomas testified that it would be worth $4,000 to do what Mrs. Jernigan had done for McConnell.

Dr. Ellington testified that during the last few years he would see McConnell two or three times a week; that he would look pretty gay and be down town; for the last few years McConnell was not able to work; he did not recall seeing Mrs. Jernigan wait on him. The last three or four weeks it was a job to take care of him.

H. S. Trice testified that for the past several years McConnell had been feeble, but that he was going around tending to his business most of the time. He had been for nine years in old age and feeble health, but was able to tend to his own business.

The will of Hugh McConnell was introduced in evidence, and the drug store and dwelling house adjoining was left to Mrs. Fisher. His will provided that his debts should be paid.

The evidence was sufficient to justify the jury in finding that appellee did the work for McConnell during his lifetime, and that it was McConnell's intention and he agreed to pay her for same.

As stated by the Texas court: "It is a delicate matter to allow a contract of the character of one under consideration to prevail, for the dead man cannot tell about the affair, and the testimony is usually in favor of the living, for the latter are usually the prime favorites as against those whose tongues are closed in death. Such being the condition of affairs, when such a contract is made the basis of recovery, it must be fully and satisfactorily proved." *Dyess* v. *Rowe* (Tex. Civ. App.) 175 S. W. 1001.

But in the instant case the undisputed evidence shows that the appellee lived at McConnell's house and did his work for several years; that a portion of the work was very disagreeable, and the evidence also shows that she had not received any pay for it. Two juries heard the evidence, and found in favor of the appellee. A majority of this court, however, is of the opinion that she cannot recover for any work or labor done more than three years prior to McConnell's death.

"The following actions shall be commenced within three years after the cause of action shall accrue, and not after: first, all actions founded upon any contract or liability expressed or implied, not in writing." Crawford & Moses' Digest, § 6950.

Appellee claims $1,500 for the last three years, and she was awarded that amount by both juries. We have therefore reached the conclusion that she is entitled to recover $1,500, and that the rest of her claim is barred by the statute of limitations.

The judgment will therefore be modified and affirmed for $1,500. It is so ordered.

RAINES *v.* O'NEAL.

4-3468

Opinion delivered June 4, 1934.

Henry Stevens, for appellant.

Searcy & Searcy, for appellee.

McHaney, J. This is an appeal from a decree foreclosing a mortgage on certain lands given by appellant, Will Raines, to secure a note for $450, representing certain advances already made and those to be made in the future by appellees. The property covered by the mortgage has been sold, and appellees became the purchasers for a sum less than the amount of the judgment.

For a reversal, it is first urged that appellees sued on a note, but recovered on an account, which amounted to a recovery on a substituted cause of action. It is true that appellees declared upon a note, secured by a mortgage. Appellants denied they were furnished the full amount of the note, stated that the note and mortgage were given for supplies to be advanced, and asked that appellees be required to set out an itemized and verified account. This was done, and its only purpose was to show that the note represented the correct amount of advances already made at the date of its execution and those to be made thereafter. It was simply another way of establishing the amount due on the note. Although a note is given for a definite sum and is secured by a mortgage given for a definite amount, it is competent to show that the transaction is simply one for future advances or for a sum already advanced and for future advances. *Henry* v. *Union Saw Mill Co.*, 171 Ark. 1023, 287 S. W. 203. It is

not the substitution of a cause of action on account for one on a note. The amendment to the complaint setting out the itemized account was called for by appellants.

It is next earnestly insisted that the note sued on and the mortgage are usurious. In the substituted answer filed by appellants it is alleged that the note is usurious because supplies were not furnished under it up to the amount of the face of the note. In this appellants are mistaken. The evidence greatly preponderates in favor of appellees in this regard, conceding without deciding that the plea of usury was sufficient, since there was no allegation of an intention on the part of appellees to take or reserve more than the legal rate of interest. See *Moody* v. *Hawkins,* 25 Ark. 191; *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *American Farm Mortgage Co.* v. *Ingraham,* 174 Ark. 578, 297 S. W. 1039. Nor does the proof show that more than 10 per cent. per annum was charged or received. Mr. Crockett testified that interest was charged at 10 per cent. from the first of the month for goods bought during the preceding month. Appellants received monthly statements of their account and never at any time questioned same, and these statements showed on their face: "All bills are due and payable on the first of each month following date of purchase. 10 per cent. interest charged after maturity." We think there can be little doubt that appellants were not overcharged either as to interest or principal.

The final contention of appellants is that the land covered by the mortgage became the homestead of Mary Raines, wife of Will Raines, prior to the recording of the mortgage, although subsequent to the date of its execution and delivery, and, not being signed and acknowledged by her, it is void. The note and mortgage were executed and delivered by Will Raines on January 11, 1928, while he was a widower. Four days later, January 15, Will and Mary (colored) were married and immediately moved on the 80 acres of land covered by the mortgage which was not recorded until February 3, 1928, and, of course, was not signed or acknowledged by Mary. This is a novel contention and one that has rarely been before

the courts. It is unsound in principle and not supported by authority. The law is thus stated in 13 R. C. L., § 109: "FAILURE TO RECORD TRANSFER: While marriage is undoubtedly in one sense a valuable consideration, yet it has hardly yet been reduced to the level of a contract of bargain and sale, nor do we find that it has ever been held that the statute of registration is intended to advise persons contemplating matrimony of the property and contract status of the other party to the contemplated engagement. It is reprehensible for either party to conceal the fact that he or she does not own large properties on the faith of the reputed ownership of which, in part at least, the other may properly enter into an agreement of marriage, but the statute for the registration of conveyances, while intended to protect purchasers for valuable considerations, mortgagees, and judgment creditors, without notice, cannot be given that enlarged construction which would include persons entering into a contract of marriage, and it is held that the failure to record an antenuptial conveyance by the husband does not render it invalid as against the future wife as regards her marital rights in the property conveyed."

From this and other authorities we are of the opinion that, as stated by the Supreme Court of Minnesota in *Snell* v. *Snell,* 54 Minn. 285, 55 N. W. 1131: "The right in her husband's real estate, which a wife acquires by her marriage, does not come within the registry law, and is postponed to an unrecorded trust."

We are of the opinion that Mary acquired her rights to the homestead subject to the existing mortgage, even though not recorded, as the registry statutes in such cases were not for her protection.

Affirmed.

UNION NATIONAL BANK *v.* KIRBY.

4-3568

Opinion delivered June 4, 1934.

Moore, Gray, Burrow & Chowning, for appellants.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

McHANEY, J. This appeal involves the construction of the will of Alexander Robertson, a resident and citizen of Little Rock prior to his death in 1921. The will created a testamentary trust for certain purposes hereinafter stated, and appointed the Union & Mercantile Trust Company of Little Rock as trustee. The latter was succeeded by the Union Trust Company, and it later was succeeded by appellant, Union National Bank, which, together with the other appellants, were, by chancery decree appointed co-trustees in succession. The only part of the will of said Alexander Robertson relating to said trust is section 4 of paragraph 2 thereof, which reads as follows:

"4. After the payment of the legacies and bequests set forth in sections two and three of this paragraph of my will, all of the rest and residue of the property in the hands of my said trustee, real, personal and mixed, shall be converted by it, as soon as practicable, into cash or other securities, and the net income therefrom shall be applied, appropriated and expended by my said trustee in procuring scholarships for a business or commercial course in some college or school, to be selected by it for such women and girls of the city of Little Rock, Arkansas, as my said trustee shall select as worthy and deserving of procuring such business or commercial course, and who, in the absolute discretion of my said trustee, shall have insufficient funds of their own for procuring such business or commercial course, such scholarship to be known as the Abigail Robertson scholarship. My said trustee shall be the sole and absolute judge as to whether or not the applicants, applying to it for such scholarship are worthy of its aid and support, the said trustee being hereby specifically conferred with full power and authority to accept or reject any applicant for said scholarship.

"Where an award is made to an applicant, said trustee shall in its absolute discretion appropriate and apply such part of the net income from the property in its hands as it shall, in its absolute discretion, deem necessary to procure for said applicant such business or commercial course, including the appropriation and expenditure by it of such sums as it shall, in its absolute discretion, deem necessary for the support and maintenance of said applicant while attending such school or college under such scholarship."

The widow, Abigail Robertson, subsequent to the probate of the will, elected to renounce same and took certain property as dower. Shortly thereafter, however, she changed her mind and deeded most of the property back to the trustee upon condition that after her death it should be held and administered as a part of the trust property and in accordance with the provisions of her late husband's will.

Appellee applied to appellants as trustees to advance her $500 to assist her in pursuing her studies of voice in

Chicago, and her application was denied on the ground that assistance for such a course of study was not authorized or permitted under the terms of the will creating the trust. She brought this action, alleging that she is a citizen and resident of Little Rock, that she had studied music in Chicago for four years under certain prominent teachers, who, on account of her unusual progress, have offered to continue her musical education without charge if she can maintain herself; that she is without funds and unable to continue her studies unless aided by this fund; that she had made application to appellants for said sum and believes they favor advancing same to her, but are in doubt as to their authority under the will to do so; that it is her intention to devote her life to music and to support herself in that way; and that a musical education is for her a matter of business. She prayed the court to construe the will and advise the trustees whether they are so authorized by the terms of the will.

The answer set up the clause in the will above copied and the clause in the deed of Mrs. Robertson above referred to, and stated that the trustees were in doubt whether a musical course of study is within the purview of the will; that they do not feel authorized to grant a scholarship for such purpose without first being advised and instructed by the court that it is within their power; and that they have accordingly refrained from considering appellee's application and her qualifications until they are so advised. The prayer joins in a request to the court to construe the will.

The evidence shows that up to the present time scholarships have been only granted out of such fund for business and commercial courses in business and commercial schools and colleges of Little Rock; and that the trustees now have in business schools or colleges seventy-four young women. The chancery court entered a decree granting the prayer of appellee's complaint, and holding that appellants have the power under the will, as trustees, to grant her application and furnish her a scholarship for the study of music.

In this we think the learned trial court was in error. Assuming that the court had jurisdiction to construe this will, a question not raised or decided, the general rule is that the paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or of some rule of law, shall control; and such intention is to be ascertained from the language used as it appears from a consideration of the entire instrument. Words and sentences used are to be construed in their ordinary sense so as to arrive at the real intention of the testator. *Witten* v. *Wegman,* 182 Ark. 62, 30 S. W. (2d) 834; *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. (2d) 349; *First National Bank* v. *Marre,* 183 Ark. 699, 38 S. W. (2d) 14; *Lavenue* v. *Lewis,* 185 Ark. 159, 46 S. W. (2d) 649.

Bearing these fundamental rules in mind, we think there can be no doubt as to the nature of the beneficence the testator intended to bestow. The language of the will is that the net income of the trust fund shall be applied by the trustee in procuring "scholarships for a business or commercial course in some college or school" to be selected by the trustee for such women and girls of the city of Little Rock as the trustee shall select as worthy and deserving of "such business or commercial course" and who in the judgment of the trustee shall have insufficient funds for procuring such "business or commercial course." It is true that the word "business" in its broadest acceptation would include every trade or occupation. See definitions in all the dictionaries and in Words and Phrases.

But we are of the opinion that the testator did not use the word in that sense, but the words "business or commercial" were used in a synonymous sense. In other words, that the word "commercial" is explanatory of the word business. This is further evidenced by the fact that the two words are connected by the disjunctive word "or." So the testator, by using the words "business or commercial course," evidently meant to use them in the sense ordinarily conveyed by such use—such a course as it usually taught by business or commercial schools and

colleges, and not to schools and colleges teaching the arts, sciences and professions. If the appellee is correct in her contentions, then the trustees would be authorized to send qualified persons to schools of law, medicine, dancing and what not, and would, in our opinion alter the purpose of the trust. This a court of equity has no power to do. As said by this court in *Morris* v. *Boyd,* 110 Ark. 468, 162 S. W. 69: "The jurisdiction of courts of equity to supervise the execution of charitable trusts does not include the power to alter the terms of the trust, nor to sanction a diversion of any portion of the trust estate. That would involve the making of a new will for the testator and a disposition of the property contrary to the intention of the donor."

We are therefore of the opinion that the court erroneously construed the will. It necessarily follows that its judgment must be reversed, and the cause dismissed.

WHEELIS *v.* FRANKS.

4-3479

Opinion delivered June 4, 1934.

George R. Steel, for appellant.

Shaver, Shaver & Williams, for appellee.

BUTLER, J. The controversy involved in this action is over the office of county examiner of Little River County. The appellant, L. F. Wheelis, was the county superintendent of schools of said county at the time of the passage of act No. 26 and act No. 247 of the Acts of the General Assembly of 1933.

By act No. 26, approved February 9, 1933, the office of county superintendent of schools was abolished and that of county examiner created. This act had no emergency clause appended, and therefore did not go into effect until ninety days after its passage.

On March 29, 1933, and within the ninety days from the passage of act No. 26, *supra,* a supplemental act was passed and approved, the same being act No. 247. This act contained an emergency clause and abolished the office of county superintendent of schools and created the office of county examiner in lieu thereof.

By § 4 of act No. 26 the county judge was authorized to select and employ a person to serve as county examiner of schools. The only restriction on the power of the county judge was that the person selected should have certain qualifications. By § 3 of act No. 247, *supra,* the county court was vested with the power of appointment but only upon the recommendation of a majority of the duly licensed teachers residing in the county.

On March 30, 1933, following the passage of act No. 247, appellant Wheelis and appellee Franks filed with the clerk of the county court their separate and several applications for appointment to the office of county ex-

aminer. Each of their applications was recommended in writing by a number of the licensed teachers. On consideration of these petitions, the county court found that "both petitioners have a majority of the licensed school teachers in the county," and thereupon appointed appellee Franks to the position. From this order an appeal was prosecuted to the circuit court of the county, which court, upon a hearing, held that a majority of the licensed teachers had recommended the appointment of Wheelis and adjudged that he be appointed county examiner and directed that its order be certified to the county court as the order of that court, which was accordingly done.

The county court thereupon appointed the appellant Wheelis as county examiner for the term of one month at a salary of $25 and caused to be delivered to him, as such examiner, all the records pertaining to the office. The appellant, acting upon the authority of the order of the county court, took possession of the records and entered upon the discharge of his duties as county examiner on August 11, 1933. Within the month between August 11 and September 11, 1933, a petition was circulated for the appointment of the appellee Franks which was presented to the county court after the expiration of the period for which Wheelis was appointed. Upon an examination of this petition, the county court found that Franks had been recommended by a majority of the licensed teachers of the county, and on the last-named date appointed him to succeed Wheelis. Franks qualified as county examiner under said order, and, upon the failure and refusal of Wheelis to surrender the office and records pertaining thereto, the instant action was instituted by the appellee Franks under the provisions of §§ 8332 and 8341 of Crawford & Moses' Digest. On September 23, 1933, the circuit court entered an order adjudging the office and records thereof to the appellee, Franks, from which is this appeal.

It is conceded that the proceedings are controlled by the provisions of act No. 247, *supra,* and therefore the principal question is the proper construction of that act. It will be observed that neither in act No. 26 nor in act

No. 247 is there a definite term fixed for which a county examiner shall serve. By act No. 26 (§ 4 thereof) the county judge is authorized to "select and employ a person to serve as county examiner of schools and contract with him for such services for a period not to exceed two years, subject to the approval of the quorum court at its first session following the appointment"; at a salary of not exceeding $600 per annum, and by § 3 of act No. 247 the following provision is made: "The office of county examiner is hereby created. Said examiner shall be appointed by the county court upon the recommendation of a majority of the duly licensed teachers residing in the respective county," and nowhere in this act is there any reference made to the duration of the period for which the county examiner shall serve.

It was the opinion of the trial court, in which we concur, that, no definite term of office having been fixed, it was the intent of the Legislature to vest discretion in the county court in the matter of fixing and limiting the period of employment of the county examiner and in fixing his salary. The judgment of the circuit court on the first appeal in this case simply found that a majority of the licensed teachers had recommended the appointment of Wheelis as county examiner and adjudged that he be appointed as such by the county court without fixing any definite time in which he should serve or any salary he should receive. Therefore the county court had the discretion to fix the term and the salary, which it did, and, of course, at the expiration of that time said court was authorized to appoint another person having the required qualifications and being recommended by the requisite number of the licensed teachers.

The argument is made that the construction placed on the acts of the Legislature by the court below would make the office of county examiner and its incumbent the mere creature of the county court, subject to removal at will with or without cause, which would be destructive to the best interest of the schools. We have no way of ascertaining the legislative intent except from the language employed in the acts, and, as this is unambiguous,

we must give to it its obvious meaning. It has been too often held, as now to be a matter of debate, that the Legislature is clothed by the Constitution with plenary power over the management and operation of the public schools. It is for the Legislature to declare the policy with reference to the schools, and, however much this court might doubt the wisdom of the policy declared, it has no power to alter it. Where the Legislature clothes any officer or tribunal with the authority to appoint officers for an indeterminate period, that power carries a discretion which the courts cannot invade unless such discretion can be clearly shown to have been arbitrarily exercised. 22 R. C. L. 430. It is not doubted but that, where an office having no fixed term is filled by appointment, the appointing power may fix the term, or it may be held at its pleasure. *Beasley* v. *Parnell,* 177 Ark. 912, 9 S. W. (2d) 10, and cases therein cited.

We conclude that the trial court correctly construed the act under consideration, and its judgment is therefore affirmed.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* HAMPTON.

4-3486

Opinion delivered June 11, 1934.

Bevens & Mundt, for appellant.
Polk & Orr, for appellee.

JOHNSON, C. J. On August 1, 1932, appellant issued its policy of insurance to Arthur Hampton by the terms of which it agreed to pay Annis Hampton, beneficiary, in the event of the accidental death of the insured, $400 as follows:

"INDEMNITY FOR SPECIFIC LOSSES FROM ACCIDENTAL INJURIES.

"If due directly (and independently of all other causes) from a bodily injury, which is sustained while this policy is in force and which is effected accidentally and through external and violent means (excluding suicide, sane or insane, and injuries fatal or nonfatal, intentionally inflicted upon the insured by himself or by any other person except by burglars or robbers) the insured shall, within ninety days of the date of such injury suffer either of the losses below enumerated in schedule B, the company will pay the amount set opposite such specific loss in the schedule B referred to; such payment to be in addition to the weekly indemnity provided in schedule A for the period of total disability prior to the date of such specific loss.

"SCHEDULE B

"Accidental Loss of Life The principal sum."

On February 11, 1933, the insured died, at which time the policy of insurance was in full force and effect.

Thereafter this suit was instituted by Annis Hampton, the designated beneficiary, against appellant, alleging the contract, its effectiveness at the time of the death of the insured by accidental means, and sought recovery of the sum of $400, together with penalty and attorney's fees.

The testimony, when viewed in the light most favorable to appellee and as stated by appellee in her brief filed herein, was to the following effect:

"Now, analyzed as an intelligent chain of facts and circumstances, let us see if the appellee has presented facts and circumstances sufficient to meet the requirement of the law as expressed by this court regarding the sufficiency of evidence to sustain a verdict. Appellee has shown that the insured was a well and able-bodied man

of forty-six years of age; that he had been working continuously for some five or six weeks prior to the time of his fall and injury; that he was strong and well enough to roll six-hundred-pound bales of linters, with a co-worker, for ten hours a day, and this was testified to by Sol Brown, Annis Hampton, Hattie Gilstrap and the foreman, Mr. Ritchie; that, while in the act of rolling one of these bales, he unexpectedly stepped down into a hole some two or three feet, and, as a result of same, received an unexpected and severe jolt; that prior to that time he had not complained in any way of not feeling well, but a short time after the fall he complained of being sick and a little later in the afternoon of having a chill, which necessitated his quitting work some thirty minutes before the regular quitting time; that about seven o'clock his wife found him at home sick and unable to eat supper and complained of suffering with pains in the stomach."

The jury returned a verdict in favor of appellee, and this appeal is therefrom.

But one serious contention is presented on this appeal, namely, that the testimony is insufficient to support the verdict of the jury. It is the well-settled doctrine in this State that a jury's verdict cannot be predicated upon conjecture or speculation. *St. Louis, I. M. & S. Ry. Co.* v. *Enlow,* 115 Ark. 584, 171 S. W. 912; *St. Louis, I. M. & S. Ry. Co.* v. *Belcher,* 117 Ark. 638, 175 S. W. 418.

Mr. Justice Brewer, in *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658, tersely stated the doctrine as follow:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." And without adding to or subtracting

from the rule thus stated, we announce our approval thereof.

The effect of the testimony here presented and heretofore quoted falls far short of the requirements of the rule as heretofore announced. No witness testified, from opinion or otherwise, that the insured died from the effects of any accidental injury received by him, nor does any witness testify that the fall, which he received on February 8, immediately prior to his death, was even a contributing factor thereto. Neither did any witness testify to any facts or circumstances from which it might be inferred that the insured's death resulted from this fall. The physician called by the insured and who attended him during his last illness testified to no such fact or circumstance. On the contrary, this physician testified that the insured died of a cerebral hemorrhage, which was probably caused by excessive vomiting, and that this excessive vomiting was caused from the effects of a chill which insured had during the evening of February 8.

Under long-established rules of this court, the burden rested upon appellee to show by evidence, not only that the insured suffered an accident, but that his death resulted therefrom. This the testimony here presented wholly fails to do.

Thus it definitely appears that the jury's verdict was based upon conjecture and speculation, and not upon facts and circumstances introduced in evidence, and for this reason cannot be sustained.

It follows from what we have said that the trial court erred in refusing to direct the jury to return a verdict in favor of appellant when requested so to do, and likewise in refusing appellant a new trial upon consideration of its motion therefor.

Since the case seems to be fully developed, it will be reversed and dismissed.

WISEMAN *v.* DYESS.

4-3550

Opinion delivered June 11, 1934.

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

Leon B. Catlett, for appellee.

SMITH, J. This suit was instituted by the Administrator of Federal Emergency Relief in this State to enjoin the State Commissioner of Revenues from collecting a license tax on automobiles, and a tax on gasoline consumed in operating therein, which are used in this State and purchased out of funds made available to the State of Arkansas under the Federal Emergency Relief Act passed by the Congress on March 12, 1933.

The cause was tried under the following agreed statement of facts: "Under the provisions of the Federal Relief Act of the Congress of the United States approved May 12, 1933, the President of the United States appointed Harry L. Hopkins as Federal Emergency Relief Administrator, and the latter has duly appointed the plaintiff, W. R. Dyess, as Emergency Relief Administrator for Arkansas, who has duly qualified and is acting as such administrator and who brings this action in that capacity. The said W. R. Dyess, in such capacity as Emergency Relief Administrator, appoints and sets the salaries of all employees of Emergency Relief Administration, subject to the approval of the said Harry L. Hopkins, which Emergency Relief Administration is the name designate of the Arkansas unit of said Federal Emergency

Relief Administration, of which said Harry L. Hopkins is the national head. The said W. R. Dyess, as such administrator, determines the amount necessary for federal relief in this State and presents said data to the Governor of the State of Arkansas, who signs requisitions therefor on blanks provided by said Emergency Relief Administration. A copy of such application is attached hereto. The Federal Relief Administrator then makes the grant for relief within the State and United States checks for the designated amount, which are payable to J. M. Futrell, Governor of Arkansas, are then forwarded by the agency of the Federal Government to said Governor. The latter indorses said checks, delivers them to said W. R. Dyess as Emergency Relief Administrator and takes a receipt therefor, a copy of which is hereto attached. The said Emergency Relief Administrator then indorses said checks and deposits them in Little Rock banks, and other banks in the State, to the credit of Emergency Relief Administration, which dispenses same in accordance with said act of Congress and the amendments thereto. All expenditures are supervised by field superintendents from the Washington office of the Federal Emergency Relief Administration, and reports of all expenditures of said money are duly and regularly made to the Federal Relief Administration in Washington.

"It is now the policy of the said Federal Emergency Relief Administration to purchase, out of the funds granted for relief within the State, certain livestock, including horses, mules, cattle and hogs, and to sell same to persons on the relief rolls and who are unable to provide same. The purpose thereof is to put a number of such financially destitute persons back on the land where they can make their own living. Mortgages are taken on said livestock so sold, with a low rate of interest, and an opportunity to repay the amount. Said mortgages are taken in the name of Emergency Relief Administration, the Arkansas unit of said Federal Relief Administration, in such legal manner as to be binding on the purchasers. All of the funds used in the purchase and distribution of said livestock are furnished by the United States Gov-

ernment, granted for relief within the State, as herein outlined.

"In order to provide for the distribution of said livestock, it has become necessary for the Arkansas unit of Federal Emergency Relief Administration to purchase a number of motor vehicles, including automobiles, trucks and trailers, with which to distribute such livestock, and, after such distribution, to superintend its care and the repayment of the purchase price. The said motor vehicles are, and will continue to be, used exclusively for that purpose, and the purchase price of said motor vehicles is paid solely out of the funds granted, as herein stated, for relief within the State of Arkansas.

"The said Earl R. Wiseman is the duly appointed, qualified and acting Commissioner of Revenues of the State and is threatening to collect motor vehicle license fees on such motor vehicles and a tax on the gasoline used in such vehicles."

The court held that the automobiles used as stated were the property of the United States Government, and that neither they nor the gasoline used in their operation were subject to taxation, and this appeal is from that decree.

For the reversal of this decree it is insisted that the act of Congress granted the funds spent in this State to the State, thereby passing the title to the State, and upon becoming State funds were subject to the tax, as the State legislation imposing the tax had not exempted such funds from taxation.

It is unnecessary to consider or to decide what the state of the law would be if the funds apportioned to this State had become the property of the State, as, in our opinion, that result was not intended and has not been accomplished. It is our opinion that these funds and the automobiles for which a portion of the funds had been expended were and are Federal property, and as such are not subject to taxation by the State. It is true the act of Congress refers to the apportionment of these funds to the States "as grants to the several States," but it does not appear that such a donation thereof was made as to

pass the title and control thereof from the Federal Government. They are—and continue to be—Federal funds, subject to the supervision of the Federal Government in their disbursement. The State has no control over the expenditure of these funds. It does appear that, for the convenience of the Federal administrator, and to expedite the distribution of the Federal Government's bounty, application for the funds is made by the Governor of the State, who signs the receipt therefor and indorses the check used in remitting the funds, but when he has done so he delivers the indorsed check to the plaintiff State administrator for distribution. The clerical acts mentioned comprise the full extent of the authority and duty of the Governor. No other officer, agent or employee of the State has any control or supervision of the funds, or of the property purchased therewith. The Governor of the State acts merely as the agent or intermediary employed by the Federal Government in discharge of the beneficent purpose of the congressional act. The checks are delivered upon indorsement to the plaintiff, who was appointed by the national administrator, and the persons who make the actual disbursement are all Federal employees, who are not subject to the control or supervision of any officer of the State. No reports of expenditures are made to the Governor, but such reports are made to the national administrator, who appointed the State administrator, and the national administrator makes report to the President of the United States and to the Congress of the manner in which and the purposes for which the money was expended. The act of Congress under which the apportionments are granted requires this, and negatives the idea that an absolute grant or gift had been made to the State. If, by any possibility, any of the funds thus apportioned were not required, the unexpended balance would revert, not to the State, but to the Federal Government.

The title to the automobiles is in the United States, and not in this State. It is stipulated that the purchase and use of these automobiles was and is in aid and in furtherance of the congressional program for the amelio-

ration of the emergency which induced the passage of the legislation. As to what would be done with the automobiles when the use of them for the purposes for which they are now employed has ceased is a question not presented by the record before us. They are now used for a Federal purpose, and, if so, they are not subject to taxation; nor is the gasoline required to run them subject to taxation.

A similar question was involved in the case of *Panhandle Oil Co.* v. *State of Mississippi,* 277 U. S. 218, 48 S. Ct. 451, 56 A. L. R. 583. There the State of Mississippi sued to recover taxes claimed on account of sales of gasoline made for the use of the Federal Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport in that State. The Supreme Court of Mississippi held the exaction a valid privilege tax measured by the number of gallons of gasoline sold; that it was not a tax upon instrumentalities of the Federal Government, and that the United States was not entitled to buy such gasoline without the taxes charged other users of gasoline being paid. 147 Miss. 663, 112 So. 584.

In reversing this case the Supreme Court of the United States held, in the case first cited, that: "While Mississippi may impose charges upon petitioner (the dealer who sold the gasoline) for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

In the case of *Johnson* v. *State of Maryland,* 254 U. S. 51, 41 S. Ct. 16, it was held (to quote the headnote) that: "A law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, can not constitutionally apply to an employee of the Post Office Department while engaged in driving a government motor truck over a postroad in the performance of his official duty."

In that opinion it was said: "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has

been regarded as established since *McCulloch* v. *Maryland,* 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today."

See also *Grayburg Oil Co.* v. *Texas,* 278 U. S. 582, 49 S. Ct. 185, reversing the decision of the Supreme Court of Texas, [3 S. W. (2d) 427], holding that the State had the right to collect a tax on gasoline sold to the United States and delivered on a military reservation in that State.

It is provided, in § 35 of act 65 of the Acts of 1929 (vol. 1, Acts 1929, page 309), that motor vehicles belonging to the United States Government and used in its business exclusively shall not be required to pay any motor vehicle fuel tax nor to pay a license fee on such vehicles, thus recognizing the exemption from taxation and the absence of any purpose to collect such a tax.

We have not overlooked act 108 of the Acts of 1933, page 329, which does not affect the conclusion announced.

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

SHRIGLEY *v.* PIERSON

4-3488

Opinion delivered June 11, 1934.

[redacted]

Reynolds & Maze, for appellant.

G. O. Patterson, Sr., G. O. Patterson, Jr., and *R. W. Robins*, for appellee.

SMITH, J. Mrs. Pierson, the plaintiff below, alleged and offered testimony legally sufficient to establish the fact that she had been invited to ride in and to drive a car owned by a Mr. Shrigley—the defendant below—the steering gear of which was defective, and because of the defect she was unable to control the car, which ran off the road, turning over, and inflicting upon Mrs. Pierson serious and permanent injuries. Mrs. Pierson drove the car from Clarksville, of which city she and Mr. Shrigley were residents, to Fayetteville, a trip any one would be pleased to take who knew what to expect in the way of scenic beauty. The purpose of the trip was to drive Mrs. Shrigley's mother and father to Fayetteville and leave them there to visit another daughter, and Mrs. Shrigley made the fourth member of the party. Mrs. Shrigley and Mrs. Pierson were returning alone, when, according to Mrs. Pierson's testimony, the steering gear locked, and she lost control of the car, which ran off the road and turned over.

There was testimony to the effect that Mr. Shrigley had been informed by a mechanic who did some repair work on the car that the steering gear was not in good order, and he was advised by the mechanic to have it put in repair, but he neglected and failed to do so. This was denied by Shrigley, and the testimony on his behalf was to the effect that the work of the mechanic put the car in good condition, and that he was advised of no defect in the steering gear. The testimony on Shrigley's behalf was to the further effect that the steering gear was not out of order even after the car had turned over, and that the accident was caused by a nail which had punctured one of the rear tires.

The cause was submitted to the jury under instructions, to which Shrigley objected and excepted, to the effect that, if he invited Mrs. Pierson to take the trip and drive the car, he was liable for any damages suffered

by her by reason of a defect in the steering gear, if he knew, or, in the exercise of due care, should have known, of the defect. Instructions were requested by Shrigley to the effect that he would not be liable, even though he had invited Mrs. Pierson to accompany his wife, and the finding was made that the injury to Mrs. Pierson was occasioned by a defective steering gear, unless he knew of the defect.

From a verdict and judgment in favor of Mrs. Pierson is this appeal. We think the law should have been declared as requested by Shrigley in the respect above stated. The case of *Howe* v. *Little,* 182 Ark. 1083, 34 S. W. (2d) 218, was a suit by an invited guest against the owner of a car in which the owner and the guest were riding when the guest was injured. There was some question as to whether the plaintiff was an invited or a self-invited guest, but we adopted the rule—which was said to be the modern rule and the one supported by the weight of authority—that no distinction was to be made as to the kind of a guest, as the duty was identical, whether the guest was invited or self-invited.

In discussing the duty owing the guest, it was there said that "the guest takes the automobile and driver as he finds them," and that there was no duty of inspection for defects so far as the guest was concerned. We there quoted from 1 Blashfield, Cyclopedia of Automobile Law, page 967, the following statement of the law: "With respect to the condition of the automobile, the rule is that one invited to ride therein by the owner or driver accepts the machine of the host as he finds it, subject only to the limitation that the driver or host must not set a trap or be guilty of active negligence, contributing to the injury of the guests."

There appears to have been no other error at the trial, but for the error indicated the judgment must be reversed, and the cause will be remanded for a new trial.

JOHNSON, C. J., and MEHAFFY, J., dissent.

STEED *v.* STATE.

Crim. 3889

Opinion delivered June 11, 1934.

Reinberger & Reinberger and *E. D. Dupree, Jr.*, for appellant.

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

HUMPHREYS, J. Search warrants were issued by the circuit judge of Jefferson County under § 2637 of Crawford & Moses' Digest on information that gambling devices commonly called slot or marble machines were kept contrary to law in a cigar store operated by S. A. Rosenberg and in a sandwich shop operated by Jerome Weaver in Pine Bluff. The sheriff executed the writs by taking into his custody certain slot marble machines which were being used at both places. The two causes were consolidated by order of court, and appellant herein, the owner of the machines, intervened, alleging that they were manufactured and used for the purpose of amusement, and not for the purpose of gambling.

On the hearing of the consolidated causes, the trial court found that the machines were gambling devices and ordered that they be destroyed, from which is this appeal.

The record reflects that the machine seized at the cigar store was used a part of the time by the patrons for gambling and at other times for amusement only; that the machine seized at the standwich shop had been used by the patrons for gambling until notice had been given by the circuit judge that marble slot machines would be confiscated, and that then it was used for the purpose of amusement only; that the machines are so constructed that by putting a nickel in the slot ten marbles are released and are brought into play one at a

time by pulling a lever on the side, and then by pulling another lever each marble is shot out to a large board containing holes which are numbered, into which the marbles drop; that the patron getting the largest score wins the game and the prize.

Section 2637 of Crawford & Moses' Digest, under which the machines were seized, provides for the destruction of gambling devices, which § 2630 of Crawford & Moses' Digest makes it unlawful to keep and exhibit. Said § 2630 is as follows:

"Every person who shall set up, keep or exhibit any gaming table or gambling device, commonly called A. B. C., E. O., roulette, *rouge et noir,* or any faro bank, or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not herein named, be the name or denomination what it may, adapted, devised or designed for the purpose of playing any game of chance or at which any money or property may be won or lost, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than one hundred dollars, and may be imprisoned any length of time not less than thirty days nor more than one year."

Appellant contends that the marble slot machines owned by him and seized in these actions are not gambling devices inhibited by § 2630 of Crawford & Moses' Digest, and that the order for their destruction should be reversed. The description of these slot machines make them gambling devices *per se* under the construction placed upon said § 2630 in the case of *Howell* v. *State,* 184 Ark. 109, 40 S. W. (2d) 782, and cases cited therein. We might add that they are gambling devices *per se* because the only reasonable and profitable use to which they may be put is use in a game of chance.

No error appearing, the judgment is affirmed.

SPARKMAN HARDWOOD LUMBER COMPANY *v.* BUSH.

4-3546

Opinion delivered June 11, 1934.

Buzbee, Harrison, Buzbee & Wright, for petitioner.

J. H. Lookadoo, for respondent.

MEHAFFY, J. W. D. McCann filed suit in the Clark Circuit Court against the Sparkman Hardwood Lumber Company, a corporation created by the laws of this State, and summons was served on W. L. Huie of Arkadelphia, Clark County, Arkansas. The Sparkman Hardwood Lumber Company filed a motion in the Clark Circuit Court to quash summons and service, appearing specially for that purpose and for no other purpose, alleging that it had no place of business in Clark County, Arkansas, and did no business therein, that its chief officer did not live or reside in Arkansas or Clark County, and stated

specifically that W. L. Huie was not its chief officer. A hearing was had upon said motion and the testimony of Eugene E. Fohrell, W. L. Huie and W. D. McCann was introduced. The circuit court overruled the motion to quash. After the motion to quash was overruled, petitioner filed its petition in this court, praying that the summons and service thereof be quashed, and that said circuit court be prohibited from proceeding further therein.

Petitioner's place of business is in Dallas County, Arkansas, and it has no place of business in Clark County and does no business in Clark County. Eugene E. Fohrell, secretary of the petitioner, lives in Dallas County. Edwin Schaff, the president, lives in Missouri, and W. L. Huie, vice president, lives in Arkadelphia, Clark County. The president, Schaff, only visits the place five or six times a year; vice president Huie goes to the place of business every day from his home in Arkadelphia.

Section 1171 of Crawford & Moses' Digest, reads as follows: "An action, other than those in §§ 1164, 1165, against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency."

It is not contended that the petitioner has any place of business in Clark County and service of summons in Clark County would not be proper service unless W. L. Huie is its chief officer. The statute expressly provides that the suit may be brought against a corporation in the county in which its chief officer resides. It is admitted that W. L. Huie resides in Clark County where he was served, therefore the only question before the circuit court was whether W. L. Huie was its chief officer.

Eugene E. Fohrell testified, in substance, that he was secretary of the petitioner, and, in addition to being secretary of the company, he was manager; that it was part

of his duty to see to the entire operation of the company. He resides in Dallas County. Had charge of the clerical details as well as the physical management of the plant. The president of the company, Mr. Edwin Schaff, resided in Missouri and spent five or six days a year in Dallas County. That Mr. Huie was vice president, and there were no other officers of the company. That he was in actual charge of the handling of the business. Mr. Huie resides in Clark County; he spent practically all of his time at the plant, he would drive back and forth from Arkadelphia. He testified that he was the acting manager authorized by resolution of the board of directors. The board of directors gave him authority. He did not have a copy of the resolution; it was not introduced in evidence. He remembered selling some land, and the deed was introduced in evidence. It showed the signature of Sparkman Hardwood Lumber Company by W. L. Huie, vice president. Attest: Eugene E. Fohrell, secretary. There was a resolution introduced showing appointment of Fohrell as agent for service in Arkansas. This resolution was signed by W. L. Huie as vice president and Fohrell as secretary. Witness signed checks, Huie did not. They had sold some timber, and he did not know who signed the instrument. Up to about two years ago, North was vice president and Huie was secretary. Witness and Huie are the only two officers of the company who resided in the State. When North was vice president, he was general manager. Later, Mr. Huie was made vice president but not manager. Huie testified that he was vice president and Fohrell was secretary, and that his general duties were to obey orders. He had charge of the books, but Fohrell performed the duties of general manager. Fohrell had supervision over logging operations and activities of the mill. That he was not Fohrell's boss or superior; he did anything Mr. Fohrell told him to do. He signed the deed as vice president. He also testified that Fohrell was authorized to sign deeds. He did not know whether there was a resolution of the board of directors or not. His testimony and Fohrell's were substantially the same as to their authority. He did not know whether Fohrell ever signed a deed or not

and did not know how many deeds had been made and did not remember whether he signed them all, but said he had authority to do so.

The plaintiff, W. D. McCann, testified in substance: "That Huie was the boss down there, that whatever he said seemed to be the last word; he had been boss for the last seven or eight months. Huie sent lumber to witness at different places, and sent witness to different places to haul logs. If witness wanted to carry lumber to the woods to fix a bridge or wanted to go log hauling or anything, he generally went to Mr. Huie.

The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. When the court has jurisdiction over the subject-matter and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy." *Order of Ry. Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448; *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421; *Lynch* v. *Stephens,* 179 Ark. 118, 14 S. W. (2d) 257; *Roach* v. *Henry,* 186 Ark. 884, 56 S. W. (2d) 577; *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. (2d) 1030.

Witness Fohrell testified that a resolution was adopted by the board of directors prescribing his duties. When one relies on any written instrument and fails to produce the instrument, the presumption is that the production of the instrument would disprove his contentions. The resolution adopted by the board of directors would have settled the question before the court. Petitioner knew this and alleged in his motion to quash that Huie was not the chief officer, but it did not produce the resolution which it had.

"Where it is apparent that a party has the power to produce evidence of a more explicit, direct and satisfactory 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. * * * 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 the 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." *Miss. River Fuel Corp.* v. *Young,* 188 Ark. 575, 67 S. W. (2d) 581; *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84.

We have many times held that if the existence or nonexistence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower court, and, if rightfully determined, would have ousted the jurisdiction.

In the instant case, as we have already said, whether Huie was the chief officer of the petitioner was a contested question of fact which the lower court had jurisdiction to hear and determine, and we have many times held that the finding of the court on questions of fact will not be disturbed by this court if there is any substantial evidence to support the finding of the lower court. In other words, we do not pass upon the credibility of the witnesses nor the weight to be given their testimony; this is the province of the trial court, and his finding based upon substantial evidence is conclusive here. The writ is therefore denied.

O'KANE *v.* FIRST NATIONAL BANK OF PARIS.

4-3487

Opinion delivered June 11, 1934.

[redacted]

James B. McDonough, for appellant.

Arnett & Shaw, for appellee.

MCHANEY, J. This is an action by appellees against appellant and her husband, W. S. O'Kane, for the foreclosure of two mortgages given to secure certain indebtedness represented by three promissory notes. One of the mortgages was dated April 6, 1927, and was executed by W. S. O'Kane alone to secure an indebtedness to L. B. Crenshaw. It was sold and assigned to appellee bank after maturity in 1933. The other was dated July 30, 1930, and purported to be signed and acknowledged by both appellant and her husband, the acknowledgment being dated October 7, 1930, and was recorded the same day. This mortgage by express terms made it subject to the Crenshaw mortgage.

The defense to the foreclosure action by appellant was that, although she signed the mortgage of July 30, 1930, she did so under duress and compulsion of her husband, and that she did not acknowledge the same. The court found both issues against her and decreed foreclosure, extinguishing her dower and homestead rights in and to the lands described.

This appeal presents the same questions for review, and these are principally questions of fact. To support

her plea of duress, appellant testified as follows: "Well, Mr. O'Kane had been trying to get me to sign the mortgage, and I refused to sign it, and he said I had to sign it. He cursed and made me sign it." She was corroborated somewhat by her husband, but the trial court held his testimony incompetent, and this forms the basis of one argument for reversal by appellant. We do not think it necessary to determine this question in this case, for, conceding without deciding its competency, we are of the opinion that the decree of the court in this respect, as well as upon the issue of whether she appeared before the notary and acknowledged the instrument, is not against the preponderance of the evidence. Appellant admitted she signed the mortgage at her home and that her husband took it to the bank. She did not at any time mention the matter of duress to any official of the bank. Mr. O'Kane took the mortgage to the bank and there acknowledged it before Dolph Guthrie, notary. His wife (appellant) was not present at that time. Officials of the bank testified that she later came in and acknowledged some paper before the same notary, and this paper was handed to the cashier. The acknowledgment was completed October 7, 1930, and was recorded that same day. The certificate of the officer is regular in form, and states that she, "in the absence of her said husband, declared that she had of her own free will executed the foregoing deed and signed and sealed the relinquishment of dower and homestead therein expressed for the consideration and purpose therein contained and set forth, without compulsion or undue influence of her said husband." This mortgage had been delivered to the notary to hold for the acknowledgment of appellant, and, when it was had, it was turned back to the cashier, Mr. Sadler, who had it recorded the same day. Appellant stands alone in denying that she appeared and acknowledged the instrument. She is contradicted, not only by her interest in the result of this lawsuit, but by the certificate of the officer and two officers and employees of the bank, and by her admission that she actually signed her name to it. The burden was upon her to establish the falsity of the

certificate of the notary, and this she has failed to meet. As said by the late Chief Justice HART, in *Nevada County Bank* v. *Gee,* 130 Ark. 312, 197 S. W. 680: "In our opinion, the weight of the evidence should not be affected by any particular rule peculiar to the subject, but rather the court should be left to determine from all the circumstances disclosed whether the certificate of acknowledgment is true or false. This much may be said, however, under chapter 29 of Kirby's Digest, a proper acknowledgment is an essential part of the execution of a conveyance. The acknowledgment is an official act done under an official oath and is protected under the presumption the law necessarily indulges in favor of the acts of its own officers. Under our statute, one of the means of evidence upon which a deed can be admitted to record is a certificate of proof or acknowledgment of an officer authorized by our statute to take such proof or acknowledgment. The burden of proof undoubtedly rests upon the person denying the falsity of the certificate, which carries with it the usual presumption that the officer making it has certified to the truth, and has not been guilty of a wrongful or criminal action.

"The notary or other officer before whom an acknowledgment is taken performs a very important duty when he takes and certifies an acknowledgment of a deed or any instrument affecting the title to real estate. For that reason great weight is given to his official act in certifying to the validity of such instruments. The impeachment of his certificate involves a charge of criminal violation of duty on the part of the certifying officer." See also *Miles* v. *Jerry,* 158 Ark. 320, 250 S. W. 34; *Clifford* v. *Federal Bank and Trust Co.,* 179 Ark. 948, 19 S. W. (2d) 1026; *Anthony* v. *Pennington,* 182 Ark. 1039, 34 S. W. (2d) 219; *Jolly* v. *Meek,* 185 Ark. 395, 47 S. W. (2d) 43, and cases cited therein.

The evidence is amply sufficient to support the court's finding that she did appear before the officer and did acknowledge the instrument. Having done so, and having solemnly and without compulsion stated to the officer that she had signed same "without compulsion or

undue influence of her said husband,'' she ought to be and is now estopped from so contending.

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

ROACH *v.* HAYNES.

4-3489

Opinion delivered June 11, 1934.

John Baxter, for appellant.

C. Warfield and *Sam Robinson*, for appellee.

BUTLER, J. T. W. Roach, the appellant, is engaged in the work of the construction of levees, and as a part of his equipment a tower machine was in use. This machine is composed of a tower about one hundred feet high with cables, engines, etc., installed thereon. It was used for placing dirt on the levee by means of buckets or scoops moving on cables from a point between the levee and the river. This structure moved on wheels along a track made of cross ties and heavy timbers, constructed in sections called "mats." As the work progressed the tower was pulled along the track by means of a cable which was fastened to a "dead man" and wound around a drum, thence back under the machine. After the machine passed over one section the cable was attached to that section, which was then pulled underneath the machine to the front so that the machine could pass over it again. A small steam engine was used in pulling the machine forward and also for bringing forward the "mats" or sections. This engine was located on a platform about twenty feet above the ground floor. The floor of the machine was about six feet above the ground level at the rear and about four feet in front. It was constructed in this manner because it operated on a slope.

The appellee Haynes was in the employ of the appellant and in charge of the operation of the tower machine. On the 10th of October, 1932, in the regular course of his employment, the appellee was under the machine taking some measurements at a time when the "mat" over which the machine had just passed was about to be pulled forward. On a given signal the engine was started suddenly by the application of a full head of steam which caused the cable to vibrate violently from side to side, striking Haynes and severely injuring him. This suit was brought to recover damages for such injuries, and resulted in a verdict and judgment in favor of the appellee, from which is this appeal.

It is contended that the injury was the result of a risk assumed by the appellee; that there was no negligence on the part of the appellant proved, that the cause of the injury was the negligence of the appellee, and, lastly, that the case was submitted to the jury on improper instructions.

In determining these questions, under settled rules, we must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and which so considered may be thus stated: The appellee was experienced in the nature of the work he was performing and aware of the danger ordinarily incident thereto. He had been in the employ of the appellant for some time before the accident occurred and had operated the tower machine, beginning about the first of August, 1931, for a few months. For an interval for some reason the machine was not in operation, and then about July, 1932, while the machine was at Greenville, Mississippi, appellant obtained a contract to construct a levee near Grand Lake in Chicot County, Arkansas. The machine was moved there and work began on that job about July 10th with Haynes in charge of the operation of the machine. At the time of the removal of the equipment, between the first and the tenth of July, Haynes notified the appellant that the small engine used for moving the machine forward and for bringing forward the "mats" was worn and defective. The appellant promised that he would have it repaired when it was taken "to the lower job." The defects were described to be the result of a worn condition, which caused about a fifty per cent. loss of power. The cylinders and pistons were worn, and, if the engine was started in the proper manner, it would come "on center" and stop. This necessitated the opening of the throttle wide and letting the steam start with full head in order that the engine would operate. This would cause the slack in the cable to be taken up quickly, resulting in the cable whipping from one side to the other. If the engine had been in proper condition, the proper manner of operation was to start it slowly, gradually applying the cable and tightening it

before applying full steam. The engine could not be repaired while on the job, and it would be necessary to stop operations and take it to some machine shop for the repairs to be made. The engine was not repaired before beginning work on the lower job, and Haynes called that fact to the attention of Mr. Frank Grant, who, according to the claim of Haynes, was the superintendent of the job. Grant promised several times to have it fixed at the first favorable opportunity when something would occur—such as rains or anything else which would cause the work to stop for a time—and that, on the occurrence of an event of this nature, the engine would be taken to the shop at Greenville and there be repaired. Relying on the promise of the appellant and Grant, Haynes continued to operate the tower machine up until the time of his injury and, not realizing the extent of his injury, operated it for some time longer.

The above facts are drawn from the testimony of the appellee. There was no dispute in the testimony as to the defective condition of the engine. As to the promise of repair, Mr. Roach, when asked if Haynes had made complaint to him at Greenville about the engine being defective, answered, "Not that I remember." Mr. Grant, in testifying regarding the notice as to the defective condition of the engine claimed by Haynes to have been given him and as to whether or not it was before or after the injury, when asked, "Did he ever make any such complaint to you," answered, "I don't think so—not before then. He did afterwards."

It will be observed that there were positive statements of Haynes regarding the notice and promise of repair both given to and made by Roach and Grant, while there is not a positive denial by them of those facts. There was therefore sufficient substantial evidence to warrant the conclusion of the jury that such notice was given and the promise of repair made.

There is a conflict in the testimony relative to the position Grant occupied and as to whether or not he was clothed with authority to represent the appellant with respect to shutting down the work for the purpose of hav-

ing the engine repaired. Haynes testified that Grant was general superintendent, and that, while he himself directed the operation of the tower machine, kept it in shape, and did such repairs to its structure or machinery as might be done without serious interruption of the work, the general supervision of the work was under Grant, from whom he received his orders. The testimony of Roach details the particular duties required of Grant, and that Haynes "was superintendent of the tower machine and had charge of all the machinery," but did not deny that given by Haynes to the effect that Grant was in charge of the general supervision of the work and that Haynes took his orders from him. The testimony of Grant relative to this told of his specific duties, which were that of a timekeeper and commissary man, and the statement that he did not have anything to do with the operation of the tower machine. But there was no denial by him of that part of the testimony of Haynes to the effect that he was clothed with general supervision of the work. We think that the evidence as to the authority of Grant to receive the notice of the defective condition of the engine and to have the repairs made is sufficient to justify the submission of that question to the jury, and its conclusion that he had such authority is binding on us, and therefore notice to him was as effectual as if made to the appellant himself. This state of case makes applicable the rule announced in *St. Louis, I. M. & S. R. Co. v. Holman*, 90 Ark. 555, 120 S. W. 146, cited by the appellee, and creates an exception to the rule that an employee assumes all the ordinary risks of his employment and such extraordinary risk as may result from defects in the instrumentalities used of which he is aware.

As said in the case cited *supra*: "The effect of a promise to repair by the master, and the continuance in his service by the servant, in reliance upon the promise, is to create a new stipulation, whereby the master assumes the risk impendent during the time specified for the repairs to be made. Where no definite period is specified in which the given defects are to be remedied, the suspension of the master's right to avail himself of the

defense of assumption of the risk by the servant continues for a reasonable time. 1 Labatt, Master and Servant, §§ 424, 425, and notes thereto. No matter how obvious the defects or how imminent the perils therefrom, the servant, pending the promise of the master to repair, does not assume the risk of the given defects by continuing in the master's service in reliance upon his promise. For, as was said by the Supreme Court of Illinois in *Swift & Co.* v. *O'Neill,* 187 Ill. 337: 'By the promise of the master a new relation is created between him and the employee whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following his promise.' "

The appellee was skilled in the operation of the appliances with which the work was done and familiar with the dangers incident to the defects therein, and ordinarily, as insisted by the appellant, where the danger arising from the negligence of the master is so obvious in its nature as to be readily discoverable by one of ordinary intelligence, the employee, by voluntarily continuing in the situation, assumes the hazard which exempts the employer from liability on account of injury. This was the theory on which instruction No. 6, requested by the appellant and given by the court, was based, which instruction was more favorable to him than he was entitled to. This instruction and the appellant's theory would have been correct, had it not been for the notice given to the employer and his promise to repair. This fact distinguishes the instant case from those cited and relied upon by the appellant announcing the doctrine of assumption of risk. The promise of repair creates a new relation between the employee and the master which removes the assumption of risk for a reasonable time pending the compliance of the promise, and it is only where the danger is apparently so great and imminent that no prudent person would continue in the work that the assumption of risk would continue. See cases first cited and *Newport Mfg. Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120. In this case it cannot be said as a matter of law that the defect in the engine caused its operation to be so

dangerous that no prudent person under any circumstances would continue to use it or to work in close proximity thereto. *Johnson* v. *Mammoth Vein Coal Co.,* 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180; *Pekin Cooperage Co.* v. *Duty,* 140 Ark. 135, 215 S. W. 715; *Mama Coal Co.* v. *Dodson,* 141 Ark. 438, 217 S. W. 475.

Appellant is in error in the contention that the evidence fails to show any negligence on his part. From the evidence accepted by the jury as true, he was negligent in the failure to repair the engine within a reasonable time after having received notice of its defects and after making promise to repair the same.

On the contention that the proximate cause of appellee's injury was not the negligence of appellant, it is argued that the injury was occasioned by the negligence of the appellee himself, in occupying a place of known danger without advising those who operated the engine that he was about to take this place. It is true that the appellee did not tell the operator of the engine, or any one else of the employees, that he was about to go under the tower machine, and, as argued by the appellant, he was well aware of the condition of the engine and that from the necessity of the manner of its operation the cables, in taking up the slack, would be switched and jerked about in varying degrees. But he was in the line of his duty in going under the machine, and this was necessary for the proper prosecution of the work. In testing the question of the degree of care the appellee took or failed to take, consideration should be given to the fact that he was engaged in the performance of necessary work and had to give to it his attention as well as the particular place he was then occupying. This place was twelve feet distant from the line of cable, and it is not shown that at that distance the appellee would have been in such an obviously dangerous place that one of ordinary prudence and caution would not have occupied it. It is well settled that, where an employee works in a situation where the danger is so obvious and imminent that no person of ordinary prudence would expose himself thereto, then the negligence would be such as to relieve the

employer of liability. On the other hand, however, where reasonable minds might draw different conclusions as to the danger and its imminence, it becomes a question of fact for the determination of the jury. *St. Louis, I. M. & S. R. Co.* v. *Mangan,* 86 Ark. 507, 112 S. W. 168; *Johnson* v. *Mammoth Vein Coal Co.,* 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180; *E. L. Bruce Co.* v. *Leake,* 176 Ark. 705, 3 S. W. (2d) 6; *Newport Mfg. Co.* v. *Alton, supra.* The court submitted the question of the appellee's contributory negligence to the jury under an instruction which fully and correctly declared the law on that subject.

It is lastly insisted that instructions Nos. 1, 2 and 3 were repetitions of identical statements, the principal objection being that in all these instructions the court assumed as a matter of law that the engine was defective. We have examined these instructions and find them not open to the objections made. The question as to whether or not the engine was defective was submitted to the jury, and in this respect was more favorable to the appellant than it should have been. There is no dispute in the evidence as to the condition of the engine and no denial by any witness that the statements regarding the defective condition of the engine were not correct.

On the whole case, we find no error prejudicial to the appellant, and, as there is substantial evidence to support the verdict, the judgment is affirmed.

[redacted]

WILLIAMS *v.* CLEMENT.

4-3492

Opinion delivered June 18, 1934.

[redacted]

E. W. Brockman, for appellants.

Bridges, McGaughy & Bridges, for appellee.

JOHNSON, C. J. This replevin action was instituted by appellee, Virginia C. Clement, against Ed Williams, *et al.*, trustees for Pleasant Grove Baptist Church, colored, in the municipal court of Pine Bluff seeking possession of a certain piano. Appellee was successful in the municipal court and appellants appealed to the circuit court of Jefferson County wherein results were obtained not dissimilar to those in the municipal court, and this appeal is likewise prosecuted, which must result as in the lower courts. The facts are not in material dispute and may be summarized as follows:

Prior to 1932 appellee owned the piano in controversy; in January, 1932, she delivered it to Kohn & Kohn Music Company of Pine Bluff for storage, the storage to be paid by use of the instrument for demonstration purposes. While the piano was thus stored, appellants representing the negro Baptist Church purchased same from Kohn & Kohn Music Company paying full value therefor in cash, without notice of appellee's ownership or circumstances indicating her interest.

This case is ruled by *Forest* v. *Benson,* 150 Ark. 89, 233 S. W. 916, and cases therein cited. Since the rendition of the opinion of this court in *McIntosh* v. *Hill,* 47 Ark. 363, 1 S. W. 680, we have consistently held that possession of personal property is only *prima facie* evidence of title, and that the doctrine of *caveat emptor* prevails notwithstanding the possession; also that the *prima facie* title must yield to the actual title when asserted unless the actual owner has done some affirmative act, or has neglected to speak when called upon to do so, which estops the actual owner in his present assertions. The trial court found, as a fact, that appellee was not estopped in asserting her actual title to the piano in controversy, and this finding is not without substantial evidence to support it. The doctrine here announced or restated is not in conflict with *Georgia Casualty Company* v. *Board of Directors,* 188 Ark. 1122, 70 S. W. (2d) 33, or any other opinion of this court on the subject here under consideration.

No error appearing, the judgment is affirmed.

MARTIN *v.* STATE.

Crim. 3884

Opinion delivered June 18, 1934.

Vernon Bankston, for appellant.

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

KIRBY, J. Appellant was tried under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one Young Butler. He was convicted of murder in the second degree, and given a sentence of sixteen years in the penitentiary, and has prosecuted this appeal to review and reverse that judgment.

It is assigned as error that the testimony is not sufficient to support the conviction. This assignment of error may be disposed of by saying that, according to the testimony on behalf of the State, the defendant made an unprovoked assault upon the deceased at a church during the church services. The parties were all negroes.

It is assigned as error that the court refused to charge the jury as to the difference between murder in the first degree and murder in the second degree. But the record does not support this assignment. The court fully and correctly defined the crime of murder, and, after doing so, then charged the jury as follows: "If you find from the evidence beyond a reasonable doubt that the defendant in Ashley County, Arkansas, and within three years next before the return of this indictment into court, with malice aforethought but without premeditation or deliberation, shot and killed the deceased, Young Butler, as alleged in the indictment, you will find him guilty of murder in the second degree."

Thereafter the court gave an instruction requested by appellant defining premeditation and deliberation.

It is insisted also that the court erred in failing to charge the jury as to the crime of manslaughter and the difference between that crime and the crime of murder. But it does not appear that the court was asked to do so, or that any instruction was requested by defendant on that subject. It has been frequently decided that, where an accused desires an instruction on a particular issue not covered by the instructions given, he should request a correct instruction thereon, and he will not be heard to complain where he fails to do so. *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. (2d) 909. It was held in the case of *Graves* v. *State,* 155 Ark. 30, 243 S. W. 855, (to quote a headnote) that: "Where defendant requested no instruction submitting the issue of manslaughter in a prosecution for murder, he cannot complain of the court's omission to give such an instruction."

It is insisted that a new trial should have been granted on account of newly-discovered evidence to the effect that the deceased had made violent threats against

the accused which had not been communicated but which would have been admissible, as tending to show who had been the aggressor in the fatal difficulty, notwithstanding the fact that the threats had not been communicated. It was not shown, however, that this evidence could not have been procured had proper diligence been exercised, and for this reason the court did not err in refusing appellant's motion for a new trial on the ground of newly-discovered evidence. *Lewis* v. *State,* 155 Ark. 215, 244 S. W. 458, and cases there cited.

It is finally insisted that the verdict returned was a quotient verdict, arrived at by adding together the number of years for which each juror thought the defendant should be sentenced for murder in the second degree—all the jurors having voted that the accused was guilty of that crime—and dividing that total by twelve. It was stipulated "that, if the members of the jury were permitted to testify, they would give the testimony as outlined in the motion for a new trial signed by the defendant."

This method of arriving at verdicts was condemned in the case of *Williams* v. *State,* 66 Ark. 264, 50 S. W. 517; but it appears that no objection was there raised as to the competency of the testimony of the jurors to that effect. The court there said: "The facts are admitted, and we need not therefore discuss the method by which they were established." The opinion recites that evidence bearing on this point was introduced both by the State and the defendant at the hearing of the motion for a new trial.

We do not understand that the evidence of the jurors was offered without objection on the hearing of the motion for a new trial in this cause. The stipulation signed by the prosecuting attorney reserved the question of its competency, and admitted only that the jurors would so testify if they were permitted to testify.

This identical question has been several times considered, and the cases on the subject were reviewed in the recent case of *Patton* v. *State, ante* p. 133, where an attempt was made to show that the verdict upon which the accused had been sentenced was a quotient verdict, simi-

lar to the one here brought into question. We there held that the verdict of a jury could not be impeached by the testimony of a member of the jury except only to show that the verdict was made by lot, and there was no other testimony except the offered testimony of the jurors as to the manner in which the verdict had been reached. It was not error therefore to refuse to grant a new trial upon this incompetent testimony.

Upon a consideration of the case in its entirety there appears to be no error, and the judgment must therefore be affirmed, and it is so ordered.

BROWN *v.* FRETZ.

4-3506

Opinion delivered June 25, 1934.

W. C. Benton, for appellant.

KIRBY, J. Appellant brought this suit to foreclose two mortgages given him by appellee. One mortgage secured a note dated December 31, 1931, for $135 executed by appellee to appellant's order. The other secured a note dated January 8, 1932, for $672.27, also executed by appellee to appellant's order. An answer was filed which alleged that each note was usurious and void for that reason.

The court found there was no usury in the note first mentioned and decreed the foreclosure of the mortgage which secured it. It was found and decreed, however, that

the second note was usurious and void for that reason, and this appeal has been prosecuted to reverse that decree. No appeal was prosecuted from the decree ordering the foreclosure of the mortgage securing the note first mentioned.

Appellee testified that he borrowed $607.97 from appellant, from which a recording fee of $4.50 was deducted, and that appellant charged him $64.33 for making the loan, which was evidenced by the note for $672.27, and that this note bore interest at ten per cent. per annum from date until paid.

Appellee's testimony makes a case of usury, but it is categorically denied by appellant. Appellee testified that he received only $607.97, from which the $4.50 recording fee was deducted. This fee of $4.50 cannot be considered in determining whether the loan was usurious, for, although it was not paid to the borrower, it was paid out for his benefit. This was a charge which appellee agreed to pay and must be regarded as a part of the money which he received.

The purpose of the loan here under review was to pay and satisfy a judgment which had been recovered against appellee, and to redeem his land from sales for taxes. Appellee itemized the payments which appellant made for his account. These, including an abstract of the title, which cost $26, totaled only $607.97, and appellee denied that any other sum had been paid out for his account or benefit.

Appellant testified that he was not in the loan business, and had never taken but three mortgages in his life. That appellee applied to him to make the loan, and urged that it be made to save his farm. He was offered a bonus to make the loan, but declined to accept it and took a note only for the actual amount that he had paid out at appellee's request and for his benefit. Appellant mentioned two items which appellee at first denied receiving. One of these was evidenced by a check to the county treasurer for $15.55, and another was a check to the sheriff for $8.52. Upon being recalled, appellee admitted the correctness of these items, which reduced the bonus which

he claimed to have paid for the loan by the amount of the two items. The loan was, according to appellee, still usurious notwithstanding these deductions.

Appellant testified that, after he agreed to make the loan, he directed J. W. Martin to prepare the abstract, to ascertain the amount of money which appellee required, and to prepare the necessary papers, and that he paid the sum which Martin told him would be required, and that the note was taken for the aggregate payments which he made, and for nothing more.

Martin testified that appellant and appellee came to his home and told him that appellee had some land which was about to be sold under an execution, and that appellant was going to loan appellee "some money to clear up his indebtedness." It was not then known what sum would be required, but Martin was directed to obtain this information and to prepare the papers. It was quite a job to do this and took Martin about two days to do so. Martin further testified: "We didn't know how much it would take to take up this indebtedness. I prepared the abstract and looked up the judgment and got the taxes on other lands besides this land and got everything up, and we came to the courthouse and Mr. Brown issued his checks to cover these different items. I drew the mortgage and Mr. Brown paid for that. Q. These items had been arrived at by you and Mr. Fretz? A. Yes, sir, and the other officials around the courthouse."

We conclude therefore that the transaction was not usurious, but, if so, there was no intention to charge usury. It was held in the case of *Leonhard* v. *Flood,* 68 Ark. 162, 56 S. W. 781, that usury will not be inferred where from the circumstances the opposite conclusion can be fairly and reasonably reached, and we think the conclusion that appellant did not intend to charge usury may be fairly and reasonably reached.

It was also held in the case of *Richardson* v. *Shattuck,* 57 Ark. 347, 21 S. W. 478, to quote the headnote, that: "A loan bearing the highest legal rate of interest, secured by a mortgage of land, is not usurious because made upon condition that the borrower should, in addition, furnish

an abstract of title of the land and a certificate that it is not incumbered, that he should have it inspected and valued by a competent person, and that he should pay the fee for having the mortgage recorded.''

The charge of such expenses as preparing the abtract and recording the mortgage cannot therefore be deducted in determining the actual amount of the loan. It follows, from what we have said, that the decree of the court below is erroneous, and it will be reversed, and the cause will be remanded with directions to enter a decree conforming to this opinion. It is so ordered.

[redacted]

CROWE *v.* DAVIDSON.

4-3491

Opinion delivered June 25, 1934.

[redacted]

Ingram & Moher, for appellants.

Frank C. Douglas, for appellee.

BUTLER, J. The appellant Crowe owned 314 acres of land in Prairie County, and Davidson 160 acres of land in Mississippi County, which they agreed to exchange according to the terms of a contract entered into on May 10, 1930. According to this contract, each was to convey to the other their respective lands by warranty deed, their wives joining therein, with the release of

dower and homestead. Davidson agreed to convey an unincumbered title and to assume the payment of a $7,000 mortgage on the lands Crowe was to convey to him in exchange for his Mississippi County lands. It was further agreed that, after the execution of the deeds, Crowe was to retain possession of the Prairie County lands for the years 1930 and 1931 "rent free" and also for the year 1932, but for the use of the land for the last year he was to pay $3,600, to be evidenced by note executed and delivered not later than January 1, 1932, bearing interest from maturity at the rate of six per cent. per annum.

Crowe conveyed his lands to Davidson as contracted. Davidson also executed and delivered his warranty deed to the Mississippi County lands and assumed the payment of the $7,000 mortgage, but his wife did not join in the execution of the deed and release her rights of dower and homestead. The Mississippi County lands, at the time of the exchange of deeds, had been rented by Davidson for the years 1930 and 1931, tenants then being in possession. They had executed rent notes for the rent of the land for these years and these notes, amounting to the sum of $3,200, were delivered by Davidson to Crowe at the time of the transfer.

Crowe failed to execute the $3,600 note, although he retained possession of the Prairie County lands throughout the year 1932, whereupon Davidson brought this suit in the chancery court of Mississippi County for the collection of the $3,600, and to subject the lands in that county which had been conveyed to Crowe to the payment of the amount sued for.

Crowe filed a petition in this court for a writ of prohibition challenging the jurisdiction of the court on the theory that the action was one merely to enforce the collection of a debt and properly triable in Arkansas County, the county of his residence where he was served. On the hearing, the prayer of the petition was denied, this court holding that the complaint stated a cause of action on a demand or interest in lands lying in Mississippi County, and that the chancery court of that county had jurisdiction. *Crowe* v. *Futrell,* 186 Ark. 926, 56

S. W. (2d) 1030. Subsequent to this ruling, the defendant Crowe filed answer renewing and preserving his challenge to the jurisdiction of the court, admitting his execution of the contract and the deeds, but pleading the failure of plaintiff's wife to execute the release of dower and homestead. He alleged that, because of this, the contract was changed and modified by defendant's letter of June 6, 1930, accepted by plaintiff, to the effect that the wife's signature was waived, and in consideration therefor it should be optional with defendant whether he make the note for $3,600, and, if he should elect not to make the same, plaintiff should pay to him $400 and take possession of the Prairie County lands January 1, 1932.

Davidson, in support of the allegations of his complaint, testified that Crowe voluntarily waived the signature of Mrs. Davidson and executed an affidavit by the terms of which he made such waiver and agreed that the failure of Davidson's wife to execute the release of dower and homestead would not be deemed to be a breach of the contract.

Crowe testified that when he learned through his agent, a Mr. Price, who resided near Mr. Davidson in Illinois, that the latter could not procure the signature of his wife, that he (Crowe) wrote a letter addressed to Mr. Davidson of date June 6, modifying the contract as alleged in his answer, and sent same through the mails to his agent in Illinois with directions that it be given to Davidson. Price testified that he received the letter and gave it to Davidson who assented to the modification.

The court found the issues of fact in favor of Davidson, gave judgment for $3,600 with interest from December 1, 1932, until paid, and held that the agreement to execute said note was a part of the consideration for the transfer by Davidson of the lands in Mississippi County to Crowe and fixed a lien on these lands to secure the payment of the judgment with directions that, if same was not paid within the time named, the lands be sold to satisfy the same.

On appeal there are two questions presented; first, that the finding of the trial court was against the preponderance of the testimony. On this branch of the case

it will be noted that Crowe does not know and did not say that his letter of June 6, 1930, was in fact delivered to Davidson and its modification of the contract accepted by him. Price is the only witness who testified to these facts, and his statement is flatly contradicted by Davidson. The appellant argues that there must have been some consideration for the waiver of the wife's release of dower and homestead; that none has been shown by Davidson, who is interested in the result, and that Price is not. The majority of the court is of the opinion that the finding of the trial court cannot be said to be against a preponderance of the evidence. The contract is unusual, and on its face appears highly advantageous to Crowe. He was getting a farm of 160 acres of land in Mississippi County free from any incumbrance, already rented for the years 1930 and 1931. The rent notes had been given him. For this he was exchanging a farm containing 314 acres incumbered by a $7,000 mortgage which he was to have "rent free" for two years. In view of the favorable terms above, it might be that he was quite willing to waive the release of dower and homestead.

The court's finding that the contract had not been modified leaves the contract of May 10, 1930, unimpaired. It was introduced in evidence and supports the allegations of the complaint. On the question of jurisdiction, the important paragraph of the contract, after reciting the description of the lands in Mississippi County then belonging to Davidson and his agreement to convey the same free of all incumbrance, provides: "That, for and in consideration of said conveyances, the said party of the second part agrees to convey to the party of the first part the" [describing lands] "subject however to a Government loan in the sum of $7,000 which the party of the first part assumes and agrees to pay provided however, the said party of the second part is to keep and retain possession of said Prairie County land above described for the years 1930 and 1931, rent free, and further as part of the consideration of this exchange of properties, the party of the second part agrees to rent or lease said Prairie County land from the party of the

first part for the year 1932 in the sum of $3,600, same to be evidenced by a note to be executed and delivered, not later than January 1, 1932, bearing interest from maturity at the rate of six per cent. per annum until paid, said note to be paid in the State Bank of Blue Mound, Illinois."

The appellants contend that the contract was fully consummated and carried out when the deeds were exchanged. They call attention to the fact that the granting clause in the deed from Davidson to Crowe contains no reference to the note to be given January 1, 1932, as part consideration, and argue therefore that the recitals of the deed must govern as to what in fact was the consideration. It is well settled that the recitals as to the consideration in a deed are not conclusive, but are subject to explanation, contradiction or modification. *Pate* v. *Johnson*, 15 Ark. 275; *Hildebrand* v. *Graves*, 172 Ark. 198, 288 S. W. 4. Then too, this court has virtually decided in the case of *Crowe* v. *Futrell, supra,* that the $3,600 was a part of the consideration and, indeed, that is the express language of the paragraph of the contract which we have quoted. The entire consideration was the exchange of the lands, the assumption of a $7,000 mortgage by Davidson, and the agreement by Crowe to pay $3,600. It took all of these things to constitute the entire consideration. This court, in *Crowe* v. *Futrell, supra,* said: "In the suit brought in the Mississippi Court, the plaintiff alleged that this $3,600 was a part of the consideration, that it had not been paid, and that he was entitled to a lien on the lands in Mississippi County to secure the payment. If this was a part of the consideration entitling the plaintiff in the case to a lien on the lands in Mississippi County, the court had jurisdiction."

Since the execution of the contract quoted from was admitted and the court found that the same had not been modified and changed, it follows that the decree is correct, and must be affirmed. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* ARKANSAS CORPORATION COMMISSION.

4-3522

Opinion delivered June 25, 1934.

R. E. Wiley, for appellant.

McRae & Tompkins, T. E. Wood, Hal L. Norwood, Attorney General and *Robert F. Smith*, Assistant, for appellee.

BUTLER, J. Effective June 11, 1932, appellant, the Missouri Pacific Railroad Company and other common carriers of freight, published a reduced rate on certain petroleum oil products, which action was voluntary on their part and to enable rail lines to meet truck competition. This publication did not carry any restrictive routing, the rates applying on all Arkansas lines. The rate expired August 9, 1932, but was republished, effective August 10, 1932, and again, by supplement No. 30, effective May 30, 1933. The only change in the last publication from the former was that the routing was restricted

to certain lines of railway and to certain specifically named points within the 150-mile radius. A protest was filed to the restricted routing in said supplement No. 30, and the Arkansas Corporation Commission issued an order suspending the operation of the supplement and rates and to set the same down for a hearing.

The testimony taken before the commission was to the effect that the rates were voluntary, made to meet truck competition, and that the carriers originating the shipments amended the schedule of rates so as to permit them to designate the routes to which the same should apply; that this was done in order to facilitate the service by lessening the time required for the movement of oil products, and to enable the originating carriers to earn a greater revenue. It was shown that in some instances the earning of the originating carrier over the restricted routing named in supplement No. 30 would be about 50 per cent. of the revenue, whereas, if the routing was unrestricted and was moved over other connecting lines, they would receive not more than 20 per cent. of the revenue. On the hearing the commission canceled the restricted routing, which order was affirmed by the Pulaski Circuit Court on appeal, and from that judgment is this appeal.

It is the contention of the appellant that, since there is no question of reasonable rates involved, the commission could not properly compel the application of reduced rates over any route except that adopted by the carriers. It was and is the contention of the appellee, and that adopted by the commission and the circuit court, that the application of the rate with restricted routing is in violation of § 1 of act of April 8, 1903, which provides as follows: "That every person, company or corporation operating any railroad in this State which connects with any other railroad in this State and which form a part of a continuous line of railway communication to any point within this State, such companies and corporations, respectively, shall afford all due and reasonable facilities for receiving and forwarding by one of such railroads all the traffic arriving by the other and shall promptly forward the same at through rates, tolls and fares, without

giving any undue preference or advantage to, or in favor of, any particular person or company, or any particular description of traffic, in any respect whatever, so that no obstruction may be offered to the public desirous of using the railroads of this State as continuous lines of carriage from one to another point within this State."

It is insisted by the appellant that the controversy presented is one between the railway companies in which the public has no interest, and that there is no discrimination as to the public since all shippers are treated alike. It is further argued that the commission has no power to fix and compel a competitive rate such as the one under consideration, but can only compel the application of reasonable rates; that in this instance the rate is voluntary, and no question is being made of its unreasonableness, and that, before the statute relied upon can apply, there must be a specific abridgment contained in it of the common-law rights of the carriers to select such agents as they may see fit for the transportation of freight they had originated beyond their own lines, and that the words of the statute invoked are general in their nature and not sufficient to divest them of their rights at common law. In support of this contention, appellant quotes § 3 of the Interstate Commerce Act and the case of *Southern Pacific Co.* v. *Interstate Commerce Comm.*, 200 U. S. 536, 26 S. Ct. 330, construing the language of the act as not authorizing the commission to order the carriers to desist from a restricted routing applied to through rates. Appellant contends that the language of our statute is no more comprehensive than that of the Interstate Commerce Act, and that the import of the two acts is the same. The Commerce Act forbids the giving of any undue or unreasonable preference or advantage to any particular person * * *, or any particular description of traffic in any respect whatsoever, or to subject any particular person * * *, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage * * *, and afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines * * *

and shall not discriminate in their rates and charges between such connecting lines. The general meaning of these acts appears somewhat the same, as contended by the appellant, but the language is more specific in our statute, for, among other things, it requires the "forwarding by one of such railroads all the traffic arriving by the other, and shall promptly forward the same at through rates * * * without giving any undue preference or advantage to, or in favor of, any particular person or company, or any particular description of traffic in any respect whatsoever."

The rate fixed for the movement of petroleum products, assented to by the commission, was unrestricted with respect to the lines of railway over which they might be routed. If the initial carriers are permitted by the restricted routing to prevent the freight from being hauled over other lines of railway than those selected by them, then they manifestly give an undue preference in favor of the lines selected and discriminate against those not favored, and deny to the latter the benefit of the through rates given to others which appears to be in direct violation of the statutory mandate. It will be remembered that by supplement No. 30 no competitive rate was fixed. That had already been fixed and approved by the Corporation Commission and was effective over all the lines of railway in the State of Arkansas. Supplement No. 30 nullified to an extent the rates fixed by preventing other lines than those of their own selection to benefit by them.

It is next argued that the statute relied on by the commission as a basis for its order was repealed by act No. 193 of the Acts of 1907. Attention is called to § 17 of that act, which is identical with § 1 of the act of 1903, *supra,* except it does not include the clause, "so that no obstruction may be offered to the public desirous of using the railroads of this State as continuous lines of carriage from one to another point within this State." If the contention of appellant is sound in this particular, we cannot see where it is helped, for that act, with respect to discrimination by any railroad against any of its connect-

ing carriers is identical with the act of 1903, and is the provision which supplement No. 30 violates.

While the public may have no direct interest in the present controversy, it has an important indirect interest. It is manifestly beneficial to the public that the short lines of railroad in Arkansas operate, and any discrimination against them cannot but result in an obstruction to the shippers within the State. By § 3 of the act of 1903, *supra,* it is made the duty of the Railroad Commission (now the Corporation Commission) to make reasonable rates of freight, etc., to be observed by all persons. Section 1 of that act, which has been quoted, prohibits discrimination, and § 4 provides that, where connecting carriers are unable to agree upon a fair and just division of the charges arising from the transportation of freight, etc., the commission shall make the division and fix the *pro rata* charges to be received by said connecting lines. Supplement No. 30 would prevent the application of this statute and permit the initial carrier to in effect make the joint rates and to determine the proportion of revenue it should receive from the traffic haul.

It follows that the judgment of the trial court is correct, and it is therefore affirmed.

HENDRICKSON *v.* FARMERS' BANK & TRUST COMPANY.

4-3485

Opinion delivered June 11, 1934.

Opinion on rehearing delivered July 2, 1934.

J. Y. Stevens, for appellants.

Wade Kitchens and *W. H. Kitchens, Jr.,* for appellees.

BUTLER, J. C. T. Fincher, trustee for the Farmers' Bank & Trust Company, brought suit in the Columbia Chancery Court to recover judgment on two promissory notes, one for $500 made on August 25, 1931, by the appellants, J. G. Hendrickson and Frances M. Hendrickson, his wife, and the other in the sum of $6,100 executed by J. G. Hendrickson on November 7, 1930. It was alleged that a certain mortgage, executed by the appellants on August 25, 1931, conveying to the appellee, trustee, certain property situated in the town of Magnolia, was made to secure the payment of both notes, and foreclosure was prayed with order of sale, etc. The mortgage declared on was exhibited and made part of the complaint. Summons was duly issued and served upon the appellants,

and, upon their failure to appear or plead, decree was rendered by default in accordance with the prayer of the complaint. This decree was rendered on September 22, 1933, at a day of the regular July term of the court.

On January 10, 1934, after the lapse of the term at which the decree was rendered, the appellants filed a pleading setting up the proceedings heretofore mentioned and asked that the decree be opened and modified so as to restrict the foreclosure of their equity in the property covered by the mortgage to the payment of the $500 note only. The ground upon which this prayer for relief was based was that the property was the homestead of the appellants, and the mortgage was not intended to, nor did it in fact, secure the payment of any indebtedness save the $500 note jointly executed by the appellants, and that "at the time the decree was obtained, counsel for plaintiff, by the complaint filed in said cause and by word of mouth, represented to the court that the deed of trust did include the $6,100 and did then and there obtain said foreclosure decree for said $6,100, when in fact said deed of trust was no lien against their homestead for said sum. If the court had been properly advised as to the execution of this note, the court would not have rendered such decree. The commissioner has advertised the lot to be sold on the 13th day of January, 1934; by these statements plaintiff's counsel practiced fraud upon the court and obtained the decree herein mentioned."

The complaint and exhibits in the former action were exhibited with this pleading.

Appellants' pleading, with the response of the appellee thereto, came on for hearing "upon the motion and complaint to set aside the decree filed on January 12, 1934, with exhibits thereto, and the response of the Farmers' Bank & Trust Company filed on January 22, 1934, both sides announcing that they do not desire to introduce any evidence, but desire that the question be submitted on the record and pleadings." The court thereupon treated the pleading of the appellants as a petition to vacate and modify the decree under § 6290, Crawford & Moses' Digest, subdivision 4. The court found that no

fraud was perpetrated upon it, "but that, if an error was made in declaring a lien for the entire amount of the judgment, the same was an error of law; that the petitioners, J. G. Hendrickson and Frances M. Hendrickson, were negligent in failing to respond to the summons and complaint in said original suit and make defense thereto; that, had they made defense to said action, they could have put in issue the question of a lien, and, had they been aggrieved by the action of the court thereon, might have perfected their appeal to the Supreme Court. The court, upon this hearing, does not decide the correctness of the original decree, but holds that any error of law in the decree upon an issue that might have been raised upon the trial of the original suit must be raised by appeal and not by motion to vacate the decree after the expiration of the term at which such decree was rendered." The prayer of the petition was thereupon denied, and petitioners have appealed.

The court below properly denied the motion to open and modify the decree. The term of the court at which the decree was sought to be modified had lapsed, and, while the court might have amended its judgment after lapse of the term to make it speak the truth, it has no power to correct its mistakes or errors or to make its judgment or decree conform to what should have been, but was not, done. *Kelley Trust Co.* v. *Lundell Land & Lbr. Co.*, 159 Ark. 218, 251 S. W. 680.

It is contended by the appellants that a proper construction of the mortgage makes it a security only for the $500 specifically mentioned therein and subsequent debts contracted by the mortgagor and cannot be extended so as to make it security for antecedent debts. Counsel for the appellee placed a contrary construction on the mortgage, insisting that it was security for antecedent debts, which view the court adopted, is the fraud suggested.

It is unnecessary to set out the recitals in the mortgage upon which the contention of the appellants is based, namely, that they did not render it security for antecedent debts. It is sufficient to say that the import

of the language used is of such character as to create a reasonable difference of opinion as to its correct meaning, and the error committed by counsel and court, if any, consisted in a mistake of law. If the decree of foreclosure was not correctly responsive to the allegations of the complaint as controlled by the mortgage, which was the basis of the suit and a part of the complaint, this error might have been corrected by appeal from the default decree, and this was appellants' remedy. *Estes* v. *Lucky,* 133 Ark. 97, 201 S. W. 815; *Old American Ins. Co.* v. *Perry,* 167 Ark. 198, 266 S. W. 943.

The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed. *James* v. *Gibson,* 73 Ark. 440, 84 S. W. 485; *Johnson* v. *Johnson,* 169 Ark. 1151, 277 S. W. 535; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

The mere fact that the security of the mortgage was erroneously extended so as to include a debt for which it might not have in fact been security is not sufficient to show that the judgment was procured by fraud (*Estes* v. *Lucky, supra*), but constituted a mistake of law which could have been corrected by appeal, and the court correctly held that it was not authorized to reopen or set aside its decree for errors of law committed by it. *Stewart* v. *Wood,* 86 Ark. 504, 111 S. W. 983.

A great part of the briefs, both of appellants and appellee, is devoted to a discussion relative to the correct construction and interpretation of the terms of the mortgage foreclosed. This question is not properly before us, and we are precluded from deciding it because no ap-

peal from the decree of foreclosure was ever taken in the trial court or granted by this court. The appeal from the order overruling the motion to vacate does not serve to bring up for review the decree of foreclosure. *Bradley* v. *Ashby,* 188 Ark. 707, 67 S. W. (2d) 739, and cases there cited.

The decree is affirmed.

BUTLER, J., (on rehearing). In this case there were two questions involved; one, the action of the court below in refusing to reopen and modify its former decree on petition filed for that purpose, the court holding that the pleading filed should be treated as a petition to vacate and modify under subdivision 4 of § 6290 of Crawford & Moses' Digest. In overruling the prayer of the petition the court held that no matter was alleged or proved to bring the pleading within the statute. In our opinion, delivered June 11, 1934, we upheld the action of the trial court in this regard and now reaffirm our opinion to that extent.

The other question presented and argued was that the decree rendered on September 22, 1933, was erroneous because the same was not responsive to the allegations of the complaint. In disposing of that question we held that, as no appeal was taken from the decree of foreclosure, either in the trial court or in this court, there was nothing for us to pass upon, and that the appeal from the order overruling the motion to vacate did not serve to bring up for review the original decree of foreclosure. In the petition for rehearing filed by the appellant our attention is called to the fact that there was an appeal prayed in this court from the original decree and by this court granted on March 14, 1934, within the time allowed by law for appeal. We have examined the transcript and freely confess our error in the original opinion and now proceed to examine the question presented by the appeal from the original decree of foreclosure.

Omitting the formal parts, the complaint alleged that on the 25th day of August, 1931, defendants executed and delivered to plaintiff their note in the sum of $500, due November 25, 1931, with interest, and to secure said

note "and all other indebtedness that might be due at or before foreclosure proceedings" the defendants executed and delivered a deed of trust whereby certain property (described) was conveyed to a trustee as security for the payment of said note and all other indebtedness due plaintiffs, in which deed of trust Frances M. Hendrickson, wife of J. G. Hendrickson, joined and relinquished her rights of dower and homestead in the property.

The complaint further alleged that the note and interest thereon was past due and unpaid, and that, in order to protect the property, plaintiffs had made certain expenditures for insurance at the request of the defendants.

The complaint also alleged that on a date prior to the execution of the aforesaid $500 note J. G. Hendrickson was indebted to the plaintiffs in the sum of $6,100, evidenced by his promissory note secured by fifty shares of stock in the Magnolia Cotton Mill Company. Reference was made to the notes and mortgage and the same were attached to the complaint as exhibits thereto.

The prayer was for judgment in the sum of $7,979.25, the aggregate sum of aforesaid notes with accrued interest, and that a lien be declared by virtue of said deed of trust upon the lands, and, by virtue of the pledge, upon the personal property mentioned, and that the equity of redemption of the defendants be foreclosed and the property subjected to the payment of the judgment.

The deed of trust provided "that the said parties of the first part, being indebted to the said Farmers' Bank & Trust Company in the sum of $500 as evidenced by their note of this date, due and payable on the 25th day of November, 1931, with ten per cent. interest thereon from date until paid, and being desirous of securing the payment of the said sum of money and all other indebtedness that may be due at or before foreclosure proceedings hereunder unto the said Farmers' Bank & Trust Company and in consideration thereof, and in the future consideration of $5, in hand paid to the said parties of the first part, the said J. G. Hendrickson and Frances M. Hendrickson parties of the first part, doth hereby bar-

gain, grant, sell and convey unto the said C. T. Fincher, as trustee, and unto his heirs and assigns forever, the following land and personal property, situated in the county of Columbia and State of Arkansas, to-wit: [describing property].''

In the defeasance clause of said deed the stipulation is ''that, in case the said J. G. Hendrickson and Frances M. Hendrickson, parties of the first part, or either of them, shall well and truly pay the said note at the time the same falls due, and all other indebtedness due the said party of the third part, then this deed is to be void. But in case the said note, or any other indebtedness due by the said parties of the first part, or either of them, to the said party of the third part, shall not be paid, the said C. T. Fincher, party of the second part, is hereby authorized and empowered to take said property into his immediate possession, and, after giving 21 days' notice by publication on the courthouse in the county of Columbia, may and shall sell said property for cash in hand, and with the proceeds arising from said sale pay off the said note and any other indebtedness due by the said parties of the first part as aforesaid.''

On September 22, 1933, the cause was reached, and, it appearing that no plea had been filed by the defendants, a decree was rendered by default, the court rendering judgment against J. G. Hendrickson and Frances M. Hendrickson jointly and severally in the sum of $602.86 with interest and the further sum of $75 with interest. The court rendered judgment individually against J. G. Hendrickson for the sum of $7,502.93 with interest and declared a lien upon the real estate described in the mortgage to secure the payment of the joint and several judgments against the defendants and also to secure the individual judgment against J. G. Hendrickson. A time was fixed by the court for the payment of the judgment and the provision made that, if not paid within that time, the real estate be sold and subjected to the payment of the aforesaid judgments.

A part of the decree dealt with the foreclosure and sale of the stock in the Magnolia Cotton Mill Company

pledged by Hendrickson to secure the payment of his individual note. That part of the decree is not affected by this appeal, no contention being made that the decree in that respect was unauthorized.

In equity exhibits to the complaint control its averments and the nature of the cause of action and may be looked to for the purpose of testing the sufficiency of the allegations of the complaint. *Moore* v. *Excelby,* 170 Ark. 908, 281 S. W. 671. It follows that upon a proper construction of the mortgage given by Mr. and Mrs. Hendrickson to secure the $500 note executed by them depends the measure of relief to which plaintiffs are entitled, and the correctness of the decree by which this relief is adjudged.

The contention for the affirmance of the decree rests upon the appellees' construction of the phrase, "all other indebtedness which may be due at or before foreclosure." It is asserted that this language is both comprehensive and definite enough to include debts other than the particular debt secured both antecedent and subsequent. Reliance is placed on the decisions of this court in *Curtis* v. *Flinn,* 46 Ark. 72; *Martin* v. *Halbrooks,* 55 Ark. 569, 18 S. W. 1046; *Hoye* v. *Burford,* 68 Ark. 256, 57 S. W. 795. These decisions do not support the interpretation by the appellees placed upon the mortgage in the instant case.

In *Curtis* v. *Flinn, supra,* the object of the court was declared to be to discover the intention of the parties to the mortgage, and, when this was discovered, to interpret the language so as to effectuate their purpose. The object of the mortgage in this case was to secure advances of money, goods and supplies during "the present year" to enable the mortgagor who was a farmer to make a crop and the mortgage was given to secure supplies already received or thereafter to be furnished. The controversy arose between the mortgagee and another creditor of the mortgagor, the latter contending that the security did not cover the indebtedness due at the time of the execution of the mortgage, but only that which was incurred subsequent thereto. In denying this contention the court said: "If the mortgage contains a general description, sufficient to embrace the liability intend-

ed to be secured, * * * it is all that fair dealing and the authorities demand." It was held that the language of the mortgage was sufficiently explicit, the object of the mortgage being shown to satisfy the rule stated. In *Hoye* v. *Burford, supra,* the rule stated in *Curtis* v. *Flinn* was held to be applicable to the mortgage involved, and that its language, "to secure all indebtedness I owe," was sufficient to cover certain specific sums where it was conceded that the object for which the mortgage was given was to secure these. It is to be inferred from these decisions that the real purpose of construction is to discover the intention of the parties and to give effect thereto.

In *Martin* v. *Halbrooks, supra,* the mortgage covered certain mentioned notes due on a date named in the future "and all other indebtedness which may then be due." The mortgagee sought to foreclose for an antecedent debt unconnected with the purpose for which the mortgage was given, contending that such was included by the general phrase "and all other indebtedness which may then be due." In considering the attendant circumstances, the court viewed the language of the mortgage in their light. It denied the inclusion of the antecedent debt within the security of the mortgage and, passing upon that question, said: "When they added the words 'and all other indebtedness,' it is fair to presume that they meant indebtedness in excess of $225 of the same nature as that already described and within the purpose of the mortgage. That construction of the language fully accomplishes the purpose which called the mortgage into being. If the mortgagees expected to acquire a right under the mortgage which was not in contemplation of the parties at the time of its execution, they should have employed unambiguous language expressing that intention." A debt created subsequent to the mortgage being not yet in existence may not in all cases be clearly indicated; whereas, antecedent debts may always be definitely stated, and for this reason the general expression, "other indebtedness," would usually be treated as referring not to an antecedent debt but to one subsequently incurred. *Detroit Fire & Marine Ins.*

Co. v. *Helms*, 184 Ark. 308, 42 S. W. (2d) 394; *First National Bank etc.* v. *Corning Bank,* 168 Ark. 17, 268 S. W. 606. In the latter case it was decided, after naming a particular debt secured, that the expression, "together with all other indebtedness which may be due," would not cover antecedent debt evidenced by notes, but only advances subsequently made.

In *Berger* v. *Fuller,* 180 Ark. 372, 21 S. W. (2d) 419, in construing the general expression, "or any indebtedness of whatsoever sort or nature that may be due from mortgagors to mortgagee at the time of the foreclosure of this mortgage," it was held to be "clearly referable to the character of indebtedness named in the language of the clause preceding, and cannot be extended to include the class of indebtedness other than those specifically mentioned."

As suggested by our early cases, in the construction of a mortgage the real question is, "what was the intention of the parties to the mortgage?" In determining this all the circumstances attendant upon the execution of the mortgage and the nature of the transaction itself are to be considered (*Martin* v. *Halbrooks, supra; American Bank & Trust Co.* v. *First National Bank of Paris,* 184 Ark. 689, 43 S. W. (2d) 248); and, in order to extend the intention of the parties beyond the primary purpose of the mortgage so as to secure the payment of debts other than those specifically mentioned, from our decisions and principles of natural justice the following rule may be deduced: where a mortgage is given to secure a specific debt named, the security will not be extended as to antecedent debts unless the instrument so provides and identifies those intended to be secured in clear terms and, to be extended to cover debts subsequently incurred, these must be of the same class and so related to the primary debt secured that the assent of the mortgagor will be inferred. The reason is that mortgages, by the use of general terms, ought never to be so extended as to secure debts which the debtor did not contemplate. "Where one contracts in good faith with a debtor that the security given should include not only that specifically mentioned in the mortgage but other indebtedness,

whether existing then or to be incurred in the future, it is not difficult to describe the nature and character thereof, so that both the debtor and third parties may be fully advised as to the extent of the mortgage." *American Bank & Trust Co.* v. *First National Bank of Paris, supra.*

In the case at bar the $6,100 note executed by Hendrickson to the appellees has no connection, so far as the mortgage indicates, with the primary debt secured, and there is nothing in the mortgage which would call to the attention of the appellants the fact that the security of the mortgage given was to be extended so as to cover that debt. This appeared from the exhibit which must control the averments of the complaint, and therefore the decree was not responsive to the allegations and was erroneous. It will therefore be reversed, and the cause remanded for such further proceedings as the parties may be advised in conformity with principles of equity and not inconsistent with this opinion.

McEachin *v.* Yarborough.

4-3542

Opinion delivered June 18, 1934.

Cockrill, Armistead & Rector, for appellants.
A. C. Thomas and *W. R. Donham,* for appellee.

JOHNSON, C. J. To compensate an injury which was received under the circumstances hereinafter detailed, this suit was instituted by appellee, Jack T. Yarborough, against appellants, Grover C. McEachin *et al.,* in the Saline County Circuit Court. The facts are not in material dispute and may be summarized as follows:

On and prior to June 27, 1933, appellants, as a partnership, were engaged in constructing a hard-surfaced highway and bridges incident thereto in Perry County, and appellee was employed by appellants as a stone mason to assist in building and constructing a stone bridge over Cove Creek. It was the duty of appellants to furnish the stone and other materials used in the construction of the bridge, while it was the duty of appellee to, and he did, furnish the tools with which the stone was sized and shaped for use in the structure. The stone employed in the construction of the bridge were obtained in the vicinity of the immediate work and were commonly known and designated as "native stone." Appellee had been in the employ of appellants for some time prior to June 27, 1933, performing similar services, and during this period practically, if not all, the stone furnished by appellant to appellee for use in construction of bridges was obtained from a rock quarry near Stone Mountain; practically if not all this stone was of a sand stone nature and easily broken and shaped for the builder's uses. On June 27, 1933, the supply of stone theretofore furnished being exhausted, appellants obtained a truck load or more of stones from the bed of South Fourche Creek. The stone thus obtained from South Fourche Creek was of a hard and brittle nature and not pliable for the uses contemplated as were the stones theretofore used, although from outside appearances this stone appeared to be of the same nature and quality as stone theretofore obtained from Stone Mountain. Appellants did not apprise appellee that this last load of stone was obtained

from the bed of South Fourche Creek, and appellee assumed that these stones came from the Stone Mountain quarry. In the forenoon of June 27, 1933, appellee, while engaged in performance of his duty constructing said bridge, obtained a stone, which was one stone from the load of stones theretofore furnished by appellants and obtained from South Fourche Creek, and undertook to size and shape it for the use contemplated. To effect this purpose, appellee struck the stone with a hammer, whereupon it shattered and crushed, a fragment of which struck appellee in the eye and destroyed the sight thereof. Appellants admit that if liability exists the award is not excessive, therefore it is not necessary to state the facts in reference to the extent of appellee's injury. The theory upon which the trial progressed is reflected in appellee's instruction No. 1 as follows:

"If you find from a preponderance of the evidence that the plaintiff, Jack T. Yarborough, at the time he was injured, and for some time prior thereto, was in the employ of the defendants doing stone work in the construction of a bridge, and, if you further find that it was the duty of the defendants to furnish the stone used by the plaintiff; and if you further find that, prior to furnishing the last few loads of stone, the stone furnished by the defendants was of a sandstone or limestone formation, being of such formation that it would not shatter when struck in shaping same for use; and if you further find from a preponderance of the evidence that the last few loads of stone furnished by the defendants came from a different place and was of a different nature, being of different formation, and that said last few loads of stone were not workable and were unfit for the use for which they were intended, same being a kind of hard flint rock, and if you further find that, from the nature of said last few loads of stone, it was dangerous to undertake to break the stone or trim same into shape, and that because of its hard flinty nature when it was struck by the plaintiff for the purpose of putting it into shape, if you find it was of such nature, it shattered and small pieces thereof flew in all directions, one of which struck

plaintiff in the eye and destroyed the sight thereof; and if you further find that the defendants failed to warn plaintiff that said last few loads of stone were of a different kind and failed to warn him of the dangers incident to the use of said stone, provided you find that same was dangerous, and that, in furnishing said stone and in failing to warn him, the defendants failed to exercise ordinary care; and that because thereof the plaintiff was injured as alleged, while he was in the exercise of ordinary care for his own safety and when he had not assumed the risk, that is, when the risk was not open or apparent to him in the exercise of ordinary care and was wholly unknown to him, then you are instructed to return a verdict for the plaintiff."

No liability exists against appellants and in favor of appellee under the facts and circumstances here presented. It is a fundamental rule in the law of negligence that liability exists when the perils of the employment are known to the employer but not to the employee, and no liability is incurred when the employee's knowledge equals or surpasses that of the employer. 18 R. C. L., p. 548. *Arkansas Smokeless Coal Co.* v. *Pippins,* 92 Ark. 138, 122 S. W. 113. The uncontradicted testimony here shows that the employer had no superior knowledge to that of employee in reference to the nature of the stone being used, therefore had no duty to perform the neglect of which would create liability. The fact is appellee was employed in this line of work because of his superior knowledge. He was an expert stone mason of long experience. The burden of appellee's contention is that the employer or master had the duty of examining the stone for latent defects. The application of this contention would be that the master would be required to examine each stone offered to the mason before the work progressed. Also, if necessary, the master would be required to break each stone before giving it to the mason to be sized and shaped. A more simple thing than native stone does not exist. Every one with or without wide experience knows that one native stone may be hard whereas another lying adjacent is harder or softer than the other.

We conclude that no duty rested upon the master in this case to examine the stone and determine in advance whether it was hard or soft, and that no liability can be predicated upon his failure to do so.

Moreover, it has been the long-established doctrine in this jurisdiction that an employee assumes all the ordinary risks and hazards incident to his employment. *Southwestern Telephone Company* v. *Waughter,* 56 Ark. 206, 19 S. W. 575; *Choctaw, O. & G. Ry. Co.* v. *Thompson,* 82 Ark. 11, 100 S. W. 83.

The testimony is conclusive that appellee had and possessed knowledge equal to and superior to that possessed by appellants in reference to the nature, formation and uses of stone employed in the performance of his duties as a stone mason. He knew that native stone was being employed in the construction, and he knew that it was imperative to break and shape the stone for the builder's uses. He knew, as every one else knows, that native stone is not of uniform formation and nature, and he had no right to assume that his master was better informed on this subject than he. The formation and nature of the stone employed in these bridges was one of the ordinary risks and hazards of his employment, which was assumed by him when he entered the service of the master. True, appellee suffered a very serious injury, but it is the result of a risk assumed by him, and he must bear the consequences.

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

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

4-3515

Opinion delivered June 18, 1934.

Guy V. Head, J. R. Crocker and *L. F. Reeder,* for petitioner.

C. C. Wait, for respondent.

HUMPHREYS, J. This is an application to this court for a writ of prohibition to prevent the circuit court of Pope County, Arkansas, from proceeding with the trial of the case of S. M. Brisco *v.* the Federal Land Bank of St. Louis, a corporation, upon constructive service. Constructive service was obtained under the provisions of our statute (Crawford & Moses' Digest, §§ 1159-1160) by suing out a general writ of attachment on the ground that the Federal Land Bank of St. Louis was a foreign corporation and by levying same upon land in Pope County belonging to said corporation and duly publishing a warning order notifying said corporation to appear in said court and defend the action.

The petitioner herein appeared in response to the warning order for the sole purpose of contesting the service and filed an unverified motion to quash the service on the grounds: first, that it was not a foreign corporation; and, second, that its property in the State of Arkansas is not subject to attachment because said corporation is an instrumentality of the government of the United States.

The motion was overruled, and this application for a writ of prohibition followed.

The basis of this suit was a claim for a commission of $300 alleged to have been earned by a duly licensed real estate broker for the sale of a farm valued at $6,000, acquired by the Federal Land Bank of St. Louis, Missouri, through foreclosure proceedings to enforce the collection of money it had loaned.

Personal service could not be obtained because the Federal Land Bank of St. Louis, Missouri, had not, and was not required to maintain, a branch office in the State of Arkansas nor to designate an agent in the State of Arkansas upon whom service of summons may be had before it could do business in the State.

The banking corporation was organized under the provisions of an act of Congress of the United States, approved July 17, 1916, for the purpose of lending money upon mortgage securities in the States of Missouri, Illinois and Arkansas, with its domicile or its principal place of business in the city of St. Louis, Missouri.

The act authorizing the creation or organization of the corporation provides, in paragraph 6 of § 4, that such banking corporations, when organized, may "sue or be sued, complain, interplead and defend in any court of law or equity as fully as natural persons."

(1). The first contention of petitioners in support of their request for a writ of prohibition is that the Federal Land Bank of St. Louis cannot be sued anywhere except in a court of competent jurisdiction within the territorial limits of its domicile in St. Louis, Missouri. This contention is without merit, as the act of Congress authorizing the creation of said banking corporation provides in the plainest language that it may be sued in any court of law or equity as a natural person may be. This section can have no other meaning except that the corporation may be sued wherever service can be obtained upon it, actually or constructively. However, petitioner argues that the constructive service in the instant case was insufficient because the basis of the service rests upon the allegation that it is a foreign corporation; whereas it was not made a foreign corporation with respect to Arkansas by the act of Congress authorizing its creation. Authorities are cited by petitioner tending to support the theory that it is a domestic corporation of the United States and consequently a domestic corporation or resident of the State of Arkansas, as Arkansas is a part of the United States. These authorities are not in point because they do not take into consideration our statutes

defining foreign corporations. Foreign corporations, in contemplation of law in this State, are defined by statutes in the following language:

"A foreign corporation is one created by the laws of some other State or country." Section 9743 of Crawford & Moses' Digest.

"The words 'other country' signify any part of the world out of this State." Section 9744 of Crawford & Moses' Digest.

In 14a C. J., 1214, § 2934, in discussing the subject of whether a Federal corporation is foreign to States, it is said: "Under statutes defining a foreign corporation as one created under the laws of any other State, government or country, a Federal corporation has been held to be a foreign corporation with respect to a State."

We are of opinion that the Federal Land Bank of St. Louis, Missouri, is a foreign corporation, and that the constructive service was sufficient.

(2). The second contention of petitioner in support of its request for a writ of prohibition is that the Federal Land Bank of St. Louis, Missouri, is an instrumentality of the government of the United States, and that on that account its property is not subject to attachment. In the act authorizing the creation of said banking corporation, there is no limitation or restriction against reaching its property by attachment. We know of no law preventing levy by attachment against the property of corporations created by act of Congress except preventing attachment against the property of national banks before judgment is obtained against them. *Van Reed* v. *People's National Bank,* 198 U. S. 554, 25 S. Ct. 775. If Congress had intended that the property of the Federal Land Banks should not be subject to attachment, it would have prohibited same in the act. We think the case of *The State of Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co.,* v. *Taylor, Judge of the Circuit Court of the City of St. Louis,* 266 U. S. 200, 45 S. Ct. 47, announces principles applicable to the case in hand.

The writ is therefore denied.

McHaney and Butler, JJ., dissent.

Smith and Mehaffy, JJ., concur in the result.

HEALEY & ROTH *v.* BALMAT.

4-3500

Opinion delivered June 18, 1934.

Fred A. Isgrig and *Buzbee, Harrison, Buzbee & Wright,* for appellants.

Donham & Fulk and *Philip McNemer,* for appellee.

MEHAFFY, J. On the 14th day of November, 1931, the appellee, Louis Balmat, with two companions, Jack Reed and Stanley Price, between twelve and one o'clock, left

Little Rock in Balmat's car, a Chevrolet roadster to attend a football game in Pine Bluff. After eating supper, Balmat and his companions started back to Little Rock in Balmat's car with Jack Reed driving. At a point near Woodson, about fifteen miles from Little Rock, the car turned over and Reed was severely injured. Balmat and Price were not injured. Shortly after the car turned over, a man and woman in a Ford two-door sedan came along going to Little Rock and proposed to take Balmat and his party to Little Rock. It was decided, however, to leave Price in charge of the wrecked roadster and that Balmat would accompany Reed, the injured man, in the Ford sedan. The driver of the Ford then proceeded towards Little Rock with Reed and Balmat riding in the back seat. On arriving at Sweet Home, about five miles from Little Rock, Balmat had the driver of the Ford to stop his car while Balmat 'phoned for an ambulance to come out and meet the Ford car and take Reed to a hospital. Balmat called appellants, Healey & Roth. Balmat had formerly been in the employ of appellants, and had ridden on ambulances when responding to emergency calls. Appellee's 'phone call was received by Hugh Revely, an employee of appellants. Appellee told Revely that Reed had been severely injured and instructed him to come out and meet the Ford and take Reed to a hospital. In order that Revely might identify the car in which Reed was riding, appellee told him that the driver of the Ford would flash his lights as a signal when he saw the ambulance approaching. Balmat then resumed his place in the Ford, which proceeded towards Little Rock, and the driver of the Ford was told that the ambulance was coming out to meet them, and that he was to signal the ambulance by flashing the lights of the Ford when the ambulance came in sight. When the Ford reached a point near the Little Rock city limits he saw the ambulance approaching. He stopped his car on the east side of the highway, the right-hand side facing Little Rock, and began flashing his lights as a signal for the ambulance to stop and pick up the injured man. The ambulance pulled up and stopped on the west side of the

highway, which was the right-hand side facing Pine Bluff. When the ambulance came to a stop, the two left wheels were about five feet from the west edge of the pavement, the right front wheel was over on the west shoulder of the highway. As soon as the ambulance had stopped, the injured man got out of the Ford assisted by appellee, on the east side, walked around the rear end of the Ford, across the highway to a position at the rear of the ambulance. The driver of the ambulance and his assistant had in the meantime gotten out the ambulance cot and placed it on the pavement lengthwise of the highway, immediately back of the ambulance. The cot was about seven feet long, mounted on wheels and was about two feet above the surface of the highway. Reed lay down on the cot and appellee took a position on the highway at the rear of the cot, west of the center line of the highway and about twelve feet behind the ambulance. Elijah Jackson, a negro preacher, who lived near where the ambulance had stopped, appeared and took a position near appellee. The driver of the ambulance and his assistant were on opposite sides of the cot preparing to lift Reed into the ambulance when Elijah Jackson called, "Look out, white folks!" Some one shoved the cot upon which Reed was lying off the highway and everyone got to a place of safety except appellee who was struck by an automobile which had approached from the direction of Little Rock and was going towards Pine Bluff. The automobile was going at a rapid rate of speed and appellee was knocked down and severely injured, and, immediately after striking appellee, the automobile collided with the rear end of the ambulance and an explosion of gasoline followed, resulting in severely burning the face and head of appellee. The car which struck appellee was occupied by two young men and two young women, and was driven by Henry Blake.

This suit was begun on December 14, 1932, by appellee against appellants and Henry Blake, to recover damages for the injuries he had received. He alleged that the driver of the ambulance negligently stopped it and left it standing on the public highway in such a position

with reference to the automobile, which was parked on the opposite side of the highway, that traffic could not pass between the two vehicles.

Appellants filed answer, denying the material allegations of the complaint, denying that it was guilty of any negligence, and denying that the position of the ambulance was the proximate cause of appellee's being struck by the Blake automobile. Henry Blake filed separate answer. There was a trial and a verdict and judgment against Henry Blake and appellants for $8,000. Blake did not appeal. The appellants filed motion for new trial which was overruled, exceptions saved, and the case is here on appeal.

The rear light and dome light on the ambulance were burning.

Henry Blake testified that he was going about thirty miles an hour, it was misting rain, and when he approached the place of the accident he saw the Ford car standing on the east side of the highway and its lights were on and created a glare on the pavement which shone in his face, and he could not see the ambulance. When he discovered the ambulance, he put on the brake, but he could not go between the cars, and his front fender hit the ambulance but he did not remember hitting any person. He did not see the lights on the ambulance. When Blake's car hit the ambulance, it knocked it several feet. The two cars, the Ford and the ambulance, blocked the road to traffic, and, if the ambulance had gone a little further, there was an open space where it could have stopped, and there would have been room for traffic.

This was an emergency call by the ambulance, and the drivers of the ambulance were in a hurry to get the injured man to the hospital and paid no attention to the parking.

Appellants first contend that the court erred in refusing to direct a verdict in their favor. It is contended that the operator of the ambulance violated no traffic law and was guilty of no negligence. It is not contended

by appellee that the traffic law was violated, but the cause of action is based solely on the negligence of appellants in stopping the ambulance opposite a car which was already parked on the highway in such a manner as to block traffic.

Appellants call attention to *American Company of Arkansas* v. *Baker,* 187 Ark. 492, 60 S. W. (2d) 572. The court, however, said in that case: "It appears to us that the negligence, if any, was the sudden stopping of the truck without giving any signal or warning of that intention to one who might be driving closely behind it. * * * This court has no power to vacate a verdict of the jury or the judgment based thereon on the weight of the evidence, but we are obliged on appeal to view the evidence in the light most favorable to the appellee, giving to it every reasonable inference in support of the verdict, and. however much we may think the evidence preponderates against the finding of the jury, we may not interfere. This court has repeatedly pointed out that this is a duty and power resting solely with the trial judge, to be exercised whenever in his opinion the verdict is against the clear preponderance of the evidence, and on that question his judgment is conclusive if there is any substantial conflict therein."

In the instant case, the undisputed proof shows that the ambulance was so parked with reference to the other car, which was already parked there, that it was impossible for vehicles to pass. The road was wet and slippery, and whether under the circumstances in this case the appellants were guilty of negligence in blocking traffic as they did when they were bound to know that other vehicles would be on the highway was a question for the jury, and, if there is any substantial evidence to sustain the verdict, we cannot set it aside, although we might think that the preponderance of the evidence showed that appellants were not guilty of any negligence. The jury might have found that there was ample space within a few feet of the place where the ambulance stopped where it could have been stopped without interfering with traffic.

Instruction No. 10 given by the court submits this question to the jury. It is true the ambulance was on the

highway at this place a very short time before it was struck by Blake's car, but the jury was justified in finding that it was not necessary to stop the ambulance for any length of time so as to obstruct traffic.

Appellants say that the ambulance was on an errand of mercy. It is true it was an emergency call, and it was endeavoring to get an injured person to the hospital as quickly as possible. This, however, did not relieve it from the consequences of its negligence, if it were guilty of negligence. One cannot, even on an errand of mercy or in an effort to relieve an injured person and remove him to a hospital, block the traffic in such a manner as to endanger others, especially when in a few feet of the place the ambulance might have been parked without any interference with the traffic.

Appellants contend that the ambulance had a superior right to the immediate use of the highway by virtue of the traffic regulations, but the traffic regulations did not give appellants any right to commit an act of negligence endangering others. Moreover, the court instructed the jury that an ambulance, when operated upon official business, has a superior right on the highway to other traffic so long as the operator does not exercise that right in an arbitrary manner, and in the same instruction told the jury that, if it found that the ambulance was blocking the highway but further found that in doing so said operator was not acting arbitrarily and in wilful disregard of the rights of other persons who might be using the highway in a proper manner but was acting as a person of ordinary prudence would act under similar circumstances, it would not be justified in finding against appellants.

It is next contended by appellants that the appellee was barred from recovery by his own negligence. The undisputed evidence shows that the cot was behind the ambulance, and that appellee was standing behind the cot when he was struck by the automobile. The court under proper instruction, submitted the question of appellee's contributory negligence to the jury, and the jury's finding on this question is conclusive here.

Appellants then contend that the stopping of the ambulance was not the proximate cause of the accident complained of. It was certainly not the sole cause. The undisputed proof shows that Blake was driving on the wet, slippery road at about thirty miles an hour, and he was unquestionably guilty of negligence, as the jury found, but the accident could not have happened if the ambulance had not been parked so as to obstruct the traffic. "As a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes other than plaintiff's fault, is the proximate cause of the injury. So that, where several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them, it being sufficient that his negligence is an efficient cause without which the injury would not have resulted to as great an extent, and that such other cause is not attributable to the person injured. But it must appear that the person sought to be charged was responsible for one of the causes which resulted in the injury. The concurring negligence of another cannot transform the remote into the proximate cause of an injury, or create or increase liabilities therefor." *Coca-Cola Bottling Co.* v. *McAnulty,* 185 Ark. 970, 50 S. W. (2d) 577; 45 C. J. 920.

As we have already said, whether this conduct on the part of the drivers of the ambulance was negligence was a question for the jury.

It would serve no useful purpose to set out or comment at length on the instructions. We have carefully examined the instructions given, those modified, and those refused, and have reached the conclusion that there was no error in giving, refusing or modifying instructions. The only serious question in this case is whether the appellants were guilty of negligence in parking the ambulance as they did under the circumstances. As we have already said, this was a question for the jury, and, although we might believe that the jury's verdict was

against the preponderance of the evidence, we have no authority to set it aside for that reason.

We find no error, and the judgment is affirmed.

GANTT *v.* ARKANSAS POWER & LIGHT COMPANY.

4-3502

Opinion delivered June 25, 1934.

Marsh & Marsh, for appellants.

C. W. McKay, W. H. Kitchens and *House, Moses & Holmes,* for appellees.

JOHNSON, C. J. Bringing into question the correctness of the Columbia County Chancery Court's findings and decree sustaining a demurrer interposed by appellees to appellants' complaint, this appeal is prosecuted. In effect, the complaint alleged: That appellants are citizens, taxpayers and property owners within the boundaries of Waterworks Improvement District 1, situated within the corporate limits of Magnolia, Arkansas; that in the year 1923 appellee Waterworks Improvement Dist. 1 of Magnolia was duly organized and established, and that J. O. Hutchinson, H. P. Carrington and D. D. Good are now and have ever been since the organization of said district the duly constituted board of commissioners thereof; that on May 12, 1924, the board of commissioners of said Waterworks District 1 of Magnolia made and entered into an invalid contract with the Consumers' Ice & Light Company, a domestic corporation, by the terms of which contract the Waterworks Improvement District 1 of Magnolia surrendered to the Consumers' Ice & Light Company the right and privilege to furnish consumers located in said district water and make and collect charges therefor, and in consideration of

which the Consumers' Ice & Light Company agreed to pay 10 per cent. of its earnings therefrom, upon certain conditions and contingencies then and there agreed upon; that the contract between the Waterworks Improvement District 1 and the Consumers' Ice & Light Company was invalid and void because all members of the board of commissioners of said Waterworks District 1 were at the time of the execution of said contract, and are now, stockholders in the Consumers' Ice & Light Company; that said board of commissioners and each member thereof was therefore directly and indirectly interested in said contract. Appellants further alleged that in 1925 the city council of Magnolia was composed of J. W. Colquitt, H. B. Couch, T. P. Lewis, C. J. Gantt, J. B. Lee, E. C. Lyle and T. H. Westbrook, mayor; that on the 20th day of July, 1925, said city council, composed of the members aforesaid, by ordinance, approved and ratified the contract theretofore executed between the board of commissioners of Waterworks Improvement District 1 of Magnolia and the Consumers' Ice & Light Company, but that said ratification and approval was invalid and void because at the time of the passage of said ordinance ratifying and approving said contract all members of said city council of Magnolia, save one member, were stockholders in the Consumers' Ice & Light Company, and were therefore directly and indirectly interested in said contract; that, after the ratification of said invalid and void contract by said city council of Magnolia, the Consumers' Ice & Light Company transferred and assigned to appellee, Arkansas Power & Light Company, all its interest therein, and since said date the Arkansas Power & Light Company has unlawfully charged and collected rentals and charges against the consumers in said Waterworks Improvement District 1 of Magnolia, and converted same to its own use and benefit; that the rentals made and charged by the Arkansas Power & Light Company and the Consumers' Ice & Light Company during the periods of their respective operations were exorbitant, unreasonable, unlawful and without right or authority; that the board of commissioners of Waterworks Improvement District 1 of Magnolia, although requested so to do, have

refused to institute, prosecute or maintain a suit for the collection of said unlawful rentals and charges against appellees, and have refused to endeavor to collect said rentals and charges for the benefit of said Waterworks Improvement District 1 of Magnolia.

It is the established doctrine in this jurisdiction that a demurrer to a complaint admits the truth of its allegations. *Greer* v. *Strozier*, 90 Ark. 158, 118 S. W. 400; *Adams* v. *Primmer*, 102 Ark. 380, 144 S. W. 522; *Keopple & McIntosh* v. *National Wagonstock Co.*, 104 Ark. 466, 149 S. W. 75; *Hamiter* v. *State Nat. Bank of Texarkana*, 106 Ark. 157, 153 S. W. 94.

It appears therefore, for the purpose of this determination, that the contract between Waterworks Improvement District 1 of Magnolia and the Consumers' Ice & Light Company was executed and consummated by a board of commissioners acting for Waterworks Improvement District 1, who were stockholders at the time in the Consumers' Ice & Light Company.

On the question of the validity of the contract, between Waterworks Improvement District 1 and the Consumers' Ice & Light Company, in its inception, but little need be said. Section 5711, Crawford & Moses' Digest, provides: "It shall be unlawful for any board of improvement, or any member thereof, in any city or town in this State, to be interested either directly or indirectly in any contract made by the board for or on behalf of any improvement district."

Therefore, when it is admitted that the members of the board of commissioners of said Waterworks District 1 were stockholders in the Consumers' Ice & Light Company at the time said contract was executed and consummated, it follows as a matter of law that each of them was directly interested in said contract, which is inhibited by the plain provisions of the statute just quoted. Just how or why a stockholder in a corporation should not be considered as interested in the business and affairs of such corporation is not pointed out in the briefs, and we cannot conceive such being the law. Although a stockholder may own only one share of the capital stock

of a corporation, he is directly interested in its affairs. Any other construction of the statute under consideration would have the effect of nullifying it.

Counsel for appellees contend that we decided in *Davidson* v. *Sewer Improvement District,* 182 Ark. 741, 32 S. W. (2d) 1062, that a contract with a corporation was not inhibited by § 5711 merely because one of the contracting parties was a stockholder in such corporation. This is not the effect of the holding in the Davidson case. Primarily, the Davidson case presented the question of the validity of the assessment of benefits. Davidson contended that the mere fact that the McIlroy Bank & Trust Company had purchased and owned certain bonds of the improvement district which were obtained by said bank while J. H. McIlroy, the president thereof, was on the board of commissioners of the improvement district rendered the assessment of benefits invalid. The court determined that the assessment of benefits was valid, and that whether the McIlroy bank had contracted unlawfully with the board of commissioners of the improvement district subsequent to the assessment of benefits was not of controlling importance. Moreover, the language quoted from the Davidson case appears to be dictum and was not necessary to a decision of the point involved.

It seems to be the rule of universal application that any contract prohibited by a constitutional statute is absolutely void. *Ridge* v. *Miller,* 185 Ark. 461, 47 S. W. (2d) 587. See *Levison* v. *Boas,* 12 L. R. A. (N. S.) 575, and notes thereunder, page 583. *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296.

Based upon reason and authority, the contract between the Waterworks Improvement District 1 of Magnolia and the Consumers' Ice & Light Company was and is void because inhibited by § 5711, Crawford & Moses' Digest. Appellee next contends that, although the contract may have been void in its inception, yet it was impliedly ratified by the city council of Magnolia subsequent to the assignment of the contract by the Consumers' Ice & Light Company to the Arkansas Power & Light

Company. The first answer to this contention is the complaint alleges that the ratification by the city council occurred prior to the assignment of the contract. Since the ratification was prior to the assignment of the contract, the question is presented whether or not this ratification was void under the allegations of the complaint. The complaint alleges that all members, save one, of the city council at the time of the ratification were stockholders in the Consumers' Ice & Light Company. Section 7520, Crawford & Moses' Digest, in effect, inhibits any member of the city council from being interested either directly or indirectly in any contract or job or services to be performed for the corporation. The only meaning of this section of the statute is that any contract made by the board of aldermen who are interested either directly or indirectly in the consideration of the contract is prohibited. Viewed from the allegations of the complaint, the ratification by the city council of the contract between the Waterworks District 1 and the Consumers' Ice & Light Company was inhibited by the section of the statute just quoted.

Moreover, since the contract has been determined to be null and void from its inception because prohibited by a constitutional statute, we know of no authority holding, and none have been cited in briefs, that such contract may be given life by subsequent acts of the parties. If the contract is void from its inception because being prohibited by statute, it cannot be vitalized by subsequent acts of the parties thereto or thereunder. The rule is thus stated in Page on the Law of Contracts, § 1038, "Ratification in its correct sense is impossible equally of an illegal and of a void contract." 13 C. J. 506, states the rule as follows: "A contract *malum in se* or against public policy cannot be made valid by ratification." In line with the authorities just quoted, we stated the rule in the early case of *Tucker* v. *West*, 29 Ark. 386, quoting from the fifth headnote: "Where the consideration of a contract is either wicked in itself, or prohibited by law, is void and incapable of ratification."

Lastly, it is contended on behalf of appellee that this case should be affirmed because the complaint shows

upon its face that appellants cannot recover any moneys that the Arkansas Power & Light Company has collected from the water consumers for the services rendered by it.

We cannot agree with this contention. Since we have determined that the contract was void in its inception, the Consumers' Ice & Light Company acquired no rights thereunder which may be enforced either in law or in equity. The position of the Arkansas Power & Light Company rises no higher than that of its assignor. The general rule is that, where a contract is expressly prohibited by law, and the statute in terms declares the contract to be null and void, no recovery can be had under it, and a taxpayer has a right to maintain an action to recover back money when its officers neglect or fail to perform their duty in that respect. *Capron* v. *Hitchcock,* 98 Cal. 427; *Winchester* v. *Frazier,* (Ky.) 43 S. W. 453; *Milford* v. *Milford Water Co.,* 124 Pa. St. 610.

The status, however, of appellees does not come strictly within the prohibition of the rule just stated. The prohibitory statute here involved does not, in terms, declare the contract to be "null and void." The rule seems to be that, in the absence of the prohibitory words "null and void" and where the contract has been performed by the parties in good faith, compensation may be retained measured by the reasonable value thereof. Such recovery, however, is not because of the contract, but is grounded squarely upon the proposition that valuable services having been rendered which have been accepted by the parties, it would be inequitable and unjust to permit one party to substantially gain under the contract to the great and irreparable damage of the other. *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800; *Spearman* v. *Texarkana,* 58 Ark. 348, 24 S. W. 883; *Frick* v. *Berkley,* 61 Ark. 397, 33 S. W. 527; *Ark. State Highway Commission* v. *Keaton,* 187 Ark. 306, 59 S. W. (2d) 481.

For the errors indicated, the case will be reversed, and the cause remanded with directions to overrule appellees' demurrer and proceed not inconsistent with this opinion.

McHaney, J., dissents.

BAILEY *v.* RIGGS.

4-3501

Opinion delivered June 25, 1934.

[redacted]

James B. McDonough, for appellants.

G. L. Grant, for appellees.

HUMPHREYS, J. This suit was commenced by appellees in the chancery court of Sebastian County, Fort Smith District, to recover $1,000 from the makers of a note executed on the first day of May, 1929, by John Mayne Bailey and Della Mae Bailey to the City National Bank of Fort Smith as agent; and to foreclose a mortgage on certain real estate therein described to secure same. It was alleged that said note of $1,000 was one of a series of six separate notes evidencing an indebted-

ness of $6,000 for borrowed money, secured by said mortgage, and the appellees purchased the $1,000 note in question from said bank for $1,000 in cash, and that the interest on said note was payable at said bank, and that at maturity the principal was also payable at said bank. It was also alleged that, the day after the note matured, the appellees left the note at said bank for collection and took a receipt therefor reciting that it was left with said bank for that purpose, and that they notified the bank that they wanted the money on the note and not to renew or extend it. It was also alleged that, in violation of their instructions, said bank took renewal notes for $6,000 and a new mortgage to secure it and canceled and surrendered the old notes and mortgage, including the $1,000 note belonging to appellees. The prayer of the complaint was for a judgment against the Baileys, the bank, and I. H. Nakdimen, president of same.

A demurrer was filed on the grounds that the complaint failed to state a cause of action; that the action of foreclosure was prematurely brought; and that there was a defect of parties for failure to make the holders of the other notes parties defendant.

The demurrer was sustained, and appellees filed an amended complaint incorporating all of the allegations of the original complaint and, in addition, alleged that said bank and its president were acting as the agent of the Baileys and themselves in renewing the loan and not as appellees' agent; and also more specifically alleged the conversion of appellees' $1,000 note by the cancellation and surrender thereof to the Baileys and their acceptance and retention thereof without paying same. Appellees renewed the prayer of their original complaint.

Appellants thereupon filed a motion to transfer the cause to the circuit court on the ground that, if any cause of action were stated in the amended complaint, it was an action at law and not in equity.

The chancery court sustained the motion, and, after the cause was lodged in the circuit court, appellees made a motion to remand same to the chancery court, which was overruled.

Thereafter, appellants filed a demurrer to the complaint upon the same grounds set forth in the demurrer in the chancery court, which demurrer was never ruled upon by the circuit court, no request being made by appellants that it do so.

Appellants then filed an answer denying the material allegations of the complaint, reserving the right to question the sufficiency thereof. Further answering, appellants stated that the original $1,000 note was left with said bank for renewal; that, after the new notes and mortgage were executed in exchange and satisfaction of the original notes and mortgage, two interest payments were made by the Baileys to the bank and by it paid to appellees with full knowledge of appellees of the exchange and cancellation of the old notes for the new, thereby ratifying the extension of the loan. The prayer was for a dismissal of the complaint.

The cause was submitted to the jury upon an instruction to the effect that they should return a verdict in favor of appellees for the face of the old note as damages against the Baileys and said bank, if they should find from a preponderance of the evidence that appellees left their note for $1,000 with said bank for collection with specific instructions not to renew same, and that the makers and said bank renewed same without their knowledge and consent and pursuant thereto new notes and a mortgage to secure them were executed to said bank as agent without the knowledge of appellees, and that the bank tendered appellees one of the new $1,000 notes in lieu of their old note, which they refused, unless the appellees subsequently ratified the renewal thereof.

Under this instruction and others requested by appellants and appellees relative to whether the renewal was ratified, the jury returned a verdict against appellants in the amount prayed for, upon which judgment was rendered, from which is this appeal.

Appellants first contend for a reversal of the judgment because no cause of action was alleged in the complaint.

It is unnecessary to determine whether a cause of action in equity was stated in the complaint because that question was determined in favor of appellants on demurrer, and the motion to transfer the cause to the circuit court, and no appeal has been taken from that decree.

The amended complaint sufficiently alleges a conversion of the old note of $1,000 belonging to appellees jointly by said bank and the makers thereof, and the attempted substitution of the new note therefor, which appellees refused to accept, all without the knowledge and consent of appellees. *Arkansas Fertilizer Co.* v. *City National Bank,* (Tex. Civ. App.), 137 S. W. 117.

Appellants also contend for a reversal of the judgment because the evidence is insufficient to support same. The uncontradicted evidence shows that, when the old note for $1,000 matured, it being payable at said bank and executed to said bank as agent, the note was presented to said bank for collection and was received and receipted for that purpose alone with specific instructions by appellees not to renew or extend same. The uncontradicted evidence also shows that said bank violated the instruction and renewed the note by agreement with the Baileys, the makers thereof, to take new notes and a new mortgage to secure same without the knowledge or consent of appellees. At this juncture, a sharp dispute or conflict arises in the testimony.

The testimony on the part of appellants reflects that, after being informed of the transaction, appellees accepted the new note in lieu of the old, but, becoming dissatisfied, returned the new note, with full knowledge of all that had been done and thereafter received two interest payments on the new note knowing they were interest payments on same.

The testimony on the part of appellees reflects that, when they were informed of the transaction and the new note was tendered to them in lieu of the old note, they declined to accept same and demanded a return of their old note or money in payment thereof, and that the two payments of interest thereafter received by them were payments of interest on the old note.

This issue of fact was clearly one for the jury and not the court, and their finding is binding on appellants, as the instructions of the court upon the question of ratification were correct.

The court gave instruction No. 3 requested by appellees on the issue of ratification, which is as follows:

"Even though you may find from the evidence in this case that the plaintiffs, J. A. Riggs and P. L. Riggs, received the interest on the $1,000 after the date that the $6,000 loan was renewed by the bank and Mr. Bailey, this alone would not constitute a ratification of the renewal, or prevent the plaintiffs from recovering in this action.

"Before the plaintiffs can be held to have ratified the renewal by accepting the interest on the $1,000, they must have accepted it with full knowledge that it was being paid on the new note."

The court also gave instruction No. 3 requested by appellants on the same issue, which is as follows: "If the plaintiffs left the old note at the City National Bank for collection, and if the said note of John Mayne Bailey and his wife were renewed, and if the plaintiffs received said renewed note and returned the same to the bank with a statement that they did not wish to purchase the note or to renew the old note, and if plaintiffs thereafter received interest on the new note, they cannot recover."

Both are correct, and there is no conflict between them.

Instruction No. 2, given at the request of appellees, fully covered the main issue in the case, and it was unnecessary to give instructions requested by appellant upon the same issue, as those requested were a repetition of the one given.

No error appearing, the judgment is affirmed.

DENT *v.* FROUG'S, INCORPORATED.

4-3509

Opinion delivered June 25, 1934.

Louis Tarlowski, for appellant.

House, Moses & Holmes and *Eugene R. Warren,* for appellees.

MEHAFFY, J. This suit was begun by appellees, Froug's, Incorporated, and the Union Bank, against the appellant, S. M. Dent, receiver of Globe & Rutgers Fire Insurance Company, in the Pulaski Circuit Court, to recover on two insurance policies issued by appellant. One of the policies for $2,500 covered the store and office fixtures. Liability on this policy was admitted in the court below, and this policy is not involved here. The other policy, the one here involved, was for $5,000 covering stock of merchandise in appellee's store at 414 Main Street, Little Rock, Arkansas. The appellant denied liability on the ground that the policy had been canceled. Jury was waived, and the case was tried by the court sitting as a jury, and resulted in a finding and judgment against appellant for the amount of the policy. The case is here on appeal.

The policy was regularly issued and accepted by the appellee. The appellant states the question to be determined by this court as follows: "The sole question therefore as to policy No. 5,510,782 is whether notice by the company to the agent (who is also the agent of the assured) to cancel, without tender of unearned premiums, and the return of the policy itself, is sufficient to constitute a cancellation in fact of the policy."

There is practically no conflict in the testimony, and the facts may be stated as follows: Bruce S. Biddle, agent of appellant, issued the policy sued on. Appellant instructed its agent to cancel the policy and retake the same from the appellee. The said agent did in fact report to the company that the policy was canceled, and he secured another policy to be issued by the Westchester Fire Insurance Company. Biddle, however, never notified the appellee either about the cancellation of the policy or that the other policy was issued by the Westchester Fire Insurance Company, and the appellee never heard anything about this until after the fire. The undisputed evidence shows that the Biddle agency had a small portion of appellee's insurance, but that on all occasions when they would get a policy for appellee it would be submitted to Froug for his approval and did not become effective until he approved it. Biddle had no authority to put in effect any policy issued until it was approved by Froug. While he had authority to write insurance policies and did write them for Froug, Froug always required that the policies be presented to him for his approval. There is no evidence in the record that Biddle had authority to cancel a policy, to waive the notice, or to waive return of premium, and there was no notice given to Froug, no premium returned, and no notice that any other policy had ever been issued. The policy sued on contains the following statement with reference to cancellation of policies: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided or become void or cease, the premium having been actually paid, the un-

earned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium." After the fire, Froug made proof of loss under the policy here involved, and, at the suggestion of one of the adjusters for the insurance company, he filed proof of loss with the Westchester Fire Insurance Company, but stated in the proof of loss as follows: "We are furnishing this proof of loss so as to preserve the rights of the parties in interest because of the controversy with respect to liability under the policy." He never had the policy of the Westchester Fire Insurance Company, never saw it, and never accepted it, and did not know until after the fire that it had been issued or was in existence, and he did not return the policy sued on in this action.

Appellant cites and relies on *Phoenix Ins. Co.* v. *State,* 76 Ark. 180, 88 S. W. 917. That case holds, as many others, that the stipulation for five days' notice was made for the benefit of the assured and could be waived by the assured, but the court stated: "The policy was in fact canceled by the agent, and his act in doing so was ratified as soon as brought to the attention of the assured." There is not only no such evidence in the instant case, but the undisputed evidence is that the assured did not ratify it, did not know about it, and never accepted any policy without an opportunity to first examine it.

Appellant next calls attention to the case of *Allemania Fire Ins. Co.* v. *Zweng,* 127 Ark. 141, 191 S. W. 903. The court stated in this case: "The court held in effect that, where a policy of insurance provides that it may be canceled upon notice to the insured, notice by the company to its own agent to cancel the policy is ineffective as a cancellation, in the absence of authority to the agent from the insured to act for him in receiving notice of cancellation and in procuring other business." In the instant case, there is no evidence of authority of the agent to receive notice of cancellation of the policy or write a policy in substitution thereof. On the contrary, the un-

disputed evidence shows that the agent did not have authority, that no policy was in effect until it had been submitted to and approved by Mr. Froug.

The next case to which attention is called is *Insurance Underwriters' Agency* v. *Pride,* 173 Ark. 1016, 294 S. W. 19. The court in that case said: "It is true that mutuality is one of the essentials of a contract, and such essential is not lacking in this contract. Both Pride and Howard conferred authority in the beginning on Burns to insure their property in any company he represented, leaving the selection or designation to him. Our court is committed to the doctrine that authority of such breadth and scope has the effect of constituting the agent of the insurer the agent of the insured also to accept the policy when written, and to waive the cancellation in this clause, and to accept a new policy in lieu of an old one." In the instant case, the evidence of both the agent and of Froug is to the effect that the agent could not accept the policy but that it must be submitted to Froug.

Appellant calls attention also to *Commercial Union Fire Insurance Co.* v. *King,* 108 Ark. 130, 156 S. W. 445. The court in that case said: "The notice must be given to the insured, and it should state not merely an intent to cancel, if some condition be not complied with, but it must be an actual notice of cancellation within the meaning of the policy and so unequivocal in its form that the insured may not be left in doubt that his insurance will expire on the time limited by the terms of the notice, and that the company will not be liable for any loss after the expiration of that time."

The next case relied on by appellant is *Firemen's Ins. Co.* v. *Simmons,* 180 Ark. 500, 22 S. W. (2d) 45. The court in this case approved the rule announced in other cases, citing the cases above mentioned, and then said: "In most of the cases coming before this court where the rule above stated had been announced and followed, there appears to have been an agreement between the insured and the agent that the agent would keep the property insured, and this agreement may be either expressed or implied from the circumstances under which the policy

was issued, or from continued course of conduct of the parties; as, for instance, where the agent renews on expirations and accepts notice of cancellations and issues other policies in their stead, which is either known or acquiesced in by the insured." The evidence in the instant case not only shows no circumstances indicating an agreement on the part of the insured but both parties testify very positively that a policy would not be in effect until submitted to and approved by Froug.

Appellant then refers to *National Union Indemnity Co.* v. *Standard Accident Co.*, 179 Ark. 1097, 20 S. W. (2d) 125. That case simply holds that the parties may agree to a cancellation with or without refund of unearned premiums, but there is no agreement in this case.

Attention is also called to *Home Fire Ins. Co.* v. *Parker*, 177 Ark. 678, 7 S. W. (2d) 324. The court said there: "We think we may safely assume, in this case, that the agent of appellant had authority from appellee to keep his property insured." There is nothing in that case which supports the contention of appellant.

It is well settled by the decisions of this court that the provision in the policy for notice is for the benefit of the insured and may be waived by him. It is, however, equally well settled that, unless there is evidence of a waiver, the notice must be given.

It is also contended that furnishing proof of loss to the Westchester Fire Insurance Company was a ratification of the cancellation. There was no ratification. This proof was made at the suggestion of one of the adjusters of the insurance company, and Mr. Froug added: "We are furnishing this proof of loss so as to preserve the rights of the parties in interest because of the controversy with respect to liability under the policy." The appellee did not have the Westchester policy, did not know until after the fire that it had been issued, never did receive it or accept it, but kept the policy sued on constantly and never did anything, so far as the evidence in the record shows, to indicate that he knew anything about any suggestion that this policy be canceled.

We find no error, and the judgment is affirmed.

TEXARKANA BAPTIST ORPHANAGE *v.* WILSON.

4-3510

Opinion delivered June 25, 1934.

[redacted]

Donham & Fulk, for appellant.

Louis Josephs and *Frank S. Quinn*, for appellee.

McHANEY, J. Appellee sued appellant to recover for eight months' salary as superintendent of its orphanage in Texarkana, Arkansas, at $85 per month, and for certain expenditures he claimed to have made in improving its property and in operating it, in a total sum of $862.49. He claims to have been employed by appellant in such capacity for a period of one year from November 10, 1932, to November 10, 1933, and that it failed to pay him his salary, except for a period of three months; that it, through its board, demanded his resignation on June 1, 1933, notified him his contract of employment would no

longer be recognized and repudiated it. He prayed judgment in said amount, that it be declared a lien on its property, and that same be foreclosed and the property sold. Appellant defended the action on the ground that, although appellee had been employed by it as superintendent of its orphanage at a salary of $85 per month, he had been discharged by its board of trustees for cause on July 15, 1933, and that, if appellee had vacated the orphanage on that date, as he should have done, it would have been indebted to him in the sum of $382.50, which amount it offered to pay him, but same was refused, and that he refused to vacate said orphanage after his discharge, continued to remain in possession and supported himself and family out of the funds donated to care for the orphans. It further alleged that he was discharged after an investigation of his moral fitness for the position after an investigation by the board at his request. Cross-complaint was filed against him seeking to recover possession of its property and for damages in the sum of $1,000. A trial of the case resulted in a decree in appellee's favor for $793.35, and required him to vacate the property and deliver possession within 10 days from the date of the decree. Thereafter appellee sued out a writ of garnishment against J. B. Richardson and caused execution to issue on said judgment. Timely motions were made to quash said writs, which were overruled by the court. This appeal challenges the correctness of said decree in rendering judgment for appellee, and the action of the court in overruling said motions to quash said writs.

In view of the disposition we make of the case, it becomes unnecessary to discuss or decide whether the funds or property of a public charity may be lawfully subjected to a writ of garnishment or the levy of an execution on a judgment.

For the purpose of this decision we assume that appellee had a contract for one year as superintendent of appellant's orphanage, although this allegation in the complaint was denied in the answer, and there is little, if any, evidence in the record to support it. But, assum-

ing that there was such a contract, the law does not impose the burden on appellant of compliance therewith for the full term at all hazards. Disability, death, resignation or disqualification for cause, such as gross immorality, theft, embezzlement or other criminal conduct rendering him unfaithful or unfit for the performance of his duties, would discharge appellant of its further obligation to perform the contract. See 39 C. J., p. 84 *et seq.* The fact is that certain charges of immorality had been made against appellee relating to misconduct with his adopted daughter. The board of trustees met on June 7, 1933, pursuant to adjournment. At the previous meeting these charges or accusations against appellee were considered and certain witnesses were heard. Other witnesses were heard at the June 7 meeting, including appellee, his wife, adopted daughter, inmates and former inmates of the orphanage. The minutes of this meeting read in part as follows: "The board retired to give the matter due consideration as to the truthfulness of the charges and to render to the best of their ability a proper decision. After due consideration, the board found that the alleged accusations and rumors were in the main true.

"Whereupon a motion was made and unanimously adopted that it would be for the best interest that Eld. A. T. Wilson be discharged, his resignation being called for effective July 1, 1933, and, if resignation not be made by then, the office of superintendent be declared vacant, and that he be discharged and that he and family vacate by July 15th."

This record clearly shows he was discharged for cause after a full and fair investigation. He was asked to resign effective July 1, but, if he failed to resign by that time, the office was "declared vacant, and that he be discharged and that he and his family vacate by July 15." He was so notified immediately. He refused to resign, and he refused to vacate. The board had the right, and it was its duty, to make the investigation it did make. Its judgment in the premises is final since no review thereof was sought, and there is nothing in this record to show the board's action to be arbitrary. Appellee's employment

ceased on July 15, 1933, and appellant was not liable for further salary under the contract. He thereafter had no right to remain in the institution, but he continued to do so until about the middle of December, some five months, with his wife and children, maintaining himself and family for such time out of donations to the orphanage. Appellee contends, however, that he remained on duty, performed services, accepted orphans, etc., all with the knowledge and acquiescence of the board. It is true he remained after his discharge, but not with the consent of the board. A committee was sent to the institution to check him out, make an inventory, etc., but appellee refused them the right to do so. In order to prevent more trouble and undue publicity to an institution dependent upon charity for support, the board refrained from the use of physical force or court procedure to remove him. It cannot be said it estopped itself or approved his action so as to make it liable for his expenditures or salary during such time.

It is admitted that appellant is indebted to appellee for salary unpaid in the sum of $382.50, but we are of the opinion that the upkeep for himself and family during the time he unlawfully and wrongfully remained in possession of the institution after his discharge should be offset against this amount. The record does not show what this would reasonably be worth. The judgment will be reversed, and the cause remanded with directions to determine this amount and to offset same to the extent thereof against the amount due for salary in the sum of $382.50.

PFEIFER *v.* W. B. WORTHEN COMPANY.

4-3514

Opinion delivered July 2, 1934.

[redacted]

E. Charles Eichenbaum, for appellants.

G. DeMatt Henderson, for appellee.

JOHNSON, C. J. This appeal involves the liability of appellants to appellee for debt which arose under the following circumstances: On April 7, 1926, F. J. Schmutz and wife executed and delivered their promissory note and real estate mortgage securing payment thereof to appellee, W. B. Worthen Company (the amount of which is not here of importance), which note by its terms matured one year after date. On June 1, 1926, Schmutz and wife conveyed the mortgaged property to one Levy, who assumed and agreed to pay the mortgage debt. On November 9, 1926, Levy conveyed the mortgaged property to appellants, who assumed and agreed to pay the mortgage debt. On April 7, 1927, the due date of the Schmutz note and mortgage, upon the application of appellants, the mortgagee extended the maturity of the Schmutz note and mortgage until April 7, 1930. On November 6, 1928, appellants conveyed the mortgaged property to one Keys, who purchased, subject to the mortgage debt, and not assuming or agreeing to pay the same. Prior to the advanced maturity date of April 7, 1930, upon application of Keys, appellee extended the maturity date of said note and mortgage from April 7, 1930, to April 7, 1933. This extension to Keys was granted by appellee without notice to appellants or either of them. From the facts thus adduced, the chancellor determined that appellants were liable for the mortgage debt, and this appeal is prosecuted therefrom.

Appellants' contention is that on November 6, 1928, when they conveyed the mortgaged property to Keys, thereby their legal status to appellee was converted into one of suretyship and that the extension of time by appel-

lee to Keys without notice to appellants discharged them from liability.

It is the settled doctrine in this State that a purchaser of mortgaged lands from a mortgagor who assumes and agrees to pay the mortgage debt thereupon becomes personally liable therefor, and this personal liability inures to the benefit of the mortgagee who may enforce it in an appropriate action. *Wallace* v. *Hammonds,* 170 Ark. 952, 281 S. W. 902; *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162; *Walker* v. *Mathis,* 128 Ark. 317, 194 S. W. 702; *Kirby* v. *Young,* 145 Ark. 507, 224 S. W. 970; *Beard* v. *Beard,* 148 Ark. 29, 228 S. W. 734.

In the more recent case of *Central Life Ins. Co.* v. *Thompson,* 182 Ark. 705, 33 S. W. (2d) 388, we expressly held that one primarily liable for a mortgage debt was not converted to the status of suretyship therefor by showing a conveyance of his interest in the mortgaged land to a third party plus an extension of the maturity of such mortgage debt by the express agreement of the mortgagee with such third party. We think the doctrine announced in the case last cited is controlling here. Appellants, by assuming and agreeing to pay the mortgage debt recited in their deed, and also by applying to appellee for and receiving an extension of the maturity of such mortgage debt, became personally and primarily liable therefor, and their subsequent conveyance of said mortgaged lands to Keys and the procuring by Keys of an extension of the mortgage debt from appellee did not have the legal effect of converting their legal status from primary liability to that of suretyship. Appellants, being primarily liable for the mortgage debt, could escape liability only by payment, release or other defenses which might inure to one primarily liable.

It may be that the doctrine thus announced is contrary to the weight of American authority on this question, but, if such be true, it is equally as important that *quasi* rules of property be stable and permanent, as that court opinions of all States should be uniform.

No error appearing, the judgment is affirmed.

NOBLES *v.* STATE.

Crim. 3893.

Opinion delivered July 2, 1934.

R. S. Wilson, for appellant.

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

JOHNSON, C. J. Appellant was indicted by the Crawford County Grand Jury as follows:

"The grand jury of Crawford County, in the name and by the authority of the State of Arkansas, accuse George Fain and Skip Nobles of the crime of robbery committed as follows, to-wit: The said George Fain and Skip Nobles, in the county and State aforesaid, on the 13th day of January, A. D. 1934, wilfully, unlawfully, feloniously, forcibly and of their malice aforethought, did make an assault upon one Albert Rich and wilfully, unlawfully, forcibly, feloniously and against his will did rob, take and steal $25, gold, silver and paper money of the

United States of America, of the value of $25, and the personal property of the said Albert Rich, and against the peace and dignity of the State of Arkansas."

Upon trial to a jury, appellant was convicted as charged in the indictment, and was sentenced to three years in the State penitentiary, and this appeal is prosecuted to reverse this judgment of conviction.

Prior to trial and conviction, appellant brought into question the legal sufficiency of the indictment by demurrer, and after conviction the same question was raised by motion in arrest of judgment. The demurrer and motion in arrest of judgment being overruled, appellant saved exceptions, and this is the first question presented for consideration.

We think the indictment was sufficient when measured by the rule announced by us in *Green* v. *State,* 185 Ark. 1098, 51 S. W. (2d) 511, wherein we determined that an indictment for robbery which alleged that the defendant violently and forcibly against its will and by intimidation did rob, take and carry away a certain sum of money, was sufficient to charge robbery under the statutes of this State.

It is next insisted that the trial court erred in permitting a witness, Mrs. Reed, to detail a certain conversation between witness and one George Fain which occurred the day following the commission of the alleged offense. This testimony was to the effect that George Fain told witness that he had had some trouble with his brother and wanted to go away until it quieted down. This testimony, although immaterial, was not prejudicial to appellant, and we cannot reverse because of it. *Castevens* v. *State,* 79 Ark. 453, 96 S. W. 150.

Appellant next urges that the verdict of the jury and the judgment of the court were contrary to the law and the evidence. This contention is grounded upon the proposition that the evidence upon behalf of the State does not show that the alleged offense was committed within three years prior to the returning of the indictment. The evidence upon behalf of the State shows that the alleged offense was committed on the 12th or 13th day

of January, and no question was raised as to the year in which it occurred. It must be remembered that venue need not be established beyond a reasonable doubt, but may be proved by a preponderance of the testimony. *Cuzic* v. *State,* 152 Ark. 230, 237 S. W. 1094. Even so, in the matter of the time when the offense was committed, this may likewise be established by a preponderance of the evidence. Section 577, 16 C. J. 771. Viewed in this light, the jury was fully warranted in finding that the 12th or 13th day of January, as detailed by State witnesses, was the 12th or 13th day of the last January preceding the trial which would have been within the requisite time.

Appellant also complains that the court erred in refusing to give his requested instructions Nos. 4, 5 and 6. The instructions given by the trial court fully covered all issues of fact presented by the evidence, and we cannot say that the court erred in refusing to give additional instructions on the same issues. Moreover, these requested instructions were fully covered by instructions given by the court.

No error appearing, the judgment is affirmed.

FAIN *v.* STATE.

Crim. 3892.

Opinion delivered July 2, 1934.

Rains & Rains, for appellant.

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

JOHNSON, C. J. This is a companion case to *Nobles* v. *State, ante* p. 472, decided on this date. The indictment is identical to that in the Nobles case; therefore need not be here set out. Upon trial to a jury, appellant was convicted as charged in the indictment, and was sentenced to three years in the State penitentiary, and this appeal is prosecuted to reverse this judgment of conviction.

Appellant's first contention that the indictment is not sufficient in law has been decided against his contention in the case of *Nobles* v. *State,* decided on this date, and need not be further considered.

The contention that there was a variance between the indictment and the proof in reference to the stolen money being coinage of the United States is without merit. *Criglow* v. *State,* 183 Ark. 407, 36 S. W. (2d) 400.

Next it is urged that the proof did not show that the offense was committed within the bar of the three-year statute of limitations. Albert Rich, the aggrieved party, testified, in effect, that he was robbed about the 14th of January, this year, meaning, of course, 1934. This was amply sufficient to establish the time when the offense was committed. *Nobles* v. *State, supra.*

Neither is reversible error made to appear because of the examination of Pete Fain by the prosecuting attorney in reference to a statement theretofore made by the witness. The record does not disclose that the trial court acted upon the contention here presented, therefore we are not allowed to determine this question.

We have carefully considered appellant's objections in reference to the instructions requested, given and refused by the trial court, but do not find reversible error therein.

Appellant's last contention is that the court permitted one of the jurors to separate from the other members

of the panel, and, while so separated, make a statement as to the mental status of the other members of the jury panel. Just how appellant's rights were prejudiced by the actions of this juror is not pointed out. This does not reflect prejudicial error. *Bieard* v. *State, ante* p. 217; *Fuller* v. *State,* 171 Ark. 730, 286 S. W. 809.

No reversible error appearing, the judgment is affirmed.

AMERICAN NATIONAL INSURANCE COMPANY *v.* WESTERFIELD.

4-3516

Opinion delivered July 2, 1934.

Coleman & Riddick, for appellant.

W. L. Jean, for appellee.

SMITH, J. On December 1, 1927, appellant insurance company delivered to the city of Little Rock its group policy of insurance covering the lives of the members of the Little Rock police and fire departments, with certain disability benefits accruing while the policy was kept in force by the payment of the annual premium required by the policy.

Appellee was and for many years had been a member of the city's fire department, and was the captain of one of the fire companies. Proper payments of premiums was alleged, and does not appear to be questioned. Appellee alleged that, while so employed and while entitled to the benefits of the group policy, he became totally and permanently disabled, and he brought this suit to recover the disability benefits which he was entitled to receive under the policy.

The policy contained the following conditions upon which the disability benefits might be demanded:

"1. That due proof is furnished the company that the said person has suffered subsequent to the date hereof for a period of at least six months either (a) total disability, (b) entire and irrecoverable loss of sight of both eyes, (c) loss of use of both hands, or of both feet, or one hand and one foot. * * *

"3. That, if proof of total disability is furnished, the said total disability must be shown to be such as to justify the presumption that it would continue throughout the entire subsequent life of the said person and during that time wholly prevent the said person from pursuing any occupation for wages, compensation, or profit.

"4. That the company, prior to the granting of the benefit, shall be permitted to make such examination of the person as may in reason be required to convince that

the conditions necessary for the granting of the benefit have been fulfilled."

Appellee alleged his total disability and that he had made the proof thereof which the policy required. The suit was defended upon the grounds (1) that the insured was not totally and permanently disabled, and (2), if so, that sufficient proof thereof had not been made to confer the right to sue.

At the trial from which this appeal comes the question of disability was submitted under instructions conforming to numerous previous decisions of this court on that subject, and the testimony, to which further reference will be made, was sufficient to support the finding that appellee was totally and permanently disabled.

The serious question in the case is whether the testimony shows sufficient compliance with the provisions in regard to notice set out above. Paragraph 3 on this subject, above quoted, requires that proof of total disability be furnished such as to justify the presumption that the disability exists and will continue throughout the life of the insured, and during that time wholly prevent him from pursuing any occupation for wages, compensation or profit. Effect must be given to this provision, because the parties have so contracted. But this does not mean that the insurer must in fact be convinced. On the contrary, the proof is sufficient if it justifies the presumption of disability to an intelligent judgment, reasonably and fairly exercised. *Missouri State Life Ins. Co.* v. *King,* 186 Ark. 983, 57 S. W. (2d) 405; § 507, chapter Insurance, 14 R. C. L., page 1337.

The question was also raised and was submitted to the jury whether proof of disability was made within a reasonable time. This question was considered in the recent case of *American National Ins. Co.* v. *Chastain,* 188 Ark. 466, 65 S. W. (2d) 899, which was a suit upon a similar—if not, indeed, the identical—policy sued on herein. The appellant here was the appellant there, and it was there contended, as it is here contended, that proof was not made within the time required by the policy. It was there pointed out that no time was specified in which

proof was required to be made. An instruction was requested in that case to the effect that there could be no recovery unless the proof was made within a reasonable time, which was modified to provide "that due proof should be made of the disability by appellee before he could recover." It was there held that: "The court was within the law in modifying the instruction and in refusing to give it in the form requested by appellant." In so holding we quoted from the case of *Sovereign Woodmen of the World* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567, as follows: "Under a benefit certificate providing for a recovery if insured should suffer bodily injury and furnish satisfactory proof of total disability, that 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."

However, in this case the question of the reasonableness of the time within which the notice and proof of disability should be furnished appears to be unimportant, for the reason that the insurer suggested and requested a postponement of the suit for an additional period of six months for the purpose of ascertaining, after that lapse of time, whether the disability from which the insured was then admittedly suffering was in fact permanent.

Now, upon the question whether the suit was prematurely brought for the reason that proof had not first been furnished sufficient to justify the presumption that the insured was totally and permanently disabled, it may be said that the testimony upon that issue was to the following effect: The city clerk, the custodian of the policy sued on, testified that on December 16, 1932, he made written application to the insurer for proper blanks for making proof of insured's disability. These blanks were duly furnished. One of these was the "claimant's statement," which was filled out and dated December 29th and signed by the insured. This statement recited that the disability began June 25, 1932, and was occasioned by a ruptured appendix, for which an operation was per-

formed 9-13-31, and a second 10-27-31. The name and address of the surgeon performing the operations was given, and the statement was made that the insured was unable to perform labor and was totally and permanently disabled.

A statement was made, as part of the proof, by the attending surgeon, which was duly verified, to the effect that, following the appendix operation, a rectal abscess came on immediately after the abdominal wound closed, resulting in a disability which the surgeon stated was "permanent and total at this time."

The city clerk, as the custodian of the city's records and of its payrolls, made the "employer's statement," which was attested by the chief of the fire department. This statement showed the insured's retirement from the fire department because of his disability. These proofs were transmitted by registered mail to the insurer.

These "proofs" were not regarded as sufficient, and the request was made that the insured submit himself to an examination by a surgeon selected by the insurer. This request was complied with and the examination made, and it is insisted that the report thereof left the permanency of the insured's disability in doubt, and for this reason a postponement of the suit for six months was suggested by the insurer. This doctor testified at the trial that the insured was totally disabled at the time of his examination, but it was his opinion that, if the fistula was cured, as it might be by one or more operations, the insured might do light work, but that he could not thereafter do heavy work, even though the operations were successful. It was the opinion of another doctor who also examined the insured that one or more successful operations would probably entirely restore the insured so that he would not be disabled, and that he thought these operations could be successfully performed. It may be said that a third operation was performed on the insured after his proof had been submitted, which did not relieve his condition, and the opinion was expressed by three physicians who testified on behalf of the insured that an incurable condition existed which

rendered the insured totally and permanently disabled. These conflicts of opinion, which are always found where experts express opinions, were resolved in the insured's favor by the verdict of the jury for the amount of the disability benefits provided for in the policy sued on.

It is insisted that the court erred in allowing a penalty and an attorney's fee, and that the fee allowed was excessive, and that error was committed in awarding judgment for interest. The insistence is that the insured had not denied liability, but had asked for additional proof, which the insured refused to furnish. This proof appears, however, to have been the same proof covered by the blanks originally furnished for that purpose, which had previously been filled and returned. Besides, as has been said, the insured had submitted himself to an examination at the hands of a surgeon selected by the insurer, and the jury was, therefore, warranted in finding that there had been no failure to furnish proof and that the suit had not been prematurely brought.

Interest appears to have been calculated from a date about sixty days later than the date on which the proof was submitted, which the court evidently found was a reasonable and sufficient time for payment. The policy itself provided that the benefits should be payable "upon receipt of the individual certificate and of due proof of the occurrence of the events upon which the payment of the benefit is contingent." It appears, therefore, that interest was properly allowed. The penalty is fixed and allowed by the statute.

The attorney's fee was fixed at $300. The sum recovered under the policy was $2,000. The attorney's fee does not appear to be excessive when compared with other fees in such cases which have been approved by this court.

There appears to be no error, and the judgment will be affirmed. It is so ordered.

BRADLEY LUMBER COMPANY OF ARKANSAS *v.* HENRY.

4-3518

Opinion delivered July 2, 1934.

D. A. Bradham, Clary & Ball and *C. C. Hollensworth,* for petitioner.

C. T. Sims, W. F. Norrell, R. W. Wilson, N. H. Sadler, Aubert Martin and *J. R. Wilson,* for respondent.

HUMPHREYS, J. This is an application or petition to this court for a writ of prohibition directed to the Hon. Patrick Henry, judge of the circuit court of Drew County, not to proceed, upon the service obtained, with the trial of two separate causes of action for damages on account of personal injuries instituted in the circuit court of said county by Willie Beard and Mrs. Lucy Leonard against Bradley Lumber Company of Arkansas. The service in each case was obtained by delivering a copy of each summons upon Leo Jackson as agent in charge or manager of Bradley Camp, a place of business owned and operated by Bradley Lumber Company of Arkansas in Drew County, under authority of § 1152 of Crawford & Moses' Digest. That section of Crawford & Moses' Digest provides that suits may be brought against a corporation in any county in the State in which it maintains a branch office or other place of business by service of a summons upon the agent, servant, or employee in charge of said office or place of business.

The petitioner herein or defendant in each of said suits appeared in said court for the sole purpose of quashing the service on the grounds that it maintained no place of business in Drew County within the meaning of § 1152 of Crawford & Moses' Digest and that the

summons was not served upon its agent, servant, or employee in charge of any such business.

The motion to quash the service was submitted to the court upon testimony introduced by the parties to the suits and was overruled over petitioner's objection and exception, and this petition for a writ of prohibition followed.

Petitioner states in its brief that it is entitled to the writ unless there is some substantial evidence in the record to support the finding of the circuit court to the effect that it maintained a branch office or place of business in Drew County which was in charge of and managed by Leo Jackson.

The construction placed upon § 1152 of Crawford & Moses' Digest by this court is that service of process is good and sufficient if served upon an agent, servant, or employee of a corporation in charge of a well defined line of business carried on by the corporation in the county where the suit is brought. *Terry Dairy Company* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Cooper* v. *Burel,* 129 Ark. 261, 195 S. W. 356; *Ft. Smith Lumber Company* v. *Shackelford,* 115 Ark. 272, 171 S. W. 99.

The record reflects that the main office or place of business of petitioner was at Warren, the county seat of Bradley County, where it carried on a large lumber and logging business. It also reflects, by the admission of Joe L. Reaves, vice-president and manager or superintendent of all the outside business conducted by said company, that it maintained a branch office and business at Camp Bradley in Drew County until the.....day of ....., 1932; at which time, it moved the branch office or business conducted in Drew County to its main office or place of business in Warren. At the particular time referred to, petitioner moved the commissary from Bradley Camp in Drew County to Warren and ceased to cut logs in Drew County and haul them to the mill at Warren, and discharged some of the employees at that point. Everything else was left intact and the rest of the business was conducted as it had been for years. About twenty employees and their families remained

at the camp and paid rent on the houses in which they lived, some eighteen or twenty of them. It continued to operate its light and water plants at that point for the use of its employees. It continued each working day to operate its two engines or trains for the purpose of transporting its employees to points in other counties to cut and load logs for use at the mill in Warren. When the engines came in over night, they were cooled off, repaired if necessary, and supplied with water for use the next day. They were housed and looked after by hostlers over night. Orders for supplies were solicited by an agent from Warren and brought from Warren to the camp and delivered to the employees. A little office attached to the building formerly used for the commissary remained furnished as before with a safe which contained records, an adding machine, chairs, and a desk. This office was used by Leo Jackson and others for clerical work such as making up time lists, logging statements, reports, etc., to be sent in to the main office or place of business at Warren. A telephone connected with the main place of business in Warren was used by Leo Jackson and others. Joe L. Reaves, in the capacity of manager or supervisor, visited the camp every ten days or two weeks, and in his absence Leo Jackson acted as his assistant and carried out his orders. Leo Jackson lived in one of the houses at the camp and was on the ground or else out where they were sawing logs in Bradley County practically all the time. The employees regarded and treated him as the boss. The deputy sheriff who served the summons on him was directed to him when he inquired from an employee for the manager. Before serving the summons on him, he asked him whether he was the manager of the business in Drew County, and he replied that he was. Other circumstances appearing in the record indicate that he was the manager of a substantial part of the petitioner's business in Drew County at the time the summons were served upon him. We think there is ample evidence in the record to sustain the circuit court in overruling the motion to quash the summons.

The writ is therefore denied.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* KROPP.

4-3520

Opinion delivered July 2, 1934.

Rainey T. Wells and *Hill, Fitzhugh & Brizzolara,* for appellant.

A. M. Dobbs, for appellee.

MEHAFFY, J. This suit was brought by the appellee against the appellant in the Sebastian Circuit Court on an insurance policy issued to appellee's father, E. C. Dunbar. The original certificate or policy was issued March 18, 1899, and various certificates had been issued to him in lieu of the original policy. It is admitted that all assessments and dues from that time up to January, 1933, were paid. The suit was for $1,000, less some charges, and complaint was in the usual form. The appellant answered, admitted issuing the certificate on the date mentioned and that the dues and assessments were all paid except the assessment or dues which were due the last day of January, 1933. Appellant defended on the grounds that the dues due in January were not

paid until February 16, and that Dunbar was at that time not in good health but suffering from tuberculosis. He died on May 7, 1933. The certificate or policy of insurance was introduced in evidence and also a letter from the appellant association dated May 31, 1933, stating that a check had been sent to Mrs. Kropp for $1.60, being a refund of the January and February installments, and she was advised that the financial secretary at Fort Smith, Arkansas, had been instructed to return any amounts paid for subsequent installments. Mr. Dunbar applied for admittance in the Woodmen of the World Sanitarium in the latter part of March, 1933.

A. M. Waldron, captain of the uniform rank of the Woodmen of the World, testified that he was a member and knew Dunbar. He testified that B. H. Smith, financial secretary of the Local Camp of the Woodmen of the World, keeps the records of the payments of assessments and collects the same from the members. Witness called at Smith's office to ascertain whether or not Dunbar was in good standing, and Smith told him that he was. Smith had been secretary for about four years. This witness went with Mr. Kropp to the office of Smith, the secretary, to interview him with reference to hospitalization of Ed Dunbar. Mr. Smith said that Dunbar had a policy, and the best of his recollection is that his assessments were paid; he said he was in good standing. Smith gave Mr. Kropp an application for hospitalization. It was about the 12th or 15th of the month. The application was made by Dunbar the latter part of March.

Dr. Riley testified that he examined Dunbar March 15, 1933, in Booneville, Arkansas, and that he had very advanced tuberculosis in his lungs. That there was no question in his mind but that Dunbar was suffering from active tuberculosis.

B. H. Smith, the financial secretary, testified and introduced the card record which is the final record of the membership standing. This record is kept by Smith, and he testified that the January assessments were paid on the 16th of February; that the February report shows

that Ed C. Dunbar was suspended for nonpayment of January dues. The March report was sent in for February dues on March 13. It shows that Dunbar was remitted for by the secretary for the months of January and February. He further testified that Dunbar was suspended February 1, but that the reports did not leave his office until the 13th and did not get to the home office until the 16th. That he stood suspended as of January 31st. On February 16th he was under suspension. He also testified that he did not tell Mr. Kropp or Mr. Waldron that Dunbar was in good standing because he said that is up to the home office. He did not know that Dunbar had tuberculosis at the time payments were made. It was admitted that the payments were returned. He said that Dunbar's sister made the payment, and he asked her why she did not come in sooner, and she said Ed had been sick. Mr. Kropp made the payment in March. Witness had been financial secretary for six years. It is the duty of the secretary under the by-laws to remit to the Sovereign Camp on or before the 5th day of every month the funds in his hands, and accompanying the remittances he must forward a detailed statement of the standing of members in the camp on blanks furnished for that purpose. He mailed the February report on March 13. A provision of the by-laws provides that if the remittances from the secretary are not received on or before the 15th day of the month the camp and all its members shall stand suspended. Witness said that he did not get any information that the camp was suspended. The report did not reach the home office until February 20th. Witness further testified that at different times in the past he had maintained Ed Dunbar in good standing by the payment of the dues himself. He said that prior to this date, February 20th, he had reported Dunbar suspended, but said he could not tell without going to his records. Prior to this time he had loaned Dunbar money to pay his dues. He loaned him about $25 and Dunbar assigned to him another insurance policy, and after Dunbar died he got his money. The secretary of the association at

Omaha, Nebraska, is supposed to mail out a notice of the suspension. The evidence does not show that Dunbar ever received this notice. The secretary further testified that he mailed the notice to him before he was suspended, around the 5th of February. He testified that he paid the dues for him, that there was no enmity between them, and that he did not fail to make the payment because he was mad at him; he did not consider that he had a chance to get his money. He also testified that Waldron called him up and asked him if Dunbar's dues were paid, and he thinks he told Waldron that Dunbar was entitled to hospitalization. Whenever members failed to pay before secretary sent in his report, he sent them in as suspended unless he wanted to stand personally responsible for the payment of their dues. The question of Dunbar being admitted to the hospital came up after February 16, after the secretary's report went in. Certain receipts were handed him, and he said there were other amounts included, that Dunbar had other policies, that his record shows that the January assessment was not paid. Before that time Dunbar had made the payments in the regular course at witness' office; witness had not paid any of the later assessments in 1932.

Dr. J. E. Little testified that he was at Dunbar's home on the 15th or 16th of February; that Dunbar had a cold and was very sick. He was in his office then at different times up to the 14th of March. He had a cough, and witness found trouble with his lungs; thinks he had tuberculosis but does not know. He died in the tuberculosis sanitorium at Booneville. Witness did not find that he had tuberculosis; he just had a bad cold. He said some people take tuberculosis quickly, and from his examination in March he thinks perhaps Dunbar had consumption, but he examined him in February and found no indication of it.

Here several provisions of the constitution and bylaws were introduced.

John T. Yates testified by deposition about the issuance of the original policy and the changes made and

identified the constitution and by-laws. He said that Dunbar failed to pay the January, 1933, installment to the financial secretary of the Local Camp on or before January 31st as required by the provisions of the beneficiary's certificate and constitution and by-laws. That he obtained this information from the regular monthly report which he received from B. H. Smith, financial secretary of the Local Camp. Then he testified about refunding the payments. He also testified that Dunbar did not pay the increases and therefore his policy was chargeable with $385.11. He then introduced several letters.

Appellant contends that the court erred in refusing to direct a verdict for it because Dunbar failed to pay his January assessment and thereby became suspended. The by-laws provide that, if one fails to make payments on or before the last day of the month, he shall become suspended and his certificate shall be void, etc. It also provides however, that, if the person suspended is in good health, he may make a new contract or, if he is suspended for the nonpayment of installment, if in good health, he may within three months from the date of his suspension again become a member of the association by the payment of current installment assessment and all installments which should have been paid to maintain him as a member. It is contended first, that he did not make the January payment until the 16th of February, and at that time he was not in good health but had tuberculosis. The only evidence tending to show that he failed to make the January payment is the testimony of Smith, secretary of the Local Camp, and he testified that he thought Dunbar was entitled to hospitalization, although he knew that, if he was suspended or not in good standing, he was not entitled to hospitalization. His testimony, we think, was such that the jury would have been justified in finding that the January dues had been paid. The burden was upon the appellant to establish the fact that the dues had not been paid 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 Mutual 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,* 133 Iowa 379, 107 N. W. 183; *Kidder* v. *Sup. Commandery, United Order of Golden Cross,* 192 Mass. 326, 78 N. E. 469; *Hood* v. *Sov. Camp Woodmen of the World,* 188 Ark. 1048, 69 S. W. (2d) 880.

It is next contended by appellant that there is no question of estoppel in the case, and for that reason it especially objected to instruction No. 1 given at the request of plaintiff because of that portion of the instruction with reference to the acts of the local secretary constituting an estoppel. It is argued that the by-laws do not permit the local camp or officers to waive any of the provisions of the contract and that the acts of the local secretary could not operate as an estoppel. The by-laws, however, provide that, unless the local secretary makes his report by the 15th of the month, the camp and all of its members are suspended. The undisputed evidence shows that the local secretary frequently made his report after the time provided for by the by-laws and no action was ever taken. It thereby waived the right to suspend the members or the local camp because of a failure to comply with this by-law.

The fact that the local secretary did not make his report on time was necessarily known to the Sovereign

Camp. This court quoted with approval, the following: "Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured, and others known to the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief. * * * The clerk, through a period of years, had adopted the method set forth in the original opinion, which was clearly calculated to induce the belief on the part of Newsom that his dues had been paid according to the method adopted by the local clerk for collecting the dues and reporting the same, and that the society had accepted such payments and would therefore not insist upon a forfeiture because of the failure of the clerk to comply, in this respect, with its laws and constitution." *Sov. Camp W. O. W.* v. *Pearson,* 155 Ark. 328, 244 S. W. 344.

The evidence in this case shows that Dunbar had paid his assessments regularly for thirty-four years, and the only evidence that he failed to pay his January dues on time is the testimony of the secretary of the local camp, contradicted by some of his own statements, especially when he stated that he was entitled to hospitalization, when he would not have been if he had not been in good standing, and this evidence given after Dunbar himself had died and could not testify. Moreover, the secretary admits that he had been in the habit of paying his dues, although he said he did not do it in the later part of 1932. We think it is wholly immaterial in this case whether there was a waiver or estoppel or whether Dunbar was in good health, because, the jury would have been justified in finding that the appellant had failed to show by a preponderance of the evidence that the January dues had not been paid.

It is next contended by the appellant that the court erred in allowing the provision of the constitution in

regard to incontestability to be read to the jury. The appellant itself introduced the constitution and bylaws, and in construing them it was perfectly proper to consider the whole of the constitution and by-laws and construe all of its provisions together. Moreover, the parties agreed in the trial that the constitution and by-laws were considered as having been introduced in evidence with the agreement that either side might offer such parts as it desired. There was no error in permitting this section to be read to the jury.

It is contended that there were errors in the instructions, but the instructions, when considered as a whole, constitute a correct statement of the law, and it would serve no useful purpose to discuss them at length. Each side requested instructions, which were given by the court, on practically every feature of the case.

We find no error, and the judgment is affirmed.

[redacted]

BREWER *v.* STATE.

Crim. 3890.

Opinion delivered July 2, 1934.

[redacted]

Edw. Gordon, for appellant.

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

MEHAFFY, J. The prosecuting attorney of the fifth district filed information against appellant, Edgar

Brewer, January 29, 1934, charging him with the offense of gross immorality. The case was tried on March 6, 1934, before the court sitting as a jury, and appellant was convicted of the offense of gross immorality and was removed from office. The following is a copy of the information filed:

"In the Conway County Circuit Court, Honorable A. B. Priddy, Circuit Judge.

"State of Arkansas, Plaintiff, v. Edgar Brewer, Defendant.

"Comes Audrey Strait, prosecuting attorney, within and for Conway County, Arkansas, and, upon his oath and information, charges Edgar Brewer with the offense of gross immorality, and for cause says:

"That Edgar Brewer is the duly elected, qualified and acting county assessor within and for Conway County, Arkansas, and maintains an office for the conduct of the affairs of his office in the courthouse situated in Morrilton, Conway County, Arkansas; that he served in said capacity during the year of 1933, and at the present time is conducting said office of tax assessor.

"That during the summer and fall of the year 1933, and particularly during the month of December, 1933, Edgar Brewer was guilty of gross immorality; that, taking advantage of the fact that he was a county official and used and occupied an office upon the first main floor of the county courthouse, he enticed, persuaded, encouraged and procured one Rosebud Jackson, a minor female child, to enter his office at various and sundry times for the purpose of immorality and of making a lewd and obscene exhibition of his person, and of making indecent and immoral assaults upon her, the said Rosebud Jackson.

"That defendant, although guilty of gross immorality, continues to use, occupy and retain the office of tax assessor and continues to use and occupy the office assigned to him as tax assessor of Conway County.

"That defendant, Edgar Brewer, is not a fit person, morally, to fill the said office of tax assessor, and that his presence in said office and his continuing to hold said

office is not conducive to morality, law enforcement and to the respect of the citizenship of Conway County, Arkansas, and that, upon a hearing of the charges preferred herein, the said Edgar Brewer, as tax assessor, should be removed from the office as tax assessor, and a vacancy declared by the proper order of this court.

"Wherefore, the State of Arkansas prays that, upon this information, the circuit court designate a day certain for the introduction of proof relative to the guilt of defendant, Edgar Brewer, as to gross immorality, and that an order of the Conway County Circuit Court issue herein ordering the removal of the said Edgar Brewer from office as tax assessor, or, in the alternative, suspending him from office as tax assessor until the charges heretofore preferred against him be disposed of at the March, 1934, term of Conway County Circuit Court.

"(Signed) Audrey Strait,
"Prosecuting Attorney within and for
"Conway County, Arkansas.

"Subscribed and sworn to before me this the 29th day of January, 1934.

"Cleo Cheek, Circuit Clerk."

Notice was served on appellant on January 29, 1934. The appellant filed motion to require plaintiff to make information more definite and certain.

Defendant also filed a demurrer, and, after argument of counsel on motion to make more definite and certain, the court held that certain parts of the information were too general and should be stricken out, and the prosecuting attorney then, on his own motion, struck out that portion of the information which stated that Brewer was under bond upon a charge of carnal abuse, awaiting the action of the grand jury, etc. Appellant filed a demurrer which was by the court overruled, and he then filed a motion for continuance, on account of the absence of certain witnesses. The prosecuting attorney admitted that, if the witnesses were present, they would testify as claimed by the appellant, and the motion to continue was overruled. The appellant then asked that he be given

a trial by jury, and this request was overruled. The appellant refused to waive a trial by jury, demanded a trial by jury, which was overruled, and the appellant at that time saved his exceptions. After hearing the evidence, the court entered an order removing Brewer from the office of tax assessor and declared said office vacant. Appellant filed a motion for new trial, which was overruled, and the case is here on appeal.

It would serve no useful purpose to set out the testimony at length. The appellant does not contend that the evidence is insufficient to justify a conviction if the procedure was proper. He first contends that the charge against him could not be tried except upon presentment or indictment. Section 27 of article 7 of the Constitution reads as follows: "The circuit court shall have jurisdiction upon information, presentment, or indictment to remove any county or township officer from office for incompetency, corruption, gross immorality, criminal conduct, malfeasance, misfeasance, or nonfeasance in office." This action by the circuit court was upon information, and the charge was gross immorality. The appellant cites and relies on *Haskins* v. *State,* 47 Ark. 243, 1 S. W. 242. The court in that case, in construing § 27 of art. 7 of the Constitution, said: "These provisions are, to some extent, in apparent conflict, and it is the office of construction to reconcile them, giving effect to each, so far as may be done, and carrying out the intentions of the constitutional convention which framed the whole instrument. Two interpretations are possible: 1. That when the alleged cause of removal is a matter not cognizable by a grand jury, *e. g.,* incompetency, drunkenness, immorality, etc., then the State's attorney may proceed upon his own motion, by information filed under oath. But, if it is for an indictable offense, the proceeding must be by indictment. 2. That when the object is to punish an offender by the infliction of the penalties which the law denounces against crime, the prosecution must originate in the grand jury room; but that an information for removal is not of this character, the consequence of a conviction extending only to a removal from office, and the primary object

being, not punishment, but the protection of the public against inefficient and worthless officers."

This court has said: "There are no statutes making 'incompetency,' 'corruption' and 'gross immorality,' as such, indictable offenses. Therefore the Legislature must have intended by the use of these terms that, when any one holding a public office was indicted for any 'criminal conduct amounting to a felony,' or for any offense which showed him to be corrupt or dishonest, or for any felony or misdemeanor which showed him to be 'grossly immoral,' and which, if proved, in the eyes of the law would render him incompetent to hold office, he should be suspended. In other words, the Legislature did not intend that an officer should perform the functions of his office while he was under presentment or indictment for any criminal conduct which, if proved, amounted to a felony, or that showed that the accused was grossly immoral or corrupt. This is the wise public policy which the Legislature manifestly intended to conserve." *Jones* v. *State,* 104 Ark. 261, 149 S. W. 56.

Appellant next calls attention to the case of *McClain* v. *Sorrels,* 152 Ark. 321, 238 S. W. 72. The court in that case said: "The case of *Haskins* v. *State, supra,* construed the provision of the Constitution to mean that, 'when an alleged cause of removal from office is a matter not cognizable by a grand jury, *e. g.,* incompetency, drunkenness, immorality, etc., then the State's attorney may proceed upon his own motion, by information filed under oath; but if it is for an indictable offense, the proceeding must be by indictment.' It results from this interpretation of the Constitution that, in case the removal is to be accomplished under an indictment for an offense involving one of the grounds for removal stated in the Constitution, the offense set forth in the indictment must be one which necessarily includes the grounds for removal, otherwise the removal would be accomplished without giving the accused the benefit of a trial upon the issue as to the existence of the grounds for removal. In the Haskins case, *supra,* the charge against the sheriff was for permitting prisoners to go at large, which neces-

sarily constituted official misconduct, and the court held that the charge must be brought by the grand jury, and not by information filed by the prosecuting attorney. The converse of that rule is equally true, and, if the charge does not involve one of the grounds of removal stated, then the removal must be sought on information containing the accusation of facts that constitute grounds for removal."

It will be observed that the court expressly stated that, if the charge does not involve one of the grounds of removal stated, then the removal must be sought on information containing the accusation of facts that constitute grounds for removal. As we have already shown, this court has held that immorality is not an indictable offense, and therefore the removal for gross immorality must be sought on information and not on indictment. It is also true that one might be guilty of gross immorality and guilty of many crimes for which he might be indicted, but the mere fact that he was guilty of a crime in addition to the act of gross immorality would be no reason why he could not be removed upon information. If that provision in the Constitution authorizing the circuit court to remove on information does not mean that one can be removed on information for gross immorality, it does not mean anything, and we think there is no question but that the court had jurisdiction to remove the appellant on information.

It is next contended by appellant that he was entitled to a trial by jury. Appellant calls attention to a great many cases which we do not review because we think they have no application to the facts in this case. The right to trial by jury does not apply to proceedings to oust one from public office. "There is some conflict in authority with respect to whether a proceeding for the removal of a public officer is of a civil or criminal nature. * * * Nevertheless, by the most approved opinion, it is regarded as an executive function, and an action for that purpose is a civil and not a criminal proceeding. It is also considered as remedial rather than penal in char-

acter, because the purpose is not to punish the officer, but to improve the public service." 22 R. C. L. 573.

"It is true that conviction of any of these officers under an indictment for malfeasance, misfeasance or neglect of official duty, by virtue of § 3, art. 9, Const., operates a removal from office; but that does not prevent their summary removal for these or other causes coming under the head of gross immorality, without indictment or criminal prosecution. *McDonald* v. *Guthrie,* 43 W. Va. 595, 27 S. E. 844, chapter 48, Acts 1897, provides that, 'upon satisfactory proof of the charges made in writing, the court having jurisdiction shall remove any such officer from the discharge of the duties of his office.' This provision wholly excludes the idea of a jury trial, and plainly imposes on the court, in the person of the judge thereof, the duty of investigating the matter, hearing the evidence, and, if satisfied of the truth of the charge, removing the incumbent." *Moore* v. *Strickling,* 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279.

Section 3 of article 15 of the Constitution reads as follows: "The Governor, upon the joint address of two-thirds of the members elected to the houses of the General Assembly, for good cause, may remove the Auditor, Treasurer, Secretary of State, Attorney General, judges of the supreme and circuit courts, chancellors and prosecuting attorneys." It will, of course, not be contended that the Governor would have to call a jury, but he acts just as the circuit judge acted in this case. The reason that no jury is necessary is that the object is not the punishment of the officer, but the protection of the public against inefficient and worthless officers.

It therefore appears that the circuit court, without the intervention of a jury, had a right to try the case and to enter judgment removing appellant from office.

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

UNITED STATES FIDELITY & GUARANTY COMPANY

v. COUGHLAN.

4-3521

Opinion delivered July 2, 1934.

William M. Hall and *Hill, Fitzhugh & Brizzolara,* for appellant.

George F. Youmans and *George W. Dodd,* for appellee Horan.

Joseph R. Brown, James B. McDonough and *Robert M. Zeppenfeld,* for appellee Coughlan.

BUTLER, J. This is the second appeal of this case on the merits. In the decree first rendered by the court, it assumed jurisdiction of an action to surcharge and falsify the settlement of John H. Vaughan, executor, but held that it had no jurisdiction to surcharge and falsify the accounts of John H. Vaughan as guardian of Mrs. Edmondson or of Mrs. Frances A. Vaughan (now Sabine), executrix and guardian in succession, on the ground that these settlements were pending and undisposed of in

the probate court. This court, with some modification, affirmed that part of the decree affecting the settlement of John H. Vaughan and reversed the remainder with direction to the court "to proceed without remanding the cause to the probate court to adjudge and settle the accounts of Mrs. Vaughan's own administration." On remand, the evidence taken in the first proceeding was considered with but little additional evidence being offered.

The salient facts developed from the evidence are stated in *U. S. F. & G. Co.* v. *Edmondson,* 187 Ark. 257, 59 S. W. (2d) 488, and no further additional facts need be stated except that on remand it developed that Mrs. Edmondson had died during the proceedings and the branch of the case affecting her proceeded under the name of Mary E. Coughlan, a sister of Mrs. Edmondson, and the executrix and sole beneficiary under the last will and testament of Mrs. Edmondson. This will had been duly probated and was introduced in evidence in the court below. There was some additional evidence relating to certain repairs on the property of the Edmondson estate which appeared as credits claimed in the settlements. This testimony was merely cumulative of testimony taken at the first proceeding, and was to the effect that the repairs were necessary to preserve the property and that the charges therefor were reasonable.

On consideration of all of the evidence adduced explanatory of the items of debit and credit on the settlement and a restatement of the same as made by the master, the court found that the Vaughans should be charged with further sums, denied certain credit items claimed, found the balance due by the Vaughans on their respective accounts as executors and guardians, and that the U. S. F. & G. Company, their surety, was liable therefor.

This decree did not wholly satisfy any of the parties interested, namely, Dr. P. F. Horan, residuary legatee, Mrs. Mary E. Coughlan, beneficiary under the will of Mrs. Edmondson, and U. S. F. & G. Company, surety on the bonds of John H. and Frances A. Vaughan, and each excepted to certain findings of the court below and have prosecuted their several appeals.

There are four accounts affected in this proceeding: that of John H. Vaughan as executor, of the said Vaughan as guardian, and the two accounts of Mrs. Vaughan in the same capacities. Among other items of credit disallowed was the sum of $2,898.97, commissions of John H. Vaughan as executor. The court reduced this claim to the sum of $988.88 for which credit was allowed. On this item the appellant U. S. F. & G. Company contends that the sum claimed was allowed by the probate court and construes our decision cited *supra* as conclusive of the correctness of the item as claimed. Without discussing in detail the various items of commission and expense claimed or setting out the order of the probate court, we do not think that a fair construction of said order sustains the contention made, nor does our decision in the former appeal conclude the trial court from determining the proper amount to be allowed, as in that respect the judgment of the probate court made no definite finding of the exact amount due as commissions. We are also of the opinion that, when all the circumstances of the case are considered, the trial court reached a just conclusion, and that the compensation allowed was reasonable for the services performed.

The court allowed Mrs. Vaughan 10 per cent. of the net income of the estate while administered by her as fees for her services as executrix, and disallowed both the credits claimed in the accounts of John H. Vaughan and Mrs. Vaughan as commission for services as guardian.

It is contended that the credits claimed as executrix fees were those allowed by law, and that the court erred in fixing any less sum. The case of *Timer* v. *Christian,* 27 Ark. 306, is cited as authority for this position. In this case, however, Mrs. Vaughan was administratrix with the will annexed which fixed her compensation at "ten per cent. of the income of the estate," by which expression "net income" was meant. *James* v. *Echols,* 183 Ark. 826, 39 S. W. (2d) 290. Any additional sum was discretionary under the terms of the will with the court to "make allowance of such amount as will compensate my said trustee for executing this trust." Under the evidence the court

was justified in finding that the ten per cent. allowed by the will was ample compensation for the duties performed by Mrs. Vaughan.

On the question of allowances of compensation as guardian, this court has held: "Commissions are allowed to a guardian for the performance of duties imposed by law; but for neglect of those duties, for mismanagement of the property * * * the law does not award compensation." *Reed* v. *Ryburn,* 23 Ark. 47. See also *Stacy* v. *Edwards,* 178 Ark. 911, 12 S. W. (2d) 901. The court found that neither John H. Vaughan nor Frances A. Vaughan is entitled to commission as guardian for the reason that the affairs of the guardianship were grossly mismanaged by both of them. This finding of fact appears to have been sustained by the evidence, and therefore, under the authority cited, the court properly refused them compensation.

Appellant, Mary E. Coughlan, complains of the action of the court in charging the item of inheritance tax to the account of Mrs. Vaughan as guardian, the effect of which was to make such tax payable out of the half of the estate taken by Mrs. Edmondson as her dower and relieving that portion acquired by the residuary legatee. Under the provision of § 10,217, Crawford & Moses' Digest, estates of dower are subject to the payment of this tax, whereas property held for charitable uses is exempt from its payment, and the evidence establishes the estate of the residuary legatee was held for such uses. The court did not err in the particular claimed.

The remaining exceptions to the findings and decree of the court depend entirely on disputed questions of fact. It would serve no useful purpose to review the accounts and the testimony relating to the findings challenged, since we find that the conclusion reached by the court below is not against the preponderance of the evidence.

On the whole, it appears that the trial court has endeavored to do substantial justice to all of the parties in interest, and, as no reversible error appears, the decree is affirmed.

McGuire *v.* State.

Crim. 3888.

Opinion delivered July 2, 1934.

Sam Robinson, for appellant.

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

Butler, J. The appellant was tried in the Pulaski County Circuit Court on a charge of murder in the first degree for the killing of W. G. Carter. The trial resulted in a verdict of guilty as charged, whereupon the court sentenced him to be electrocuted.

On appeal it is not contended that the evidence adduced was insufficient to justify the verdict. The evidence introduced on the part of the appellee is to the following effect: W. G. Carter and G. G. Barham were operating a filling station in Little Rock. At about 7:00 o'clock on the evening of January 8, 1934, appellant, Bill McGuire, came into the filling station and stated that he had intended holding up the place, but as they had been

so nice to him he had changed his mind. He then walked from the station and stopped a short distance away. Barham saw him return and approach a window through which he discharged a firearm, the shot from which struck Carter in the back, and he died early the next morning as a result of the wound.

One Arthur Lindsey testified that McGuire visited him on January 4th; that he stayed all night, and after he had left the next day witness discovered his Winchester rifle was missing. No one else except McGuire was at witness' house at the time the gun disappeared. This weapon was found some time after the killing in a small water course near the scene of the killing and was subsequently identified by witness as the one taken from his home during McGuire's visit to him. On examining the premises where the killing occurred, a discharged rifle cartridge was found which fitted this rifle.

Two other witnesses stated that they had seen McGuire on the night of January 8 in the vicinity of the crime and that he was carrying a Winchester rifle. McGuire was arrested at his home in Little Rock at about 10:30 o'clock on the night of the homicide, and, when arrested, was in bed. He had on his underwear which the officers discovered was wet and the clothes which he had taken off were also wet. This evidence was accepted by the jury as true and is ample to sustain the verdict.

McGuire not having employed counsel, the court appointed a lawyer to conduct his defense. One of the grounds upon which the request for reversal is based is that the court was negligent in the appointment of the attorney for the reason that he was a young and inexperienced practitioner and known to be such by the court; that he did not have sufficient ability and experience to fairly represent the defendant, and that therefore defendant was denied a fair and impartial trial such as the law contemplates.

Our attention is called to the case of *People* v. *Blevins,* 251 Ill. 381, 96 N. E. 214, where a judgment of the trial court, based on a verdict of guilty of murder was reversed because the trial judge, under a statute similar

to our own, appointed two lawyers to represent the defendant who had not been engaged in the practice longer than two years and were inexperienced in the trial of criminal cases. At the time of their appointment these lawyers protested that they were inexperienced and were overmatched by the array of able and experienced counsel for the State. It appears that there were four eminent lawyers representing the prosecution. From the opinion of the court in that case it would seem that the rules of evidence and procedure of that State were grossly violated, and from the record before the Supreme Court it concluded that the lawyers appointed by the court were totally unsuited to properly present the case of the defendant or to protect his rights during the progress of the trial. For that reason and because of the court's knowledge of the inexperience of the lawyers as gained by their protest, the Supreme Court concluded that the trial court had abused its discretion, and that the judgment should be reversed.

This question is before us for the first time. A case might be supposed where a trial court would be so negligent and arbitrary in the appointment of counsel where the defendant is unable to procure any himself, and their conduct of the trial might show such lack of ability as to warrant a reversal of the case because of manifest miscarriage of justice. The record before us, however, presents no such case. The only reason stated to show the lack of ability of counsel appointed by the court is that he had been engaged in the practice not more than thirteen months, but the extent and nature of the practice in which he was engaged during that time is not shown nor his skill in the conduct of matters intrusted to his charge. It is altogether possible that this lawyer might have had much more experience in the defense of those charged with the commission of crime and would be able to conduct the defense more skillfully than one who had been admitted to the practice for a much longer time. Indeed, an examination of the record discloses that the defense was conducted in a creditable manner, and no more errors appear than is usual in the conduct

of trials of that nature. It is seldom—and almost impossible—to make a record in a murder case without some error appearing, and that the errors appearing in this case were not more grave and prejudicial than those which have been called to our attention is a matter for which the trial lawyer is to be congratulated.

The only error complained of in the conduct of the trial was the admission of improper testimony. This testimony is found in that given by the officer Barrett. He had described the arrest and stated that the clothing of the defendant was wet at the time. In this connection he was asked, "what did he say about his clothes being wet?" The answer was, "He said he had been in a stream of water—he had been hiding out because he said he was an escaped convict from the penitentiary." There was no objection interposed to this answer, no request that it be stricken, and no instruction given to the jury to disregard it. This waived the error. "It therefore appears to be the settled rule of this court that, although in capital cases exceptions would not have to be saved, objection must be made at the time before this court will be authorized to review it, and, as to the admissibility of the testimony complained of, no objection was made at the time." *Howell* v. *State,* 180 Ark. 241, 22 S. W. (2d) 47.

Moreover, there could have been no prejudice to the defendant, for he elected to take the stand and the same evidence was brought out on his cross-examination. It is well established in this State that, when a defendant in a criminal case takes the witness stand, he is subject to the same rules of cross-examination as any other witness and can be asked about former convictions for the purpose of testing his credibility. *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41; *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636; *Bieard* v. *State, ante* p. 217.

Counsel who prepared the brief for the appellant in this case and who orally argued the case did not represent the defendant in the trial below. In his excellent brief and oral argument he has called attention to a number of matters extraneous to the record which, he

contends, cast grave doubt on the guilt of the defendant and also which tend to establish the fact that his mind, on the night of the alleged homicide, was in such condition as to prevent him from forming a specific intent to take human life. These matters have been presented in a most persuasive way, but are such as should be addressed to the Governor and not to us.

We have examined the record with care and have reached the conclusion that the trial was fairly conducted, and that no prejudicial error was committed. The judgment is therefore correct, and must be affirmed.

WAGLEY *v.* ROBERTS.

4-3527

Opinion delivered July 9, 1934.

M. A. Hathcoat, for appellant.

Cotton & Murray and *J. Loyd Shouse,* for appellee.

JOHNSON, C. J. Appellant, J. M. Wagley, presented to appellee, John Roberts, administrator of the estate of Dr. J. L. Sims, deceased, his verified demand against said estate for the sum of $1,215.99, same being evidenced by a note purporting to have been signed and executed

by Dr. Sims. Appellee in his representative capacity denied the claim upon presentation, and thereafter said demand was presented to the probate court of Boone County for allowance. The claim was allowed by the probate court and classified. Appellee appealed from this probate court allowance to the circuit court, where a trial was had to a jury, which resulted in a verdict and judgment in favor of appellee, and this appeal is therefrom.

Appellee defended against allowance of the demand upon two grounds, namely; first, that the note was not signed and executed by the deceased, and, secondly, that on the date of the purported execution of the note Dr. Sims was incompetent. Either defense interposed, if established by testimony, would be all sufficient to deny the allowance of the demand. The testimony on the issue of the signing and executing the note was, to the effect that Dr. Sims, on the date of the purported execution, was 80 years of age and very feeble in body and mind, and that the note did not appear to bear the true signature of Dr. Sims. This was the effect of the testimony of Mrs. Roberts and Dr. George Kirby, children of deceased. In addition to the testimony just referred to, the admitted signatures were introduced in evidence for comparison with the signature of the note attached to the claim.

The court instructed the jury as follows: "You should find for the plaintiff, Wagley, unless you find from a fair preponderance of the evidence that the note sued on is not genuine, and that Dr. Sims didn't receive the money indicated by the note."

Appellant requested the court to give the following instruction: "The note itself as introduced is evidence of its genuineness and of the indebtedness therein mentioned, and the burden rests upon the defendant, John Roberts, administrator, to show by a fair preponderance of the testimony that the signature to the note is not genuine, and that he is not indebted to the said J. M. Wagley; and unless these facts are shown by a fair preponderance of the testimony, you will find for the plaintiff, J. M. Wagley."

This presents the first alleged reversible error. The instruction given by the trial court was more favorable

to appellant than he was entitled to under the law. It placed the burden of proof upon appellee to show by a fair preponderance of the testimony that the signature was not genuine and that Dr. Sims did not receive the money indicated by the note. A preponderance of the testimony is the true test under the law in this State and should have been the test here applied.

It is the established doctrine in this State that one can not complain of an instruction more favorable to him than he was entitled to under the proof or the law. *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458, 92 S. W. 249; *Gurdon & Fort Smith Ry. Co.* v. *Calhoun,* 86 Ark. 76, 109 S. W. 1017; *Hamiter* v. *Brown,* 88 Ark. 97, 113 S. W. 1014; *Jones* v. *Dyer,* 92 Ark. 460, 123 S. W. 757; *St. L. I. M. & S. Ry. Co.* v. *Hutchinson,* 101 Ark. 424, 142 S. W. 527.

Next, appellant urges that the court erred in refusing to give his requested instructions heretofore quoted. This instruction is fully covered by the one given by the court, and trial courts should not give instructions which are covered by instructions already given. *Furlow* v. *United Oil Mills,* 104 Ark. 489, 149 S. W. 69.

It is next insisted that reversible error was committed in allowing the cross-examination of witness Jackson in reference to the comparison of certain signatures. This cross-examination was entirely proper as tending to test the knowledge of the witness in reference to signatures generally and the true signature of Dr. Sims in particular.

No reversible error appearing, the judgment is affirmed.

STATE LIFE INSURANCE COMPANY *v.* GOODRUM.

4-3519

Opinion delivered July 9, 1934.

Chas. A. Walls, for appellant.

Trimble, Trimble & McCrary, for appellee.

JOHNSON, C. J. The sole question here presented for determination is the applicability of an affirmative plea of *res judicata* in bar of appellee's alleged cause of action. The facts are not in material dispute and may be summarized as follows:

On December 18, 1920, appellant issued its policy of life insurance by the terms of which it agreed to pay to designated beneficiaries $2,500 in the event of the death of the insured, Thomas T. Goodrum. On April 18, 1921, appellant issued a second and additional policy of life insurance identical in all respects to the one issued on December 18, 1920, except as to the date of issuance. The insured died on April 9, 1933, at which time both policies, as heretofore described, were in full force and effect. After the death of the insured, proof of loss under each separate policy was made and liability was denied by the insurer under both contracts. Thereafter, on August 7, 1933, a suit was instituted by the beneficiary in succession upon the policy or contract of date December 18, 1920, in the Lonoke Circuit Court, and upon trial thereof on September 6, 1933, judgment was rendered in favor of the beneficiary and against the insurer for the face value of the policy *plus* penalty, attorney's fees and costs. Thereafter, this judgment was paid and satisfied in full of record. On September 7, 1933, the suit here under consideration was instituted in the Lo-

noke Circuit Court upon the policy or contract of insurance dated April 18, 1921, and the defense interposed and urged below and insisted upon here was the plea of *res judicata.* This plea of *res judicata* is bottomed upon the proceedings had and done under the prior judgment of September 6, 1933. Appellant's contention is that appellee was required, under the law, to prosecute and maintain in one law action all demands which he had or held against appellant, and that, since appellee failed so to do, the present action is barred by the previous one. The argument is that the death of the insured is the basis of the cause of action, and that the maintenance of two suits upon separate policies of insurance is the splitting of his one cause of action and should not be tolerated by the courts. If we could agree that the insured's death is the basis of the cause of action, appellant's contention would be correct, but such is not the fact. The basis and foundation of these suits were the respective contracts of insurance upon the life of the insured. The only reason why any liability existed in favor of the beneficiary and against the insured is by reason of the contract which so provides. All the rights and liabilities of the parties are measured by the terms of the contracts. Therefore, it certainly appears that the basis of the suit is the contracts of insurance and not the death of the insured. The death of the insured was the condition named in the contract of insurance upon which liability attached as against the insurer and is not the basis of such liability. *Smith* v. *Mutual Life Ins. Co. of New York,* 188 Ark. 1111, 69 S. W. (2d) 874.

The general rule in reference to the question under consideration is stated in 34 C. J., par. 1246, p. 836, thus: "The rule against splitting causes of action does not require a plaintiff who has distinct and disconnected causes of action against the same defendant, each of which by itself would authorize independent relief, to join them in a single suit, although they existed at the same time and might permissibly be so joined, etc."

Section 30, Subject Actions, 1 R. C. L., 351, states the general rule as follows: "With respect to separate

and independent contracts, separate actions may be brought at the pleasure of the party, subject only to the power of the courts to direct them to be consolidated in proper cases."

Appellant cites *Berry* v. *Linton,* 1 Ark. 252; *Blakeney* v. *Ferguson,* 18 Ark. 347; *Wassell* v. *Trapnall,* 19 Ark. 677, and many other cases as supporting the contention here presented.

Berry v. *Linton* decided only that separate causes of action could not be joined for the purpose of conferring jurisdiction. *Blakeney* v. *Ferguson* decided that a liability on an injunction bond could not be split but that one action must suffice. This doctrine is predicated squarely upon the theory of one bond, one liability and one action for its recovery. This will suffice to show the material distinctions between cases cited and their application to the case under consideration.

Moreover, it has ever been the rule in this State that separate causes of action can not be joined in one action except when authorized by the code. *Clements* v. *Lumpkin,* 34 Ark. 508; *Riley* v. *Norman,* 39 Ark. 158; *Waldo* v. *Thweatt,* 64 Ark. 126, 40 S. W. 782; *Hill* v. *Dade,* 68 Ark. 409, 59 S. W. 39; *K. C. S. Ry. Co.* v. *Tonn,* 102 Ark. 20, 143 S. W. 577.

Separate causes of action may be joined in one complaint only in the instances prescribed by § 1076, Crawford & Moses' Digest. Even after joining of separate cause of action as authorized by § 1076, cited *supra,* § 1077 authorizes the striking of any separate cause of action by plaintiff prior to final submission to the jury. Thus it appears from our statutes on civil procedure that it is discretionary with plaintiff, and that he may elect, whether or not separate causes of action accruing to him under separate contracts shall be joined in one complaint and in one action. It is true that, after separate suits are filed on separate and distinct contracts, the courts are authorized, by §§ 1080 and 1081 of Crawford & Moses' Digest, to consolidate certain causes for trial purposes, but when such order of consolidation is effected, it in no wise changes the rule in reference to separate causes of action, and, even after such order of

consolidation, the causes of action remain separate and distinct. *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520.

It follows that by the execution and delivery, by appellant to the insured, of the two separate policies of insurance two separate and distinct causes of action were thereby created, and, under the authorities cited *supra,* when liability accrues such separate causes of action may be instituted, prosecuted and maintained separately at the election of plaintiff or until consolidation is effected as provided by law.

The judgment appealed from conforming to the views here expressed, the same is in all things affirmed.

STANDARD LUMBER COMPANY *v.* HENRY.

4-3493

Opinion delivered July 9, 1934.

A. F. Triplett, for appellant.

Barber & Henry and *Louis Tarlowski,* for appellees.

JOHNSON, C. J. This controversy arises over the alleged superior rights of an attaching creditor of an insolvent foreign corporation and the receiver of said foreign corporation appointed by the courts of this State.

On May 11, 1933, appellant, a creditor of the National Surety Company caused writs of garnishment to be served on F. W. Offenhauser & Company of Texarkana, Arkansas, and the People's Trust Company of Little Rock; and on May 15, 1933, caused a writ of garnishment to be served on Taylor & Company. Each of said garnishees answered the writs by admitting indebtedness or liability to a certain extent in favor of the National Surety Company. On May 16, 1933, appellee, E. A. Henry, was appointed ancillary receiver of and for the National Surety Company by the courts of this State. Thereafter, appellee, as such receiver, filed his intervention in appellant's action pending in the Pulaski Chancery Court in which the receiver asserted a paramount right or claim to the funds in the possession of all said garnishees, and, upon trial thereof, the chancery court determined that the receiver's rights were superior and paramount to appellant's garnishments, and this appeal is therefrom.

The receiver's asserted superior rights must be tested by the laws of this State. The applicable insolvency laws of this State are §§ 5885 to 5893, inclusive, Crawford & Moses' Digest. Section 5886 provides: "The receiver shall intervene in every case in which the property of such insolvent debtor has, within ten days before the filing of such petition, been attached, and, upon such receiver's motion, every such attachment shall be dissolved and the attached property shall be turned over to such receiver upon the payment by the

receiver of all costs which shall have accrued in the attachment suit."

Appellant contends that the cited sections of Crawford & Moses' Digest have no application to the facts in this case because: First, said sections apply only to residents of the State of Arkansas and can not be invoked by or extended to foreign corporations. This contention is made, not because the statute excludes such foreign corporations, but because they do not expressly designate them as a class to be benefited thereby. We perceive no good reason why the statutes cited *supra* should not apply to an insolvent foreign corporation which comes within its purview as effectually as to a domestic corporation. If the insolvent foreign corporation has property and creditors in this State, just why it should not be administered by the courts of this State is not pointed out in briefs. The cited statutes do not exclude foreign corporations by its terms, and we believe upon logic and reason that the insolvency laws in this State do apply to insolvent foreign corporations to the extent of administering such property as may be found within the boundaries of this State for the benefit of creditors in this State. In *Franklin* v. *Mann,* 185 Ark. 993, 50 S. W. (2d) 606, it was contended that certain insurance laws in this State were applicable to resident insurance companies only and not to foreign corporations, but, after citing § 11 of art. 12 of the Constitution of 1874, we specifically decided that the Legislature had the intent and purpose of protecting all persons interested in insolvent insurance companies and that the insurance laws were applicable to such foreign corporations.

Neither can we agree that as a sequence of this view the assets of a foreign corporation in the hands of a State receiver must pass from this State to the State of the domicile of the foreign corporation for administration and distribution. It is well settled by authority that a foreign receivership can not divest the possessions and control of property situated in this State as against the rights of the citizen creditors of

this State. No rule of comity is breached by enforcing our own laws in preference to the laws of other States. *Choctaw C. & M. Co.* v. *Williams-Echols Dry Goods Co.*, 75 Ark. 365, 87 S. W. 632, and authorities there cited.

It is next urged that the insolvency statutes do not apply because, as it is said, the National Surety Company did not invoke the aid of the courts of this State in the appointment of the receiver. The nature and kind of proceedings which invoked jurisdiction in the appointment of the receiver is not before us for determination. It suffices to say, we must presume that the receiver was rightfully appointed by the court which effected it, and especially is this true in a collateral attack on such appointment as this appears to be. The view here expressed in no wise conflicts with the holding of this court in *Walker* v. *McMillan,* 187 Ark. 586, 61 S. W. (2d) 455, but is in full accord with it.

Next, it is insisted that § 5886, Crawford & Moses' Digest, *supra,* does not provide for the dissolution of garnishment proceedings, but applies only to attachments. This is the letter of the statute. We are cited *McGuire* v. *Barnhill,* 89 Ark. 209, 115 S. W. 1144, as supporting this contention. If a garnishment proceeding were the same thing as an execution, then the case referred to would be decisive, but such is not the fact.

The question here presented is, does attachment as used in the statute include garnishments? Practically, if not all, the courts agree that garnishment is a mode of attachment. Rood on Garnishment, § 192, and authorities therein cited. 12 R. C. L., § 2, p. 775, defines garnishment as follows: "Garnishment has very properly been defined as an attachment by means of which money or property of a debtor in the hands of third parties, etc."

We conclude, therefore, that garnishment proceedings are included in the word "attachment" as appears in the statute.

It follows from what we have said that the trial court was correct in holding that our insolvency statutes were applicable to the facts of this case, and that the rights of the receiver were superior and paramount

to those asserted by the creditor under the garnishment proceedings.

The net result of our view is that the assets of the foreign corporation were rightfully determined as belonging to the State receivership for administration and distribution by the court of this State, and, after paying costs of administration in this State, so much of the balance as may be necessary should be distributed to creditors in this State *pro rata* or according to law or the rules and usages of equity courts, and any balance remaining should be paid to the domiciliary receivership.

The decree appealed from, conforming to the views here expressed, should in all things be affirmed.

BUTLER, J., concurs.

EVELAND *v.* STATE USE OF FOSSETT.

4-3513

Opinion delivered July 9, 1934.

Partlow & Rhine and *W. A. Jackson,* for appellant.

Adrian Coleman and *Jeff Bratton,* for appellee.

SMITH, J. This suit was brought in the name of the State for the use and benefit of Birdie Fossett, to affiliate

a bastard child of which she alleges appellant was the father. It was adjudged both in the county court and in the circuit court on appeal that appellant was the father of the bastard child, and he was required by the judgment of the circuit court, pronounced upon the verdict of a jury, to make monthly payments provided for by the statute under which the proceeding was had.

An appeal has been duly prosecuted from that judgment, and for its reversal it is insisted that the court erred in admitting certain testimony, and in excluding certain other testimony. These are assignments of error which can be reviewed only upon a motion for a new trial filed in the cause below calling the attention of the court to the errors complained of.

It has been several times decided that, although a bastardy proceeding is in the name of the State, it is of a civil nature. *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668; *Belford* v. *State,* 96 Ark. 274, 131 S. W. 953; *Chambers* v. *State,* 45 Ark. 56; *Pearce* v. *State,* 55 Ark. 387, 18 S. W. 380.

It was held in the case of *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673, which was an appeal from a misdemeanor conviction, that where the offense charged is a misdemeanor, we are not required, as in felony cases, to explore the record to see whether error was committed, but are only required to consider the assignments of error properly presented under the rules of the court.

It was held in the very recent case of *State* v. *Neil, ante* p. 324, 71 S. W. (2d) 700, that a motion for a new trial is essential to a review of alleged errors not apparent on the face of the record. The improper admission or exclusion of testimony is not an error apparent on the face of the record, but is one which must be brought upon and into the record by a proper bill of exceptions after a motion for a new trial has been filed calling the attention of the court to the alleged error.

If there was a motion for a new trial, it has not been abstracted, and the alleged error has not been called to our attention as the rules of this court require, and it is not, therefore, properly presented for our consideration.

As no other assignments of error are suggested, the judgment must be affirmed, and it is so ordered.

PERRYMORE *v.* STATE.

Crim. 3898.

Opinion delivered July 9, 1934.

Evans & Evans, Sid White, Ray Blair and *Robert J. White,* for appellant.

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

SMITH, J. Appellant was the duly elected and acting sheriff of Logan County, and as such was the legal custodian of the prisoners confined in the jails of that county. He was indicted for permitting two of these prisoners to escape. One of these prisoners was named Richard Warren Holly, the other was named Ed Kleier, and both were under indictment for the commission of a felony. Appellant was suspended temporarily from his office upon the return of the indictment against him, and upon his conviction, his removal from office was made permanent, and he has prosecuted this appeal to reverse that judgment.

The authority and the duty of a sheriff in regard to the custody and control of prisoners confined to his keeping was thoroughly considered in the case of *Houpt* v. *State,* 100 Ark. 409, 140 S. W. 294, and the responsibil-

ity of a sheriff for the escape of a prisoner was so fully stated that the subject need not again be reviewed. It was there pointed out that it had been held in the case of *Martin* v. *State,* 32 Ark. 124, that permitting a prisoner to escape through the negligence of his custodian was not a statutory offense, but only one at common law, yet an indictment would lie for its commission, and a person convicted therefor was subject to removal from office, although the offense was only a misdemeanor and punishable as such under chapter 22, §§ 772-773, of Gantt's Digest, which appear as §§ 1432-1433, Crawford & Moses' Digest.

A question arose—which we find it unnecessary to decide—whether the indictment charged a common-law offense or a violation of the statute (§§ 2574-2584, Crawford & Moses' Digest), for the reason that the trial court construed the indictment as charging only a misdemeanor.

The theory upon which the case was tried is indicated by the questions which the court permitted the prosecuting attorney to ask the jurors in qualifying them for service. For instance, a juror was asked: "Q. If Bryan Godfrey, the deputy sheriff, permitted him (the prisoner) to escape, and Mont (appellant) knew or should have known about it, and the court tells you it would be your duty, would you convict?"

Logan County has two judicial districts, with a jail in each, one being located at Paris, the county seat, the other at Booneville, the town in which the courthouse and county jail for the Southern District of the county are located. The sheriff resides in Paris, and ordinarily visits Booneville when the circuit court is not in session at that place only about once each week. Bryan Godfrey, the person referred to in the question of the prosecuting attorney above quoted, resides in Booneville, and represents the sheriff there, and had charge of the jail at that place. There was testimony to the effect that Godfrey allowed Kleier, one of the prisoners referred to in the indictment, much freedom of action, but whether enough to constitute an escape under the law as declared in the Houpt case, *supra,* we need not decide, as he is not a

party to this proceeding. It was the theory of the prosecution that the sheriff himself was criminally responsible for the acts of his deputy; in fact, the court read § 2581, Crawford & Moses' Digest, as a part of one of the instructions given in the case, this being done over appellant's objection and exception. This section reads as follows: "If any officer, or his under officer or deputy, having the lawful custody of any prisoner, for any cause whatever, shall voluntarily suffer or permit or connive at the escape of such prisoner from his custody, or permit him to go at large, he shall upon conviction be punished in the same manner as if convicted of aiding or assisting such prisoner to escape."

The theory upon which the charge was defended is indicated by an instruction numbered 4 which was requested by appellant but was refused by the court. This instruction reads as follows: "If the jury should believe from the testimony that deputy sheriff and jailer, Bryan Godfrey, was guilty of a crime in connection with the escape of Holly and Kleier, or either of them, this will not be sufficient to authorize the jury to convict Mont Perrymore, unless the defendant, Perrymore, knew of and participated in, or consented to such criminal conduct, if any, on the part of the said Godfrey in connection with such escape."

It is our opinion, for reasons hereinafter stated, that this instruction was a correct declaration of law, and the refusal to give it was an error calling for the reversal of the judgment.

The most serious question in the case is whether, under the law as thus announced, there was any competent or sufficient testimony to support the verdict, and we have reached the conclusion, after giving the testimony tending to support the verdict its highest probative value, that there was not.

There appears to be no testimony that Holly, one of the prisoners who escaped, was accorded such freedom of action as to constitute an escape. The testimony relates to the liberty of movement accorded Kleier, but all this testimony relates to the conduct of Godfrey, and

it was not shown that the sheriff himself had authorized, or had consented to, or was aware of the fact, that Kleier was not kept properly confined. The only relevant testimony tending to show any knowledge of or any participation in Godfrey's conduct was given by appellant himself, who testified that the presiding judge had told him Godfrey was not sufficiently careful in his surveillance of Kleier. The undisputed testimony shows, however, that, immediately upon hearing the judge express this opinion, appellant directed Godfrey to confine Kleier in the jail, and he did so except that on certain occasions he took Kleier out of the jail to get coal and build fires, but Godfrey testified that this was done in his presence. On the night of the escape Kleier was not confined in a cell, but was locked up in what was called the "run-around," the area around and within the walls of the jail surrounding the cells. There was a lock to the door affording entrance to this run-around. Godfrey did not regard this as an unsafe thing to do, as Kleier had been twice tried upon the charge for which he was in jail, and there had been a mistrial in each case. This liberty was accorded that night because Kleier had been given salts and the commode was in the run-around. We are not required to decide whether this liberty would constitute an escape, as Godfrey was not on trial. In any event there is no testimony whatever to the effect that appellant knew of, or consented to, or connived at, the extension of even this liberty.

We have reached the conclusion that the negligence, if any, resulting in the escape of the prisoners was the sole act of Godfrey, and not that of appellant. We have also concluded that the judgment must not only be reversed, but, inasmuch as the case appears to have been fully developed, the cause should be dismissed.

The case of *State of Alabama* v. *Kolb,* 201 Ala. 439, 78 So. 817, considers the liability of an officer for the acts of his deputy, and is exhaustively annotated in 1 A. L. R. 218, from pages 218 to 264. On the liability of sheriffs, constables, and marshals, for the acts of their deputies, the annotator, at page 236, says: "The general rule has long since been settled that sheriffs and other officers

performing similar duties are liable civilly but not criminally for the acts and omissions of their deputies when acting officially or under color of the office. This general rule, which is recognized in and constitutes the basis of most of the decisions dealing with this phase of the question, is expressly stated in *Rogers* v. *Marshal,* (1863) 1 Wall. (U. S.) 644, 17 L. Ed. 714." A large number of cases are there cited which support the text just quoted.

Our own case of *Edgin* v. *Talley,* 169 Ark. 662, 276 S. W. 591, was a suit against a sheriff for a wrongful arrest made by his deputy, which was aggravated by an assault made by the deputy upon the person arrested, and we there held the sheriff was liable for the act of the deputy committed under the color of his office. We said: "The general rule is that for all civil purposes the acts of a deputy sheriff or constable are those of his principal. Hence a sheriff or constable is liable for the act, default, tort, or other misconduct done or committed by his deputy, *colore officii.*"

But, unlike that case, this is not an action to enforce a civil liability. This is a criminal prosecution, and we have no statute imposing criminal liability on an officer for the act of his deputy which he did not authorize, or connive at, or consent to, or otherwise aid or abet in its commission.

It follows, from what we have said, that the judgment must be reversed, and the cause will be dismissed.

School District No. 12 of Grant County *v.* School District No. 37 of Sheridan.

4-3572

Opinion delivered July 9, 1934.

Isaac McClellan and *S. J. Reed,* for appellant.

D. M. Halbert, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Grant County dissolving School District No. 12 and annexing the territory contained therein to Special School District No. 37.

A petition for the purpose of consolidating the districts was filed with the county examiner in September, 1933. The county judge, J. W. Lybrand, who was a member of the board of directors of said District No. 37, certified his disqualification to hear and try the cause to the Governor on October 9, 1933; and on the 6th day of November, 1933, T. Nathan Nall, an attorney at Sheridan, was appointed and commissioned as special county judge of said county to hear and determine the cause. On application, a writ of prohibition was granted by Hon. Thomas E. Toler, judge of the circuit court, preventing the special county judge from trying the cause for the reason that proper notice had not been given of the date set for hearing and that the petition had been filed with the county examiner instead of with the county clerk.

On January 1, 1934, a new petition for the consolidation of said districts was filed with the county clerk, and on May 10, 1934, the special county judge, assuming to act under his appointment and commission to hear and determine the petition filed in September, 1933, heard the new petition filed on January 1, 1934, which trial resulted in a judgment dissolving District No. 12 and annexing the territory contained therein to Special School District No. 37.

The board of directors of District No. 12 duly appealed the case to the circuit court. The circuit court affirmed the judgment of the county court, and said board has appealed from the judgment of affirmance to this court.

There is no authority in the law for a special county judge appointed and commissioned to try a particular cause of action to hear and determine a separate and independent cause of action filed after his appointment.

There was no connection between the first and the last petitions filed except that they were both filed for the same purpose. The first was filed with the county examiner and the last was filed with the county clerk. The special judge was prohibited by the circuit court from hearing and determining the first petition. The special county judge was not appointed and commissioned to try the petition filed January 1, 1934. He had no authority to try the cause, and, he being without jurisdiction to do so, the circuit court acquired no jurisdiction to try it on appeal.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to the circuit court to remand the cause of action to the county court.

ALSTON *v.* ALSTON.

4-3498

Opinion delivered July 9, 1934.

Abe Collins, for appellant.

Lake, Lake & Carlton, for appellee.

MEHAFFY, J. The appellee, Bess Alston, and the appellant, Roy Alston, were married October 12, 1915, and lived together as husband and wife until June 1, 1933,

practically 18 years. On September 14, 1933, the appellee filed in the Sevier Chancery Court a suit for divorce on the grounds of indignities. She alleged the indignities as follows: "Treating her with rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, manifest disdain, abusive language, malignant ridicule, intentional incivility and studied neglect, habitually and systematically pursued. That his manner toward her had been repeatedly persistently unkind. That he withdrew from her all confidence. That his conduct toward her indicated plain manifestation of settled hate, alienation and estrangement, both of word and action." That such course of conduct upon the part of the defendant commenced some three or four years ago, and has grown in intensity and severity since that time until it finally became impossible for her to longer live with him.

It will be observed that the complaint does not state any facts, but states mere conclusions based on the statute, without any attempt to set out what the facts are, or when they occurred, other than stating that the course of conduct commenced three or four years ago.

"The indignities of which she complained should have been specifically set out, that it might have been seen whether they were such as to render her condition intolerable as alleged, or a sufficient cause for the divorce she sought." *Brown* v. *Brown,* 38 Ark. 324; *Waldren* v. *Waldren,* 187 Ark. 1077, 63 S. W. (2d) 845.

We said in the case last mentioned: "An allegation such as the one in appellee's complaint would be sufficient to support a decree where no motion to make more specific was filed, if the evidence had been as to specific facts or specific acts of appellant instead of mere conclusions.

"Where one brings suit for divorce alleging indignities and misconduct, as the appellee did in this case, the defendant of course would be entitled to know what the plaintiff claimed were the facts constituting the indignities, and if a motion was made to make more specific, the court would require the plaintiff to set out the facts."

The appellee testified about the date of the marriage and the date when she left the appellant; that they had

one little girl nine years of age who is with her, except week-end visits to her father; that Mr. Alston made a visit to Vicksburg, Mississippi, in July, and since then they have not lived together as husband and wife; that Mr. Alston is in the mercantile business; he was gone to Vicksburg about ten days, and appellee did not hear from him during that time; did not know when he came back, and when he came back he did not call her up or notify her; the first she knew about his coming back was on Wednesday after he came back on Monday. Appellee, when appellant went to Vicksburg, stayed at her mother's, and was there when he returned. She was at her mother's and went out to get some water, and appellant was on the roof of the new home that her mother was building, and when she saw him she said, "Hello," and he said "Good morning," and that was all that was said. He stayed there about five or ten minutes after speaking to her. He did not say anything about the appellee's going home, and did not call or send for her after he got home. She went home and took her daughter, Joy, and when they got home appellant just looked ugly, and did not have anything to say to her; that they had a bedroom and a sleeping porch, with a door between, and the door had always been left open. That night he closed the door and did not have anything to say. She did not open the door that night. A few nights after that when Joy was away, she opened the door and thought she would joke with him. He was out of tune, and she thought he would get in a better frame of mind. She told him she was lonesome, and asked him why he did not open the door, but he did not answer or look at her, and she closed the door.

Appellee and Joy were in an automobile accident in August. When she tried to talk to appellant, the chances were he would get his hat and go to the store. He was never in a good humor, never undertook to have a pleasant conversation or cohabit with her as husband and wife. The little girl was badly hurt in the accident and appellee was injured. Joy was rendered unconscious. Appellee's back and knee were hurt. The bus driver took her to the hospital and her

husband got in the front seat. She and Joy were in the back seat. Appellant did not say anything to her, but just looked ugly. He did not ask appellee if she were hurt. The bus driver asked her to explain how the accident occurred. Appellant did not ask the doctor in her presence about the extent of her injuries. She thinks he did not even know she was hurt; thinks he was still pretty mad at her. She was suffering, she said, and the doctor gave her a hypodermic. Appellant sat right over Joy all the time, and when the nurse came in to take Joy's temperature, appellant said to her, pointing over her shoulder: "She's the one that is making the racket."

She told appellant that she was going to the hospital at Texarkana, and he did not make any arrangements for her to go. When she told him she was going, he said: "Who said so, your mamma?" She told appellant that she had had X-ray pictures made. He just listened and did not say anything. He just had a look of disdain—just an ugly look that he has for witness.

Appellant said to her, at a time she had gone to DeQueen for some dental work, that he was getting mighty tired of this, and asked her when she was going to get her lawyers and get a divorce. She told him that if he wanted to talk about it they would talk then, but he said: "No, your aunt is out there. Go on."

Appellee then testified about some conversations with her brother and her father, and then said that appellant told her she was not a nice girl when he married her, and asked her if she had not had dealings with so and so. She also testified that when some lady came into the room and asked appellant how appellee's knee was, he said: "I do not know what the doctor said about her knee. He has been in there looking at her leg for 30 minutes."

Appellee testified that, after they had been married about two years, he employed Miss Pearl Rogers to work in the store, and she wanted him to get rid of Miss Rogers, and he finally did. She then said that appellant did not like Mr. Custer Hughes, but that she had known Hughes always. That appellant often got his gun and

would take a walk with it. She testified about their going to the country club when appellant did not want to go. She also testified about a diary she said appellant kept, and she complained about it and said it was such trash; that appellant did not confide in her with reference to his business matters.

She left her husband about September 12th and did not presume he wanted her to come back; that he never let any one hear him say very cruel remarks. There was some disagreement about the purchase of a piano for Joy. She also admitted that she told appellant when the baby was born that she was going to teach her to dislike him.

When appellee was asked on cross-examination if it was not a fact that every time Custer Hughes would come around the house he would grab her and kiss her and put his arms around her, she answered: "Don't you know Custer Hughes well enough to know that he does that with a good many other women?" She said that at one time appellant called her a liar.

The above is substantially the testimony of appellee. She introduced O. C. Kirby, her father, and Mrs. Sarah Graves, but neither of these witnesses introduced by her testified to any facts in corroboration of appellee's testimony.

We do not set out the testimony of appellant because, as we view the testimony of appellee, there is not sufficient evidence to justify the granting of a decree, and appellant does not ask for a divorce. The appellant denied all the appellee's testimony.

There is very little evidence as to facts constituting indignities. The evidence about appellant's looking ugly and treating appellee with disdain are merely conclusions, and no facts are testified to with reference to these matters. The evidence of appellee is without sufficient corroboration.

We recently said: "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." *Sutherland* v. *Sutherland,* 188 Ark. 955, 68 S. W.

(2d) 1022; *Darrow* v. *Darrow,* 122 Ark. 346, 183 S. W. 746; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897; *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; *Preas* v. *Preas,* 67 S. W. (2d) 1013.

In 2 Nelson on Divorce and Separation, page 742, the rule as to corroboration is discussed, and, among other things it is said: "If both parties testify, and the defendant denies all the plaintiff's testimony, the evidence is insufficient. In such cases, however, the court must be careful to notice the character of both parties, and the consistency of the testimony, and may refuse a decree if the evidence is not satisfactory. In New Jersey and Arkansas and perhaps other States, the courts have required corroborative evidence for so long a time that the rule has acquired almost the effect of a statute."

In Keezer on Marriage and Divorce, page 361, it is stated: "While there is no general rule aside from the statute, requiring corroboration, courts are so reluctant to decide cases on such evidence, that it amounts to nearly the same thing, and evidence of the parties should be corroborated, if possible." To support this rule, several Arkansas cases are cited.

Our conclusion is that there was not sufficient evidence to justify the granting of a decree, and the decree therefore must be reversed, and the cause dismissed.

It is so ordered.

TINSLEY *v.* MISSOURI PACIFIC RAILROAD COMPANY.

4-3511

Opinion delivered July 9, 1934.

W. W. Bandy, for appellants.

Thomas B. Pryor and *Daggett & Daggett,* for appellee.

BUTLER, J. On October 26, 1932, at about 1 o'clock, A. M., the appellants were traveling in an automobile along Highway No. 39 within the corporate limits of the city of Paragould. This highway crossed the line of the appellee railroad company at right angles. When appellants reached the intersection of the highway and the railroad, their automobile ran into a moving passenger train. The automobile was demolished, and the appellants suffered certain personal injuries. Suit was instituted by the appellants to recover for the value of the automobile and for damage to them by reason of the personal injuries sustained. At the conclusion of the testimony, the court directed a verdict for the appellee on the theory that the undisputed evidence showed that the negligence of the appellants was the proximate cause of the collision.

The plaintiffs alleged that the passenger train with which they collided was traveling at a rate in excess of that provided by the ordinance of the city; that the statutory signals were not given as the train approached the crossing; that the bell was not rung or the whistle sounded; and that the train was moving at a high and excessive rate of speed, which acts of negligence were the direct cause of the collision and the injuries sustained. The answer of the defendant was a general denial of the allegations of the complaint with a plea that the

injuries sustained were the result of the negligence of the plaintiffs themselves.

The evidence which tended most strongly to establish the liability of the railroad company was that of the appellants themselves, which, viewed in the light most favorable to them, may be stated as follows: The appellants were young men from nineteen to twenty years of age. On the evening of the accident they had been attending some social function in the neighborhood, and after its conclusion had carried some girls home. At the time of the collision they were on their way to their own homes. It was raining and the night was dark. The windows on the sides of the car had water on them. They were traveling in a closed car with all the windows up except the one on the driver's side which was lowered about two inches. The windshield wiper was working, and the brakes were in good condition. The railroad ran north and south and the highway crossed it from east to west. The appellants were approaching the railroad from the west traveling east and their view of the railroad was obscured by houses on the south of the highway to a distance of about 123 feet from the line of railroad and on the north by houses to a distance approximately forty-five feet from the railroad. When they reached a point where their view to the south was unobstructed, they looked and saw the headlight of a locomotive. One of the appellants judged it to be about 789 feet south of the crossing and the other estimated it at 500 feet. They were traveling at the rate of fifteen to twenty miles an hour and continued, after seeing the headlight, without further looking to the south, to approach the railroad at that speed. When they passed the last house on the north of the highway—about 45 feet from the crossing—they looked to the north and, seeing no sign of danger in that direction, kept driving until within about 24 feet of the railroad track, the locomotive suddenly "loomed" on the track before them. The driver applied his brakes, but was unable to check his car so as to prevent striking the train. The front end of the automobile ran against the baggage coach, striking the steps of the same which descended from the door. The

impact bent the steps of the baggage coach and deflected the automobile from the highway causing it to crash through a line of posts and into a ditch. The automobile was practically demolished and the appellants injured.

The appellants testified that the train was moving at a speed, variously estimated, at from thirty to fifty miles an hour, and offered to introduce the ordinance of the city of Paragould fixing the maximum at which trains should be operated through the city limits. This testimony was objected to by the defendant company, and the objection was sustained over the exception of the appellants. Appellants also introduced testimony to the effect that no signals were being given as the train approached the crossing either by ringing a bell or sounding a whistle. This testimony was excluded by the court.

Appellants insist that the court erred in refusing to accept the testimony offered relative to the speed limit prescribed by the city ordinance and in excluding from the jury evidence tending to show that no signals were given by the engineer and fireman. They also insist that the testimony raised a question for the jury as to whether or not the collision was the result of the negligence of the railway company and whether or not the collision was occasioned by their negligence.

Under the undisputed facts, it is immaterial whether or not the signals were given and what was the rate of speed of the moving passenger train. By their own admission the appellants were cognizant of the fact that a train of some character was just south of the crossing, and therefore the blowing of the whistle or sounding of the bell would have given them no information not already in their possession, and the failure to give these signals was not the proximate cause of the injury. *St. L. S. F. R. Co.* v. *Ferrell,* 84 Ark. 275, 105 S. W. 263; *C. R. I. & P. Ry. Co.* v. *Elzen,* 132 Ark. 431, 200 S. W. 1000; *Tyler* v. *St. L. I. M. & S. R. Co.,* 130 Ark. 583, 198 S. W. 128.

The appellants in their testimony attempted to justify their conduct by saying that they did not realize that the train was on the main line when they saw the headlight, but thought it was on a side track, but, from

the testimony of the appellant, McHaney, it appears that the side track intersected with the main line about sixty-eight feet south of the crossing, and both of the appellants were familiar with the surroundings in the vicinity of the crossing. It also developed from their testimony that they did not anticipate the approach of any train at that hour, but were of the opinion that it had passed about 11 o'clock. The proof is undisputed, however, that the appellants did in fact see the headlight of the approaching train at a point from 123 to 80 feet of the crossing and paid no further attention to it, but drove heedlessly along taking no precaution for their own safety, and the passing train did not strike them. They struck it after the entire locomotive and tender had passed and one-half of the baggage coach. The conclusion is inescapable that the only cause of the collision was the negligence of the appellants themselves, and that the speed of the train was immaterial. Therefore, there was no error in the court's refusal to permit the introduction of the city ordinance, and the court correctly directed a verdict in favor of the appellee.

Judgment affirmed.

WASSON *v.* WOOTEN.

4-3583

Opinion delivered July 23, 1934.

W. H. Donham, Moore, Gray, Burrow & Chowning and *Trieber & Lasley,* for appellant.

Fred A. Isgrig and *House, Moses & Holmes,* for appellee.

T. J. GAUGHAN, Special Chief Justice. On February 28, 1933, the Bankers' Trust Company, People's Trust Company and Union Trust Company, all of Little Rock, Arkansas, being unable to meet the current lawful demands of their respective depositors, continued business under what is termed a restricted deposit basis. On May 1, 1933, the State Bank Commissioner took charge of each of said banks, and soon thereafter issued charters for three new banks.

A part of the assets of each of the banks was pledged to the Reconstruction Finance Corporation to secure a loan for amounts sufficient to pay the respective depositors fifty per cent. of their deposits. Certain other assets, including the cash from the loan, were transferred to the respective new banks, and shares of stock in the new banks were issued to the old banks. The shares of stock were pledged to the Reconstruction Finance Corporation, with the other assets referred to, but later the stock

was released and became assets of the old banks in the hands of the Bank Commissioner. The new banks, under their agreement with the Commissioner, paid to all of the depositors of the three old banks fifty cents on the dollar of their deposit claims.

The principle involved in the determination of this case applies equally to each of the three banks. We shall therefore refer to the proceedings of one and the discussion will be equally applicable to the others.

When the common stock of the new Bankers' Trust Company was released by the Reconstruction Finance Corporation to the Bank Commissioner, he offered it to the depositors of the old Bankers' Trust Company in exchange for a certain percentage of their deposit claims. Each depositor was requested to accept a like proportionate part. According to the brief filed by plaintiff, a majority of the depositors declined to exchange any part of their deposits for stock, while a number of others accepted stock in exchange for a part of their deposits.

The question now presented by the complaint is whether, in making distribution in the future, in order to prevent a preference, the Bank Commissioner should be required to distribute to the depositors, who did not accept stock, a sum equal to the amount of the exchange value of the stock accepted by the other depositors.

In order to simplify the problem, let us suppose that A and B were depositors in the Bankers' Trust Company, each in the sum of $1,000. They were paid fifty per cent. of their deposits, so that A and B afterwards held deposit claims each in the sum of $500. Both were requested to exchange a certain per cent. of their claim for a certain number of shares of stock in the new bank. A declined to make the exchange. B accepted the stock, and his deposit is, as a result, reduced to $350. A small distribution has, by the Bank Commissioner, been made to the depositors. In the case of A, his percentage is based on a $500 claim and in the case of B, on a $350 claim. The plaintiff is contending that no distribution should have been made to B until after the distributions to A should amount to $150, and that, until this is done, to allow a dividend or distribution to B on the remainder of his

claim of $350 is a preference. Obviously this position assumes that the exchange of stock for deposits, made between B and the Bank Commissioner was not an exchange or sale, but was in fact a dividend or distribution. A is not asking that the trade between the Commissioner and B be set aside or rescinded, but that the exchange price of the stock be treated as if it were an advancement in legal tender currency.

The stipulation pertinent to the issue is as follows:

"5. Simultaneously with taking charge as aforesaid, the Bank Commissioner joined with each of the respective old banks in the procurement of loans from the Reconstruction Finance Corporation upon the security of certain of the assets of each of the said respective old banks, and in transferring to the respective new banks, which were organized at that time in succession to the said respective old banks pursuant to act 88 of the Acts of the year 1933, effective March 9, 1933, and to the rules and regulations duly made and approved thereunder, substantially all of the assets of the old banks, at their appraised value, other than those assets pledged as security for the said loans. Included with the assets so transferred to the respective new banks were the proceeds of the respective loans. The said new banks were organized with shares of capital stock having an aggregate par value, in the instance of the one succeeding the said People's Trust Company of $200,000, in the instance of the one succeeding the said Bankers' Trust Company, of $300,000, and in the instance of the one succeeding the said Union Trust Company of $300,000. Each share of the stock of the said new banks had a book value on May 1, 1933, in the instance of the one succeeding the said People's Trust Company of $31.25, in the instance of the one succeeding the said Bankers' Trust Company, of $28, and in the instance of the one succeeding the said Union Trust Company of $28.75. Of the stock of the new banks, there was issued to the said respective old banks, or the Bank Commissioner in charge thereof, in part consideration for the assets transferred to the respective new banks, in the case of the People's Trust Company, 5,086 shares on the basis of book value, but having a par

value of $25 per share; in the case of the said Bankers' Trust Company 14,650 shares, on the basis of the book value, but having a par value of $20 per share; and in the case of said Union Trust Company 14,107½ shares, on the basis of book value, but having a par value of $20 per share. The said amounts of stock so issued to the said respective old banks were included among the assets thereof which were pledged as security for the said respective loans of the Reconstruction Finance Corporation, and were all of the stock which is or can be involved in the within suit; all the remainder of the capital stock of the said respective new banks having at all times belonged to individuals who, at the issuance thereof, subscribed and paid cash therefor at the said respective book values per share. Each of the said old banks guaranteed its respective successor new bank, to the extent of the book value of the number of shares of stock in the new bank issued to the old bank, against loss within three years of any assets transferred to the new bank. * * *

"7. Immediately upon taking charge of the said respective old banks, the Bank Commissioner, on said May 1, 1933, duly levied assessments against the stockholders of each of the said old banks, for the purpose of paying its respective debts, in amounts of 100 per cent. of the par value of the stock holdings of its respective stockholders, aggregating $350,000 in the instance of said People's Trust Company, of which $21,800 has been collected to this date, aggregating $600,000 in the instance of said Bankers' Trust Company, of which $8,400 has been collected to this date, and aggregating $500,000 in the instance of the Union Trust Company, of which $161,-225.92 has been collected to this date.

"8. Sometime prior to February 1, 1934, the said Reconstruction Finance Corporation released to the said Bank Commissioner all of the shares of stock in the respective new banks which had theretofore been pledged on behalf of the respective old banks as aforesaid, and thereupon the said Bank Commissioner, in charge of the respective said old banks, in pursuance of said act No. 88 and of the rules and regulations duly made and approved thereunder, offered to each and all of the de-

positors of the respective old banks an opportunity to acquire their proportionate parts of the stock so released through purchase thereof by them respectively, and their payment therefor out of their respective remaining deposits in said old banks, and all of the said stock so released to the said respective old banks was disposed of at said time to such of the said depositors as respectively were willing to acquire the same in the manner aforesaid. The respective depositors who elected to acquire said stock paid therefor out of their said remaining deposits for each share of stock the sum of $31.25 in the instance of stock in the new bank succeeding the said People's Trust Company, $28 in the instance of stock in the new bank succeeding the said Bankers' Trust Company, and $28.75 in the instance of stock in the new bank succeeding the said Union Trust Company, said amounts being in each respective instance the then book value. Country banks organized and existing under the laws of the State of Arkansas were depositors of each of the said old banks, and they respectively acquired and paid for considerable aggregates of the said stock in the manner, and at the respective prices aforesaid; but each of the said country banks was forthwith required by the Bank Commissioner to include the said stock among its respective assets at not more than par, and to agree to dispose of the same within not more than one year. No market for the said shares existed at the time when the Bank Commissioner offered the same to the respective depositors of the said old banks, inasmuch as the public generally were then fearful of acquiring bank stock. At the time of this stipulation, there have been very few sales of the shares of stock of the new banks, and the market value, if any, thereof is uncertain. Since the said sales of stock to depositors of said old banks each of the said new banks has nationalized. * * *

"12. The offer of the Bank Commissioner to dispose of stock in the respective new banks to the depositors of the respective old banks, hereinabove referred to, was in each instance made on the same terms to all depositors of the said respective old banks propor-

tionately, and without partiality or preference to any of them, and the sales of said stock were consummated only by separate arrangements with such of the depositors as respectively consented to acquire the same in the method and at the purchase price aforesaid. At the time of the said respective stock sales there was no way of foretelling with definiteness, nor is there now, the amounts which will ultimately be realized from the assets and assessments against the stockholders of the respective old banks, but the Bank Commissioner and the respective old banks were hopeful, at the time of said respective stock sales on the basis of appraisals, that each of said old banks had sufficient assets through orderly liquidation thereof, and the collection of stock assessments to pay all of its respective depositors in full. In disposing of said stock in the manner aforesaid, the Bank Commissioner and each of said old banks acted in good faith, and in the belief that the same was to the best interest of all the depositors of each of said old banks. Since disposing of said stock in the manner aforesaid, the Bank Commissioner has required all State banks having deposits in any of the respective said old banks to charge off the same as having no value as assets."

"14. The plaintiff was a depositor of each of said old banks at the close of business on said February 27, 1933, and is now, and has not acquired stock from either of said old banks, and he is not chargeable with laches in the bringing of this suit."

"The facts set forth in the stipulation were all of the facts before the court in the said cause."

The court below directed that future distributions of dividends be paid to such depositors, as had not heretofore purchased stock of the Bank Commissioner to the exclusion of depositors who purchased stock, until each depositor not purchasing stock was brought to a parity with depositors who had purchased stock.

The plaintiff contends that, notwithstanding paragraph No. 12 of the stipulation, if it appears from the stipulation as a whole that there was, in fact, a preference created by the sale of stock in exchange for de-

deposits, the court should remove the inequality in the manner prayed for in the complaint.

The general doctrine is well settled that preference in distributing trust property is forbidden. Yet our statute authorizes the Bank Commissioner, in liquidating banks, under supervision of the chancery court, to compound debts, sell assets in piecemeal, and exchange property for deposits. It must have been known by the lawmakers that inequalities would result. The Commissioner may act in perfect good faith, and for what he conceives to be the best interest to all concerned, and yet he may sell a doubtful note in exchange for a deposit, and the buyer may, contrary to his own expectations, collect the note in full. On the other hand, the buyer of the note may fail to collect any sum whatever. In each instance a preference resulted. In one instance, against the seller, and in the other, against the buyer. It is not this character of preference that is condemned. In determining whether depositors suffer injury or discrimination on account of sale of assets or exchange for all or part of deposit liability, we must consider the transaction as of the time the sale or exchange occurred.

Now, applying this rule to the present case, do the facts justify us in holding that the sale complained of was a preference as between the depositors who retained their deposits, and those who exchanged a part for stock?

After carefully studying the stipulation and taking cognizance of the well-known financial conditions of our country at the time, we have reached the conclusion that at the time the exchange was made, neither the stock nor the deposit liability had a market value, nor could the Bank Commissioner or anyone else foretell, with any reasonable certainty, the future return from either.

Plaintiff presents two reasons for his contention that the stock, at the time of the sale, was of more value than the deposits canceled in exchange. The two reasons relied on are: First, the guarantee of the old bank, set out in paragraph No. 5 of the stipulation; and, second, because, since the sale of the stock, the Bank Commissioner has permitted country banks to retain the stock obtained by them among their assets, as set out in

stipulation No. 8, and also has required them to charge off any deposit claim held against any of said banks. See stipulation No. 12.

The difficulty in enforcing, in a practical way, the guarantee referred to renders it doubtful whether the guarantee added substantial value to the stock of the new banks.

No explanation of the action of the Bank Commissioner in respect to the so-called country banks is offered, and we are left to conjecture as to what reasons prompted him to this action. The fact is presented in evidence, no doubt as a circumstance to establish the claim of preference. Unexplained and without proof that the action of the Commissioner truly reflected the respective fair market value of the stock and the deposit liability at the time of the exchange, we think the circumstance can have but little, if any, probative force.

It is observed that the country banks must dispose of the stock within one year, and that up to this time, but little has been sold. What loss the country banks will sustain in disposing of the stock within the year named, and what sums those who retained their deposits may ultimately receive, we cannot, under the stipulation of fact, know with sufficient certainty to enable us to disapprove the action of the Commissioner, admittedly made in good faith, and in what he conceived to be to the best interest of all depositors alike.

We have also carefully considered the question of fact as to whether the transfer of the stock in the new banks to the depositors of the old banks in exchange for their deposit claims, or a part thereof, amounted to a separate sale to each of the depositors or to a dividend or distribution; and have reached the conclusion that each such transaction was in fact a separate sale.

Since the facts do not establish that a preference, within the legal meaning of this term, was given by the Commissioner in the exchange of stock for deposits, and since each such transaction was in fact a sale, it only remains for us to determine whether or not the Commissioner was clothed with authority to sell the stock for deposits. We think the authority, subject to the super-

vision of the chancery court, is fully sustained in the following recent decisions of our court: *Dunkin* v. *Taylor,* 185 Ark. 1033, 50 S. W. (2d) 978; *Lummus Cotton Gin Co.* v. *Taylor,* 188 Ark. 100, 64 S. W. (2d) 90.

Under the facts presented, we think the acts of the Commissioner should be approved. The decree appealed from is reversed, and the cause remanded with directions to approve the acts of the Commissioner in disposing of the stock of the new banks, and in distributing the funds of the old banks. It is so ordered.

MEHAFFY, J., (dissenting). I do not agree with the majority that the facts in this case do not establish a preference. The majority opinion correctly states the issue as follows: "The question now presented by the complaint is whether, in making distribution in the future, in order to prevent a preference, the Bank Commissioner should be required to distribute to the depositors who did not accept stock a sum equal to the amount of the exchange value of the stock accepted by the other depositors."

The majority opinion states: "The general doctrine is well settled that preference in distributing trust property is forbidden."

Therefore the majority holds that, if there was a preference, it would be unlawful. The question then is: Was there a preference?

The majority opinion supposes that A and B were depositors in the Bankers' Trust Company each in the sum of $1,000. They were paid 50 per cent. of their deposits so that A and B afterwards held deposit claims each in the sum of $500. Both were requested to exchange a certain per cent. of their claims for a certain number of shares of stock in the new bank. A declined to purchase stock in the new bank. B purchased stock to the amount of $150, and was paid $150 of his $500 deposit. Neither of them were required to purchase the stock, but the stock was offered to stockholders and others at a fixed price.

I think it makes no difference whether they paid B $150 of his deposit in money or permitted him to use it

in the purchase of stock of the value of $150. In either event, he received $150 of his deposit, and A received nothing.

But suppose that B was a depositor in the sum of $5,000 and A in the sum of $500. When the 50 per cent. dividend was paid, B's deposit would be reduced to $2,500 and A's to $250. Then, if B purchases $1,250 worth of stock in the new bank and A does not purchase any stock, B's deposit then would be $1,250 and A's would be $250. The plaintiffs contend that, since B has received $1,250 of his deposit in stock, he is not entitled to any further dividend until A receives the same per cent. that B has received. It is true that A is not asking that the trade between the Commissioner and B be rescinded, but he is asking that he receive the same per cent. of his deposit that B received. How it can be contended that when A has received 50 per cent. in dividends and B has received 75 per cent. of his deposit in dividends, that this is not a preference or discrimination, I am unable to understand. According to the opinion of the majority, it is conclusively presumed that B received $1,250 in value on his deposit and that A received nothing. But it is said that this is not the character of preference that the law condemns.

It is true that the law authorizes the Bank Commissioner under the supervision of the chancery court to compound debts, sell assets in piecemeal, and exchange property for deposits. I think a complete answer to this is that the trade in the instant case was not made under the supervision of the chancery court. No order was made by the chancery court authorizing the sale, and the chancery court refused to approve it.

This court has never held that these things could be done except under the supervision of the chancery court. The majority opinion cites two cases only: *Dunkin* v. *Taylor,* 185 Ark. 1033, 50 S. W. (2d) 978, and *Lummus Cotton Gin Company* v. *Taylor,* 188 Ark. 100, 64 S. W. (2d) 90.

In the Dunkin case it was held that the order of the chancery court did not go any further than the statute, and that the parties were endeavoring to carry out the

letter and spirit of the order of the chancery court. The chancery court had made an order authorizing the Bank Commissioner to do just what he did in that case.

In the Lummus Cotton Gin case the court said: "The only difference between the two cases is that in the Dunkin 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."

The court therefore impliedly held in that case that the settlement would have been void without the order of the chancery court. I think the decisions in both cases would justify the affirmance of the instant case.

As I have already said, there was no order of the chancery court either authorizing the settlements or confirming them. Moreover, the question that we have here was not involved in either of the above cases.

It is not contended here that the sale of the stock or the trade of deposits for stock was a preference, but the contention is that, after B has received stock for a part of his deposit, it would give him a preference to pay him any further dividends until A had received the same per cent. of his deposit that had been paid to B.

Of course it is not contended that A could be required to purchase stock. I think we may assume that A's deposit was all the money he had to provide food for his family, and that he could not afford to go into the banking business, even if he had desired to do so. But it is immaterial whether he was unable or unwilling to go into the banking business. The payment to B of any dividend after he had received the stock was wrongful until A had received the same per cent. in payment of his deposit that B had received, and any such payment constituted a preference.

It seems to me that the decision of the majority is an application of the rule announced in Matthew 25:29:

"For unto every one that hath shall be given, and he shall have abundance; but from him that hath not shall be taken away even that which he hath."

"The general rule that a private debtor may lawfully prefer one creditor over another, as expressed in the case of *Jackson* v. *Citizens' Bank & Trust Co.,* 55 Fla. 265, 44 So. 516, does not apply in a case where the debtor, a banking institution, is charged with quasi-public duties and obligations and its business is so burdened with a public interest as to require the exercise by the State of its police power to regulate and supervise." *Leyvraz* v. *Johnson,* 154 So. 159; *Baird* v. *First Nat. Bank,* 55 N. D. 856, 215 N. W. 810, 56 A. L. R. 200; *Baird* v. *Reinerston,* 253 N. W. 159.

"With such a spirit and understanding of the law, may the officers of a bank, knowing its insolvency, realizing that its receivership is imminent, thus prefer certain depositors over all others by the subterfuge of trading the best assets in the bank's note case for deposits, in some instances not yet due? We think not. To decide otherwise could be a manifest travesty upon justice." *Luikart* v. *Hunt,* 124 Neb. 642, 247 N. W. 790; *Divide County* v. *Baird,* 55 N. D. 45, 212 N. W. 236.

"A preference, however, is the paying or securing to be paid in all or in part of one claim to the exclusion of other claims." *Preference-Security Savings & Trust Company* v. *Portland Flour Mills Co.,* 124 Or. 276, 261 P. 432-454.

I think that payment to B until A has an equal per cent. paid on his deposit is clearly a preference, and that the decree of the chancellor is correct and should be affirmed.

WASSON *v.* LILLARD.

4-3490

Opinion delivered June 18, 1934.

J. G. Waskom, for appellants.

Maddox & Greer, for appellees.

McHaney, J. Aaron McMullin and Lula McMullin, his wife, were for a long time residents of Tyronza in Poinsett County. The former became quite prosperous and was the owner of substantial properties. His wife, Lula, died intestate January 14, 1929. He died testate August 7, 1930. No administrator was appointed on the estate of Lula McMullin until after the death of her husband. At the time of her death she had on general deposit in the Bank of Tyronza, hereinafter referred to as the bank, $3,220 and a time deposit of $3,115.32. Shortly after her death, to-wit, on February 5, 1929, the bank, of which Aaron McMullin was a stockholder, director and vice-president, permitted him to withdraw the sums above mentioned to her credit amounting with interest to $6,368.20, and deposit same to his credit. This transaction forms the basis for the first suit by her administrator and was brought against the bank and his executor to recover said sum of money. The bank was later found to be insolvent, was taken over by the Bank Commissioner for liquidation, and appellant J. A. Emrich was appointed Deputy Bank Commissioner for this purpose, he having agreed with the Commissioner, if appointed, to pay all creditors of the bank in full.

The complaint was thereafter amended to make the Bank Commissioner and Emerich parties defendant, and judgment was sought against Emrich who was president of the bank for the wrongful misappropriation of said funds and on his promise to pay all claims in full. Trial resulted in a decree for the administrator against all defendants for said sum with interest. One branch of this appeal challenges the correctness of the decree in this respect.

In 1928 Aaron McMullin purchased from the Odd Fellows Lodge a plot of ground in Tyronza, paying the purchase price of $1,000 in cash, and thereafter erected a brick building thereon at a cost of some $6,000 a portion of which was leased for theater purposes and will hereafter be referred to as the picture show property. Warranty deed dated April 21, 1928, was executed by the Odd Fellows Lodge, through its officers and delivered to Aaron McMullin. This deed has been lost or destroyed, but was recorded August 20, 1928, and the record shows the grantees were Lula McMullin and Aaron McMullin. On May 15, 1929, after the death of Lula, Aaron McMullin mortgaged this picture show property and certain of his farm lands to J. L. Dean as trustee for the bank to secure a large indebtedness to it, which mortgage was promptly recorded the next day. In October, 1929, Aaron McMullin conveyed all the lands mortgaged to the bank to his nephew, Ivan McMullin, including the picture show property. After Aaron McMullin's death, the administrator and heirs at law of Lula McMullin, deceased, brought an action against the bank and Ivan McMullin, to reform the deed to the picture show property in which it was alleged that the conveyance was to Lula McMullin alone, and that the name of Aaron McMullin had been inserted in said deed fraudulently before the record thereof; and that the conveyance to Ivan was fraudulent, and, Aaron McMullin not having any title, the mortgage to the bank was void. Prayer was for reformation so as to place the title to the picture show property in the heirs of Lula McMullin and to cancel the deed to Ivan and the mortgage to the bank.

After the insolvency of the bank, the Commissioner brought suit to foreclose the mortgage given it by Aaron McMullin. Two creditors, Abston, Wynne & Company and Dillard & Coffin Company, intervened and alleged the insolvency of Aaron McMullin at the time of the conveyance of the properties by him to Ivan McMullin and prayed a cancellation thereof as a fraud on creditors. The court entered a decree denying reformation of the deed to the picture show property, foreclosing the mortgage in favor of the bank and refusing to cancel the deed to Ivan McMullin. Another branch of this appeal challenges the correctness of the decree refusing to reform the deed to the picture show property to show a conveyance thereof to Lula McMullin alone. The two intervening creditors prayed but were not granted an appeal in the trial court, and no appeal has been granted them in this court.

A brief has been filed by counsel for said creditors, but counsel for Ivan McMullin has moved to strike same on the ground that they have not appealed. This motion must be granted, as the judgment against them has become final, no appeal having been taken by them within the time provided by law. *Camden National Bank* v. *Donaghey,* 145 Ark. 529, 237 S. W. 457. Nor can they be treated as cross-appellants, as provided in § 2166, Crawford & Moses' Digest. See *Porter* v. *Morris,* 131 Ark. 382, 199 S. W. 106; *Myers* v. *Linebarger,* 144 Ark. 389, 222 S. W. 720; *Gordon* v. *Reeves,* 166 Ark. 601, 267 S. W. 133; *Scott* v. *Stephenson,* 168 Ark. 763, 271 S. W. 714. Said creditors are neither appellants nor co-appellees. Said brief will be stricken.

As to the deposit of Lula McMullin in the bank which was withdrawn by her husband after her death, we are of the opinion the court erred in rendering judgment against appellants The undisputed evidence shows that she had no income of her own, except small amounts from the sale of butter, eggs and milk; that the deposit was made with funds belonging to Aaron McMullin and deposited to her credit for his convenience; that at the time the account was opened, and at all times, it was agreed and under-

stood between them and the bank that either could check against the account; and that in reality it was his account in her name. Checks were drawn by him against this account from time to time, and no objection was ever made by her to the bank or to any one else. Having paid the money to Aaron McMullin, the apparent and actual owner of the deposit, it would be a great injustice to require appellants to pay it again on the suit of the administrator of her estate who waited until afer his death to institute the suit. This part of the judgment will be reversed and the cause dismissed.

As to the suit to reform, we are of the opinion that the court correctly refused reformation. While it is true the three trustees of the Odd Fellows Lodge who signed the deed and the notary who wrote it and took the acknowledgments testified very positively that the conveyance of the picture show property was to Lula McMullin alone, and that Aaron McMullin was not a grantee therein, there are other facts and circumstances that speak louder than the memory of witnesses. The deed has been lost or destroyed and was not in evidence. The record of the deed was in evidence, and it showed a conveyance to Lula McMullin and Aaron McMullin and unto their heirs and assigns forever. If it had been originally written to Lula McMullin alone, it would have required the interlineation of the name of Aaron McMullin four times, and the word "her" would have been changed to the word "their" two times. No such changes were noted on the record although the statute, § 8629, Crawford & Moses' Digest, provides: "Each recorder shall record every deed by entering them word for word and letter for letter, and noting at the foot of each record all interlineations, erasures, etc." There is a presumption of law, rebuttable, of course, that the recorder performed his duty in this regard. Since no interlineation or erasures were noted, the presumption is that none appeared in the deed. Another circumstance is that Aaron McMullin at all times handled or managed the property as his own. He rented it to the picture show owner and others as his own, collected the rents

and handled them as his own. He occupied an office in the building himself. Another fact testified to by the cashier of the bank is that, when he took the mortgage, McMullin delivered to him the deeds to the property so that it could be properly described in the mortgage, and that the deed to the picture show property was made to Lula and Aaron McMullin, and that it did not show any interlineations and erasures. There are other facts and circumstances tending to support the court's finding in this regard, but we deem it unnecessary to detail them. Suffice it to say that the decree is proper and is supported by the weight of the evidence. At least, we are convinced that the evidence is not sufficient to meet the clear and convincing rule for the reformation of written instruments as the law requires, announced in many decisions of this court.

This branch of the appeal will be affirmed. Costs will be adjudged against appellees.

BROWNE *v.* DUGAN.

4-3465

Opinion delivered June 25, 1934.

James R. Campbell, C. T. Cotham and *Walter Hebert,* for appellants.

Geo. P. Whittington, for appellee.

BUTLER, J. Mrs. Katheryn C. Dugan is the owner of an office building in the city of Hot Springs. She leased offices to the appellant, Dr. Browne, and thirteen others. These tenants abandoned their leases, and Mrs. Dugan brought suit to collect for the rents which had accrued up to the time of the bringing of her suit. The trial resulted in a verdict for the defendants, and Mrs. Dugan appealed to this court, which, in an opinion delivered March 13, 1933, reversed the judgment of the

lower court for error in refusing to give certain instructions requested by Mrs. Dugan. *Dugan* v. *Browne,* 187 Ark. 12, 58 S. W. (2d) 426. On remand, the case was again submitted to a jury, which found in favor of Mrs. Dugan, and from the judgment based upon that verdict comes this appeal.

At the beginning of the trial, it was stipulated that the fourteen leases exhibited with the complaint were executed by the defendants and the plaintiff lessor; that the defendants had paid no other rent than that stated in the complaint, with the exception of Dr. W. H. Deadrick; that they had not paid the amounts alleged in the complaint as the balance due of rent, except the said Deadrick who would be entitled to a credit of $480. The lease provided that the lessor should furnish necessary heat, light, gas, water, elevator and janitor service during the term of the lease. The defense tendered by defendants when the case was first tried was that the lessor had failed to comply with this agreement, thereby breaching the contract and justifying the defendants in abandoning the lease. At the trial on remand, the same defense was pleaded, and by an amendment to the answer the following further defense was offered: "That, in connection with and incident to the express covenant made by plaintiff (appellee here) to furnish defendants (appellants here) as tenants of said office building the necessary heat, light, gas, water, elevator and janitor service required by defendants as such tenants, the plaintiff undertook to furnish and install the necessary plumbing fixtures, lavatories, water closets, sewer pipes, etc., required to accommodate the defendants as tenants of said building and undertook and agreed to keep such fixtures in proper condition and repair during the term of said leases." The defendants alleged that plaintiff did not furnish the necessary plumbing fixtures, etc., but allowed the same to become defective and out of repair, and, although frequently requested to put them in proper condition, she neglected and refused to remedy them, thereby breaching her contract and justifying the defendants in abandoning the premises.

To the answer as amended the plaintiff replied, denying the allegations, and upon the issues thus tendered the case was submitted to a jury upon the evidence adduced and the instructions of the court.

The appellants make seven contentions for reversal, the last being that the verdict was against the evidence. This we shall first consider. The testimony of the appellants was to the effect that there was insufficient janitor service, that the offices were poorly kept and were suffered to become and remain unclean; that they failed to receive the necessary heat, and there was trouble in entering and leaving their offices because of poor elevator service; that the plumbing was bad and the general conditions so unsatisfactory that they were compelled to abandon their offices and move into a new building; that they had complained of the failure of the lessor to comply with her agreements to the superintendent of the building, and some of them testified that they had complained to Mrs. Dugan personally, but that none of these complaints were considered or the defects remedied.

The evidence adduced by the testimony of witnesses for the appellee was in direct conflict with that given by those for the appellants, and was to the effect that all of the services agreed to were performed; that the offices were kept in good condition with the necessary attendants, the plumbing kept in proper condition, the elevator properly maintained and efficiently operated. Both Mrs. Dugan and the superintendent of the building, Mr. King, stated that they had never received any complaint other than was usual or ordinary, and that these they attended to and complied with the requests of the tenants, although inspections disclosed that the causes for these complaints were often brought about by the negligence of the tenants in the use of the offices and their equipment. They also testified that the first they knew of the intention of the tenants to vacate was when they had already left or were in the act of leaving.

The evidence also developed the fact that a new office building was in course of construction during the

time of the occupancy by the tenants of Mrs. Dugan's building. This was known as the "Medical Arts Building," a large and modern structure; that the tenants, before abandoning their leases and before the Medical Arts Building had been completed, had contracted to rent offices therein.

We think there is sufficient evidence to warrant the submission of the defenses pleaded to the jury. It is the sole judge of the credibility of the witnesses and weight and value of their testimony, and its conclusion is binding upon us.

It is also contended by the appellants that the court erred in admitting certain testimony. The specific complaint made is that "counsel for appellee, on cross-examination of certain witnesses over the protest of the appellants, read to the jury certain portions of the transcript of their former testimony without laying a proper foundation therefor." We are not favored with the names of the witnesses or the questions propounded to them relative to their former testimony, but we have examined the record and are unable to see in what particular appellants could have been prejudiced. Complaint is also made of the action of the court in permitting appellee's counsel to interrogate appellants "concerning a lease which was not material or competent to any of the issues involved in this case and was injected into the case for the sole purpose of prejudicing the jury." We presume that counsel refer to the testimony elicited from the appellants on cross-examination to the effect that, while they were still occupants of the Dugan building and before they had given notice of an intention to abandon same, they had signed leases for offices in the new building which was being erected. We think this testimony pertinent to the issue and competent as tending to show a motive for the abandonment of their leases other than that alleged in their answer.

An amendment had been filed to the answer of the defendants (appellants) on a certain Saturday morning. It was shown that they had met in the office of one of them, and on cross-examination they were asked as to

whether or not they had talked over the case and discussed their respective defenses. This was over their objection. In the closing argument of one of the attorneys he was permitted to say: "I say they (the doctors) had a meeting last Friday night to discuss this case, and I suspect at that meeting the subject of additional claim was discussed and formulated, because on Saturday morning the amended answer was filed. That was alleged, and it was not done before Friday. You can draw your own conclusion. I am drawing mine. I do say that it came out Saturday morning that they made additional claim." The appellants objected to this argument and here urge the same as reversible error. It will be observed that the attorney merely argued the meeting of the doctors on Friday night as a circumstance tending to show that the grounds set up in the amended answer were an afterthought, as the case had been once fully tried without these grounds of the answer having been mentioned. He said to the jury, "You can draw your own conclusion. I am drawing mine." It is our opinion that no prejudice could have resulted from this argument.

In the motion for a new trial it was urged that the verdict, which purported to be a unanimous one, was not such in fact. Jurors were called and testified to the effect that the verdict as returned, correctly reflected the action of the jury.

An attorney at the hearing on the motion for a new trial offered to testify as to statements made by jurors to him tending to contradict their testimony. The court refused to hear or consider the offered testimony, and this action of the court is assigned by defendants as error.

When the verdict was announced, either party might have required the jury to be polled (§ 1299, Crawford & Moses' Digest), and when this has not been done, the jury's verdict becomes final. Section 1300, Crawford & Moses' Digest. Therefore, if any error was committed, it was one of which defendants can not complain.

There were two instructions numbered "7" given by the court, one at the request of the appellee, and one on

its own motion at the conclusion of the argument of one of the attorneys for the appellants. In the testimony of Dr. Deadrick, he complained of the refusal to permit him to use the passenger elevator for the purpose of taking a safe down to be sent out to be repaired. The court, by instruction No. 7 given on its own motion, excluded that testimony from the jury in the following language: "I want to eliminate that complaint from the consideration of the jury. That is just one isolated instance, and does not apply to the other defendants; and, so far as Dr. Deadrick himself is concerned, that particular complaint will not be considered by you. It would not be enough to warrant him in abandoning his lease, so you will eliminate that from your consideration of the case." It was shown by the doctor's own testimony that the rule of the building, which was posted at the elevator, was: "This elevator is to be used for passengers only from 8:00 A. M. until 7 P. M.," and the time that he desired the safe to be removed was about the middle of the morning which was ordinarily a time when passengers were most frequently using it. It was not attempted to be shown that the rule relating to the use of the elevator was unreasonable or unnecessary. The court therefore properly excluded this complaint from the jury.

At the request of the appellee the other instruction numbered "7" was given, which is as follows: "You are instructed that, in considering your verdict, you shall consider the evidence and instructions as applicable to each of the defendants, irrespective of whether you find against or for any other defendant or defendants." The contention is that this instruction is improper and prejudicial. Counsel for appellants has not pointed out in what particular prejudice might have resulted, and we are unable to see how any could have. There were fourteen defendants, and the court merely, and very properly, by this instruction, informed the jury that the evidence and instructions applicable to each should be considered by it in determining what its verdict should be as to any one of them. This, we think, is the pur-

port of the instruction, and, if it was inaptly drawn, specific objection should have been made to its language.

It is insisted that the instruction last above quoted is in conflict with the one relating to the testimony of Dr. Deadrick. We see no connection between them, nor any conflict between the two.

Instruction No. 2, given at the request of the appellee, placed the burden upon the appellants to establish their defense by preponderance of the evidence. It is urged that this is error, the contention of the appellants being that the burden was upon the lessor to establish affirmatively the fact that the defenses pleaded were unfounded. This contention is based upon an allegation of the complaint "that plaintiff has performed each and every agreement and covenant stipulated in said lease to be kept and performed." The contention of the appellants in this particular is unsound. The stipulation of counsel heretofore noted was offered in evidence by the appellee together with the lease, and she thereupon rested her case. The appellants assumed the burden of establishing their defense and contended that the burden of proof in the whole case would be on them, which would entitle them to the opening and closing of the argument. The court, answering this contention, said: "We will determine that later." Whereupon, to sustian their several defenses, evidence was adduced by the defendants. In further recognition that the burden rested upon them, defendants requested the court to give an instruction which, in part, is as follows: "You are instructed that if you believe from a preponderance of the evidence during the period of said leases the plaintiff breached the same by failure to comply with the provisions of said leases incumbent upon her in furnishing the defendants with necessary heat, light, gas, water and elevator and janitor service * * *, the defendants had the legal right to abandon the rooms embraced in said leases and to vacate same." This instruction was not given by the court because it was covered by other instructions given. No complaint is made as to the refusal of the court to give this instruction, but we

call attention to it simply for the purpose of showing that at all times the defendants voluntarily assumed the burden of proving the affirmative defenses offered by them. This being the case, there was no error committed by the court in instruction No. 2, placing the burden upon the appellants. Complaint was made of instruction No. 5 on the same ground as made to instruction No. 2.

Appellants requested instruction No. 11a which the court refused and which action of the court is assigned as error. That instruction in effect declared the law to be that a leasehold interest might be terminated by the mutual assent of the tenant and landlord, either express or implied, and the jury was told that, if it should find "from the evidence in this case that the defendants, or any of them, abandoned the rooms occupied by them under a written lease with the plaintiff before the expiration of the term of said lease and that by her actions the plaintiff took possession of any of the rooms abandoned by any of the defendants for her own benefit and to the exclusion of the defendants, or any of them, then it will be your duty to find that there has been a surrender of such premises, although there was no express agreement to that effect between the parties." This instruction was abstract, the evidence relied on by appellants to support it being entirely insufficient. This evidence goes no further than to show that the signs were removed from the windows of one of the appellants after he had vacated his rooms; that another gave the key to his offices to the manager a while after he had left, and after this he noticed that there were no lights in the office and all the doors were open; that the offices of Dr. Deadrick were rented to another party sometime after he moved, without his consent; and another one of the appellants testified that lights were removed from his offices after he had moved from the building and that he did not know who had removed them. None of this evidence is sufficient to show any assent by the lessor to the action of the lessees in vacating the premises. The evidence is undisputed that the lessor was advised by the conduct of the lessees that they had no thought other

than to absolutely and permanently vacate the premises, and it is clear that the renting of Dr. Deadrick's rooms was for his account. This is shown by the efforts made to get Dr. Deadrick to consent to the renting.

In the case of *Hays* v. *Goldman,* 71 Ark. 251, 72 S. W. 563, cited and relied upon by the appellants, the lessee of a store building was holding under a lease for a period of nine months, terminating on December 30, 1899. The lease gave the lessee the option to continue the same for a period of one year at the same rental. On the day of the expiration of the lease, the lessee served written notice upon the agent of the lessor that he would not continue the lease through the year 1900, but would like to retain it for the month of January. This notice was delivered to a clerk in the agent's office who read it and remarked, "That is all right." Without taking further steps to notify the agent, the lessee remained in the store and paid the rent for January in advance. Learning that the agent considered that he had elected to keep the property under his contract for another year, he protested against this view, and declared his intention of holding only during the month of January. At the end of that month he moved out and returned the keys to the agent. The owner, during the month of January learning that the lessee intended to abandon the store, rented it to another for the remainder of the year at a monthly rental fifteen dollars per month less than he had been receiving and afterward brought suit to recover this difference from the lessee. To this suit the lessee answered that plaintiff consented that he might occupy the premises during the month of January and quit at the end of that time, and also that at the end of that month he had surrendered possession of the store to plaintiff's agent, which surrender had been accepted by said agent. This court held that the circumstances entitled the lessee to have these defenses submitted to the jury and stated the law to be that "if the landlord takes charge of the property after the tenant has abandoned it merely to protect it from injury, or if, knowing that the tenant does not intend to return,

he rents it for the account of the tenant, these acts may not show assent on his part, but if after an abandonment he takes possession and rents the premises on his own account, this is conclusive evidence of a surrender." The circumstances of the instant case fall far short of those in the case cited and did not create evidence of a substantial nature to warrant the giving of the instruction above referred to.

Instructions Nos. 3 and 4 requested by the appellants and refused by the court are not abstracted, but from the argument made we judge that they in effect would have told the jury that it was the duty of the lessor, on abandonment by the lessee of the premises, to use a reasonable effort to let the premises to others to thus minimize the damage. The court properly declined to so instruct the jury. The general rule is stated in 16 R. C. L. 969, § 481, as follows: "If the tenant wrongfully abandons the possession of the demised premises, the landlord may re-enter and determine the contract of lease and in so entering is not guilty of a trespass. On the other hand, it is well settled that a tenant cannot by an abandonment of possession before the expiration of the term for which he has agreed to pay rent affect his liability for the subsequently accruing rents; in such a case the landlord may let the premises lie idle and recover rent for the whole term. In such a case, according to the better view, the landlord is under no obligation to attempt to relet the premises on account of the tenant; the latter cannot by his own wrong in abandoning the premises impose this duty upon the landlord." The rule announced is supported by the weight of authority and approved by this court in the cases of *Meyer* v. *Smith,* 33 Ark. 627, and *Grayson* v. *Mixon,* 176 Ark. 1123, 5 S. W. (2d) 312.

We find no prejudicial error in the rulings of the court as to any of the particulars presented by the appellants, and, as there is substantial evidence to support the verdict of the jury, the judgment is affirmed.

PLEDGER *v.* CUTRELL.

4-3571

Opinion delivered July 2, 1934.

[redacted]

Bridges, McGaughy & Bridges and *Coleman & Gantt,* for appellant.

Evan W. Crawford, for appellee.

JOHNSON, C. J. This is a taxpayer's suit instituted by appellees against appellant, county treasurer of Jefferson County, seeking to permanently restrain and enjoin him as such treasurer from paying out or disbursing any funds now or which may hereafter come into his hands as such treasurer from taxes arising under an eighteen-mill district levy voted by the electors of Pine Bluff Special School District at the annual elections of March 7, 1933, and March 6, 1934.

The cause was submitted for trial and decree upon the following agreed statement of facts:

"1. That Claude Pledger, treasurer of Jefferson County, Arkansas, is *ex officio* the legal custodian of the school funds of Pine Bluff Special School District of Pine Bluff, Arkansas.

"2. That there are now outstanding bonds of said school district of Pine Bluff approximately $490,500 accruing in annual principal and interest installments.

"3. That the form and titles of the printed ballots used in the annual school elections held in the years 1933 and 1934 were:

" 'For General Tax.....18 Mills.
For Building Tax..... Mills.
Total tax not to exceed eighteen (18) mills.
Against Tax .....'

"4. All of the bonds of said Special School District were issued prior to act 169 of 1931 upon the following dates, to-wit:

" '(a) Third Mortgage Bonds, August 1, 1917.'
" '(b) Fifth Mortgage Bonds, December 15, 1923.'
" '(c) Sixth Mortgage Bonds, September 1, 1927.'

"5. All the bonds are secured by mortgages on the various school buildings and pieces of real property belonging to said district and by a pledge executed at the same time with each mortgage on the part of the district, pledging all the income of the district from all yearly taxes for the purpose of paying off and retiring said bonded indebtedness and interest thereon, in yearly installments as same should accrue.

"6. At the annual school elections in said Special School District of Pine Bluff which were held therein on the 7th day of March, 1933, and the 6th day of March, 1934, there was voted and carried 'For General Tax 18 Mills.' That at neither of said elections was a specific millage tax voted for the payment of 'Bonds or Interest,' * * * nor for 'Building Fund,' nor for 'General School Purposes.'

"7. That the county board of education on March 10, 1933, after the holding of said election March 7, 1933, did find and certify to the county levying court, as provided by law, that at said school election there was voted for 'School Tax'

" 'For 18 mills.....1,573'
" 'For 15 mills..... 1'
" 'For 12 mills..... 7'
" 'For 10 mills..... 25'

as shown by the county educational board record of said Jefferson County, page 117. And the levying court of said county on November 13, 1933, made the 'tax levy' of said school district 18 mills, as shown by county court record BB of said county at page 209. And the county court of said Jefferson County on March

10, 1934, found, determined and adjudged that at the election of said Special School District held on March 6, 1934, the vote was as follows:

" 'For General Tax 18 mills.....282'
" 'For 10 mills..... 2'
" 'For Building Tax..... 1'
" 'Against Tax ..... 14'

And also found and adjudged that the result of said election was 'For General Tax 18 Mills,' as shown by Record BB of the records of the county court of said county at page 254.

"8. That there has been paid into the hands of defendant to the credit of said district from the collection of the 18 mills school taxes so voted therein for the school year 1933-1934 approximately the sum of $45,000, and that additional revenues from said source will be paid into his hands during said year. That all of said revenues are collected under the 'general tax' of eighteen mills mentioned herein.

"9. That during the school year 1934-1935 there will accrue and be paid into the hands of the defendant to the credit of said district revenue in like manner as that mentioned in paragraph 8 hereof.

"10. That during the school year 1933-1934 there will become due the sum of approximately $19,500 of bonds and approximately $24,500 in interest on said bonds; or in the aggregate the sum of $44,000 principal and interest. That of the $45,000 paid into the hands of the defendant, heretofore, a portion of said amount has already been expended by him for the payment of accrued bonds and interest, and further expenditures for said purposes having been pledged will be made by him. That the revenue on said 18 mills general tax approximates $218,000 each year.

"11. That said eighteen mills school tax has thus been customarily voted upon each year and likewise devoted in part to the payment of the yearly accruing installments of the outstanding bonds of the district, since the effective date of the constitutional amendment providing for the eighteen mills school tax.

"12. That the plaintiffs, R. C. Cutrell and E. M. Long, are residents, citizens and taxpayers of Pine Bluff School District No. 3 of Jefferson County, Arkansas."

The chancellor awarded a permanent injunction as prayed, and this appeal is therefrom. The school fund here under consideration arises and accrues exclusively under Amendment No. 11 to the Constitution of 1874, which provides: "The General Assembly shall provide by the general laws for the support of common schools by taxes which shall never exceed in any one year three mills on the dollar on the taxable property in the State, and by an annual per capita tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years. Provided, that the General Assembly may, by general law, authorize school districts to levy by a vote of the qualified electors of such districts a tax not to exceed 18 mills on the dollar in any one year for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings. Provided, further, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied."

It appears from the 11th amendment last quoted that it levies no taxes and that no tax may be levied thereunder save by an affirmative vote of the qualified electors of the school district in which such levy is sought, and then such levy is limited to 18 mills on the dollar in value for any one year. Therefore it definitely appears that the levy of any tax under this amendment is exclusively optional with the qualified electors in the school district affected. On the question here under consideration we decided in *Horn* v. *Paragould Special School District,* 186 Ark. 1000, 57 S. W. (2d) 568; "Three purposes are named in the amendment (1) 'for the maintenance of schools'; (2) for 'the erection and equipment of school buildings'; and (3) for 'the retirement of existing indebtedness for buildings.' And it is then provided 'that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied.' This appears to be very simple language, unam-

biguous, and not difficult of comprehension. The electors of any school district may vote a tax at any rate they wish for any or all said purposes, provided the tax voted for all does not exceed 18 mills. For instance, they might vote 6 mills for bond and 12 mills for school purposes, as they did in this case, and, when so levied and collected, neither sum could 'be appropriated for any other purpose * * * than that for which it is levied.' In other words, the 12 mills voted for school purposes could not lawfully be appropriated for payment of bonds or the interest thereon, nor could the 6 mills voted for bond purposes be appropriated for schools. Such is the plain language of the amendment. No other construction can be given, and any other in the present case would probably work disaster to both parties. For, since the voting of any tax for any purpose is optional with the district's electors, the taking of the 12 mills voted for general school purposes to pay bonds would close the schools and keep them closed for many years, it would seem reasonably certain the electors would not vote a tax on themselves and have no schools. The bondholders would lose the 6-mill tax now being received, a substantial loss to them, and the district would be without a free public school for years to come, which would be disastrous to it and its people."

It follows from what we have said that neither creditors nor any one else can acquire a vested right or interest in or to any levy of taxes under Amendment No. 11 or to any part thereof until same has been voted by the qualified electors each year. The question then arises, did the qualified electors in Pine Bluff Special School District at the elections in March, 1933 and 1934, vote a tax or dedicate a part of the tax so voted under amendment No. 11 to the payment of outstanding bonds and interest of the school district? The agreed statement of facts heretofore copied shows that the electors in said school district at the elections aforesaid voted upon the following questions:

"For General Tax"

"For Building Tax"

"Against Tax"

At the election in March, 1933, all votes cast by the qualified electors were in favor of "For General Tax 18 mills" and none were cast in favor of "For Building Tax." At the election in March, 1934, all votes cast by the qualified voters, save one, were in favor of "For General Tax 18 mills" and only one vote was cast in favor of "For Building Tax."

Therefore, it definitely and certainly appears that the qualified electors of Pine Bluff Special School District did not vote a building tax at the elections in said district for either the year 1933 or 1934.

It necessarily follows that, if "For Building Tax" as it appeared on ballots cast by the qualified electors in the elections for 1933 and 1934 has reference to funds for the retirement of bonds and interest thereon owed by the district, then certainly no tax was voted by the qualified electors for this purpose, and the chancellor was correct in so deciding.

Section 66 of act 169 of 1931 defines "Building Fund" as follows:

"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 whatsoever source derived, and shall be held by the county treasurer solely in the manner and for the purposes set out throughout this act."

Tested by the definition of "Building Fund" as it appears above, there can be no doubt that the qualified electors of Pine Bluff Special School District at the elections held in 1933 and 1934 refused to vote or dedicate any part of the 18 mills tax for schools to the purpose of paying or retiring the outstanding bonds of said district or the accrued interest thereon.

We cannot agree that the electors by voting in favor of "For General Tax 18 mills" intended to grant to the directors of the school district a discretion in the application of this fund to any purpose authorized by Amendment No. 11. The affirmative vote of the electors "For General Tax 18 mills" dedicated this fund to one

purpose only, and this purpose was neither "Building Fund" nor the "Retirement of existing indebtedness for Buildings." Therefore, the only remaining purpose for which the levy could have been effected under Amendment No. 11 was "For the maintenance of schools."

Therefore, the county treasurer of Jefferson County was without authority in law in paying or asserting the right to pay out any of the funds arising from the 18-mill levy of taxes accruing to the school district under Amendment No. 11 for the retirement of bonds or accrued interest thereon owed by said school district, and the injunction was properly awarded restraining such misapplication of funds.

For the reason stated, the chancellor was correct in awarding a permanent injunction against appellant treasurer, and the decree will therefore be affirmed.

SMITH, J., (dissenting). The case of *Horne* v. *Paragould Special School District,* 186 Ark. 1000, 57 S. W. (2d) 568, upon which the majority of the court relys, does not, in my opinion, support the conclusion which the majority have announced, and I therefore respectfully dissent.

The record is silent as to whether the school directors had complied with the law defining their duties in the matter of holding the election at which the school tax was voted, and we must therefore presume that those duties had been performed. Section 97 of act 169 of the Acts of 1931 (Acts 1931, pages 476-588) defines these duties. Subsection H of § 97 requires the school directors to prepare an estimate of the amount of money needed by the district for the year following the school election, showing separately the amount needed "for general control instruction, operation of the plant, maintenance of the plant, auxiliary agencies, fixed charges, capital outlay, and debt service," and to send a copy of the estimate to the county board of education, and to publish it once a week for three consecutive weeks in a newspaper published in the county at least twenty-five days before the annual election. The obvious purpose of this requirement is to advise the electors what amount of money will be required for school purposes and the uses

to which it will be devoted. This may be done by voting a given number of mills for each purpose, or by voting any number of mills, not exceeding 18, for all purposes, or for a general school tax. It is a matter of common knowledge that the latter is the method ordinarily employed in the districts throughout the State, and it is stipulated that the tax was so voted in the instant case. The tax voted was "For General Tax," and it is respectfully submitted that this does not include any one purpose to the exclusion of any other purpose for which a school tax may be legally voted.

In the Horne case the majority of the electors voted a tax of 6 mills "for the building or bond payment fund and 12 mills for general school purposes," thus specifically limiting to 6 the number of mills for the building or bond payment fund. The remaining 12 mills was not voted for any one of the purposes designated in subsection 4, above quoted, but was voted for all those purposes except for the building or bond payment fund, for which 6 mills was specifically voted.

Not so in the instant case. No certain number of mills was voted for any specific purpose. The electors, on the contrary, voted "For General Tax." Now, what is "General Tax"? The obvious answer is that it is a tax for all purposes for which the electors had authority to vote, leaving to the directors of the school district the duty to apportion the tax collected to the items embraced in the budget which had been submitted to the electors. If the electors are unwilling to confer this authority, they must vote such number of mills for a particular purpose, as was done in the Horne case, *supra*.

The authority to vote the 18 mills is derived from the 11th Amendment to the Constitution, as is said in the majority opinion, and I submit that a vote "For General Tax" includes each and all of these purposes, and it should be assumed, in the absence of a showing to the contrary, that the electors had dedicated the tax to all the purposes shown in the budget report of the school directors.

It must be remembered that the electors voted "For General Tax," and a more comprehensive adjective

could hardly have been employed. Many definitions of the word "general" are given in Webster's New International Dictionary, and these, among others: "Of or pertaining to the whole of a body, society, organization, or the like; pertaining to, affecting, or applicable to, each and all of the members of a class, kind, or order; universal within the limits of the reference; not particular; not precise or definite."

A tax thus voted, when not otherwise limited, as was done in the Horne case, *supra,* covers all items for which the tax may be voted. If this is not true, then no tax whatever was voted. There is no more reason for saying the general tax is applicable for maintenance of schools than it is for the retirement of existing indebtedness. Neither was written on the ballot. The electors might have voted a definite number of mills for either purpose, but they did not do so.

The term "General Tax" is not a synonym for "Maintenance" nor for "Indebtedness," and it, therefore, no more includes one than it does the other, and unless it includes both it does not include either. But it does include both, because a tax for maintenance or to pay indebtedness is a general tax, all being for school purposes and all permissible under both the constitutional amendment and under act 169, *supra.*

As was said in the Horne case, *supra,* the three purposes for which a tax may be voted under the constitutional amendment are: "1) for the maintenance of schools; (2) for the erection and equipment of school buildings; and (3) for the retirement of existing indebtedness for buildings." It is true the printed ballot contained the words, "For Building Tax," which was for the second purpose above-named, but no tax was voted for that purpose. But there is no question in this case about using this money for building purposes. The relief prayed and granted in the court below was that the directors be enjoined from using any of the taxes for the retirement of existing indebtedness (some of which had been outstanding since 1917), the third purpose named in the amendment for which taxes may be voted. There was no specific vote on this question no more than there

was on the first purpose, that of maintenance, and I, therefore, repeat that if a vote "For General Tax" did not authorize an expenditure for the third purpose, there is a lack of authority to expend it for either the first or second.

The decree of the court below should, therefore, be reversed, and the directors allowed to complete the payment of the installment of the bonded debt and interest, a portion of which, according to the stipulation, has already been made.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY *v.* BRITT.

4-3452

Opinion delivered July 2, 1934.

Thos. S. Buzbee, H. T. Harrison and *A. S. Buzbee,* for appellant.

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

MEHAFFY, J. This action was begun in the Scott Circuit Court against the appellant and Dr. J. P. Runyan for injuries alleged to have been sustained by the ap-

pellee, Mrs. Sue Britt, by reason of an infection in her eye, the result of what she charged to be negligence on the part of Dr. Runyan. Dr. Runyan was chief surgeon at Little Rock for the appellant company. Mrs. Britt was employed as a registered nurse by the appellant. The following contract was introduced in evidence:

"This agreement, made in duplicate this 15th day of March, 1928, between The Chicago, Rock Island & Pacific Railway Company, by S. C. Plummer, M. D., its chief surgeon, as first party, and Drs. J. P. Runyan, J. P. Sheppard, L. D. Reagan, C. E. Witt, J. P. Delaney and Mrs. W. S. Britt, M. D., of Little Rock, State of Arkansas, as second party (known as the St. Luke's Hospital Clinic) WITNESSETH, That,

"1. The second party is hereby appointed district and hospital surgeons of the first party for Little Rock, in the State of Arkansas and vicinity, and he hereby accepts said appointment.

"2. The second party agrees, for the consideration hereinafter provided, as follows:

"(a) To render all proper and necessary surgical and medical attention to the employees of the first party residing within the territory covered hereby, also to all such employees of the first party as shall be injured accidentally while in discharge of duty, no matter where residing, whenever requested so to do by any of such employees.

"(b) To render, at any point within the jurisdiction covered hereby, similar services to all passengers injured while traveling upon the road of, or injured on the premises of, the first party, when requested so to do by any officer, conductor, or station agent thereof.

"(c) To render, at any point within the jurisdiction covered hereby, such services as shall constitute actual emergency attention necessary for the relief of any injured trespasser, until he can be turned over to public authorities or friends.

"(d) To render in all other cases, such as crossing accidents and the like, actual emergency attention necessary for the relief of any such injured person,

when requested so to do by an authorized representative of the first party, and also such further attention as may be so requested by the first party.

"(e) To fill out full reports in duplicate on the First Report Blank, Form 1601, and to forward this on the first passenger train after the services are rendered, one report to the claim agent, in whose territory the injury occurred, and one to the office of the chief surgeon, at Chicago. Should the injury be serious, all the facts in the case should be reported at once by railroad telegraph to the office of the chief surgeon.

"(f) In cases of serious injury, of which the first party assumes permanent charge, to fill out in duplicate supplementary report on form 1609 every five days, until the indications are all of a favorable character, and to forward the same in the manner provided for first report blanks. In addition to these reports in serious cases, a supplementary report must be made in duplicate at least every ten days in all cases.

"(g) In discharging a case, either in the event of recovery or transfer to the care of other surgeon, or death, to fill out in duplicate final report blanks form 1602, and to forward the same in the manner provided for first report blanks. Also fill out form 1610 (release blank) and hand it to the patient to take to his employing officer. Mail duplicate of this to the district claim agent.

"All of the above apply to every case, no matter how trivial in appearance and whether the company is thought liable or not.

"Note: No formal operation of serious character must be attempted until full reaction from the shock of injury is established, with exceptions in two conditions, viz., grave hemorrhage, or injury to abdominal viscera.

"(h) To make all such examinations as may be required by the first party in connection with its personal record and pension bureau.

"(i) To make all examinations of employees or persons desired by the legal and claim departments of the first party, sending one copy of the report indicating

the result of such examinations to the chief surgeon, and one copy thereof to the claim agent.

"(j) To attend in behalf of the first party as a witness in any investigation or judicial proceeding where the testimony of the second party may be required or desired.

"(k) To faithfully observe and carry out all orders, directions and regulations which said chief surgeon shall from time to time transmit or cause to be transmitted to the second party.

"(l) The second party will furnish without charge, instruments, anaesthetics, splints, medicines or anything necessary for the performance of any operation, treatment of fracture or dressing of wounds.

"(m) Drugs, other than those required for first attention, must be paid for by the patient, except in the hospital association district.

"Medical Treatment in Hospital Association District

"(n) The foregoing provisions of this contract will also govern employment of surgeons at points on the lines of the company in the hospital association district, except that the following instructions shall be followed as to those entitled to free attention.

"Those Entitled to Free Attention

"(o) Contributors to the hospital fund, who are sick (or injured while off duty) are entitled to free attention at the expense of the hospital fund when they present identification slip from the employing officer showing that they are entitled to attention.

"(p) All bills account hospital association district for hospital, nursing and ambulance services, and for surgical services where the employee was not injured in discharge of duty, shall be presented monthly in duplicate, on form 1619; hospital, nurse and ambulance bills to bear the approval of second party. In the cases of employees injured in discharge of duty, duplicate bills are not required, but every bill presented should bear the approval of second party.

"3. It is expressly agreed between the parties hereto that the compensation hereinafter provided for

shall include all surgical and medical attention or service of every nature and description which the second party shall render as aforesaid, including all dressings of injuries, amputations, adjustment of fractures, reducing of dislocations, ligations of arteries, and trephining and raising depressed fractures of skull, and all microscopical, pathological and X-ray examinations which may be required in the proper treatment of the patient, or may be desired by the first party.

"4. In consideration of all services and attention to be rendered by the second party under this agreement, the first party agrees to pay to the second party, and the second party agrees to accept from the first party, in full compensation therefor, the sum of Four Hundred One and 50/100 Dollars per month, beginning with the month of March, 1928; provided, however, that if the second party shall at any time be required, for any of the purposes aforesaid to make trips away from the city where his office is maintained, he shall be paid in addition thereto a per diem of twenty-five dollars, together with his actual expenses. It is further expressly agreed that the first party shall not be held for any other expenses of the second party, whether for office rent, lights, books, instruments, rubber gloves, furniture, dressings, or of any other nature or character whatsoever.

"5. Payments hereunder by the first party shall be made to the second party at his place of residence as aforesaid within a reasonable time after the end of each calendar month.

"6. It is further agreed that either party hereto may terminate this agreement by giving to the other thirty days' notice in writing, provided that the first party, by its chief surgeon, may at any time forthwith terminate this agreement for the failure of the second party to faithfully and fully perform any of the service contracted by him hereunder to be performed.

"7. The courtesies of the first party are extended to the second party in the form of an annual pass.

"In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written.

"The Chicago, Rock Island & Pacific
Railway Company,
"By S. C. Plummer, M. D.,
"Its Chief Surgeon.
"J. P. Runyan, M. D.,
"J. P. Sheppard,
"L. D. Reagan,
"C. E. Witt,
"J. P. Delaney,
"Mrs. W. S. Britt."

The following stipulation was introduced in evidence:

"It is agreed by and between all parties hereto that the following statement of facts may be read in evidence at the trial of the above entitled action and treated as true, to-wit:

"At the time the surgical operation was performed on Wilson Cobbs by Dr. J. P. Runyan, with the assistance of Mrs. Sue Britt and others, Wilson Cobbs was in the employ of the Chicago, Rock Island & Pacific Railway Company. Wilson Cobbs, at the time the operation was performed upon him, was entitled to medical and surgical treatment and hospital care, afforded certain employees of the Chicago, Rock Island & Pacific Railway Company employed at, and near, Little Rock, Arkansas. That the operation being performed on Wilson Cobbs was not for a condition resulting from an injury received while working as an employee of The Chicago, Rock Island & Pacific Railway Company."

In addition to the contract and stipulation, witnesses were introduced whose evidence tends to show that the operation on Wilson Cobbs by Dr. Runyan was negligently performed, and that that negligence was the cause of the injury to the appellee. The evidence shows that the appellee was assisting Dr. Runyan, and that in the operation a gland was burst by the negligence of Dr. Runyan, and that the contents went into her eye and

caused it to become infected and caused the loss of the eye. The evidence as to the manner in which the operation was performed, that is, whether Dr. Runyan was negligent in performing the operation is in conflict, and it would serve no useful purpose to set it out at length. Several witnesses testified that a surgeon, before performing the operation which Runyan performed, would have awaited the making of a laboratory test before operating when no emergency existed. There was also evidence to the effect that the surgeon should have warned his assistants to look out before he dissected or attempted to tear out the gland. That this warning should have been given to protect the assistants, as none of them would know when the surgeon intended to dissect the gland. The evidence also showed that it was customary for the surgeon to have a sponge or piece of gauze in his hand to prevent pus or infected tissue from flying out. They usually hold a piece of gauze in one hand, holding it over the working fingers so that if anything does break or fly out, the gauze catches it or stops it so it does not get into the face. The undisputed evidence shows that the surgeon took hold of the gland with his fingers, that it burst, and the infected tissue went into the eye of appellee, causing the injury complained of. As to whether the operation was negligently performed was a question of fact for the jury. The jury's verdict is conclusive here on questions of fact, even though we might believe that the preponderance of the evidence was the other way. This court does not pass on the credibility of witnesses nor the weight to be given their testimony. The jury returned a verdict against the executor of the estate of Dr. Runyan and against the Chicago, Rock Island & Pacific Railway Company for $12,000, and judgment was entered accordingly. To reverse this judgment the Chicago, Rock Island & Pacific Railway Company prosecutes this appeal. There was considerable testimony as to whether the appellant was negligent in employing or retaining an incompetent surgeon. It is unnecessary to set out this testimony because, as we understand the law, if the operation was negligently performed, and this negligence caused the

injury, the appellant is liable without regard to whether the appellant exercised care in the selection or retention of the surgeon, the sole question being, whether he was negligent in the operation and whether this negligence caused the injury complained of. The appellant cites many cases to sustain its contention that the appellant is only liable if it fails to exercise care in the selection or retention of the surgeon, and if it exercises care in this respect, it contends that it is not liable although the injury may have been caused by Dr. Runyan's negligence.

The first case relied on is *Union Pac. Ry. Co.* v. *Artist,* 60 Fed. 365, decided in 1894. The court's decision in that case is based squarely on its finding that the hospital was a charitable institution, and the facts are wholly unlike the facts in the instant case. The next case relied on is *Big Stone Gap Iron Co.* v. *Ketron,* 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839. In that case there was no evidence of a contract like the contract in the case at bar. The facts are wholly different, and the opinion, as we view it, has no application in this case.

Appellant also calls attention to *Texas Central Ry. Co.* v. *Zummwalt,* 103 Tex. 603, 132 S. W. 113. In that case the contract was wholly different from the contract in the present case. The surgeon agreed to establish and maintain a hospital at his own expense, and the railroad company simply agreed to collect fifty cents from each of its employees, and turn over the money thus collected to the surgeon for his compensation. It did not agree to pay him anything, but simply agreed to collect from the employees and turn the money so collected over to him. The next case to which attention is called is *Louisville & Nashville Ry. Co.* v. *Foard,* 104 Ky. 456, 47 S. W. 742. The facts in this case are so wholly different from the facts in the case at bar that we think it has no application at all. The next case is *Cummings* v. *C. & N. W. Ry. Co.,* 189 Ill. 608, 60 N. E. 51. The only thing the court of Illinois decided was that under the statutes of the State of Illinois the appeal in that case could not be maintained. The next case is *Fire Ins. Patrol* v. *Boyd,* 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745. The court

held in that case that the appellant was a public charity, and that is the reason and the only reason that it was held not liable. Appellant then calls attention to *Phillips* v. *Ry. Co.*, 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167. The court in that case said: "Nor are institutions of the character disclosed by this record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules, which are too familiar for repetition here. If they undertake to furnish the treatment not as a charity, they stand in no different light than the ordinary physician. But this question is really beside the issue in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital is broken, the yolk therein is the defendant; * * * that the Hospital Association is operated for the benefit of the defendant as much as for the benefit of the employees is too apparent from this record."

The contract in the case last quoted is similar to the contract in the instant case, and the court held the railway company liable. In the case at bar it is claimed that the appellant does not operate the hospital for profit. There is, however, no showing in the evidence how much is collected from the employees nor what the expenses paid by the railway company in the operation of the hospital amount to, but, as said in the case last quoted, it is certainly operated as much for the benefit of the railway company as it is for the employees. The contract in this case expressly provides: "That the surgeon is appointed district and hospital surgeons for the first party in Little Rock in the State of Arkansas, and that he hereby accepts said appointment. The contract also provides that the second party, that is Dr. Runyan, shall observe and carry out all orders, directions and regulations which said chief surgeon shall from time to time transmit or cause to be transmitted to the second party. Unlike the contract in one of the cases relied on by appellant, this contract does not provide for the col-

lection of the money from the employees, but it is expressly provided that, in consideration of the services of the party of the second part the first party, that is, the railway company, agrees to pay the second party and the second party agrees to accept from the first party, in full compensation therefor, the sum of $401.50 per month. It then provides that, if at any time the second party is requested to make trips away from the city where his office is maintained, he shall be paid $25 a day, together with actual expenses. The contract provides that either party may terminate the agreement by giving thirty days' notice, provided that the first party, by its chief surgeon, may at any time forthwith terminate this agreement for failure of the second party to faithfully and fully perform any of the services contracted by him to be performed. It also provides for giving the parties annual passes. In other words, this is purely a contract of employment. The contract giving the railway company the right not only to hire but to discharge and the right to control the actions of the parties of the second part. It is true this contract was signed by several persons besides Runyan, but the undisputed evidence is that Runyan was in charge of the hospital, and that the other parties were under his supervision and control. The appellant also relied upon the case of *Ark. Midland Co.* v. *Pearson*, 98 Ark. 399, 135 S. W. 917. That case holds, in effect, that where the railway company gratuitously assumed to collect and preserve from its employees and therefrom to provide hospital accommodations and medical attention to its injured employees without any profit or gain therefrom, it will not be responsible for the negligence of the physicians and surgeons employed at such hospital, provided they use ordinary care in their selection.

It will be observed that the court said that where the railway company gratuitously assumed to collect and preserve a fund therefrom to provide hospital accommodations and medical attention without gain or profit, it would not be liable. There is no evidence in the instant case that it gratuitously did this, and there is no evidence

in the instant case that it paid the surgeons and hospital employees from this fund. One witness testified that a certain portion was paid from the employees' fund and a part by the appellant, but the evidence also shows that the fund collected from employees was kept with appellant's money. The contract here provides, without reference to this fund, to pay the surgeon a certain amount per month. Appellant hired him, entered into a legal contract in which it reserved the right to the chief surgeon to discharge him at any time. The court also said, in the last case mentioned, it was not contemplated by such employees, in their contribution to this fund, that it would be used in the payment of damages for the negligence or malpractice of physicians employed in the operation of such department, and certainly the railway company that assumed gratuitously to collect and preserve such fund and employ competent physicians and surgeons to operate without any profit or gain therefrom should not be required to pay damages for malpractice, it being no part of its business to maintain a hospital. There was nothing in that case, as we understand it, indicating what was in the charter of the railway company, and there is nothing in the instant case indicating what the charter provides with reference to the hospital. The court holds in the last case, at most, that it can only be considered a trustee for the proper administration and expenditure of such fund and should be held only to ordinary care in the selection of competent and skillful physicians to administer relief, etc.

The contract in this case is wholly different. They are not in this contract trustees for anybody or any fund but they contract to pay the surgeon and employees without regard to any fund. The court further said in that case, if it agreed and contracted with such employees in consideration of the fees paid by them to furnish proper medical attention the rule might be different. In the instant case, it did contract to furnish the medical attention and agreed to pay for same, and the surgeon agreed to perform the services and accept the pay. It is wholly immaterial whether the railway company ac-

cumulated a fund by taking a certain amount from the wages and salaries of its employees or whether it created the fund by charging for freight and passenger services or how it got it. If an employer enters into a contract with an employee to pay him a certain sum per month for his services, neither the servant nor any one else has any right to inquire how or where the master gets the money. He is required to pay and agrees to pay, and the relation of master and servant existed, and there was no relation, so far as the record in this case shows, of administering the fund as trustee.

There is nothing in the contract in this case about the employees contributing except the statement that the contributors to the Hospital Fund who are sick (or injured while off duty) are entitled to free attention at the expense of the hospital fund when they present identification slip from the employing officer showing that they are entitled to attention.

In the case of *St. Louis S. W. Ry. Co.* v. *Webb,* 170 Ark. 1089, 282 S. W. 966, the court stated that by the contract introduced in that case it was shown that the railway company operated the hospital under agreement as a trustee. There is no evidence in the instant case to that effect. The court said also in that case that the superintendent and all others drawing salaries were paid out of this hospital fund. The contract in the instant case is to pay without any regard to the hospital fund, but the court also said in the Webb case: "We think the jury was warranted in finding that the railway company was in complete control of the hospital as trustee through the power conferred on it by the trust agreement of appointing and discharging the superintendent who was completely in control subject only to the right of Neislar to inspect and to report to the labor unions any inattention to any of the members of the unions which had selected him for that purpose." The court then quoted from Sears' "Trust Estates as Business Companies," as follows: "That trustees are liable in their personal capacity for acts of negligence or other torts committed by themselves or their agents in matters

relating to the trust seems not seriously disputed." The court in that case further said: "There is a humanitarian doctrine involved here. The patient was carried to the hospital where the operation could have been performed. The theory of the plaintiff's case is, not that there was any negligence in the treatment given the patient, but that there was a withholding of treatment which was never rendered, and nothing was done, except to send the patient to another hospital, and this only after a delay of several hours." We think the principles announced in that case are controlling here. Any person or corporation who makes a contract of employment with another agreeing to pay the other for his services and the other person accepts the employment and agrees to do the work, if he is negligent in doing the work, the employer is liable. We think there was just a question of negligence, and there was ample evidence to justify the jury's verdict.

Appellant complains about the instructions, but, in the view we take of the law, the instructions complained about were not prejudicial. The court instructed the jury with reference to the exercise of care in employing and retaining a surgeon. This instruction was more favorable to the appellant than it was entitled to, and, of course, it cannot complain about the court giving it. This is simply a question of master and servant and of liability of the master for the wrongful conduct of the servant, and, as we have said, we think that whether the servant was guilty of negligence was a question of fact, and the finding of the jury is conclusive here. There was no question, we think, of fellow-servants in the case. Of course, it would be immaterial whether Mrs. Britt and Dr. Runyan were fellow-servants or not. The appellant, however, contends that neither Dr. Runyan nor Mrs. Britt was in the employ of the Chicago, Rock Island & Pacific Ry. Company in performing this operation; that the evidence shows that the patient was being treated for the Rock Island Employees' Association. The appellant may have had a contract with the Rock Island Employees' Association to treat patients like the one being

treated, but the contract in this case, which certainly governs the relation of the appellant with Dr. Runyan and Mrs. Britt, clearly shows that they were acting for the appellant. The evidence shows that Dr. Runyan was in complete charge of the hospital under his contract with appellant and had supervision of the other employees. Dr. Runyan died after the suit was begun, and there was no appeal from the judgment against his estate.

We find no reversible error, and the judgment is affirmed.

SMITH, McHANEY and BUTLER, JJ., dissent.

McHANEY, J., (dissenting). While performing a surgical operation on a colored employee of appellant at the Baptist State Hospital on October 7, 1927, and while removing an enlarged and infected gland from the inguinal region or groin of said employee, the late Dr. J. P. Runyan punctured said gland or it was caused to burst and the fluid or exudate therefrom was thrown upon him and appellee, some of which struck her in the left eye. Appellee's eye became infected therefrom causing the loss of said eye, and said infection caused her to undergo other serious and painful operations, as well as the removal of said eye, from which she suffered intense pain. Her personal appearance has been greatly marred because thereof.

Appellee sued Dr. Runyan and appellant for damages, alleging that both were in the employ of appellant —she as head nurse in said hospital and as an assistant to him, and he as head surgeon. She alleged negligence on the part of Dr. Runyan and appellant in failing to warn her of the infectious condition of said gland, and that Dr. Runyan carelessly and negligently cut into said gland and ruptured it without warning her that he intended so to do and without first ascertaining whether it was infected. Later appellee amended her complaint as follows: "It is stated in the complaint, and the first amendment thereto, that an infected gland in the lower right abdominal region of Wilson Cobbs was carelessly and negligently cut into, or ruptured, by the defendant, Dr. J. P. Runyan, while using a surgical instrument,

resulting in a quantity of pus and infected tissue from the gland flying into the left eye of plaintiff and injuring same. This is, in part, erroneous. At the time the infected gland was ruptured, or torn, Dr. J. P. Runyan did not have in his hand a surgical instrument. The infected gland was carelessly and negligently ruptured, or torn, by the defendant, Dr. J. P. Runyan, while attempting to remove the infected gland with his hands and fingers, and without the use of a surgical instrument.

"At all times mentioned in the complaint, and amendments thereto, the defendant, Dr. J. P. Runyan, was a careless, incompetent, negligent and an unskillful physician and surgeon. At all times mentioned in the complaint, and amendments thereto, the defendant, the Chicago, Rock Island & Pacific Railway Company, knew, or by the exercise of ordinary care, could have known that the defendant, Dr. J. P. Runyan, was a careless, incompetent, negligent and an unskillful physician and surgeon." These latter allegations of negligence were denied by Dr. Runyan and appellant. The case went to trial on these issues alone and was submitted to the jury, first, on the negligence of Dr. Runyan in the performance of said operation, and, second, on the negligence of appellant in employing a "careless, incompetent, negligent and unskillful physician and surgeon"; that appellant knew or by the exercise of ordinary care could have known Dr. Runyan to be "a careless, incompetent, negligent and unskillful physician and surgeon."

It becomes unnecessary to discuss the alleged negligence of Dr. Runyan in performing the particular operation, although, if he were free from such alleged negligence, no recovery could be had against either, no matter what his general reputation may have been or the knowledge of appellant with reference thereto. I assume, for the purpose of this opinion, that Dr. Runyan was negligent as alleged, and that the evidence thereof is sufficient to support the verdict against him, although, in my opinion, there was no such substantial evidence. Assuming, however, that he was negligent in this particular operation, what is the measure of appellant's liability? It is undisputed in this record that appellant did not own

the Baptist State Hospital, nor was it operating it, nor was it engaged in rendering hospital facilities and the services of physicians, surgeons and nurses to its sick and injured employees for profit. A small deduction was made by it from the wages of employees, which went into a hospital fund, for furnishing the facilities and services above mentioned to its employees. Under such circumstances, it has been the settled law in this State, since the decision of this court in *Arkansas Midland Railroad Co.* v. *Pearson,* 98 Ark. 399, 135 S. W. 917, that a "railroad company that assumed gratuitously to collect and preserve such fund and provide hospital accommodations and competent physicians and surgeons to operate it, without any profit or gain or hope thereof therefrom, should not be required to pay damages for such negligence or malpractice, it being no part of its business under its charter to maintain a hospital. At most, it can only be considered a trustee for the proper administration and expenditure of such fund, and should be held only to ordinary care in the selection of competent and skillful physicians to administer relief and provide attention to sick and injured employees." It was there further said that: "A physician cannot be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily cannot be directed in the diagnosing of diseases and injuries and prescribing treatment therefor, his office being to exercise his best skill and judgment in such matter, without control from those by whom he is called or his fees are paid." See also *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397.

Counsel for appellee recognize this to be the law in this State and based their cause of action against appellant on the ground that it employed a careless and negligent physician in Dr. Runyan, and that it either knew he was a careless and negligent physician and surgeon, or by the exercise of ordinary care could have known it; and in instruction No. 1, given by the court at their request, the only hope expressed on which to hang a verdict against appellant is the same basis. Said instruction follows: "1. If you find, from a preponderance of the evidence that the plaintiff, Mrs. Sue Britt,

while assisting Dr. J. P. Runyan perform a surgical operation, and, while in the exercise of ordinary care for her own safety, was injured, and that Dr. J. P. Runyan, in performing the surgical operation, negligently failed to warn plaintiff that he intended to dissect the gland or tissue, and that both plaintiff and Dr. J. P. Runyan were, at the time the operation was performed, in the employ of, and performing duties required of them by, the defendant, the Chicago, Rock Island & Pacific Railway Company, and that before and at the time the operation was performed, Dr. J. P. Runyan was a careless, negligent, and an unskillful surgeon, and the defendant, the Chicago, Rock Island & Pacific Railway Company, at, and before, the time the operation was performed, knew or, by the exercise of ordinary care could have known, Dr. J. P. Runyan was a careless, negligent, and an unskillful surgeon, and that the defendant, the Chicago, Rock Island & Pacific Railway Company, negligently failed to use ordinary care in selecting, employing and retaining in its employ, Dr. J. P. Runyan, as a surgeon, and that the negligence of Dr. J. P. Runyan, if any, and, also, of the defendant, the Chicago, Rock Island & Pacific Railway Company, if any, was the proximate cause of the injury, if any, sustained by the plaintiff, then your verdict will be for the plaintiff, unless you should find the plaintiff, Mrs. Sue Britt, was guilty of contributory negligence or assumed the risk, as defined elsewhere in these instructions."

What are the facts on which this instruction is based? No witness testified that Dr. Runyan was in fact "a careless, negligent and an unskillful surgeon." Dr. Samuel G. Boyce, of Little Rock, said that Dr. Runyan had a general reputation in Little Rock of being careless and negligent. Mrs. Routh said that he was so considered. One witness testified that he was employed by appellant as switchman for a few months in the latter part of 1925, and that he had heard some of the employees say Dr. Runyan was careless and negligent—hard to find when he was wanted; that he saw a petition signed by 20 or 25 employees to have Dr. Runyan removed as chief surgeon, but he refused to sign it. Dr. L. M. Sipes,

pastor of the Pulaski Heights Baptist Church testified that Dr. Runyan was a good physician and surgeon, but mixed up in too many things. On the other hand, a large number of eminent physicians of Little Rock testified to the high standing and good reputation of Dr. Runyan as a physician and surgeon. No witness testified to any actual knowledge of appellant of his alleged negligence, carelessness or unskillfulness. The chief surgeon of appellant in Chicago, Dr. Plummer, who is in charge of the hospital department and who employed Dr. Runyan and appellee, testified positively that he had no knowledge of the charges; that Dr. Runyan had the reputation of being a skilled surgeon, had been chief surgeon for appellant at Little Rock for nearly 30 years at the time of his death; that he had never heard of the petition to remove him; that Dr. Runyan frequently attended meetings of district surgeons in Chicago, made addresses and read papers at said meetings; that he had visited Dr. Runyan's hospital in Little Rock, also the Baptist State Hospital, had observed his work, seen his equipment and knew his reputation to be that of a competent and skillful surgeon; that he had received no complaints as to his ability or competency or carefulness with his surgical work.

Now, the only duty imposed by law on appellant in this regard was to exercise ordinary care to select a capable, competent and skillful surgeon, or in keeping such a one in its employ. *Ark. Midland Rd. Co.* v. *Pearson, supra; St. L., I. M. & S. Ry. Co.* v. *Taylor,* 113 Ark. 445, 168 S. W. 564. Of course, if appellant knew or by the exercise of ordinary care should have known him to be incompetent, then appellant would be liable. It did not in fact so know. Should it have so known, exercising ordinary care? Although a petition was circulated in 1925, two years prior to appellee's injury, no witness testified as to what became of this petition. It may have been destroyed. It was not sent to Dr. Plummer, and, so far as this record discloses, it was not brought to the attention of any official of appellant. I cannot agree that the evidence of Dr. Boyce and the other lay-witnesses mentioned is sufficient to make a

question for the jury as to whether appellant should, in the exercise of ordinary care, have known of the bad reputation given him by such witnesses. Such knowledge must have been brought home to appellant, or such a notoriously bad reputation must have been established that a person exercising ordinary care must have known about it, or at least such a reputation as would justify the jury in inferring the fact of knowledge. The case of *St. L. S. W. Ry. Co.* v. *Webb*, 170 Ark. 1089, 282 S. W. 966, has no application here for in that case "it is pointed out that it is not charged that these doctors were lacking in skill or that they were negligent in their capacity as surgeons," which is the whole basis of this lawsuit, assuming Dr. Runyan to have been negligent.

But the majority opinion is based on the doctrine of *respondeat superior*,—that the relation of master and servant existed between appellant and Dr. Runyan. In the opinion it is said: "There was considerable testimony as to whether the appellant was negligent in employing or retaining an incompetent surgeon. It is unnecessary to set out this testimony because, as we understand the law, if the operation was negligently performed and this negligence caused the injury, the appellant is liable without regard to whether the appellant exercised care in the selection or retention of the surgeon, the sole question being, whether he was negligent in the operation and whether this negligence caused the injury complained of."

It is difficult to understand how the majority can make use of such language, since the only action of negligence on the part of appellant relied on and submitted to the jury is that already quoted in the amendment to the complaint and in instruction No. 1 heretofore set out in full. Appellee did not submit to the jury her right to recover from appellant on the sole ground of Dr. Runyan's negligence in the performance of the operation, but the only instruction asked or given for appellee required the jury to find, in addition to the negligence of Dr. Runyan, that appellant was negligent in the employment of a careless and unskillful surgeon. Now, since appellee based her cause of action against appellant on

this sole ground and submitted same to the jury on this sole ground, she ought to be required to stand or fall by the same ground in this court.

It seems to me the majority have overruled the cases of *Ark. Midland Railroad Co.* v. *Pearson* and *Runyan* v. *Goodrum, supra,* although an attempt is made to distinguish them. In doing so, it is said in this case there is no evidence that appellant "gratuitously assumed to collect and preserve a fund therefrom to provide hospital accommodations and medical attention without gain or profit." In my opinion the evidence is undisputed that such is the fact. The witness Blessing testified that the hospital association got its funds from the employees from deductions from their salaries made by the railroad company, the amount of deductions being dependant on the occupation the employee was in as it does at the present time. The money thus collected was paid out on the order of the chief surgeon, and that the Rock Island did not charge anything for handling the fund. Dr. Plummer testified that he had been connected with the Rock Island Hospital Association since 1902; that the fund for the association was collected from the old C. O. & G. Railroad employees just as it is now by deductions once each month from salaries and wages of employees of appellant; that he has administered the fund since 1916; that Mr. Shonlou, his assistant, attended to the details; and that his salary was not paid out of the hospital fund, but was paid by appellant, but that a portion of Shonlou's salary, $75 per month, was paid out of said fund. Shoulou testified that Dr. Runyan and associates, known as Baptist State Hospital Clinic, which included appellee, were paid $401.50 per month, of which $162.75 was paid by appellant and $238.75 paid by the hospital association. This testimony was not disputed. It shows unequivocally that appellant not only made no charge for collecting and handling the fund for the Employees Hospital Association, but paid a substantial portion of the expense of its operation out of its own funds. I am therefore of the opinion that the rule announced in *Arkansas Midland Railroad Co.* v. *Pearson,*

supra, is controlling and should be followed or the case overruled.

In *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397, the same question was involved. This court there held "that the relation of master and servant cannot exist between physicians and surgeons who are not X-ray specialists themselves and the X-ray special or Roentgenologist, whom they employ to assist them in the diagnosis and treatment of diseases." The case of *Ark. Midland Railroad Co.* v. *Pearson* was cited and quoted from with approval, as also the cases of *Keller* v. *Lewis,* 65 Ark. 578, 47 S. W. 755, and *Norton* v. *Hefner,* 132 Ark. 18, 198 S. W. 97, the following being quoted from the latter case: "This view of the law is based upon the theory that the doctrine of *respondeat superior* applies only in case of the negligence of a servant who acts under the direction and control of the master (*De Forrest* v. *Wright,* 2 Mich. 368), and does not apply to a physicain or other professional man who, when employed, acts upon his own initiative without direction from others." In that case, *Norton* v. *Hefner,* Dr. Norton performed an operation on Hefner's wife and arranged with a young physician at the hospital to look after the patient until she recovered. Hefner sued Dr. Norton for damages for the alleged negligence of the young physician whom he had left in charge of the patient. In addition to the language last above quoted, the court said: "Appellant (Norton) was not guilty of negligence in the performance of the operation, nor in the selection of a physician to continue the treatment after he left the city. Not being negligent in these respects, he cannot be held responsible for the negligence of the other physician who was left in charge merely because the other physician took charge on his suggestion and arrangement."

I am therefore of the opinion that the above cases demonstrate that the relation of master and servant did not exist between appellant and Dr. Runyan, and that the doctrine of *respondeat superior* cannot apply in this case, even though Dr. Runyan may have been negligent in performing the operation.

I respectfully dissent, and am of the opinion the case should be reversed and dismissed. I am authorized to say that Mr. Justice SMITH and Mr. Justice BUTLER concur in the views here expressed.

ARKANSAS BAPTIST COLLEGE *v.* DODGE.

4-3594

Opinion delivered September 24, 1934.

John A. Hibbler and *R. W. Wilson,* for petitioner.

Booker & Booker and *Chas. B. Thweatt,* for respondent.

JOHNSON, C. J. This proceeding is a continuation of the litigation reported *ante* p. 204, and reference is here made thereto. The concluding paragraph of the opinion in cause number 3459 is as follows:

"For the reason stated, cause number 3459 is reversed and remanded with directions to overrule appellees' demurrer to appellant's answer, and to enter a decree sustaining appellant's plea of *res judicata.*"

Upon the remand of said cause number 3459 to the Pulaski Chancery Court, appellees in said cause moved the respondent, Frank H. Dodge, Chancellor, to make and enter of record in the Pulaski Chancery Court the following order, to-wit:

"On this day comes the plaintiff by its attorneys, Booker & Booker and Chas. B. Thweatt, and the defendant, though duly notified of this hearing, comes not but wholly makes default; and this cause is presented to the

court upon the record of this cause, which record is copied in the transcript heretofore filed in the Supreme Court, the mandate of the Supreme Court filed herein, plaintiff's motion for leave to plead further and plaintiff's reply and amendment to complaint tendered with said motion, and the court finds that the mandate and judgment of the Supreme Court herein does not have the effect of denying the plaintiff the right to plead further or to deny the allegations of defendant's answer and cross-complaint.

"It is thereupon ordered, considered, adjudged and decreed by the court that plaintiff's demurrer to the answer and cross-complaint be and the same is hereby overruled; that defendant's plea of *res judicata* be and the same is hereby sustained and held to be a sufficient plea; that plaintiff's reply and amendment to complaint be filed herein; and that this cause take its place on the calendar for trial; that the injunction herein remain in force until the further order of this court."

Upon the entry of the foregoing order this original proceeding was instituted by petitioner seeking prohibition against respondent and to prohibit said respondent as chancellor from proceeding further in said cause save to enter a decree dismissing the complaint for want of equity. A temporary writ of prohibition was granted upon application and now comes on for final determination.

The temporary writ was rightfully awarded, and must be made perpetual because, regardless of whether our opinion in cause number 3459 is right or wrong, it is the law of the case binding upon this court and upon the chancery court to which it was remanded, and should be followed. From the paragraph of the opinion quoted, it definitely appears that the cause was reversed with specific directions to enter a decree in accordance with the opinion, therefore there was nothing for the chancellor to do but enter a decree dismissing the complaint for want of equity.

Gaither v. *Campbell*, 94 Ark. 329, 126 S. W. 1061; *Walker* v. *Goodlet*, 109 Ark. 525, 160 S. W. 399; *Henry* v. *Irby*, 175 Ark. 614, 1 S. W. (2d) 49; *New England*

Securities Co. v. *Afflick,* 172 Ark. 964, 291 S. W. 100; *Jeffett* v. *Cook,* 175 Ark. 369, 299 S. W. 389.

For the reasons stated the temporary writ of prohibition is made perpetual.

JOHNSTON *v.* AMERICAN INSURANCE COMPANY.

4-3499

Opinion delivered September 24, 1934.

Walter L. Pope, for appellants.

Dudley & Barrett, for appellee.

HUMPHREYS, J. This is an appeal from a decree for $522.48 rendered in the chancery court of Randolph County against appellants on a simple account comprising debits alone, some fifty-two in number, for the commissions on unearned premiums on fire insurance policies written by appellant Ben Johnston for appellee on farm property and which policies were cancelled by appellee when it decided to withdraw its farm department from the State of Arkansas on May 15, 1931.

The complaint filed by appellee alleged, in substance, that appellant Ben Johnston entered into a contract with it in 1921 to write fire insurance policies for it on farm property in Arkansas and to refund his commissions on unearned premiums in case it should cancel any of the policies; that it canceled all of the policies in force on farm property in Arkansas on May 15, 1931; that a bond was executed by appellant Ben Johnston and his co-appellants conditioned that he would refund all the commissions he had received on unearned premiums resulting from the cancellations of said policies; that the bond was for $1,000, which fully covered the commissions he was to refund, and that appellant Ben

Johnston had failed and refused to return his commissions on the unearned premiums which were collected.

The complaint also contained the following allegation:

"By reason of the number of transactions, the large number of the policies involved, and the course of dealing over a period of years, it will require an accounting to determine the exact amount of the indebtedness due and owing plaintiff (appellee). Plaintiff (appellee) has no plain and adequate remedy at law, and this suit is brought in equity for the purpose of stating an account between the parties."

Appellants filed a motion to transfer the cause to the circuit court, in form as follows:

"Defendants (appellants) state that under the allegations of the complaint plaintiff (appellee) has stated a cause of action at law and not one in equity, and that, if plaintiff (appellee) is entitled to recover at all, it should be in an action at law, and the defendants (appellants) move the court that the cause of action alleged in the complaint be transferred to the circuit court."

The motion was overruled, over the objection and exception of appellants; whereupon appellants filed an answer denying each and every allegation in the complaint and incorporated therein a motion to transfer the cause to the circuit court. The motion was again overruled, over the objection and exception of appellants.

The trial court then appointed a master, over the objection and exception of appellants, to state an account between the parties, who filed a report in accordance with the account attached to the deposition of one of appellee's witnesses. The account contained debits but no credits and was simple and could easily have been understood by a jury. There were no complications in it whatever.

Appellants contend for a reversal of the judgment because the chancery court had no jurisdiction over the cause of action, insisting that they were entitled to a trial by jury in a court of law. In this contention they are correct. The general rule as stated in 1 R. C. L., 223, is that "equity will not take jurisdiction in matters of

account which are not complicated where there is no other ground for equitable jurisdiction."

This court, following the general rule thus announced, has said, in substance, in the cases of *Trapnall* v. *Hill,* 31 Ark. 345, and *Dennis* v. *Tomlinson,* 49 Ark. 568, 6 S. W. 11, that, before a court of equity will take jurisdiction of an action on an account, it must be mutual, it must be a running account, and involve complications. The complaint must show that the account is mutual, and it must allege facts which clearly show that the account is complicated.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to sustain appellants' motion to transfer the cause to the circuit court.

McINTYRE *v.* PRATER.

4-3480

Opinion delivered September 24, 1934.

J. O. Goff and *Howard H. Hasting,* for appellant.

Fred M. Pickens, for appellee.

McHANEY, J. Appellant sued appellee to recover damages for personal injuries sustained by her when she was attacked by a vicious bull kept and owned by appellee. It was alleged that the bull was vicious and known to be so by appellant. The record does not contain appellee's answer, and none was actually filed, although the record shows the filing thereof was noted, and the case went to trial as if an answer had been filed, con-

sisting of a general denial of all the allegations in the complaint.

The undisputed evidence shows that appellee owned a bull which he kept in a pasture near the home of appellant; that on the afternoon of January 30, 1933, while appellant was picking up wood in her yard, she was attacked by the bull which had broken out of the pasture where he was kept; that she ran to a nearby tree to escape him, but the bull followed and chased her around the tree until she tried to escape to a fence, but before she could reach the fence, he knocked her down, trampled upon, gored and continued to fight her until he was shot two or three times with a .22 rifle by her daughter-in-law; that appellee came to see her that evening and made the statement that the bull was vicious; and that it had been necessary to remove the bull from the farm operated by his brother to prevent the animal from injuring the children. According to appellant (and corroborated by others present) appellee said: "I got him from my brother because he fought the children; and I brought him up here."

At the conclusion of the testimony on behalf of appellant, appellee moved for a directed verdict, which the court granted. Judgment was entered for appellee on the verdict as directed by the court, and the case is here on appeal.

There is no merit in the contention that the appeal should be dismissed because appellee's answer does not appear in the record. According to the record itself, an answer was noted filed, but none was actually filed. Appellee will not be permitted to take advantage of his own neglect in failing to file an answer. The case went to trial as though an answer of general denial had been filed, and we will so treat it here.

On the merits of the case, we are of the opinion that the court erred in directing a verdict for appellee. This was done on the ground, as stated by the court, "that the proof fails to show that this bull was of that vicious character and disposition." But the learned trial court must have overlooked the testimony of appellant and her witnesses as to the statements and admissions of

appellee regarding the vicious propensities of the bull above set out. This was sufficient to take the case to the jury both on the vicious propensities of the bull and appellee's knowledge thereof. It is wholly undisputed, and, even if it were, it would still be a question for the jury. This case is ruled by the decision of this court in *Field* v. *Viraldo,* 141 Ark. 32, 216 S. W. 8, where we said: "This court is committed to the rule expressed in the recent case of *Holt* v. *Leslie,* 116 Ark. 433, 173 S. W. 191, that if any one knowingly keeps a vicious or dangerous domestic animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept. We said in that case: 'The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (except as to trespassers) and renders him liable to damages to one injured by such animal'." As we said in the same case, "the admissions of appellant (appellee here) made to appellee (appellant here) according to the latter's testimony were sufficient to sustain a finding that appellant was advised of those vicious tendencies of the bull."

For the error committed in directing a verdict for appellee, the judgment is reversed, and the cause remanded for a new trial.

NATIONAL REFINING COMPANY *v.* WREYFORD.

4-3530

Opinion delivered September 24, 1934.

Owens & Ehrman, for appellant.

Alonzo D. Camp, Joe B. Norbury and *Tom W. Campbell,* for appellee.

BUTLER, J. In April, 1932, M. W. Wreyford was, and had been for about two years preceding, in the service of the National Refining Company as a filling station manager at the company's filling station located at 23d and Arch streets in the city of Little Rock. It was his duty to sell gasoline and motor oil and to grease cars and keep the station clean. This was done under the supervision of a Mr. Crane, the assistant superintendent of stations, who from time to time would visit each station to observe the manner in which the business was being conducted and the stations maintained and to give such orders in relation to the conduct of the stations as occasion required. It was the duty of the station managers to obey these orders.

At the station in question the motor oil was kept in a back room which was floored with concrete, there being five barrels containing oil, which when full would weigh approximately 500 pounds each. On a morning in April, 1932, while moving the oil barrels, Wreyford fell to the floor and one of the barrels containing oil rolled upon him causing an injury, to recover damages for which this suit was instituted. Wreyford alleged that the injury was occasioned by the negligence of the master in requiring him, unaided, to move the barrels of oil. The answer denied the allegation of negligence and affirmed that the injury was occasioned by a risk ordinarily incident to the employment of Wreyford for which the company was in no wise responsible. At the conclusion of the testimony the court submitted the question of negligence of the company and the assumption of risk by Wreyford to the jury, overruling a motion by the defendant company for an instructed verdict. There was a verdict and judgment in favor of the plaintiff, the

correctness of which is challenged by this appeal on the ground that the court erred in refusing to direct a verdict in favor of the defendant as requested.

The appellant contends that the evidence fails to establish actionable negligence on its part, but that it shows that whatever injury Wreyford sustained was the result of a danger which was better known to him than to any one else; that it was not occasioned by any negligence of the master, but was one of the hazards incident to his employment.

The evidence most strongly tending to sustain the allegations of the complaint was the testimony of the appellee, Wreyford, which, briefly stated, is to the following effect: At the time of the accident appellee was a strong, able-bodied man weighing about 190 pounds, and had been in the service of the appellant for a little more than two years. He was familiar with the duties incident to the work in which he was engaged. He first testified, and so also did some witnesses called in his behalf, that the accident occurred on the morning of April 12, 1932, but, on being recalled at the request of the appellant and being shown reports signed by him on the 12th, 13th and 14th of April, 1932, he corrected his testimony as first given as to the date of the accident, stating that it occurred on the 15th of April, instead of the 12th. He stated that on this morning he discovered that some oil had leaked upon the floor of the room where the motor oil was stored; that he at once reported this fact by telephone to Mr. Crane, his immediate superior, requesting that the latter send some one to help him move the barrels in order to ascertain which one was leaking; that, instead of complying with his request, Crane said, "You can move those barrels." Witness replied, "I might can move them, but I would like to have some help," and Crane said "Go in there and move the barrels—find the one that's leaking and call me back so I can send the correct amount of cans out there to put the motor oil in—we haven't any more barrels." Appellee then proceeded to move the barrels. He moved four of them, each of which contained only a small amount of oil and found that none of them were leaking.

Notwithstanding this he undertook to move the fifth barrel, which he estimated to contain around 45 or 50 gallons, but which, when the oil was taken out and measured, was found to contain about 30 gallons. In this barrel a pump was installed, and appellee testified that, as he was moving the last barrel and had gotten it out where he thought he could handle it, and started to turn it, the pump attached to the barrel hit him on the leg, knocking him down, and the barrel then rolled or fell on top of him; that he was unable to arise without help and remained on the floor until some one moved the barrel and assisted him to get up.

There was no contention or evidence to the effect that the pumps were improperly installed or that Crane was informed by Wreyford of any particular amount of oil in any one of the barrels. The only information given Crane by Wreyford was that the oil was leaking on the floor of the storage room. Appellee stated that there were five or six gallons of oil wasted on the floor. From the last report of the oil on hand on the 14th of April, 1932, it appeared that there were only 132 gallons of oil in all five barrels.

Counsel for appellee contend that the questions raised by the pleadings were properly submitted to the jury, and were for it to consider under the rule announced in 18 R. C. L., p. 655, which has been approved by this court in *Choctaw O. & G. Ry. Co.* v. *Jones,* 77 Ark. 367, 92 S. W. 244; *Clark Lbr. Co.* v. *Northcutt,* 95 Ark. 291, 129 S. W. 88; *Dickinson* v. *Mooneyham,* 136 Ark. 606, 203 S. W. 840; *Griffin* v. *St. L. I. M. & S. R. Co.,* 121 Ark. 433, 181 S. W. 278; *Woodley Pet. Co.* v. *Willis,* 172 Ark. 671, 290 S. W. 953; *Ouvosso Mfg. Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. (2d) 762; *Berry's Sons Co.* v. *Presnall,* 183 Ark. 125, 35 S. W. (2d) 83, and the recent case of *Chapman* v. *Henderson,* 188 Ark. 714, 67 S. W. (2d) 570. The rule involved in all these cases is that an element which may affect an employee's appreciation of the perils of his employment is a command by one in authority to do a particular act, or an assurance that such act may be performed without danger. This is on account of the relation existing between the

master and servant that the latter shall yield obedience to the former and may ordinarily assume that the command may be obeyed without danger, or may be relied upon as an assurance of safety. Especially is this true when the command is sudden and where the situation gives little time for reflection and deliberation. In this state of case the employee is justified in subordinating his own judgment to that of his superior, and, notwithstanding any misgivings and doubts on his part, may ordinarily rely on the advice or the assurance of safety of his superior. In cases of this sort the employee is not required to weigh the degree of danger and decide whether it is safe for him to act and, in a measure, he is relieved of the usual obligation to exercise ordinary caution in the performance of his work. In ordinary cases he may assume that the employer has superior knowledge and may rely thereon; especially so, when the act to be performed could be made safe by the exercise of special care on the part of the employer, which the employee may assume has been done. This rule is founded on the psychological truth that habits of obedience are formed by employees to a degree which often overrules independent thought and action, and thus deprives them of the exercise of intelligent foresight and prudence which would otherwise protect them. The rule, however, has application (as will be discovered by a review of the cases cited) where the superior who gives the command is present in person actually directing the performance of the work, or where the command is given with a degree of knowledge equal to that of the employee as to the situation and circumstances surrounding the performance of the act commanded. The question of assumption of risk of the danger arising from an act commanded by a superior, under the rule stated, is always under circumstances from which the jury might find that the command was negligence in that it directed the performance of an act which, from its very nature, or from the attendant situation and circumstances, might be reasonably apprehended as dangerous to the employee.

In the instant case, we perceive no evidence from which the danger of injury in obeying the command might have been reasonably anticipated by the superior. According to the appellee's testimony, he made no claim that he informed Crane that it was dangerous to move the barrels by himself, or that he so considered it. He gave Crane no information as to the approximate number of gallons of oil contained in any one of the five barrels, and it will be remembered that there were only 132 gallons in all five barrels. The only information given Crane was that the oil had leaked and covered the floor of the storage room, and this appears not to have been the cause of Wreyford's fall, but that the pump attached to the barrel came in contact with his leg as the barrel was being moved. It also appears that the purpose for which Crane's command was given—to discover from which barrel or barrels the leak was proceeding—had been accomplished when the first four barrels were moved and no leak was found. There was no necessity for any further movement of the barrels and the act of the appellee in moving the fifth barrel was purely voluntary. Crane was not present when the command was given to move the barrels. He was at a distance, being communicated with by telephone, and as Wreyford failed to apprise him of any particular reason for needing help, it was reasonable for him to assume that the movement of the barrels by Wreyford, unaided, might be accomplished with no particular danger, nor can we see where any danger would ordinarily result. Wreyford had complete knowledge of the situation and Crane did not. Under the circumstances it appears that the cause of appellee's fall was occasioned by no negligence of the employer, but was one of those dangers ordinarily attendant upon the performance of his work.

It follows from the views expressed that the judgment of the trial court must be reversed, and, as the cause appears to have been fully developed, the case is dismissed.

LEHMAN *v.* FIRST NATIONAL BANK IN ST. LOUIS.

4-3536

Opinion delivered October 1, 1934.

[redacted]

W. A. Jackson and *Tom W. Campbell,* for appellants.

George H. Steimel, Frauenthal & Johnson and *Walter L. Pope,* for appellees.

SMITH, J. On June 16, 1930, the Randolph State Bank borrowed $30,000 from the First National Bank in St. Louis, and as collateral therefor indorsed and delivered to the St. Louis Bank notes payable to the order of the Randolph State Bank for about twice that amount. Among the notes so indorsed and delivered was one executed by R. C. Lehman, which was secured by a deed of trust describing six lots owned by Lehman situated in the towns of Hoxie and Walnut Ridge. Lehman's note was not due at the time of its indorsement and delivery to the St. Louis bank as collateral security.

Ben A. Brown, who is a brother-in-law of Lehman, was an active vice president of the Randolph State Bank, and was the trustee in the deed of trust which Lehman had executed. Dr. J. W. Brown, the president of the

Randolph State Bank, testified that Ben A. Brown had made the loan to Lehman against the will of the board and the loan committee, and that the loan was not regarded as a satisfactory one.

Ben A. Brown took up with the president of the Randolph State Bank and with Judge J. L. Bledsoe, a director in and the attorney for that bank, the question of releasing from the deed of trust one of the lots described therein as lot 1, block 19, in the town of Hoxie, and in that connection made the following representations to the bank's president and attorney: That this lot 1 was vacant and unimproved, and that Lehman had an opportunity to make an advantageous lease of this lot for a filling station, but that the lease could not be made unless the lot was released from the deed of trust, but that, if it were released, the lease itself would be assigned to the bank, and a new deed of trust would be executed subordinate to the lease. As a matter of fact, lot 1 was not vacant but had a brick garage on it.

There is a conflict in the testimony as to these representations, but we think the testimony clearly established the facts as above stated.

There is a controversy also as to whether Ben A. Brown, in repeating these representations to the president of and the attorney for the bank was acting as Lehman's agent. We think he was if it is of any importance to decide that question, and the effect of the representations is the same as if Lehman himself had made them directly to the president of and attorney for the bank. "One is liable for his agent's fraud and misrepresentations within the apparent scope of his employment, whether he authorized or knew of them or not." *DeCamp* v. *Graupner,* 157 Ark. 578, 249 S. W. 6.

There was no other consideration for the release of this lot 1 from the deed of trust, and the president, thinking to improve the security of the bank, consented to the preparation of a release of the lot by the bank's attorney. The release was prepared and executed and later recorded. After the execution of the release a lease was executed by Lehman to O. K. Wing, as trustee, which lease was duly assigned by the lessee to the Phillips Petroleum

Company. Thereafter Lehman conveyed this lot 1 to his wife, subject, of course, to the outstanding lease. Lehman and his wife testified that the consideration for the deed from him to her was the partial payment of a debt which Lehman owed his wife.

The Randolph State Bank became insolvent and closed its doors without repaying all of its loan to the St. Louis Bank. Upon the maturity of the Lehman note, payment thereof was demanded, and, upon refusal or failure by Lehman to pay, suit was brought by the St. Louis bank to foreclose the deed of trust given to secure Lehman's note.

There had been no notation upon the margin of the record where the deed of trust was recorded showing that the note which it secured had been transferred or assigned when the release deed was executed on September 13, 1930, but the note had been indorsed and delivered to the St. Louis Bank as above stated, and was in the possession of that bank as collateral when the release deed was executed. The St. Louis bank was not advised of and did not consent to the execution of the release.

Separate answers were filed by Lehman and his wife. He admitted the execution of the note, and did not question the amount due on it, but he alleged that the release had been executed without fraud or misrepresentation on his part, and that he had conveyed the lot for full value to his wife. Mrs. Lehman alleged that she was a subsequent purchaser of the lot within the meaning of § 7399, Crawford & Moses' Digest, and that she had accepted the deed from her husband in good faith in part payment of a debt due from him, and gave testimony to support those allegations.

The court held, in effect, that Mrs. Lehman was not a subsequent purchaser within the meaning of § 7399, Crawford & Moses' Digest, but that the petroleum company—the assignee of the lease—was, and decreed the cancellation of the release except in so far as it affected the lease, which was held to be valid. Judgment was rendered against Lehman for the balance due on the note, and the deed from him to his wife was canceled, and it was held that the deed of trust was a subsisting lien

against lot 1, and the foreclosure of the deed of trust was ordered, subject to the lease held by the petroleum company.

An appeal has been duly prosecuted from so much of the decree as holds, in effect, that Mrs. Lehman is not a subsequent purchaser within the meaning of § 7399, Crawford & Moses' Digest.

It was shown by the testimony of a real estate agent that the value of all the lots described in the deed of trust was only $4,725, and that the present value of lot 1 was $2,500, leaving property worth only $2,225 to secure a debt of more than $5,000 if lot 1 is excluded.

It was shown by the testimony that the loan evidenced by the note was made to Lehman alone, and that his wife had not obligated herself to pay it, but it was shown also that she joined in the execution of the deed of trust here sought to be foreclosed.

It is not contended that Mrs. Lehman was under the apprehension that the note had been paid, nor is it contended that she advanced to the Randolph State Bank any consideration for the execution of the release deed.

There was testimony at the trial from which this appeal comes to the effect that the St. Louis bank had become the owner of the Lehman note through a public sale thereof, but it is contended that it was not shown that there was such a sale as operated to pass the title thereto.

We do not think it essential to determine this question. The St. Louis bank holds the note either as owner or as pledgee, and the law is well settled that, when the owner of securities pledges them to secure the payment of his own debt, he impliedly transfers the right to the remedies which will make the securities available for the payment of his debt in case of his own default. Chapter on Pledge, 21 R. C. L., page 666. We held, in the recent case of *Leonard* v. *Taylor*, 183 Ark. 936, 39 S. W. (2d) 704, that: "The holder of the pledge has a special ownership therein to the extent of the debt secured thereby, and may proceed to enforce it if it be a chose in action, a negotiable instrument, or any of a like nature."

Appellants make no contention that the assignment of the Lehman note to the St. Louis bank as a part of the collateral to secure the note executed to it by the Randolph State Bank did not automatically effect an assignment of the lien of the deed of trust securing the Lehman note. That such was its effect has been many times decided. Among the latest cases to that effect are those of *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. (2d) 714, and *Rockford Trust Co.* v. *Purtell,* 183 Ark. 918, 39 S. W. (2d) 733.

The controlling question to be considered is the effect of § 7399, Crawford & Moses' Digest, as applied to the facts of this case. This section gives any person who, according to the face of the mortgage record, is the owner of any of the liens there mentioned the right to satisfy the liens of record by indorsement on the margin of the record where the instrument is recorded, and provides that, when this is done, a subsequent purchaser, mortgagee, or judgment-creditor, is protected against such liens "unless there shall appear on the margin of the record where such instrument is recorded a memorandum showing that the said mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby has been transferred or assigned, which said memorandum shall be signed by the transferrer or assignor, giving the name of the transferee or assignee, together with the date of such transfer or assignment, said signature to be attested and dated by the clerk."

Section 7400, Crawford & Moses' Digest, provides that the lien may also be discharged "by separate release deed or instrument duly executed, acknowledged and recorded, which instrument, when so recorded, shall be of the same effect as a marginal entry."

Now, as has been said, there was no indorsement on the margin of the record showing that the note there secured had been assigned, and it is therefore insisted that Mrs. Lehman acquired title to lot 1 as a subsequent purchaser discharged from the lien of the deed of trust.

We do not think so. In our opinion, the case of *Vance* v. *White,* 180 Ark. 470, 21 S. W. (2d) 853, an-

nounces the principle which controls here. The facts in that case were as follows: Brandon & Baugh sold a tract of land to Jeff White, and in part payment took a note secured by a vendor's lien. Brandon & Baugh indorsed and delivered the note, before its maturity, to Mrs. Vance as security for a debt due by them to her. While the note was so held by Mrs. Vance, the maker thereof died, and the note was paid to Brandon & Baugh by White's son. No indorsement of the transfer of the note had been made on the margin of the record when Brandon & Baugh made the marginal indorsement that the note had been paid. In holding that § 7399, Crawford & Moses' Digest, did not apply, we said: "The rights of no such person" (subsequent purchaser) "have intervened here. If the original grantee in the deed reserving the vendor's lien were living, he would not be heard to say that he had paid the amount of his note to a person who did not own it, and was not in possession of it when he made the payment, and had thereby discharged the lien which secured the note. Nor can his heirs."

Here there was no payment of or upon the secured note, and the release was obtained, not for a valuable consideration, but upon the false representation that the lot was vacant, when, in fact, it was one upon which there was a building of value. Moreover, Mrs. Lehman as well as her husband was one of the makers of the deed of trust. She may not therefore claim to be a subsequent purchaser within the meaning of § 7399, Crawford & Moses' Digest, through the fraudulent representation of her husband, who had joined with her in the execution of the deed of trust.

The decree of the court below is correct, and will be affirmed. It is so ordered.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* ADCOX.

4-3538

Opinion delivered October 1, 1934.

S. Hubert Mayes, for appellant.

Claude M. Erwin, Jr., for appellee.

MEHAFFY, J. This action was begun by appellee in the Jackson Circuit Court against the appellant, Coca-Cola Bottling Company, to recover for personal injuries caused by drinking a part of a bottle of Coca-Cola which contained foreign substances, alleged to be glass and hairs.

It was alleged that appellee purchased from the Missouri Pacific Restaurant at Newport, Arkansas, a bottle of Coca-Cola which had been manufactured, bottled and delivered to the said Missouri Pacific Restaurant by the appellant, Coca-Cola Bottling Company, which was to be offered for sale as a beverage for human consump-

tion by the said restaurant; that, instead of being wholesome and good for human consumption, said bottle of Coca-Cola purchased by appellee had been negligently manufactured and negligently bottled, and was unwholesome, poisonous, and wholly unfit for human use, in that said bottle contained putrid and foreign substances, among which were hairs, having the appearance of bristles from a brush, and pieces of broken glass, poisonous and deleterious, which had been negligently permitted to enter and remain in said bottle, by the appellant; that appellee drank of said bottle of Coca-Cola without knowledge of its unwholesome condition, and did not know that it contained any foreign or unwholesome substances until he had drunk about one-half of the contents of said bottle; that, by reason of taking the said unwholesome Coca-Cola in his stomach, appellee immediately became violently ill, cramping and sick at his stomach, and was so violently ill that it was necessary for him to go to bed for care and medical attention. Further allegations were made with reference to appellee's injuries.

The appellant filed answer denying the allegations of the complaint, and pleaded the contributory negligence of appellee. There was a trial by jury, and a verdict and judgment for $1,000. The case is here on appeal.

The evidence of appellee tended to show the facts alleged in the complaint, and the testimony offered by appellant tended to show that there was no carelessness or negligence in the manufacturing and bottling of the Coca-Cola.

Only two questions are presented for our consideration. The appellant contends, first, that the court erred in admitting the bottle from which appellee drank the alleged impure Coca-Cola, and, second, that the verdict is excessive. There is no contention that the evidence is not sufficient to support a verdict for the appellee.

When appellee offered the bottle in evidence, the appellant objected. Appellant states that the case falls squarely within the rule announced by this court in *Hooks* v. *General Storage & Transfer Company,* 187 Ark. 887, 63 S. W. (2d) 527. It is stated in that case: "According to the uncontradicted testimony in this case, the

photographs of the two trucks which were in the collision were not taken until a week or ten days after the collision, and at that time appellant's ice truck had been fully repaired." The photographs in that case were inadmissible because the truck had been repaired, and the photograph did not show the condition of the truck at the time of the injury. If the photographs had been taken before the trucks were repaired, and if the evidence had shown that at the time the photographs were taken there had been no change, the photographs would have been admissible. In the instant case, the appellee testified that he took the bottle that he drank from and poured the Coca-Cola out, and that naturally it rinsed some of the contents out, but there is some in there yet; that he corked the bottle up and put it away. When he was asked if it was sealed in that condition, he said: "Absolutely." On cross-examination he was asked if it had some Coca-Cola in it, he said "Yes," and he poured it out. He also testified that he put a top on it; that several persons saw him do this, and he took it up to Mr. Claude Erwin, and it had been in Mr. Erwin's safe ever since that time; that the bottle was in the same condition it was when he delivered it to Mr. Erwin.

Mr. Erwin testified that the bottle was given to him by Adcox, and that it had been in his safe until the morning of the trial, when he brought it to the trial, and that it was in the same condition that it was when Adcox gave it to him.

It was not error for the court to permit the bottle to be introduced in evidence.

The Alabama court, in passing on a similar question, said: "We do not think the trial court was in error in permitting the introduction of the bottle, and the decomposed rat over the appellant's objections. The appellee identified the bottle and its contents. The testimony is not to be excluded because the witness does not speak with positive assurance." *Coca-Cola Bottling Company* v. *Barksdale,* 17 Ala. App. 606, 88 So. 36.

In the case of *Walker Hospital* v. *Pulley,* 74 Ind. App. 659, 127 N. E. 559, the court held that it was not

error to introduce in evidence a piece of gauze taken from the sinus.

The Nebraska court held that, under the circumstances outlined, bottles and labels from defendant's line of drug stores tend as circumstantial evidence to throw some light on the issue of sales, and were therefore admissible in evidence. *Thamann* v. *Merritt,* 107 Neb. 602, 186 N. W. 1003.

"Plaintiff offered in evidence a sample of corn claimed to have been taken from the car actually delivered to him. This sample was received in evidence. There is some controversy as to the identity of this sample. We think, however, plaintiff's evidence of identity was sufficient to warrant the court in receiving it." *McGuire* v. *Chambers,* 148 Minn. 57, 180 N. W. 1013. See also *Ranney-Davis Merc. Co.* v. *Morris,* 223 Pac. 887; *Keith* v. *Drainage Dist.,* 183 Ark. 384, 36 S. W. (2d) 59; *Miss. River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255; *Sloan* v. *Newman,* 166 Ark. 259, 266 S. W. 257; *S. L. S. F. Ry. Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576; *Graves* v. *Jewel Tea Co.,* 180 Ark. 980, 23 S. W. (2d) 972.

It is next contended by the appellant that the verdict is excessive. The appellee testified that in drinking the Coca-Cola he swallowed some of the hair and glass; that he was made sick, treated by a physician about six weeks, suffered great pain, and still suffers. This evidence was practically undisputed.

There is no rule by which we can measure damages for pain and suffering.

"Verdicts of juries are not set aside on account of the amount of recovery unless the amount is excessive. If the plaintiff was entitled to recover, and the amount of the verdict was a fair compensation for the injuries complained of, the verdict of the jury should be permitted to stand." *Ward* v. *Blackwood,* 48 Ark. 399, 3 S. W. 624.

"The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate con-

sequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability as he had sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained." 17 C. J., 869, *et seq.*

We are of opinion that the verdict of the jury is not excessive. The issues were submitted to the jury on proper instructions, and its verdict must be permitted to stand.

We find no error, and the judgment is affirmed.

REDUS *v.* WAGLEY.

4-3531

Opinion delivered October 1, 1934.

Patterson & Patterson and *Hill, Fitzhugh & Brizzolara,* for appellant.

J. L. Shouse and *S. W. Woods,* for appellee.

McHaney, J. Appellant sued appellee to recover judgment on a promissory note for $5,000 and accrued interest which appellee had given H. W. Redus in his lifetime. Appellee defended on the ground that he had paid the note and interest on April 19, 1930, by check to the H. W. Redus estate which was delivered to the First National Bank and cashed by it. The facts, briefly stated, are as follows: H. W. Redus, a well-to-do citizen of Harrison, Arkansas, loaned appellee $5,000 in 1921 at 8 per cent. interest. Some time thereafter said Redus became insane, and appellee was appointed guardian of his estate in 1925, said note being a part of the assets of said estate. Interest was paid from time to time and the note kept alive. Stock owned by appellee in the People's National Bank of Harrison was given as collateral to secure said note, and appellee was the bank's president. Said note and other assets of said estate were kept in said bank for safekeeping and collection and credit. Notes, rents, dividends and other assets were collected by the bank from time to time and deposited to appellee's account as guardian of said estate. Later the name of said bank was changed to First National Bank. In 1929 appellee resigned as guardian, and appellant, son of H. W. Redus, was appointed guardian in succession. At that time, all the assets in the hands of appellee were turned over to appellant, including the note in controversy, and at the same time appellant left same in said bank for safekeeping and collection. The account was thereafter handled by the bank just as it had been handled while appellee was guardian. The note in question was made payable at the People's National Bank, later changed to First National. On April 19, 1930, appellee sold all his stock in said bank to A. T. Hudspeth, receiving a draft on a St. Louis bank for $39,075 in payment therefor which he deposited to his credit in the First National of Harrison. After the draft had cleared and on April 23, 1930, he went to the bank, drew his check thereon for $5,800 payable to the order of the

H. W. Redus estate, delivered same to the cashier in payment of said note and interest which was accepted by him as full payment, and was handed his note marked paid, and said collateral. The cashier deposited said money to the credit of H. W. Redus estate, a new account, and not to the credit of C. H. Redus, guardian. On May 19, 1930, the bank applied said money to the payment of two notes held by it against appellant, C. H. Redus and his sister, Mary Redus White, and appropriated same to its own use, claiming authority so to do on a written guaranty executed by H. W. Redus while sane. On this state of facts, the trial court found "that the People's Savings Bank (successor to the First National) had authority to collect the moneys herein involved for the plaintiff, C. H. Redus, as administrator of the estate of H. W. Redus, deceased, and that therefore plaintiff's cause should be dismissed for want of equity." Decree was entered accordingly.

For a reversal of the judgment, appellant makes two contentions: (1) Conceding the bank's authority to collect said note, "the deposit in the bank in the manner and form made on April 23, 1930, was not good payment, and Wagley is liable upon his note"; and (2) that the finding that the bank had authority to collect said note is against the preponderance of the evidence.

We cannot agree with either contention. The note was made payable at the People's National Bank, and it actually made the collection, although its name had been changed to First National Bank. It had been left there for collection and safekeeping by appellant. The deposit of April 23, 1930, "in the manner and form made," was not made by appellee. It was made and credited by the bank acting through its cashier. Appellee was not a stockholder in the bank at that time and, of course, was not its president. He had sold his stock on April 19, and had been paid for it. His stock attached to said note had not been delivered, but it belonged to the purchaser. Appellee paid the bank the amount of his note and interest by check to the H. W. Redus estate. He had no authority to control the bank in the manner it was credited on its books and did not do so. If the bank on May 19 wrong-

fully misappropriated the money, then it would be liable. It, through the Bank Commissioner, was made a party, but its liability was not determined by the trial court. The fact that the check was made payable to the H. W. Redus estate did not prevent the bank from depositing it to the credit of the guardian. Whether the bank had authority to collect the money was a question of fact, and, as we view the evidence, the finding of the court that it did have such authority is not only not against the preponderance thereof, but is supported by the decided weight if not by the undisputed evidence.

Let the decree be affirmed.

TEXARKANA-FOREST PARK PAVING, WATER, SEWER AND GAS DISTRICT NO. 1 *v.* STATE USE MILLER COUNTY.

4-3517

Opinion delivered June 11, 1934.

L. P. Biggs, for appellants.

Millard Alford, Will Steel and *James D. Head,* for appellees.

Wm. F. Kirsch, Maurice Cathey and *DuVal Purkins, amici curiae.*

JOHNSON, C. J. Appellant, Texarkana-Forest Park Paving, Water, Sewer and Gas District No. 1 was organized under and by authority of act 183 of 1927, which act was amendatory of act 126 of 1923 as amended by act 645 of 1923. Subsequent to the organization of appellant district, the General Assembly passed act 63 of 1931, the effect of which was to levy a one-cent tax upon all gasoline sold in this State for the benefit of county public roads as distinguished from State roads; the act of 1931 further provided, in effect, that the State Treasurer, prior to disbursing the funds to the respective counties, as provided therein, shall deduct the amount required to pay 75 per cent. of the maturing bonds and interest of all bonds issued by road improvement districts issued since February 4, 1927. The act of 1931 expressly provides in § 6 thereof that all districts organized under act 126 of 1923 and amendments thereto shall come within its purview and application.

On October 1, 1931, pursuant to the provisions of act 63 of 1931, the State Treasurer deducted from Miller County's allotment under said act a sum sufficient to pay 75 per cent. of the maturing bonds and interest of appellant district, and subsequent thereto made similar deductions and allotments in favor of appellant district and asserted his intention of continuing said deductions and

allotments. Thereupon the State, for the use and benefit of Miller County and J. J. Sewell, as county judge of Miller County and in his own right as a citizen and taxpayer thereof, instituted this suit in the Pulaski Chancery Court against Roy V. Leonard, State Treasurer, and appellant district praying a permanent injunction against the State Treasurer restraining and enjoining him from making any deductions from Miller County's allotment under act 63 of 1931 in aid or for the benefit of appellant district. This suit progressed to trial and decree on March 23, 1934, and the court determined therein that the prayer of appellee's complaint should be granted, and this appeal is therefrom.

Act 183 of 1927, under authority of which appellant district was organized, is unconstitutional and void for the following reasons: Act 126 of 1923 as amended by act 645 of 1923 by its mandatory provisions applied to and had effect only in and to Pulaski County. Section 24 provides: "This act shall be operative only in counties with a population exceeding seventy-five thousand inhabitants, as shown by the last Federal census."

In virtue of the section of the act just quoted, it and the amendment thereto of 1923 applied only to Pulaski County because Pulaski County was the only county in Arkansas in 1923 which contained the requisite seventy-five thousand population. So it was from the date of the passage of act 126 of 1923 until the passage of act 183 of 1927. Section 1 of act 183 of 1927 provides:

"Section 24 of act No. 126 of the Acts of the General Assembly of the State of Arkansas of the year 1923 is hereby repealed."

The effect of § 1 of the act 183 of 1927 was to repeal § 24, act 126 of 1923, thereby making act 126 of 1923 and the amendments thereto apply to all counties of the State.

Act 183 of 1927 contains eight sections only. Section 1 is heretofore quoted. Section 2 amends § 25 of act 126 of 1923, which has to do only with the application of the act to districts created adjacent to certain cities and towns. Section 3 amends § 4 of act 126 of 1923, which has reference to the purpose only for which the district

may be organized. Section 4 provides for the formation of districts authorized under act 126 of 1923 embracing lands in two or more counties. Section 5 provides for the annexation of territory to districts theretofore organized by authority of act 126 of 1923. Section 6 authorizes the commissioners of districts, organized under authority of act 126 of 1923, to sell and convey the improvements effected by the district under certain restrictions. Section 7 expedites litigation affecting districts organized under said acts. Section 8 is the emergency clause.

It definitely and certainly appears from a mere reading of act 183 of 1927 that no valid improvement district could be organized under its authority and mandate. Without the aid of acts 126 and 645 of 1923 the provisions of act 183 of 1927 are absolutely meaningless and void of purpose. Section 23 of article 5 of the Constitution of 1874 provides:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

In *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384, this court decided that an act of the General Assembly which had the purpose and effect of extending to cities and towns rights and remedies which existed by law in favor of counties could not be so extended by reference to title only. We have uniformly held, following the case just cited, that when a new right is conferred or cause of action given § 23 of article 5 of the Constitution of 1874 requires the whole law governing the right and remedy to be re-enacted in order to enable the court to effect its enforcement. *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889; *Beard* v. *Wilson,* 52 Ark. 290, 12 S. W. 567; *Common School Dist.* v. *Oak Grove Special School Dist.,* 102 Ark. 411, 144 S. W. 224; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Palmer* v. *Palmer,* 132 Ark. 609, 202 S. W. 19; *Hermitage Special School Dist.* v. *Ingalls Special School Dist.,* 133 Ark. 157, 202

S. W. 26; *Fenolio* v. *Sebastian Bridge Dist.,* 133 Ark. 380, 200 S. W. 501; *St. L.-S. F. Ry. Co.* v. *Southwestern Telegraph & Telephone Co.,* 121 Federal 276.

In *Rider* v. *State,* 132 Ark. 27, 200 S. W. 275, we had before us, in effect, the exact question here presented. There the Legislature of 1909 passed act 310 creating a stock district in the Charleston District of Franklin County. The General Assembly of 1915, by act 145, amended the former statute by adding two other townships in Franklin County to the stock district as formed by the act of 1909. This addition was effected by amending the act of 1909 as follows: "That wherever act No. 310 of the General Assembly of 1909 now reads 'Charleston District of Franklin County,' the same shall be amended and the same is hereby amended to read: 'Charleston District of Franklin County and Barham and Wittich townships of Franklin County'." We there said: "The act of 1915, under which appellant was convicted, was clearly an attempt on the part of the lawmakers to extend the provisions of another statute merely by reference to title without re-enacting and publishing the new statute at length. * * * The statute now under consideration falls clearly within the first rule stated above, for the power granted under the new statute is not declared on its face, but is given merely by reference to the title of another statute."

The similarity of the case just cited to the one under consideration is: In the Rider case the stock district, which applied to the Charleston district only, was extended to cover two other townships in the county by amendment; in the instant case the authority to organize suburban road improvement districts, which existed only in favor of Pulaski County, was extended to the other 74 counties of the State by the simple repeal of § 24 of act 126 of 1923. There is and can be no distinguishable difference.

Act 183 of 1927 falls squarely within the condemnation and inhibition of § 23, article 5, of the Constitution of 1874 and likewise within the doctrine of the cases cited *supra,* therefore is unconstitutional and void.

It is insisted, however, that the allotments to appellant district from Miller County's allotment of the funds under act 63 of 1931 is lawful and valid and should be continued because the donation by the State is a gratuity and may be bestowed regardless of the constitutionality of the act under which it was created. This is probably true if the General Assembly has manifested such intention, but such is not the case. The primary purpose of act 63 of 1931 is to make donations to counties and aid them in their efforts to improve county roads which lie without the State highway system. This is made evident by the fact that the 75 counties of the State were made the units to which the donation was granted. Subdivision F of § 1 of said act provides, in effect, that this created fund shall be divided among the several counties of the State upon the following basis: 1. One-third on population of county. 2. One-third on car license revenue received from the county. 3. One-third on area of county.

Subdivision G of § 1 provides: "From the allotments made to each county as provided in paragraph F the State Treasurer shall deduct the amount required to pay * * * maturing bonds and interest, etc." Thus it appears from the plain language of the act that its primary purpose is to aid counties and not road improvement districts. Since it was and is the primary purpose of this act to aid counties, we are unwilling to hold that the General Assembly had the purpose and intent to take funds primarily allotted to a county and donate them to road districts which were organized under an unconstitutional act.

Moreover, the General Assembly evidently had in mind, upon the passage of act 63 of 1931, that the road improvement districts therein sought to be aided were organized and existing under valid acts and not those organized and existing under invalid laws. We are unwilling to hold that the act of 1931 would have been passed by the General Assembly regardless of the constitutionality of the act under which it was organized. In addition to what has just been said, the evidence presented upon trial of this cause warranted the chancel-

lor in finding that appellant district was not, when organized, a public enterprise but, on the contrary, a private and personal venture of those effecting the organization thereof. The power to pay gratuities to individuals is denied to the Legislature generally by constitutional mandate, and usually a gift of money to an individual would be an appropriation of public funds to private uses, which cannot be justified in law. *Mead* v. *Action,* 139 Mass. 341; *Citizen Sav. & Loan Ass'n* v. *Topeka,* 20 Wall. (U. S.) 655; *Parkersburg* v. *Brown,* 106 U. S. 487, 1 S. C. 442; *Cole* v. *La Grange,* 113 U. S. 1, 5 S. Ct. 416; Cooley, Constitutional Limitations (6th ed.) 601, 602.

For the reason last stated, we cannot and should not presume that the Legislature would have passed act 63 of 1931 donating public funds to private uses, or to road districts organized under unconstitutional law.

Neither can we agree that the citizens of Miller County are estopped to assert their claim to the funds here in controversy. The first answer to this contention is that these funds were not created until 1929 and 1931, long after the creation of appellant district. Secondly, the citizens of Miller County had no interest in the organization of the district and could assert no objections thereto until funds belonging to Miller County were diverted to the purpose of extinguishing a debt owed primarily by appellant district. It was then and only then that the citizens of Miller County had the right to bring in question the constitutionality of the act under which appellant district was organized.

It follows from what we have said that the chancellor did not err in granting the permanent injunction against the State Treasurer, and the decree is therefore affirmed.

SMITH, MCHANEY and BUTLER, JJ., dissent.

JOHNSON, C. J., (on rehearing). On motion for rehearing it has been most earnestly insisted that the original opinion is in conflict with and by implication overrules the opinion of this court in *White River Lumber Company* v. *Drainage Districts,* 141 Ark. 196, 216 S. W. 1043. The original opinion does not effect this result.

The question under consideration in the White River Lumber Company case arose under the following circumstances: act 279 of 1909 was of general application throughout the State in reference to the formation and creation of drainage districts. Act 279 of 1909 was amended by act 221 of 1911 and by act 177 of 1913. Section 7 of act 221 of 1911 expressly exempted Phillips and Crittenden counties from the provisions of act 279 of 1909 as follows:

"Provided, that this act does not apply to Phillips and Crittenden counties, and this act being necessary for the immediate preservation of public peace, health and safety shall take effect and be in force from and after its passage."

Act No. 177 of 1913 amended the Acts of 1909 and 1911, and § 20 of act 177 of 1913 expressly repeals § 7 of act 221 of 1911. In the White River Lumber Company case we said: "The act of 1911 expressly exempted Phillips and Crittenden counties from its operation, and, this exemption being found in a separate section, it left the original act of 1909 in full and unamended force as to those counties. *Rennau* v. *State,* 72 Ark. 445, 81 S. W. 605.

"The extension of the act of 1911, so as to operate in Phillips and Crittenden counties, resulted under the act of 1913, not from extension by mere reference to the title of the act of 1911, but from the express repeal of the exemption, which had the effect of making the statute altogether general in its application."

Thus it definitely appears from the opinion that we were dealing with a question very different from the one here under consideration. The gist of the opinion in the White River Lumber Company case was that since the Drainage Act of 1909 was general in its application and applied to Phillips and Crittenden counties; and since Phillips and Crittenden counties were expressly exempted from the provisions by a separate and severable section of the subsequent Drainage Act of 1911, this separate and severable exempting section might be repealed by a subsequent act of the Legislature and thereby leave the law as it stood under the Drainage Act of 1909. Here

act 126 of 1923 as amended by act 645 of 1923 were never general in their application, but on the contrary only applicable to Pulaski County, and act 183 of 1927 by repealing § 24 of act 126 of 1923 undertook to and did extend the provisions of act 126 of 1923 to the other 74 counties of the State and thereby fell within the prohibition of the rule as announced in *Rider* v. *State,* 132 Ark. 27, 200 S. W. 1002.

Act 183 of 1927 not only had the effect of repealing § 24 of act 126 of 1923 and extending the provisions thereof to the other 74 counties of the State, but it had the direct effect of amending act 126 of 1923 by bringing 74 counties of the State under its mandate. It is a rule of universal application that the Legislature cannot do indirectly that which it is prohibited from doing directly. Therefore, when it undertook to extend the provisions of act 126 of 1923 to the other 74 counties of the State by repealing § 24 of said act, it undertook to do indirectly that which it is prohibited doing directly by constitutional mandate—that is to say, amending act 126 of 1923 —and its endeavors in this behalf cannot and should not be sanctioned by the courts.

Had the Legislature of 1927 sought to amend the act of 1923 by adding the name of one or more counties, thereby making the act of 1923 applicable thereto, all would readily agree that such amendment would fall within the doctrine of the Rider case, *supra,* and would be violative of constitutional mandate. The effectuation of this identical result was accomplished by indirection and because thereof is equally obnoxious to constitutional direction.

Moreover if the White River Lumber Company case can be given the construction now asserted by appellants, it is unsound in principle and should be overruled.

The mandate of § 23 of article 5 of the Constitution of 1874 is:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only: but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

Four things are expressly prohibited by this constitutional mandate, unless the law is reenacted and published at length, namely: (1) no law shall be revived—(2) no law shall be amended—(3) no law shall be extended—and (4) no law shall be conferred. The second and third prohibitions that no provisions of law shall be amended or extended unless same is reenacted and published at length is clearly violated by the method pursued in the act of 1927. Act 126 of 1923 which was local and special in its application and effect to Pulaski County was amended and extended by act 183 of 1927 to the other 74 counties of the State without re-enacting and publishing the former at length. Any other interpretation of the Constitution would nullify its plain language and mandate, and we are unwilling to prostitute its wholesome protection by judicial interpretation.

In addition to what we have just said, in the White River Lumber Company case, we were dealing with the general act of 1909 which was subsequently amended in 1911 to exempt two counties from its provision which exemption was repealed by the Legislature in 1913. There we had a statute of general application in the first instance—here we have a statute local and special in its application in the first instance—there we had an exemption created by a subsequent, separate and severable enactment—here we have an exemption created at the birth of the act (and we must presume that this act would not have become a law without such exemption)—there we had a law (the act of 1909) of general application which was not extended in effect or in its application by any subsequent act—here we have a law that is amended and its provisions definitely extended by mere legislative manipulation and without reenacting and publishing at length.

Not only is act 183 of 1927 unconstitutional and void for the reasons heretofore stated, but it is likewise invalid because inhibited by amendment No. 14 to our Constitution. Amendment 14 was adopted by the people in 1926 and provides: "The General Assembly shall not pass any local or special act. This amendment shall not

prohibit the repeal of local or special acts." In *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S. W. (2d) 233, we said:

"After the adoption of this amendment, the Legislature could not pass a valid local act. They could not amend a local act, but they were given authority in the amendment to repeal local acts.

"Act 205 of the Acts of 1927 amended § 321 of Crawford & Moses' Digest. This section of the Digest is § 1 of the local act of 1915, above mentioned. It provides for the per cent. of qualified electors necessary for the county court to order an election and a vote by the people."

Again, in *Benton* v. *Thompson,* 187 Ark. 208, 58 S. W. 924, we said: "This court has held, while the Legislature may repeal a local act, or may repeal a portion of it, it can not amend a local act." The situation is simply this: Every one must admit that act 126 of 1923 was local and special in its effect; every one must admit that act 183 of 1927 amended the act of 1923 so as to make it general in its application. The act of 1927 was an abortive attempt to amend a local law; the act sought to be amended remained a local act at all times unless it was converted into a general act by the passage and approval of act 183 of 1927. This act of 1927 shows upon its face that it was "an act to amend act 126 of the Acts of the General Assembly of the year 1923." After the adoption of amendment No. 14 in 1926, no local or special act could be amended. Therefore the attempt of the Legislature to do so by the act of 1927 is expressly prohibited by the 14th amendment.

For the reasons stated we adhere to the original opinion.

SMITH, MCHANEY and BUTLER, JJ., dissent.

McMillan *v.* Gurdon Lumber Company.

4-3483

Opinion delivered June 18, 1934.

McMillan & McMillan, Walter L. Pope, and *Frauenthal & Johnson,* for appellants.

D. H. Crawford and *McRae & Tompkins,* for appellees.

Mehaffy, J. Charles S. Thornton and Justus Chancellor owned a large tract of timber land in Clark County, Arkansas, and on June 24, 1924, entered into a contract with the Sparkman Hardwood Lumber Company to give the Sparkman Hardwood Lumber Company and its assigns the exclusive right for a period of ten years to go upon said land and cut and remove therefrom such timber as the said Sparkman Hardwood Lumber Company or its assigns might desire, and which it or its assigns within the terms of the agreement, actually cut and removed. The price agreed upon, and which was paid, was $70,000. The contract provided that the title to the timber when cut should immediately vest in the lumber company or its assigns. The sellers agreed not to cut or remove or permit any one else by their consent to cut or remove any of the timber from said land until it was surrendered as provided for in the contract. The contract also provided for the purchasers to pay the taxes. Another provision in the contract was that, when all the timber desired by the lumber company should be cut and removed from any sections of the land described, the purchaser should immediately designate such section in writing to the sellers and should not thereafter be permitted to cut or remove any timber from the section or sections so surrendered and not thereafter be required to pay taxes except on

those tracts of land over and through which it might be operating its logging railroad or tramway, but that it should continue to pay taxes on such lands as long as it is operating a line of railroad over and through same. The contract provided for free ingress and egress for the purpose of cutting and removing timber, and was given the right to construct, maintain and operate logging railroads and skidways, logging camps and mills, but that such use and privilege was not to interfere with the cultivation of said lands or other use to which the sellers may desire to put the same. It was provided in the contract that no representation or warranty was made with reference to the amount of timber, but that the estimates were made merely for the purpose of arriving at a basis for making deferred payments. The contract described the land and the amount of timber on each section as estimated was set out. It was also provided that the purchaser was not required to cut any part of the timber or remove any of it, but the right conferred was an exclusive privilege given to the purchaser or its assigns to remove as much of said timber as it might desire within the life of the contract.

Thereafter there was a suit in partition by Thornton against Chancellor, and the land was divided. After the division, Dougald McMillan in 1931 became the owner of that part of the land awarded to Chancellor in the partition suit, and in 1933 the appellee, Gurdon Lumber Company, obtained an assignment of the right of the Sparkman Hardwood Lumber Company for the same lands. This suit was then brought by appellant, alleging that the Gurdon Lumber Company had been for many weeks cutting and destroying much timber besides that which they had a right to or were entitled to cut because it was less than 12 inches in diameter, and the complaint alleged that the appellee was still cutting and intended to continue to cut all trees 6 inches and over if not restrained; that cutting the young timber was a waste and the product an inferior quality in grade, but, if the trees were permitted to stand, they would grow and become valuable. It was further alleged that appellee's cutting

deprived appellant of the use of his land for the purpose for which it was best suited, that of growing timber, and that this was an irreparable injury to the appellant. It was also charged that appellee was wilfully destroying appellant's timber by causing the fallen trees to strike and break the small trees and that this caused irreparable injury; that appellee was piling and permitting piles of trees and tops to rest against young trees, thereby injuring them; that appellee had placed several mills on the land and was permitting sawdust to accumulate, which would destroy the value of the land. The complaint stated that the appellee had the right to cut all timber 18 inches and over in diameter, but that they were asserting a right to cut all trees on the land; that appellant notified appellee as soon as it obtained the assignment from the Sparkman Hardwood Lumber Company, and the appellee, instead of respecting appellant's claim, increased its force and continued to cut timber which it had no right to cut. There was a prayer for injunction and permanent restraining order and for damages. The appellees filed answer, denying all the material allegations in the complaint. After taking the evidence, the court entered a decree dismissing appellant's complaint for want of equity, and the case is here on appeal.

It is first contended by appellant that there is an entire absence of language in the contract which shows an intent on the part of the lumber company to claim any growth on its land. In other words, it is the contention of appellant that the lumber company could only take the timber which was of certain dimensions at the time the contract was made, and the first case cited and relied on is *Griffin* v. *Anderson-Tully Co.*, 91 Ark. 292, 121 S. W. 297. The court said in that case: "The language of the contract describing the trees sold is as follows: 'All the cottonwood trees 20 inches in diameter and up at the stump now standing or located on the following described lands' (here follows description of land). Thus it will be seen that the title passed according to the plain and express terms of the contract only to those trees which measured the required size at that date and not at the

date of their severance. The identification of the trees by specifying their size tends to show that the intention of the parties was to include such only as at the time the contract was made answered the description. Their diameter at that time was capable of definite ascertainment.'' It will be observed that the court said the identification of the trees by specifying their size tends to show that the intention of the parties was to include such only as at the time the contract was made answered the description. There is no such identification in the present contract. It does not mention the size of the timber and expressly states that the estimate which does contain the size of the timber is made solely for the purpose of the deferred payments.

The next case referred to is *Neal Lumber & Mfg. Co.* v. *O'Neal,* 166 S. E. 647. This is a case in which a lease and timber deed were construed, and the deed stated: ''does hereby grant, bargain, sell and convey unto the said W. T. O'Neal, trustee, his successors and assigns, all of the trees and timber of every kind and description growing or being on the land.'' The instrument gave to the purchaser a license and privilege at any and all times to, during the life of the contract, cut and remove all trees and timber growing or being on said lands. The contract in that case was somewhat different from the contract in the present case. ''Growing and being on said lands'' was held by the court to mean such timber as of the dimensions described as growing on the land at the date of the contract, but the court in the O'Neal case said: ''We are aware that our construction of the lease in question may not be in accord with the views expressed by some other courts in like cases, but it is in harmony with adjudications by this court and with the weight of authority,'' and in the same case the court also, with regard to the meaning of the word ''trees,'' held that a plant may be called a tree before it has attained such a growth as to be useful as timber, and the court also said: ''A word may have one meaning in a dictionary and an entirely different meaning in a contract.'' In a case decided by the Federal court where the court was construing a lease giv-

ing the right to cut all timber on the lands suitable for sawmill purposes during the 20 years covered by the lease, "the lessees are entitled to cut, not only the timber suitable at the date of the lease, but all that becomes suitable during the life of the lease." *Nelson* v. *Americus Mfg. Co.,* 186 Fed. 489.

The authorities are not in harmony, and the language and terms of the contracts construed differ. The contract involved in the instant case does not mention the dimensions of the timber sold and does not in express terms provide that the timber sold is that now standing on the land, but the contract gives the purchaser the right to cut any timber it may desire, and we think, when the entire contract is considered, that it was the intention of the parties that the purchaser should have all the timber it desired on the land at any time during the life of the contract. It is claimed, however, by the appellants, that the contract meant timber which would measure twelve inches, eighteen inches above the ground, although there is nothing in the contract to indicate that this is true. Appellants state, however, that the conduct of the Sparkman Hardwood Lumber Company after the contract was consummated shows what it considered it had purchased. Without setting out the evidence, which we think is unnecessary, because we believe the contract is unambiguous, some of the witnesses testified that the Sparkman Hardwood Lumber Company cut timber 8 inches in diameter, and it does not appear that any complaint was ever made about this. Some of the testimony shows that the Gurdon Lumber Company cut timber only six inches in diameter. The appellants say that timber has a well-defined meaning, and that it does not include saplings, undergrowth and shrubs. We agree that this is true under the terms of the usual contract, but that in this instance the purchaser could cut whatever timber it desired.

Appellants cite many authorities to sustain their contention, one of which is 17 R. C. L. 1094. The text relied on states: "Generally speaking, a deed to all the timber on a tract of land without reservation conveys all the timber on such tract. Contracts or deeds for the sale

of standing timber frequently specify the size of the timber sold, but sometimes the term 'timber' is used without definition as to trees included within its scope, and, where this is the case, resort must be had to the definition of the term as well as to the intention of the parties as manifested by the agreement. Where there is nothing to indicate that the contract was made with reference to construction of the word 'timber' peculiar to the locality, and the parties appear to have used the term in its customary meaning, it is generally held that fire wood is not included.''

Appellants also call attention to 38 C. J., p. 143. It is there said: ''The word 'timber' has an enlarged or restricted sense according to the connection in which it is employed. It may refer to standing trees, to stems or trunks of trees cut and shaped for use in the erection of buildings or other structures, and not manufactured into lumber within the ordinary meaning of the word 'lumber,' or to that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships and the like. It has generally been held that the word 'timber' does not include fruit trees, saplings or undergrowth, or trees suitable only for fire wood.''

It may be, as contended by appellants, that the appellees in 1933 cut smaller trees than the Sparkman Hardwood Lumber Company cut, but there is no evidence showing that they cut any timber for any other purpose than the market, and this, under the contract in the instant case, they had a right to do. As we construe the contract, the purchaser had a right to cut any timber it desired to cut, and, in addition to this, the Sparkman Hardwood Lumber Company is admitted to have cut timber below twelve inches in diameter. On these questions of fact as to what the parties did under the contract, the lower court had a right to pass on them and determine the facts, and we cannot say that his finding is against the preponderance of the evidence. The contract in this case is quite different from the usual contract. It is not a sale of the timber, but it is a license and privilege to cut all the timber which the purchaser desired. It nowhere

mentions the dimensions, nor does it state the time at which it shall be cut, except that it must be done within ten years.

The decree of the chancellor is affirmed.

BUTLER, J., (dissenting). The construction of the contract between Thornton & Chancellor and Sparkman Hardwood Lumber Company is the question presented in this case. That contract gave the lumber company and its assigns "the exclusive right for the period of ten years next ensuing to go upon said land and cut and remove therefrom such timber as the said second party or its assigns may desire."

The majority of this court has construed this clause of the contract as giving the appellee the growth of the timber from the date of the contract and the right to cut any of the growth without respect to size or character—in other words, it is permitted, if it sees fit, to entirely denude the land of all vegetation which might in the future develop into merchantable timber. The majority opinion cites no authority for the conclusion reached, learned counsel favor us with none, nor has my research discovered any. All the decisions which I have been able to find use the word "timber" in the sense defined by the lexicographers—*i. e.,* trees which are suitable for being converted into lumber used in building and carpentry.

In the case of *Broad River Lumber Co.* v. *Middleby,* 194 Fed. 817, the Circuit Court of Appeals held as follows (quoting syllabus No. 1): "Generally, the word 'timber' as used in a contract selling standing timber, unless modified or controlled by other expressions in the contract, means such trees as are fit to be used in buildings or similar construction; that is, trees of a size fit to be used in the construction of dwellings or ships; trees too small to be used for these purposes, not, strictly speaking, being considered as timber, although their products are utilizable for the construction of interior work in dwellings, or for the manufacture of tools and other appliances."

It might be argued that the definition of "timber" has been broadened because trees are now used for the

manufacture of useful articles other than lumber, such as paper and chemicals distilled from the wood fiber. It is a matter of common knowledge, however, that at the time of the execution of the contract in this case there were no plants for the manufacture of chemicals out of wood, or for the manufacture of small timber into paper, within this State. The contract, therefore, must be construed with reference to the uses to which trees were put at the time of the execution of such contract, which was only for the purpose of the manufacture of trees into lumber.

The recent case of *Nettles* v. *Lichtman,* decided by the Supreme Court of Alabama in January of this year and reported in 91 A. L. R., p. 1455, discusses a contract similar to the one involved in the case at bar and concludes, as does the great weight of authority, that a deed purporting to grant "trees and timber" is to be construed as conveying only such trees as are suitable for the manufacture of lumber to the exclusion of smaller trees usable only for making wood pulp.

The appellant has cited a great many cases to support his contention that the word "timber" as used in the contract must be construed as meaning trees suitable for manufacture into lumber. Among these is the Broad River Lumber Company case, cited *supra; Neal Lbr. & Mfg. Co.* v. *O'Neal,* 166 S. E. 647; *Anderson* v. *Palladine,* 257 Pac. 761; *Roberts* v. *Gress,* 67 S. E. 802; *McRae* v. *Smith,* 137 S. E. 390; *Balderson* v. *Seeley,* 160 Mich. 186, 19 Ann. Cas. 1049. The definition approved in these cases is that generally accepted by the text writers. 17 R. C. L., 1065-1094; 38 C. J., 143.

The generally accepted rule, and the one adopted by this court, is that only such trees as are timber at the date of the contract are included in the contract and intended to pass to the grantee, unless there are prospective words indicating a contrary intention. *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292, 121 S. W. 297.

The great preponderance of the evidence in this case is that trees were considered merchantable timber fit to be sawed into lumber which were, on the date of the contract, twelve inches in diameter, eighteen inches above

the ground. There is some evidence to the effect that some trees smaller than that were cut by the Sparkman Hardwood Lumber Company, but it is evident, when the testimony is considered in its entirety, that these trees were cut by mistake and most of them were left in the woods. It is also true that a quantity of mulberry posts were cut and some cross-ties, but it is a matter of common knowledge that mulberry is a timber of scattered growth unfit for any use except for making fence posts and is never considered when estimating the value of land for its timber, and the cross-ties were evidently cut from small worthless trees to be used to lay the temporary lines of log roads across the tract of land.

The conclusion is inescapable, when all the evidence is considered, that the grantee construed the contract to mean that it was only entitled to cut the timber suitable for sawing into lumber at the date of the contract. As a basis for fixing the purchase price, it was estimated that the tract contained 13½ million feet of lumber. The grantee cut and removed 25 million feet sawed from trees which with but rare exception were twelve inches in diameter at the stump, and then ceased its operations. If the contract were ambiguous, this conduct on the part of the grantee is amply sufficient to support the construction placed on the contract by the appellant. *Robbins* v. *Kimball,* 55 Ark. 414, 18 S. W. 457; *Kahn* v. *Metz,* 88 Ark. 363, 114 S. W. 911; *Lasater* v. *Western, etc.,* 177 Ark. 997, 8 S. W. (2d) 502; *Natl. Eq. Life Ins. Co.* v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6.

It is clear therefore that the appellees had no right to cut any trees which were not at least eight inches in diameter on the 24th day of June, 1924, the date of the contract, and the appellants are entitled to the relief prayed.

For the reasons stated, I respectfully dissent and am authorized to say that Mr. Justice HUMPHREYS approves what has been hereinbefore stated, and joins with me in the dissent.

FULBRIGHT *v.* STATE.

Crim. 3886

Opinion delivered September 24, 1934.

Cooper B. Land and *William G. Bouic,* for appellant.

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

JOHNSON, C. J. The grand jury of Jackson County indicted appellant for the crime of murder in the first degree for the killing of one W. P. Ford. Upon trial to a jury she was convicted of second degree murder and was sentenced to a term of five years in the State penitentiary, and this appeal is therefrom.

The only serious contention advanced by appellant for reversal is that the trial court erred in permitting witnesses to detail certain statements made by deceased immediately prior to his death because, as it is urged, not made by deceased while in the belief that death was imminent and impending. To understand the contention made, it is necessary to detail in brief the facts.

The deceased Ford and Will Parish met in the court house at Batesville in Independence County about 10 A. M. on September 7, 1933, and after some conversation went to inspect a small place purchased by deceased,

which was located about one mile from Batesville. They returned to Batesville about 1 o'clock P. M. the same day and went to the home of a Mrs. Mainard for refreshments. There appellant first appeared upon the scene. After imbibing freely of whiskey at Mrs. Mainard's home, deceased, Ford, appellant, Will Parish, Roy Hicks, Geneva Hicks, the wife of Roy Hicks, and Otis Crosser about 2 P. M. secured an automobile and went to a wooded section known in that community as Lover's Lane where the party again engaged in drinking. After all the whiskey was exhausted, the party concluded to go to Newport in Jackson County, and upon their way there additional whiskey was obtained and the party arrived at Newport about sundown the same day, all in a more or less intoxicated condition. At this point the evidence of witnesses is in irreconcilable conflict, but that upon behalf of the State tended to establish that at the bridge at Newport three other people joined the party and after riding over Newport for some little time the party as augmented went to a secluded spot adjacent to Newport where deceased was slugged and robbed of $58. This occurred about 8 o'clock P. M., September 7, 1933. A witness on behalf of the State, a Mr. Ward, testified that about 5:30 or 6 o'clock A. M., September 8, 1933, his attention was attracted by the cries of deceased Ford; that deceased requested witness to assist him, and he did so by calling Mr. William and Mr. Albright; that deceased was in a bad condition—his head was caved in on the right side. Deceased told witness that "he did not aim to be here much longer," and showed witness a rock upon which deceased had carved his name for identification. Deceased told witness that he "had done give up," and for that reason had carved his name upon the rock. Deceased died in about thirty minutes after this conversation. Deceased told witness that he, a Mr. Parish, and another fellow, Essie Fulbright, and another woman named Mabel were out drinking together; that Parish started to the car and deceased attempted to follow Parish at which time he was struck on the head. Deceased mentioned no other person being present at the scene. This occurred in Jackson County.

Sheriff Albright testified that he examined deceased before he died and found a large hole in the right side of deceased's head; that deceased told witness he didn't know who struck and robbed him, but that Will Parish, Essie and Mabel were with him when he was struck and robbed. Deceased told witness: "I have been laying here all night, and it looked like I wasn't going to get any help, and I was afraid of what might happen to me, and I wrote this on the rock to identify myself."

After appellant, Hicks and wife, and Crosser left deceased at the place where he was found, the following morning they returned to Batesville arriving there about 10 P. M., and immediately thereafter left Batesville for points in Missouri and Oklahoma. They were apprehended near Springfield, Missouri, some three days after Ford's death, and all made conflicting statements in reference to their locations, whereabouts and travels not only after Ford's injury but prior thereto.

From the facts and circumstances here detailed, it was certainly a question of fact for the jury's determination whether or not deceased believed that death was impending at the time he made the declarations to witnesses Ward and Albright.

The fact that deceased had carved his name upon a stone for identification purposes was patent evidence that he believed the end was near; the fact that the right side of his head was crushed must have demonstrated to him the seriousness of his condition; the fact that deceased told witness Ward that "he had done give up" was tantamount to saying that death was inevitable. At any rate the facts and circumstances were amply sufficient to warrant the trial court in submitting the matter to the jury.

True, it is the settled law in this State that declarations of a deceased person made when hope of recovery was not relinquished are not admissible as dying declarations, but, when all the facts and circumstances surrounding such declarations unerringly indicate that hope of recovery is relinquished, then such declarations are admissible as dying declarations. Underhill on Criminal Evidence, § 172. Greenleaf on Evidence, (16 ed.) § 158;

Sanderlin v. *State,* 176 Ark. 217, 2 S. W. (2d) 11; *Alford* v. *State,* 161 Ark. 256, 255 S. W. 884; *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026; *Scroggins* v. *State,* 109 Ark. 510, 159 S. W. 211.

Weakley v. *State,* 168 Ark. 1087, 273 S. W. 374, in no wise conflicts with the views here expressed. There the wound was in the leg, and no fact or circumstance was offered in evidence showing or tending to show that deceased Garrison had relinquished hope of recovery at the time the declarations were made.

Other cases are cited in brief, but the discussion heretofore set out fully disposes of the contentions urged.

We have explored the transcript to ascertain the correctness of the instructions requested, granted and refused, and have concluded that no prejudicial error was committed in this regard.

No prejudicial error appearing, the judgment is affirmed.

FIREMEN'S INSURANCE COMPANY *v.* LITTLE.

4-3478

Opinion delivered September 24, 1934.

Verne McMillen, for appellants.

O. H. Sumpter, for appellee.

MEHAFFY, J. The appellee, Annie E. Little, was the owner of a frame hotel or rooming house located at 201 Prospect Avenue in the city of Hot Springs, Arkansas, and was the owner at the time the policies hereinafter mentioned were issued, and at the time of the fire. Policies were issued covering said property as follows:

Firemen's Insurance Company	$1,000
National Fire Insurance Company	1,000
City of New York Insurance Company	2,000
Georgia Fire Underwriters (two policies)	3,500
North British & Mercantile Insurance Company	2,500

The appellee executed her promissory note in the sum of $25,000 payable to appellee, Ed B. Mooney, due nine months after date, and to secure the payment of said note, executed a deed of trust conveying the property on which the insured building was located to Claude E. Marsh, trustee. Mooney borrowed $20,000 from the National Realty Company, and pledged the $25,000 note mentioned as security for the payment of his note. A mortgage clause was attached to each of the policies, providing the loss, if any, should be payable to Ed B. Mooney, mortgagee, as his interests might appear.

Separate suits were filed by appellee, Annie E. Little, against each of the above-named insurance companies, and the National Realty Company and Ed B. Mooney were also made defendants. It was alleged in each complaint that the building was totally destroyed by fire, and appellee prayed judgment for the full amount mentioned in each policy. She also alleged that the defendants, National Realty Company and Ed B. Mooney, falsely and without right claimed a mortgage lien on the property, and also claimed the debt due under the policies.

The National Realty Company and Ed B. Mooney filed answers and cross-complaints, asking that the causes be transferred to equity, and the mortgage be foreclosed. The appellee, Annie E. Little, filed answer to the cross-complaints, and alleged that the loan made by Ed B. Mooney to her was usurious and void, and prayed that the cross-complaints be dismissed.

The insurance companies answered, admitting that the policies of fire insurance were in force, but denying that the building was totally destroyed by fire. They admitted the property was damaged by fire, but alleged that the policies provided that the insurance company should not be liable for more than it would cost the insured to repair or replace the same with material of like kind and quality at the time of the loss, and that it would have cost the insured not exceeding $5,000 to make the repairs. Each of the appellants offered to confess judgment for its proportion of the damage upon the basis of $5,000 total damage. The cases were transferred to equity and consolidated for the purpose of trial. By agreement the consolidated cases were tried as to the liability of the insurance companies, and the question of the liability of appellee, Annie E. Little, under her note and mortgage to Ed B. Mooney, was reserved for determination of the court. The only question before this court is the amount of liability of the insurance companies under their policies.

The chancery court found that there was a total loss, and that the value of any salvage was less than the cost of removing same, and entered a decree against

each of the insurance companies for the full amount of the policies, together with attorney's fee of 15 per cent. and a penalty of 12 per cent. The case is here on appeal by the insurance companies.

J. C. Copeman, a witness for the appellee, testified that he was a construction superintendent, and had just completed the Army & Navy Hospital; that he was called upon to make an examination of the property at 201 Prospect Avenue, owned by Mrs. Little, and made a report of his investigation to Mr. Little. Witness testified that, upon a thorough inspection of the property and what there was still remaining of the building, in his opinion there was nothing left that could be used in the reconstruction of any building at all; that, if any one would take the property over now, it would cost them between $400 and $500 to take the debris off in order to get ready to put up a new building on the site; that it was his opinion that the building, as a building, was a total loss. He did not make an estimate to rebuild the building. He made the examination on September 1, 1933. He examined the foundation, and the foundation was bad and crumbly through the heat that had been in the building. He did not believe it could be used; it would have to be torn out if any structure of any kind was built.

Henry P. O'Hagan, a witness for appellee, testified in substance that his profession was supervising engineer for the War Department, and he had been connected with the work in Hot Springs in the construction of the new Army & Navy Hospital, the nurses quarters, known as the annex, and two sets of double NCO quarters. The last two were built by himself without a contractor; he did the purchasing and hiring. He made an inspection of the property known as 201 Prospect Avenue for Mrs. Little; that the building as it now stands is, in his opinion, of no value; the owner might salvage some firewood, but doubted if any contractor would offer any money for the material now in the building; did not think that any possible salvage would be worth what it would cost to take it down and remove it; believed that the owner would have to pay to have the property cleaned

up. In his opinion the property is a total loss. He made the examination of the property about September 1, 1933.

G. Solberg, a witness for appellee, testified in substance as follows: that his business was general superintendent, building supervisor, and he had been recently engaged in construction work in Hot Springs; that he is supervisor of the new nurses' quarters, Army & Navy Hospital; that he inspected the property at 201 Prospect Avenue and found, in his estimation, the whole thing a complete loss; there would not be any way to get anything out of the salvage on any of the material. It would not even pay to strip the thing and take it down for the salvage of the material. It is a complete loss in his estimation. He made the examination about four weeks ago.

Captain E. M. George, a witness for appellee, testified in substance that he was captain of the Quartermaster Corps, U. S. Army, and that Solberg is now employed as general superintendent for the H. B. Ryan Company of Chicago, Illinois, and in that capacity is looking after the building of the $160,000 nurses' quarters, under witness' supervision. He considers Solberg a competent judge of construction material, and of materials that go into building. H. P. O'Hagan is superintendent of construction and civil engineer, and has been in the employ of the War Department for thirty years under the direct supervision of witness for the last six years. Witness considers him a competent man in his business, and a judge of construction material and buildings. J. C. Copeman is construction superintendent and has been for the past eighteen years. In all witness' experience he is the best building superintendent witness has ever had. Mr. O'Hagan is employed by the War Department and Mr. Solberg and Mr. Copeman are employed by general contractors. They have to do with government buildings and commercial buildings. Witness is construction quartermaster. He inspected the building at 201 Prospect Avenue and considers the building a total loss and a menace. The inspection was made about a month ago.

O. M. Harrison, a witness for appellant, testified in substance that he was a building contractor, had been in that business for eighteen or twenty years, and had built numbers of buildings in Hot Springs, one right across the street on Prospect Avenue, for Captain Rix; made an estimate of the damage to the building at 201 Prospect, August 26, 1932. The building was not destroyed by fire, but was damaged. Witness went over the building carefully, and his estimate of the cost of repairing the building and replacing all the damaged parts at that time was $6,164.40. He was at that time ready and willing to take a contract to make the repairs with the exception of the heating plant. The foundation of the building was not damaged in any way by the fire. His estimate included every part of the building that was damaged in any way, with the exception of the furnace. Several rooms in the building were not damaged by the fire, the canvas and paper still on them. If witness owned the building and wanted to build one like the building was before the fire, he would use the part remaining as a basis for restoring the building.

W. W. Brown, a witness for appellant, testified that he lived in Little Rock and was a building contractor; had been actively engaged in that business for thirty years; made an estimate on the building at 201 Prospect Avenue on November 20, 1932, and estimated that to repair all the damage caused by the fire the cost would be $5,525.87. Witness proposed to make the repairs for that amount. His estimate consisted of removing the debris, hauling it from the premises, a little brick work, topping one flue, sufficient lumber to replace that which was damaged or destroyed, and mill work, which consists of doors and windows, replacing all that were damaged, a composition roof, repairs to plumbing, and gas fittings. The fire was confined practically to the first and second floors and the roof; no damage to timbers below the first floor; it was necessary to replace a good part of the mill work on the first floor. A part of the outside walls on the left side toward the rear would have to come down from the second and third stories; the studs were damaged there, and a portion of that wall;

the larger part of the building remained intact. If witness desired to replace the building in the condition it was before the fire, he would use that part remaining. Any reasonable man would. There was 65 per cent. of the building with the materials in place that were sound values. Witness had been engaged in building residences and apartments for the better class of residents in Little Rock. Witness made estimates for both insurance companies and insured. The damage by the fire was about 35 per cent. Witness introduced photographs of the building. Witness' idea of total loss of a building is when it has lost its identity as a building, and this building has not lost its identity.

George H. Burden and J. D. Johnson testified as to their experiences, and that the building was damaged about 35 per cent. Their testimony was substantially the same as that of Brown.

F. J. W. Hart testified for appellee in rebuttal that he was an architect; had been engaged in that profession about 48 years, and testified as to property that he had built. There was no damage by fire below the first floor. The damage there was caused by water, and caused a settlement of the piers and old flues and chimneys. In his opinion the flood of the water caused damage to the piers. Three days afterward there was one of the piers kicked out entirely caused by flooding of the water.

The policy of the North British & Mercantile Insurance Company was introduced in evidence, and it was agreed that all of the other policies sued on were the same with the exception of dates and amounts, and that the concurrent amount of insurance permitted was $10,000. Each of the policies contained the following: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurred and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation however caused and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality."

"This company shall not be liable, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of building."

It is the contention of the appellants that there was no competent evidence tending to support the finding of the chancellor that the building was a total loss. We have set out the appellee's testimony substantially as contained in appellant's abstract and brief. From this evidence it appears that J. C. Copeman, Henry P. O'Hagan, G. Solberg and Capt. E. M. George, were all men of experience in the construction and value of buildings. Each of them had had considerable experience. Each of them had inspected the property, made a careful examination of it, and testified that the building was a total loss. Some of these witnesses stated that there would not be any way to get anything out of the salvage on any of the material; it would not even pay to strip the thing and take it down for the salvage of the material. Another one testified that after careful inspection of the property he was of the opinion that there was nothing left that could be used in the construction of any building at all. Another one said that he did not think any possible salvage would be worth in value what it would cost to be taken down and removed. These were facts testified to by these witnesses after a careful examination and inspection of the property. There was no effort to show that these witnesses were not skilled.

"A skilled witness is one possessing, in regard to a particular subject or department of human activity, knowledge and experience which are not acquired by ordinary persons. Where he testifies as to facts, he must be shown to have adequate knowledge of the matters of which he speaks, and where he states an inference he must have the ability, skill, and experience, not only to observe accurately, but to draw the correct conclusion from what he observes. Such a witness may be qualified by professional, scientific, or technical training, or by practical experience in some field of activity conferring on him special knowledge not shared by mankind in general, the rule in this respect being that one who had been engaged for a reasonable time in a particular pro-

fession, trade, or calling, will be assumed to have the ordinary knowledge common to persons so engaged." 22 C. J., 519-520; 11 R. C. L., 571, 642.

These witnesses were competent to express the opinion that the building was a total loss. *Ringlehaupt* v. *Young,* 55 Ark. 128, 17 S. W. 710; *Transportation Line* v. *Hope,* 95 U. S. 297; *Bedell* v. *Long Island Rd. Co.,* 44 N. Y. 367; *Fort* v. *State,* 52 Ark. 180, 11 S. W. 959; *Miller* v. *State,* 94 Ark. 538, 128 S. W. 353.

The witnesses of appellee had made a personal inspection. They were therefore more competent to testify, and their testimony would be more satisfactory than if they had answered hypothetical questions, or had testified from having heard the facts from other witnesses. There could be no better method of acquiring knowledge as to the condition of the building as to whether it was a total loss than for competent witnesses to make an examination and inspection of it.

"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., 526-527.

After the inspection by these witnesses and their testimony was given on direct examination, the appellants had an opportunity to cross-examine them to find out what the extent of their examination was, what portion of the building was left standing, if any, and whether or not it could be used in the construction of another building.

The evidence of the appellee was contradicted by appellant's witnesses, W. W. Brown, J. D. Johnson, George H. Burden and O. M. Harrison. These were competent witnesses who had examined the building and testified that the building was not a total loss. One of ap-

pellee's witnesses testified that the foundation could not be used; that one pier had already kicked out, and that it was so damaged by water that it could not be used in building another building. Appellants' witnesses testified that it could be used, although none of them contradicted the witness about the pier, and none of appellants' witnesses testified about the damage by water, and so far as the record shows, the damage by water was caused by the fire, that is, in an effort to extinguish the fire. At any rate, there is no evidence of water causing damage in any other way. The witnesses of appellants testified however, that the foundation could be used, and that it was not damaged by fire.

These were all questions of fact, and we have many times held that a chancellor's finding of fact will not be disturbed on appeal unless clearly against the preponderance of the evidence, and we can not say that the finding of the chancellor is clearly against the preponderance of the evidence in this case.

Appellants cite and rely on the case of *Springfield Fire & Marine Ins. Co.* v. *Ramey,* 245 Ky. 367, 53 S. W. (2d) 562. In this case there is no showing that the witnesses had made any inspection or examination, and neither of the witnesses testified to any facts at all, but each simply stated that in his opinion there was a total loss. The court, however, did not hold that this testimony was incompetent, but the court said: "The appellants succumbed to the inviting temptation, which often presents itself to opposing counsel, to cross-examine the other party's witnesses, and thus aided in the development of the facts. When the evidence appearing as it is in the record, and thus brought in, it cannot be claimed that no competent evidence was presented authorizing the submission of the issues to the jury."

The court held that it should have been submitted to the jury. The court also held: "The only evidence offered by the appellee other than that developed by the appellants on cross-examination of her witnesses was mere opinions of the witnesses, expressed in response to improper questions. It is a wise and salutary rule that a witness must testify to facts within his knowledge and

not a mere conclusion, except experts in response to hypothetical questions which must embrace the facts. To this general rule there is another exception which permits the admission of opinion evidence, not conclusions, when, from the very nature of the subject-matter under investigation, no better evidence can be obtained."

The court held that in cases of the kind before it, that a witness could not be allowed to give his opinion without requiring him to state the facts upon which it is premised. The court then held that the instruction offered by appellant defining "total loss" was erroneous.

In the instant case the best qualification that witnesses could have had was the inspection and examination of the building. The main question in this case is whether there was a total loss, and, as we have said on this question, there was a conflict in the evidence. We said in a recent case: "If a building is destroyed as a building, so that the walls, although remaining, are in such a condition that they will have to be torn down, there is a total loss." *St. Paul F. & M. Ins. Co.* v. *Green,* 181 Ark. 296, 29 S. W. (2d) 304; *Williams* v. *Hartford Ins. Co.,* 54 Cal. 442, 35 Am. Rep. 77; *Oshkosh Packing & Provision Co.* v. *Mercantile Ins. Co.,* 31 Fed. 200; *Penn. Fire Ins. Co.* v. *Drackett,* 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608; *Teter* v. *Franklin Fire Ins. Co.,* 74 W. Va. 344, 82 S. E. 40; *German Ins. Co.* v. *Eddy,* 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707; *Seyk* v. *Miller's Nat. Ins. Co.,* 74 Wis. 67, 41 N. W. 772, 3 L. R. A. 523; *Lowry* v. *Fidelity-Phoenix Fire Ins. Co.,* 210 Mo. App. 121, 272 S. W. 79; *Fire Ass'n* v. *Strayhorn,* Tex. Civ. App. 211 S. W. 447; *Ins. Co.* v. *Heckman,* 64 Kan. 388, 67 Pac. 879.

Under the authorities above cited, the chancery court was justified in finding that there was a total loss. The trial court held that the ordinance of the city of Hot Springs was inadmissible, and therefore did not consider it. It is unnecessary to discuss it here because the appellants not only did not complain about it, but urged that the trial court decided it correctly. Whether it was correctly decided or not is immaterial here.

It is finally insisted that the clause of the policy above set out limits the liability of appellants, and that they are not liable for any loss beyond the actual cash value of the property, and in no event shall the recovery exceed what it would then cost the insured to repair or replace the same, etc. It is insisted that the appellees are bound by the contract, and cannot recover anything in excess of what it would cost to repair the building. That is not true in cases where there is a total loss.

Section 6147 of Crawford & Moses' Digest provides that in case of total loss the insurance company is liable for the full amount stated in the policy. *American Central Ins. Co.* v. *Noe,* 75 Ark. 406, 88 S. W. 572; *Farmers' Home Mutual Fire Ass'n* v. *McAlister,* 171 Ark. 574, 285 S. W. 5; *Nat. Union Fire Ins. Co.* v. *Kent,* 163 Ark. 7, 259 S. W. 370.

We find no error, and the decree is affirmed.

AMERICAN HISTORICAL SOCIETY, INC. *v.* VESTAL.

4-3534

Opinion delivered October 1, 1934.

Henry J. Burney, for appellant.

Sam T. & Tom Poe and *Raymond Jones,* for appellee.

JOHNSON, C. J. This action was instituted by appellant against appellee in the municipal court of North Little Rock where a judgment was entered in favor of appellee. Upon appeal to the circuit court of Pulaski County, the result was likewise adverse to appellant, and this appeal must result in affirmance.

The suit was predicated upon the following written subscription contract:

"Number 92, May 15, 1929, DE LUXE EDITION. ARKANSAS AND ITS PEOPLE. In four volumes. Please enter my name as a subscriber in the above named publication, issued in three-quarters leather, for which I agree to pay to the order of the American Historical Society, Inc., the sum of sixty-five dollars ($65), upon delivery of same at my residence or place of business. Occupation: Florist. Name: Charles H. Vestal. Residence address: 509 W. 5, No. L. R."

On October 2, 1931, appellant notified appellee that delivery of the books called for in the subscription contract would be made during October and November, 1931, whereupon appellee advised appellant that he would not accept the books. The books were afterwards delivered but not accepted.

The trial court construed the contract as one to be performed within a reasonable time—same not providing any definite time for performance—and this is the first contention urged for reversal.

We are committed to the doctrine that where time of performance of a contract is not specified in the written instrument the law reads into it, "performance within a reasonable time," therefore, no error appears from this assignment. *Dunn* v. *Forrester,* 181 Ark. 696, 27 S. W. (2d) 1005.

Next it is urged that error was committed in permitting appellee to testify that the sales agent who solicited the subscription contract told him that delivery of the books would be made about October, 1929. Certainly this testimony was at least a circumstance indicating what was considered a reasonable time by the parties for performance of the contract at the time of its execution. This statement does not alter, vary, contra-

dict or otherwise affect the contract, and was admissible and competent for the purpose indicated.

The question as to whether the contract was offered to be performed by appellant within a reasonable time after its execution was submitted to the jury under correct instructions, and the testimony is amply sufficient to sustain the jury's verdict; therefore the judgment must be affirmed.

UDES *v.* NYEGAARD.

4-3541

Opinion delivered October 1, 1934.

Reinberger & Reinberger and *Arnold Fink*, for appellants.

Rowell & Rowell and *Jay W. Dickey*, for appellees.

HUMPHREYS, J. This foreclosure proceeding was commenced in the chancery court of Jefferson County by appellants against appellees on June 29, 1933, upon a note and mortgage executed by appellees to A. Udes on June 24, 1927, due three years thereafter and which, at first maturity, had been extended three years. At the time of the institution of the suit, the debt was due, and appellees were in default on interest and taxes, which they were required to pay under the terms of the mortgage.

Appellees interposed the defense that on the 21st day of June, 1933, they entered into an oral agreement with A. Udes that, in satisfaction of the debt and mortgage, they would convey said property to him, and pay the then due improvement taxes and the county and State

general taxes for 1932, and accrued interest of $25 due at that time; that, pursuant to the agreement, they tendered him a deed describing the property and $25 interest, and exhibited to him a receipt for improvement taxes, and offered to pay the county and State general taxes for 1932; that he refused to accept the deed and carry out the agreement. They prayed, by way of cross-complaint, that appellants be required to perform the oral contract.

The court heard the cause upon the pleadings, exhibits, and testimony adduced and adjudged that the note and mortgage be canceled, and that A. Udes be required to accept the deed, from which is this appeal.

John W. Nyegaard testified unequivocally that an oral agreement was entered into between A. Udes and himself to the effect that A. Udes would accept a deed to the property, and cancel the note and mortgage if he would pay the interest then due of $25, and pay the district improvement taxes and the county and State general taxes, all of which he offered to do, but that A. Udes refused to accept the deed and carry out the agreement.

A. Udes testified just as positively that no such agreement was ever made between them.

This court is committed to the doctrine that a mortgage may be released by either a written or parol agreement, but, in order to effect such a release by parol, the agreement must be established by clear and convincing evidence. This court said in the case of *Riley* v. *Atherton,* 185 Ark. 425, 47 S. W. (2d) 568, that: "We have reached the conclusion that, as to mortgages of real estate, the correct rule is that the proof relating to the discharge or release thereof must be clear, satisfactory and convincing. Title to real property, and the validity and continued existence of mortgages thereon, would be insecure by any less stringent rule."

The most that can be said in the instant case relative to the evidence is that it is in equipoise. Both parties stand in the record unimpeached, and their evidence presents an irrevocable conflict, creating a doubt rather than a certainty that such an oral agreement was ever made.

The payment of taxes does not corroborate the testimony of John W. Nyegaard, because it was his duty under the terms of the mortgage to pay them.

The tender of a deed and $25 interest does not sufficiently corroborate his testimony to make it certain and convincing that Udes had agreed to accept the deed and satisfy the mortgage.

It would be an unwise and dangerous rule to say that a mortgage on real estate might be satisfied in parol by a mere preponderance of the evidence. The parol agreement must be established by clear and convincing evidence in order to effect a satisfaction of a mortgage.

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

THE CORNING BANK & TRUST COMPANY *v.* FOSTER.

4-3523

Opinion delivered October 1, 1934.

Oliver & Oliver, for appellant.

F. G. Taylor and *Jeff Bratton,* for appellee.

MEHAFFY, J. In 1923 Arthur D. Foster, the appellee, took out a policy on his life for the sum of $5,000. The policy carried a disability clause, and was made payable on the death of appellee to his executors, administrators or assigns.

The appellee became indebted to Dr. S. P. Blackwood, and on June 1, 1926, and also on July 10, 1926, executed unconditional assignments. On August 2, 1926, Blackwood assigned the policy to the First National Bank of Corning to secure an indebtedness of approximately $4,500 and any other indebtedness which he might owe.

Foster became disabled within the terms of the policy, and the company made payments, some of which were paid to the bank and credited to Blackwood's indebtedness.

In April, 1929, the First National Bank of Corning secured a loan from the Corning Bank & Trust Company, and among the assets offered the Corning Bank & Trust Company was the indebtedness of Blackwood. In 1930 the Corning Bank & Trust Company became insolvent, and The Corning Bank & Trust Company purchased the assets, among which was the indebtedness of Blackwood secured by assignment of the policy above mentioned.

This suit was filed by appellee, alleging that his assignments to Dr. Blackwood were intended only to secure payment of a debt he owed Blackwood at the time, and that the debt had since been paid in full. It is appellee's contention that appellant has no greater title than Blackwood had. He prayed for a reformation of his assignment and for possession of the policy.

Appellant admitted that it had possession of the policy, but denied appellee's right to reform, and alleged that it was the unconditional owner by reason of the transaction above set forth. It further alleged that it, and its assignor, Corning Bank & Trust Company, with-

out knowledge or notice of appellee's contention, had relied upon the assignments executed by appellee to their prejudice, and that appellee is estopped to claim ownership.

There was a trial and a decree in favor of appellee, and the case is here on appeal.

Both Foster and Blackwood testified that, while the assignment was unconditional, it was made for the purpose of securing appellee's indebtedness to Blackwood, which was at that time $1,580. They further testified that, when Blackwood made the assignment to the bank, appellee only owed Blackwood $905, and they talked to Mr. Lindsey, of the bank, and told him that the assignment to Blackwood was made for the sole purpose of securing Foster's indebtedness to Blackwood, and that it had all been paid except $905; that the bank knew that the assignment was made to Blackwood for the purpose of securing the debt, and knew the amount of the indebtedness. They testified that they told the bank that the assignment was not intended to be an absolute assignment, but the intention was that, when the debt was paid, the policy was to be returned to appellee. There was other evidence corroborating the statements of the payments to Blackwood, reducing the indebtedness to $905. The evidence of Foster and Blackwood was not contradicted.

The witnesses for appellant testified that they read the assignment, and relied on Mr. Arnold's statement that it had an assignment of a life insurance policy as security for Blackwood's note. F. B. Sprague, J. G. Black and J. F. Arnold, all testified to substantially the same facts: that they took the assignment, and understood that they were getting the policy because the assignment was unconditional.

There was considerable testimony introduced, but it is immaterial in the determination of the issues in this case, and for that reason we do not set it out.

The appellant makes two contentions: first, that the court erred in its finding that appellee was entitled to a reformation of his assignments to Dr. Blackwood; second, that the court erred in its finding of law to the ef-

fect that Corning Bank & Trust Company could not rely upon the written acknowledged assignments from appellee to Dr. Blackwood, and that appellee is not estopped to deny they conveyed absolute title.

As to the first proposition, it is urged that appellee was not entitled to reformation of his assignments unless the evidence was clear and convincing, and appellant cites and relies on two cases: *Purvis* v. *Horn,* 185 Ark. 323, 27 S. W. (2d) 48, and *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. (2d) 714. In the case in 185 Arkansas, there was an assignment, and the court said: "If the second assignment set out above had been the only assignment, it would, of course, have been proper to tell the jury that it could not be treated as a mere pledge unless the testimony to that effect was clear, satisfactory and convincing."

In the instant case, there was the positive testimony of both Blackwood and Foster that the assignments were intended only for the purpose of securing the indebtedness to Blackwood, and that this was known to the bank. The representative of the bank, who received the assignment and contracted with Blackwood, was not a witness, and therefore the testimony of Blackwood and Foster was undisputed.

The evidence shows that S. P. Lindsey was the vice president of the First National Bank, and had positive knowledge that the assignment to Blackwood was for the purpose of securing a debt which at that time amounted to $905. The fact that both Blackwood and Foster testify to this, and that Lindsey does not testify, make the evidence on this, we think, clear and convincing.

It is contended by the appellant that the fact that appellee had Lindsey subpoenaed, and did not put him on the stand raises the presumption that, if he had been examined, his testimony would have been unfavorable. We do not agree to this contention. He was an officer of the bank; both appellee's witnesses testified to the transaction with him; he was present, and the appellant could have put him on the stand, and would doubtless have done so if he would have contradicted the testimony of Foster and Blackwood.

In the case in 182 Arkansas, the court said that a contract would not be reformed for mistake unless it be clearly shown that the mistake was common to both parties, and that the contract as executed does not express the contract as understood by either of them.

We think the finding of the chancellor on this question was correct. Moreover, the insurance contract, while assignable, was not negotiable, and any defense which could have been made to a suit by Blackwood, could also have been made against his assignee. *General Motors Acceptance Corp.* v. *Sanders,* 184 Ark. 957, 43 S. W. (2d) 1087.

Again this court said: "The fifth requisite of a negotiable instrument under that section is that it must be payable to order or bearer. The instruments sued upon are lacking in that essential, and are not negotiable instruments. Since the instruments were not negotiable, but assignable only, appellant took them subject to all defects or infirmities available to the maker as a defense against the payee therein." *General Motors Acceptance Corporation* v. *Salter,* 172 Ark. 691, 290 S. W. 584.

It is next contended that the court erred in holding that the bank could not rely on the written assignments, and erred in holding that appellee is not estopped. Appellant calls attention to 37 C. J. 438. The paragraph relied on in C. J. reads as follows: "An assignor may be estopped to question the validity of an assignment of a policy, where the elements of an estoppel are present; otherwise not."

That same paragraph also contains the following: "It has been held, however, that the assignor is not estopped to set up title as against one to whom the assignee assigned the policy."

There could be no estoppel in this case for several reasons; first, the court found that the bank knew that the original assignment was for the purpose of securing a debt; second, the court found that there is still a balance of the debt due Blackwood. Appellee would have no right to maintain a suit for the policy until the debt secured by the assignment was paid. The policy, being

assignable but not negotiable, put the bank upon inquiry to discover what interest Blackwood had in the policy, and especially is this true since the assignment by Blackwood was of his interest only.

There is no claim and no evidence that the appellee did anything that would estop him, and he did nothing that would prejudice the rights of the appellant, and the only thing that appellant claims would operate as estoppel is making the unconditional assignment. As we have already said, the instrument, being assignable but not negotiable, appellant was put on notice, and it was its duty to make inquiry and ascertain for what purpose the assignment was made. In addition to this, Blackwood's assignment was an assignment of his interest only, and this put the appellant on notice.

"As to estoppel and laches, the onus is on the party setting them up to make out the facts on which they rest." *Locke* v. *Bowman,* 168 Mo. App. 121, 151 S. W. 468.

"Nobody ought to be estopped from averring the truth, or ascertaining a just demand, unless, by his acts or words or neglect, his now averring the truth or ascertaining the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something by reason of what he had said or done or omitted to say or do." Herman on Estoppel, vol. 1, p. 6.

"Equitable estoppels only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results, and this forms the distinction between the common-law estoppel, and that which has grown up in equity in modern times." Herman on Estoppels, vol. 2, p. 862.

Appellant next calls attention to Cooley's Briefs on Insurance, vol. 2, p. 1115. There is nothing in this authority that supports the contention of the appellant.

Appellant cites and relies on the case of *Tower* v. *Stanley,* 220 Mass. 429, 107 N. E. 1010. The court there said, among other things: "The first notes being valid for their original tenor, the plaintiff concedes that he must pay the amounts, and it would follow that upon pay-

ment he would be entitled to a cancellation of the assignment and a return of the policy."

Appellant next calls attention to *Fidelity National Bank & Trust Co.* v. *McNeal,* 67 Fed. (2d) 516. We find nothing in this case that supports the contention of the appellant. The certificates transferred in that case bore the blank indorsement of the paving company, the original owner, and the appellant indorsed nothing on them to indicate its ownership or interest in them. It thereby clothed the Municipal Securities Corporation with every indicia of ownership. The court held: "Having clothed that company with every indicia of ownership, the appellee having acquired the securities in good faith, for value, and without notice of appellant's interest, it is estopped to assert that interest to defeat appellee."

The facts in this case clearly show that the original assignment by Foster was to secure the payment of his indebtedness to Blackwood, and that the bank took Blackwood's assignment of his interest with full knowledge of the facts. There is considerable conflict in the authorities as to the assignment of insurance policies. Many courts hold that a life insurance policy cannot be assigned to any person having no insurable interest, except as security for a debt. Those courts hold that an assignment to a person who has no insurable interest except for the purpose of securing a debt, is void, and that when made for the purpose of securing a debt, they are valid only for that purpose. This court, however, has held otherwise.

"But it is said that Mrs. Bledsoe had no insurable interest in the life of Henry, and that the assignment was void for that reason. The law does not allow one having no interest in the life of another to speculate upon that life by taking out a policy of insurance upon it; and, if Mrs. Bledsoe had taken out this policy on the life of Henry in her own name, there might be some question as to whether she had such an interest in his life as would support the policy. But every person has an insurable interest in his own life; and, as Henry had the right to take out a policy on his own life, payable to his administrator or assigns, it is not disputed that this policy was

valid. The policy being valid and belonging to Henry, he had, on the approach of death, the same right to give and transfer this property to any one in whose welfare he felt an interest as he had to dispose of any other property that he owned." *Matlock* v. *Bledsoe*, 77 Ark. 60, 90 S. W. 848. This case was followed in *Page* v. *Metropolitan Life Insurance Co.*, 98 Ark. 340, 135 S. W. 911; *National Life & Accident Ins. Co.* v. *Jackson*, 179 Ark. 412, 16 S. W. (2d) 469; *Home Life Ins. Co. of N. Y.* v. *Masterson*, 180 Ark. 170, 21 S. W. (2d) 414.

In the last case the court said: "Again, in *Page* v. *Metropolitan Life Ins. Co.*, 98 Ark. 340, 135 S. W. 911, it was held that the assignment of a life insurance policy to one not having an insurable interest in the life of the insured is not objectionable as being by way of cover for a wager policy, unless, at the time the policy was taken out, the insured intended to make such assignment.

"This court has adhered steadily to this ruling, and it has been uniformly held that a wagering contract of insurance is contrary to public policy, and void."

The assignment therefore is not void, although there may be no insurable interest, but since the policy is assignable but not negotiable, the assignee of Blackwood had no greater right than Blackwood had. Besides, the evidence shows that the bank knew that the original assignment to Blackwood was for the purpose of securing a debt.

We find no error, and the decree is affirmed.

BRANCH *v.* VETERANS' ADMINISTRATION.

4-3549

Opinion delivered October 1, 1934.

W. M. Hall, James G. Coston and *J. T. Coston,* for appellants.

Cleveland Cabler, for appellee.

BUTLER, J. Prior to August 1, 1927, Thad Branch, the appellant, was appointed guardian of Bert Branch, an insane person. The guardian took possession of the estate of his insane ward which was derived from the Federal Government through the Veterans' Administration on account of services rendered by Bert Branch as a member of the military forces of the United States during the World War. The guardian had in his hands surplus funds not needed for the support and maintenance of his ward and, on August 1, 1927, filed a petition with the probate court for authority to loan the sum of $3,000, alleging that the security proposed was one hundred

acres of land favorably located in the Osceola District of Mississippi County, in a high state of cultivation and worth $100 per acre, but which was then incumbered by a mortgage in the sum of $3,000 due the Southwest Mortgage Company. On the same day the court granted the prayer of the petition and made and entered an order finding that the security was adequate and authorizing the guardian to lend the money taking as security a mortgage on the land subject to that of the mortgage company.

In November, 1931, the guardian filed his settlement in which he credited himself with the aforesaid loan of $3,000 and two other loans made by him as guardian, one to O. P. Whitson in the sum of $250 and one to R. C. Allensworth in the sum of $125. To this settlement exceptions were filed by the Veterans' Bureau. The probate court sustained the exceptions, holding that the loan of $3,000 made to one Isadore Branch was not made on the security provided by law, that the two small loans mentioned were without any authority of the court having been obtained, and that the guardian had further failed to account for a sum of $272.58. The court adjudged him to be liable for all of these sums with interest thereon at six per cent. On appeal to the circuit court the action of the probate court in sustaining the exceptions was sustained, from which judgment this appeal has been prosecuted.

The appellants contend that, since the statute regulating the guardianship of insane persons places the management of their estates under the control of the probate court, that court had jurisdiction to make the order of August 1, 1927, authorizing the guardian to make the $3,000 loan to Isadore Branch, from which no appeal was ever prosecuted, and that, as the judgment of the probate court cannot be attacked collaterally, it protects the guardian in the loan made.

The finding of the probate court that the loans to Whitson and Allensworth, aggregating $375, were unauthorized does not appear to be contested. It is insisted, however, that the finding that the sum of $272.58 has not been accounted for is not supported by any evidence and that the judgment finding the guardian liable

for this sum should be reversed, and this contention is conceded by appellee.

It is the contention of the appellee that § 5061 of Crawford & Moses' Digest limits the power of the probate court to make an order authorizing the loan of an insane ward's money, and that, since the loan was not made on the security named in that section, the order of the probate court was *coram non judice* and so may be attacked in a collateral proceeding. Section 5061, *supra,* is as follows: "Guardians and curators shall loan the money of their wards at the highest rate of interest prevailing in the community that can be obtained on unincumbered real estate security, and then not more than to the extent of one-half of the value thereof. The interest in all cases shall be paid annually, and if not then paid shall become part of the principal and bear interest at the same rate." The order of the probate court of August 1, 1927, shows on its face that the security was not on unincumbered real estate, but it is the contention of the appellants that the statute quoted has no application. In this we find the appellants to be correct. The section is a part of chapter 78 of Crawford & Moses' Digest relating to guardians of minors and prescribing how a guardian shall administer their estates. The statute relating to insane persons providing how guardians shall handle the estates of such is wholly independent and distinct from that relating to the guardianship of minors, and has been since the earliest legislation in this State on those subjects. In 1838 the Legislature dealt with both subjects. In chapter 72 of the Revised Statutes the Legislature dealt with the subject of minors and their guardians, which statute was approved February 14 of that year. On February 20 following, chapter 78 of the Revised Statutes, dealing with insane persons and the guardianship of their persons and estates, was adopted and approved. That act remains unchanged except in some unimportant details and now appears as chapter 92 of Crawford & Moses' Digest.

In 1873 the Legislature considered anew the subject of minors, the appointment of their guardians and the administration of their estates, and enacted a compre-

hensive statute relating to this subject, being act No. 78 of that year, without, however, repealing or altering parts of chapter 72 of the Revised Statutes which now with that act is chapter 78 of Crawford & Moses' Digest. Section 40 of that act provided for the lending by the guardian of the money of his ward. That section was digested in Gantt's Digest as § 3076, and was amended by act No. 69 of the Acts of 1879 which became § 3514 of Mansfield's Digest. This section was further amended by act No. 73 of the Acts of 1893 and is now § 5061, Crawford & Moses' Digest. As a reason for reading § 5061 into the statute dealing with the estates of insane persons, counsel for the appellee suggests: "Some parts of the original act No. 78, approved April 22, 1873, concerned only estates, of minors, whereas other sections of that act concerned the administration of estates of both minors and insane persons, and as the major part of said act concerned minors, the Digester brought forward act No. 78 of 1873 to form a part of chapter 78 of Crawford & Moses' Digest, which probably was the proper place for act No. 78; however, the fact that the Digester placed it in that manner does not in any way change the provisions of that law or the intent which the lawmaking body had, as it is not an uncommon thing for our lawmaking body to incorporate as a part of a measure, a provision which, although it is related to the subject-matter, does not in fact strictly come under the general subject of the measure as enacted." Counsel does not point out the sections of the act which, in his opinion, relate to insane persons and the estates of such, and we cannot agree with him that any such exist. A careful reading of that statute leads to the inescapable conclusion that it relates to minors and the guardianship of their persons and estates, and to these alone.

This court in the case of *Fleming* v. *Johnson,* 26 Ark. 421-438, had under consideration the original acts contained in the Revised Statutes—one relating to minors and their guardians and the other relating to insane persons, drunkards, spendthrifts, and their guardians, and held the two acts to be independent of each other. In that case a father had been appointed guardian of

his son, a minor child, and, acting under the order of the court as such, sold to the appellee, Johnson, a parcel of land which was the property of said minor. Shortly afterward, the mother was appointed guardian of the minor on account of his insanity and brought an action to set aside the conveyance of the first-named guardian. In passing on the points thus raised, this court held that the probate court had jurisdiction of the subject-matter when it made the order for the sale of the real estate, and that it was not subject to collateral attack. The court said:

"Another point raised by the appellants is, that the court erred in excluding the proof that the ward of the guardian was insane from the time he was six years of age down to the time of the trial. It appears that the appellant, William Warren Fleming, was born April 14, 1842. His father, William W. Fleming, was duly appointed guardian by the probate court on the 15 of January, 1856, when he, the son, was under the age of fourteen years. The order for the sale of the lot was made at the same term of the court, and the report of the sale was made, approved, and the sale confirmed at the April term following.

"The matter in issue on the trial was the validity of the sale; and it was immaterial and irrelevant whether the appellant was sane or insane, when his father was appointed his guardian, or when the order of sale was granted, or when the sale was made, confirmed, etc., he being all the while an infant. The probate court appoints a guardian for an infant, solely because of the infancy, and no inquiry is made as to sanity. The law regards the infant, whether sane or insane, as incapable of acting for itself, and provides for it to be placed under a guardianship, which continues until it is of age, and then this guardianship ceases. Gould's Digest, chap. 81, p. 570. The law also provides for the appointment of guardians for adult persons, when found, upon proper inquest, to be insane, etc., Gould's Digest, chap. 89, p. 605. The two kinds of guardianship are as distinct as the two statutes which provide for them. The latter begins where the former ends, after the infant is of age."

In *Baker* v. *Loveland,* 174 Ark. 262, 295 S. W. 20, a daughter was appointed guardian of her aged and mentally incompetent mother. During the last two years of the mother's life she was an invalid and required much attention. The daughter guardian nursed her mother under a tentative agreement with the other members of the family that she would be compensated for her services. After the death of the insane ward, the guardian filed her claim in the probate court for the sum of $1,037 as compensation for her services. This was found to be reasonable and the claim allowed. After disposing of other questions in favor of the claimant, the court said: "Neither do we find any merit in appellant's contention that the claim for services rendered could not be allowed against the estate of the deceased, under the statute (§ 5058, Crawford & Moses' Digest) providing that the guardian shall not be allowed in any case, for the maintenance and education of the ward, more than the clear income of the estate, unless upon an order first made permitting such expenditure. This statute has no application to the guardianship or estates of insane persons." Thus it will be seen that we have held the two statutes distinct, both before and after the passage of the Acts of 1873 and the amendments in 1879 and 1893, and held the provisions governing the guardianship of minors has no application to the guardianship and administration of the estates of insane persons.

It is well settled that a guardian of an insane person at common law had no power except to hold intact and preserve the estate of his ward. Since the power to invest the insane ward's money does not exist at common law and is not given by § 5061, *supra,* if it exists at all, it must be found in the statute dealing with insane persons and the administration of their estates. This is the point which presents the greatest difficulty. We find no express grant to the probate court of the power to order the lending by a guardian of money belonging to his insane ward. The sections which deal with the administration of an insane person's estate are §§ 5852 and 5853 of Crawford & Moses' Digest, which are §§ 43 and 19 of chapter 78 of the Re-

vised Statutes. Section 5853 impowers the probate court, where an insane person is committed by it to guardianship, to make the necessary orders with respect to the person of the ward, and "for the management of his estate and the support and maintenance of his family and the education of his children out of the proceeds of his estate." Section 5852 places in the court the control of the guardian in the management of the person and estate of the ward and the settlement of his accounts, with power to enforce its orders in the same manner as a court of chancery.

We are of the opinion that the authority given the court to make orders for the management of the estate of an insane person and to control the guardian of such in the management of the estate by necessary implication confers the authority to make all necessary orders affecting the surplus money of the ward which, in the judgment of the court, would be to the best interest of the ward and of his estate. Therefore, the court is authorized to order a guardian to lend the surplus money of his ward.

The conclusion reached is supported by decisions construing the term "management of estates, property, etc.," as used in conveyances, wills and statutes. "Management" is defined as government, control, superintendence, physical or manual handling or guidance—the act of managing by direction or regulation, or administration, as the management of a family, or of a household, or of servants, or of great enterprises, or of great affairs. In re *Sanders,* 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

A statute giving the management of a certain fund to a certain commission implies the power to control the fund. "It allows the exercise of discretion. It could not be managed without the power to do so and by requiring the one the other was conferred." *Commissioners of Sinking Fund* v. *Walker,* 7 Miss. 143, 38 Am. Dec. 433.

A will constituting certain persons trustees of the estate * * * and directing that said trustees have the entire management of the estate * * * means the control

of the property to the end that income and profit should be derived from it such as leasing, investing, securing, collecting, etc. *Watson* v. *Cleveland*, 21 Conn. 538-41.

"Management," within the statute giving finance commissioner management of city finances, means control, superintendence, or physical handling or guidance. *Topeka* v. *Independent Indemnity Co.*, 130 Kan. 650, 287 Pac. 708.

A power of attorney, after mentioning certain specific powers, authorized the agent to act generally in the sale and management of the principal's personal property. This impowered the agent to execute in his principal's name a note for the price of corporate stock purchased by him for the principal, and did not limit the agent's power in executing notes to execute notes for indebtedness existing at the time the powers were executed, since to take entire management of an estate necessarily implies the power to invest the income and collections, and to manage money means to employ or invest it. *Keyes* v. *Metro. Trust Co.*, 220 N. Y. 237, 115 N. E. 455.

In *Sencerbox* v. *First National Bank of Idaho*, 14 Idaho 95, 93 Pac. 369, in construing a statute giving to the husband the management and control of the separate property of the wife during the continuance of the marriage, the court held that the words "management" and "control" have a well-defined meaning, that the power to manage implies the power to control, and that to manage money is to employ or invest it.

Sections 5853 and 5852, *supra*, therefore, impliedly authorize the court to order the investment by the guardian of surplus funds of a ward. The terms upon which a loan may be authorized and the security required is left to the discretion of the court, the presumption being that no improvident loans will be made or such as would not be well secured. In dealing with the estates of insane persons, the court ought never to authorize a loan except where there can be no reasonable doubt that the security is such that out of it payment could be secured without delay, and in the case at bar the court abused its discretion in authorizing a loan secured by property al-

ready incumbered with a mortgage which could, and would, have been corrected on direct appeal. However, probate courts are superior courts within the limits of their jurisdiction, and where, as in this case, jurisdiction is had of the subject-matter, a judgment of such court is impervious to collateral attack. This doctrine is so well settled by numerous decisions of this court that a citation of authorities is deemed to be unnecessary.

In view of the conclusions reached, it follows that the trial court erred in sustaining the exceptions as to the $3,000 loan. As heretofore noted, it appears that the action of the court in sustaining the exceptions as to the loans of $250 and $125 is not questioned. Indeed, this could not be, for the duty rests upon the guardian to administer the estate of his ward under the orders of the court and to affirmatively show that any loan made by him was so authorized.

The judgment of the lower court is therefore affirmed as to the $250 and $125 items, and reversed as to the $272.58 item, and, as to the "loan to Isadore Branch of $3,000," the cause is remanded with directions to overrule the exceptions as to those items, and certify its action to the probate court.

McHaney, J., dissents.

Campbell *v.* Anderson.

4-3533

Opinion delivered October 1, 1934.

Owens & Ehrman and *Herschell Bricker*, for appellants.

BUTLER, J. This action was begun by Anderson and certain other persons to enforce a laborers' lien upon crops grown by J. L. Kestle on lands owned by the Winooski Savings Bank. At the conclusion of the testimony a judgment was directed for the plaintiffs over the objection of the defendants, which action of the court is assigned as error.

The lease agreement under which Kestle operated was executed on March 29, 1930, between A. W. Campbell, agent, as lessor, and J. L. Kestle, as lessee. By this agreement the lessor leased for the crop year of 1930 certain lands in Arkansas County for the purpose of the lessee raising a crop of rice thereon. The lessee agreed to prepare the soil for planting, to plant, irrigate and harvest the crop, furnish all necessary work for said purposes, and for the threshing of the crop and hauling the same to market. He was also to furnish all necessary implements and to pay all other expenses incident to making the crop, including binder, twine, etc. The lease further stipulated that, "in consideration of lessor's leasing said lands to the lessee, lessee agrees to deliver for the account of the lessor one-half of the rice grown on said lands to the cars or mill at Almyra, DeWitt, or Stuttgart, at the option of the lessor." The lessor agreed to furnish the seed rice, electric power for the irrigation plant, to make necessary repairs thereon, to keep said plant in good working order during the year, and was to furnish lessee a "reasonable" amount of money with which to make the 1930 crop.

There is practically no conflict in the evidence. It was proved that the plaintiffs performed the work for Kestle in thrashing the rice, and that he was due them the amounts claimed, payment for which had not been made. It was admitted by them that they had no dealings

with the Winooski Savings Bank or with its agent, Campbell. It is also undisputed that the appellants furnished reasonably sufficient money with which to make and gather the crop, and that, after the proceeds derived from Kestle's half of the crop has been credited to his account, there remains a considerable balance still due.

The contract, the substance of which has been set out, establishes the relation between the Winooski Savings Bank and Kestle of landlord and tenant under the rule announced in *Hammock* v. *Creekmore*, 48 Ark. 264, 3 S. W. 180, followed and restated in *Barnhardt* v. *State*, 169 Ark. 567, 275 S. W. 909. From the terms of the contract, it is apparent that Kestle was not to receive a part of the crop from the landlord as wages for his work, but that he had dominion over the lands and controlled the processes of agriculture unhampered by interference on the part of the landlord, and was to pay one-half of the crop grown for the seed, use of the land and irrigation equipment, using his own farm equipment and furnishing the labor.

"If the share-cropper raises a crop for the landlord, and is to receive a part of the crop from the landlord as wages for his work, the title to the crop grown vests in the landlord, and the share-cropper has a lien thereon for his labor. If the share-cropper is to pay one-half the crop for the use of the land, with the tools and team and feed therefor, then the title to the crop is in the tenant, and the landlord has a lien thereon, and, in addition, the landlord has a lien for any necessary supplies of money or provisions to enable the tenant to make the crop, but the title to the crop is in the tenant." *Barnhardt* v. *State, supra.*

The statutes give a landlord a lien on crops raised by his tenant or employee for the rent of the land and for advances of money, or other supplies necessary to enable the tenant or employee to make and gather the crop. Section 6864, Crawford & Moses' Digest, which is § 1 of act No. 35 of the Acts of 1895, gives laborers an absolute lien on the thing, material, or property upon which they have performed work for the amounts due for such work, subject to the landlord's liens for rent and sup-

plies. The respective rights and conflicting claims of landlords for rent and advances made and those who perform work for a tenant or share-cropper in making or gathering a crop is discussed in *Burgie* v. *Davis,* 34 Ark. 179. In that case it appears that one Armistead was a laborer on the farm of Burgie. He was to make and gather the crop furnishing only his labor, food and clothing, and was to receive one-half the crop as his wage. Burgie was to, and did, furnish the supplies necessary to make the crop for which Armistead was to pay out of his half. The latter made a contract with others to work for him for which work he was to pay out of his half of the crop a certain part thereof. Burgie took possession of the crop when gathered, and Armistead's laborers brought suit to recover the value of the cotton agreed to be paid to them by Armistead as wages. It was held that they had a lien upon Armistead's half of the crop, but that it was subordinate to that of the owner for supplies furnished.

In *Cotton* v. *Chandler,* 150 Ark. 368, 234 S. W. 165, it was held, quoting headnote that: "Where a landowner employed a share-cropper to raise a crop on land, and made advances to him to be repaid out of his share of the crop, the landowner's right to a lien for such advances is superior to the rights of third persons who assisted the sharecropper in making the crop under an agreement with the latter that they should receive one-third of the latter's crop."

From the undisputed evidence in this case, with the statutes and decisions cited *supra* applied thereto, it is evident that the trial court erred in any view of the case in directing a verdict for the plaintiffs, but should have directed a verdict in favor of the defendant as requested by it. The judgment is therefore reversed, and the case is dismissed.

FORT SMITH GAS COMPANY *v.* WISEMAN.

4-3548

Opinion on rehearing delivered October 1, 1934.

Miles, Armstrong & Young, for appellant.

Trieber & Lasley, for appellee.

BAKER, J., (on rehearing). Upon the rehearing in this cause, we hold that the original opinion is erroneous, and that this opinion should be substituted for the one rendered on June 18, 1934.

There was passed at the 1933 session of the General Assembly (Acts 1933, p. 203) act 72, entitled, "An Act to Create a Fact-Finding Tribunal in the Corporation Commission." This tribunal was given the power, and it was made its duty, to investigate and make a finding of all facts entering into or forming the basis of

rates to be charged for any service supplied by any public utility "furnishing gas, water, light, heat or power; producing, generating, transmitting or distributing gas, water, light, heat or power; or furnishing telephone, telegraph or street railway service."

To raise funds to defray the expenses of this tribunal, it was provided in § 8 of the act that each public utility subject to the provisions of the act shall file with the tribunal "a sworn statement showing its gross earnings from property in this State for the preceding calendar year, and at the same time shall remit to the State Treasurer the sum of $2 for each $1,000 of such gross earnings as a fee for the fact-finding facilities afforded by this act, which fee shall be in addition to all property, franchise, license or other taxes, fees or charges now or hereafter prescribed by law. * * * The tribunal is hereby authorized to inspect the income tax return of any public utility for the purpose of checking up its gross earnings."

The Fort Smith Gas Company is engaged in the distribution of natural gas in the city of Fort Smith. The gas which it distributes is purchased from various pipe line companies. As required by the act from which we have quoted, the Fort Smith Gas Company made report of its gross earnings for the year 1932, from which it appeared that gas which had been furnished by the pipe line companies to the Fort Smith Gas Company at a cost of $214,769.01 had been distributed to the consumers for the price of $407,588.83. The Fort Smith Gas Company reported its gross earnings to be the difference between what it had paid for the gas and the price received for it, and made a tender of the tax imposed by § 8 of the act on that basis. The tender was declined by the Commissioner of Revenues, who insists that the tax should be paid on the whole amount for which the gas was sold, and not on the difference between the purchase and the sale price. The court below sustained that contention, and entered a judgment accordingly, from which is this appeal.

The question presented here for our determination and decision is whether the term "gross earnings," as

used in act 72, was intended by the Legislature to be synonymous with "gross receipts." In attempting to decide what the Legislature meant by "gross earnings," as the same appears in § 8 of said act, we think recourse should be had to the act itself, and with whatever authority we may be able to find, to aid in a determination of the legislative intent.

Act 72, appearing on page 203 of the Acts of Arkansas of 1933, is a regulatory statute, whereby the fact finding tribunal, organized as a bureau of the corporation commission, is empowered, by the act, to make investigations under the prescribed methods and procedure as set forth in said act, to determine and fix a basis upon which rates may be charged by utility companies doing business in the State. This investigation, for purposes of regulation, as will appear from § 2 of the act, is such that a person, firm, association, corporation, trustee, receiver or lessee, furnishing gas, water, light, heat, power; producing, generating, transmitting, or distributing any of the said products, or furnishing telephone, telegraph, or street railway service, may be made the subject of such investigation for the purpose of finding facts necessary to determine rates that may be charged. It will be observed in reading § 2 that the Legislature had in mind that one selling or distributing any of the products mentioned was supplying a service in the same sense that a service is supplied by telephone, telegraph, or street railway. Whether the utility sells commodities or transportation, the utility is treated as supplying "services" to the public. It was certainly not the purpose of the Legislature to discriminate as between one generating electricity or producing gas from its own wells or plants, and one who also renders a service by selling transportation on the street car system, or provides means for communication by telephone and telegraph. The rates to be charged for the rendition of this service, whether in the distribution of a commodity or in the production and sale of it, and the service rendered by a street railway company, or a telephone or telegraph company, come under the same regulatory power of the Fact Finding Tribunal.

The purpose of the Fact Finding Tribunal, the power or authority granted to it, the method of procedure provided, demonstrate that its function is purely regulatory, and that it is brought into being in the exercise of the police power of the State.

In order that it might become operative or effectual, it was necessary that money, or funds be raised, with which to pay expenses, including salaries, and this is provided for under § 8 of the act, and it is in this section that the term "gross earnings" is used.

Section 8 provides that: "Each public utility subject to the provisions of this act shall file with the tribunal a sworn statement showing its gross earnings from property in this State for the preceding calendar year, and at the same time shall remit to the State Treasurer the sum of $2 for each $1,000 of such gross earnings as a fee for the fact-finding facilities provided by this act, which fee shall be in addition to all property, franchise, license or other taxes, fees or charges now or hereafter prescribed by law."

It will be observed that the word "fee" is used instead of "tax," and we think that word is used in the sense that it is a "charge fixed by law for services of public officers or for the use of a privilege under the control of the Government." The charge made is of the same kind and class as that usually made, as authorized by statute, in municipalities for license fees, which are assessed or fixed by city councils, not as revenue charges, but in order that the regulations, inspections, etc., may be had without expense to the municipality. The law in such matters is too well known and recognized to require citation of authorities.

The principal case relied upon by learned counsel for appellant is *District of Columbia* v. *Georgetown Gaslight Co.*, 45 Appeals, District of Columbia, 63. We think that this case is not applicable and furnishes us no aid in the determination of the question involved here.

This District of Columbia case arose under an act of Congress of July 1, 1902, and the act itself shows that the words "gross receipts" and "gross earnings" were not intended to be used as meaning the same thing. We

agree with learned counsel that it is a well-reasoned case, but that court also recognized the fact that the terms "gross receipts" and "gross earnings" are very frequently regarded as equivalents.

A careful reading of the above case will disclose the fact that the act under consideration was a tax for revenue upon the "gross earnings," and not a fee for regulation. Each national bank was required to pay 6 per cent.; each gas company 5 per cent.; each electric lighting and telephone company 4 per cent. It provided also that street railway companies should continue to pay 4 per cent. per annum on "gross receipts," and insurance companies 1½ per cent. from premium receipts. The court followed the principle that our court has also approved—that an act imposing a special tax should be construed strictly against the State, and in favor of the taxpayer, and to the effect that the gas company was permitted to take from its "gross earnings" the amount expended or invested by it in the purchase of raw materials in the production of its commodity, in order to arrive at the basis for the tax. If we follow the same principle, as announced in the District of Columbia case, and treat the act as one of taxation, for the mere purpose of producing revenue, and not a fee, which the act calls the charge, then necessarily the authorities are ample to support the contention that earnings cannot be determined except by taking from the gross income, or "gross receipts," all of the expenses of the production of said commodity, and necessarily this would include whatever investments of capital were made in raw material, incidental to the production of the commodity from which the gross income was derived.

It is true that this court has held that a law imposing a special tax is to be construed strictly against the Government and favorably to the taxpayer. *McDaniel* v. *Byrkett,* 120 Ark. 295, 179 S. W. 471.

While we recognize the justice of that argument and would not impair the effect of the decision in the last cited case, we cannot concede that it is authority to defeat what we believe to be the legislative intent in the case under consideration.

Counsel for appellant in this case agree that the Fort Smith Gas Company should pay on the amount remaining, after deducting the cost of the gas purchased by it, and without any deduction of any cost of operation, or any return on its investments, or any tax or other charge of any kind. This is a fair concession in order to present its real contention to this court, but, if the District of Columbia case is authority, and if it should be followed by this court, it is also authority for deductions that should be made for cost of operation, etc.

But this question as to cost of operation, as we think, is conceded by all the parties, is settled in the case of *Railway Co.* v. *Shinn,* 52 Ark. 93, 12 S. W. 183. Quoting Chief Justice COCKRILL, the statement of the case is as follows:

"The company is known as the Dardanelle & Russellville Railway Company, and sells tickets to passengers and issues bills of lading for freight from the town of Dardanelle to Russellville and from Russellville to Dardanelle. It maintains a passenger ticket office, and a warehouse for the receipt of freights in the latter town. To facilitate the transaction of its freight and passenger business, it entered into a written agreement with Shinn, by the terms of which the latter agreed (to quote from the contract) 'to ferry all passengers, freight, baggage, mail, express matter, live stock and other kinds of freight, presented for ferriage by the party of the second part (the company) in the course of transportation by it, together with such conveyances as may be necessary to convey and transfer the same with dispatch and safety across the Arkansas River. * * * For and in consideration of which ferriage, and the services in regard thereto, the party of the second part hereby agrees to pay to the party of the first part (Shinn) one-fifth of the actual gross earnings of the railway, the party of the second part, on all passengers, freight, mail, express or other matter of every kind and nature whatsoever, carried across the said river either way.'

"Under the agreement the company transported its freights from the terminus of its track, across the ferry to its destination in Dardanelle, and from Dardanelle to

the railway at its own cost, and accounted to Shinn for one-fifth of the gross amounts earned thereby, and for the same proportion of the gross receipts for mail and express matter. It let the contract to haul its passengers, to a transfer company; which ostensibly charged twenty-five cents for transporting each passenger to or from the terminus of the track and points in the town of Dardanelle. The passenger vehicles were carried over the ferry without charge by Shinn under the impression that they were acting for the railway company, as a continuation of its line. The railway company sold the hack tickets, and out of the proceeds paid the transfer company twenty cents for their services, and retained five cents as a commission for selling such tickets, and as pay for the transfer company's ferriage for their hacks. The fare of the railway proper, between Dardanelle and Russellville, was fifty cents, which sum added to the hack fare made seventy-five cents for a complete ride between the two towns. Passengers were not required to purchase the hack tickets, and the railway fare entitled them to free ferriage without transportation from the terminus of the track to the ferry. The railway company accounted to Shinn for one-fifth of the amount collected by them as railway fare, that is, ten cents on each passenger and one-fifth of the five cents retained by them on the sale of each hack ticket."

"Shinn contended that he was entitled to five cents for each hack ticket sold, as being a part of the gross earnings contemplated by the contract. The railway company insisted that the transfer company was not a part of its system, and what it earned was a matter of no concern to Shinn. The latter instituted this suit to recover the difference between the amount he received and what he claimed. The cause was tried without a jury before the circuit judge, who heard testimony establishing the facts above detailed, and found therefrom that Shinn was entitled to recover. The only ground assigned for a new trial is that the finding is not sustained by the facts."

In this case it is stated that the railroad company paid four-fifths of the expense for crossing the river and

retained one-fifth, and in its settlement with Shinn was willing to pay him the one-fifth part of the five cents retained, claiming that the five cents was its "gross earnings," because of the fact that it had paid twenty cents of the twenty-five-cent charge for transfer across the river. The controversy arose because of the fact that the railway company construed the term "gross earnings" to be the one-fifth part of the charge, five cents, which it retained, and Shinn contended that "gross earnings" meant the full amount received, or the twenty-five cents.

In the consideration of this case, it should be kept in mind that the railroad company had nothing to sell, except its service, transportation; that it actually received, as between it and Shinn, only the five cents, but from the passengers it received twenty-five cents, though it paid to the transfer company twenty cents of that amount. The railroad company bought a part of the transportation, part of the service it sold, the part that was in dispute, just as the gas company in this case bought the gas that it resold to its consumers.

This court, in deciding that issue, held that the term "gross earnings" meant all that the railroad company had received, including this twenty-five-cent charge for each passenger transported. This case was decided at the May term of the Supreme Court in 1889, and, by its decision, gave to the term "gross earnings" the exact meaning contended for, of the same expression by the appellee in this suit. This particular case has never been overruled or modified, nor has the legal definition given by this court to the words "gross earnings" been changed in any particular.

Moreover, act 72 of Acts of 1933, shows the Legislature knew approximately what the work of regulation would cost. The fixing of the charges and appropriation determines that fact, and we think we can correctly assume it had some information in regard to the amount of fee or charge to make or place, so that payment by the utilities for the functioning of this regulatory plan, to which they were to be subjected, would be just.

It is apparent the fee fixed was intended to rest ratably and equitably upon such utilities. We cannot believe it proposed to fix a charge on a street railway which sells service only upon a basis of the gross amount of money received, and upon a gas company upon a basis of the gross profits only.

A street railway system might conceivably be organized with a million dollars capital stock, and use it all in its equipment to render the service for which it charges. The gas company organized, for a like sum, could spend one-half or three-fourths of its capital in a distribution system, and employ the remainder of its capital in the purchase of gas for distribution, and the total intake or receipts of the two corporations be the same. The two have employed the same capital, but in a different manner. The Legislature certainly meant they should pay equally. If one received or took in but a third part of what the other got, it should pay ratably. This construction eliminates expenses of bookkeeping, the costs of tax experts, controversies as to proper charges and deductions.

The court is of the opinion that the term "gross earnings," used in act 72 of the Acts of 1933, meant the entire receipts, without deduction for any expenditure, or any cost of operation, or other expense or cost of the service.

The act employs the expression, "gross earnings" as synonymous with "gross receipts," as in the case of *Railway* v. *Shinn, supra.*

The rehearing should be granted, and the judgment of the circuit court should be affirmed.

It is so ordered.

SMITH, MCHANEY and BUTLER, JJ., dissent.

SMITH, J., (dissenting). There was passed at the 1933 session of the General Assembly (Acts 1933, page 203) act 72, entitled, "An Act to Create a Fact-Finding Tribunal in the Corporation Commission." This tribunal was given the power, and it was made its duty, to investigate and make a finding of all facts entering into or forming the basis of rates to be charged for any service supplied by any public utility "furnishing gas, water,

light, heat or power; producing, generating, transmitting or distributing gas, water, light, heat or power; or furnishing telephone, telegraph or street railway service."

To raise funds to defray the expenses of this tribunal, it was provided, in § 8 of the act, that each public utility subject to the provisions of the act shall file with the tribunal "a sworn statement showing its gross earnings from property in this State for the preceding calendar year, and at the same time shall remit to the State Treasurer the sum of $2 for each $1,000 of such gross earnings as a fee for the fact-finding facilities afforded by this act, which fee shall be in addition to all property, franchise, license or other taxes, fees or charges now or hereafter prescribed by law. * * * The tribunal is hereby authorized to inspect the income tax return of any public utility for the purpose of checking up its gross earnings."

The Fort Smith Gas Company is engaged in the distribution of natural gas in the city of Fort Smith. The gas which it distributes is purchased from various pipe line companies. As required by the act from which we have quoted, the Fort Smith Gas Company made report of its gross earnings for the year 1932, from which it appeared that gas which had been furnished by the pipe line companies to the Fort Smith Gas Company at a cost of $214,769.01 had been distributed to the consumers for the price of $407,588.83. The Fort Smith Gas Company reported its gross earnings to be the difference between what it had paid for the gas and the price received for it, and made a tender of the tax imposed by § 8 of the act on that basis. The tender was declined by the Commissioner of Revenues, who insists that the tax should be paid on the whole amount for which the gas was sold, and not on the difference between the purchase price and the sale price. The court below sustained that contention, and entered a judgment accordingly, from which is this appeal.

As appears from the facts stated, the question presented for decision is whether the term "gross earnings"

should be construed as being synonymous with the term "gross receipts."

The question here presented was thoroughly considered by the Court of Appeals of the District of Columbia in the case of *District of Columbia* v. *Georgetown Gaslight Co.,* 45 Appeal Cases Dist. of Columbia, page 63. An act of Congress directed the collector of taxes of the District of Columbia to collect a tax on the gross earnings of banks, electric lighting, telephone, and gas companies doing business in the District of Columbia. The act required all street railway companies to pay a tax on their gross receipts, and insurance companies to pay on their gross premium receipts. The Georgetown Gaslight Company filed a report with the assessor of the district showing its gross earnings to be $97,719.58, and the assessor called upon the company for a statement as to how it arrived at the sum returned. The company furnished a statement showing that the total sales from gas and its byproducts were $160,939.99, and the cost of the raw material actually entering into the manufacture of the gas was $63,220.41, and that by deducting the cost of the raw material from gross receipts the company found and reported its gross earnings as $97,719.58, which was refused.

A demurrer was filed, which presented to the trial court the question whether the Gas Company should have been allowed the deduction of the cost of the raw material used in the manufacture of the gas in determining what were its gross earnings. The District of Columbia appealed from a ruling favorable to the Gas Company, and the synopsis of the brief filed by its counsel on its appeal to the Supreme Court of the District of Columbia indicates that an exhaustive investigation of the authorities had been made, and the opinion on appeal showed the cases cited were carefully considered and properly distinguished.

It was insisted there, as it is here, that gross receipts and gross earnings are in a broad sense equivalent terms, and that a tax on gross earnings and on gross receipts is one and the same thing.

It was pointed out in the opinion cited that with certain sorts of business concerns gross earnings and gross receipts constitute precisely the same sum of money, and it was there said that: "A railroad company engaged entirely in the rendition of services for which it received compensation, and neither producing nor furnishing any tangible commodity to persons as an incident to the rendition of the services, may have as its 'gross receipts' and its 'gross earnings' precisely the same moneys." But it was pointed out very clearly that it would be an economic fallacy to assert their identity in all cases or in any case where the revenue or income was derived from purchases and sales or from manufacturing and selling. There the taxpayer manufactured and sold gas, and it was there said: "It is engaged in selling a commodity, gas, which it produces by processes of manufacture by converting raw materials which have been purchased by money from its capital and its net surplus of earnings of former years which has been added to its capital. Large sums are used to buy those raw materials; and when the gas which is made from them is sold, there comes back to the company as a part of the money received from such sales the capital used in the original purchase of raw material, and when it thus comes back to the company it is returned to capital." This is equally true of gas bought and resold as in the case before us.

Among numerous other cases there cited and quoted from was the case of *People ex rel. Brooklyn Union Gas Co.* v. *Morgan,* 114 App. Div. 266, 99 N. Y. Supp. 711, where, upon facts identical to those involved in the District of Columbia case, the Supreme Court of New York, in the Appellate Division, said: "The comptroller has thus fixed the tax, not on the 'gross earnings' of the relator, as required by the statute, but on its gross receipts. Capital of a corporation which must first be invested before it begins to earn anything cannot be said to be a part of the earnings of such corporation merely because it is turned into cash, and thus in one sense becomes a receipt of the corporation. Earnings do not in-

clude capital, but are the productions or outgrowth of capital."

If the gas was not sold for something more than its cost, there would be "gross receipts," but not "gross earnings." If sold for more than it cost, the difference between the cost price and the sale price would be the gross earnings. If, for any reason, it was important to determine, as would be necessary in an income tax return, what the net earnings or net profits were, it would be necessary to know what the operating expenses had been, and to deduct these also.

If a merchant buys goods for a thousand dollars, and sells them for two thousand dollars, the gross receipts would be two thousand dollars, but his gross earnings would be only one thousand dollars, and his net profits or net earnings would be this thousand dollars less the operating expenses, and this is as true of gas as it is of goods or other merchandise.

These terms are explained and defined in our Income Tax Act (act 118, Acts 1929, vol. 1, page 573), under which income tax returns are made, to which the Fact-Finding Tribunal is given access by § 8 of the act of 1933 for the purpose of checking up the gross earnings of the utilities subject to the tax here sought to be collected. See also *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720.

There is nothing to indicate that the General Assembly did not use the term "gross earnings" in the sense in which it is ordinarily employed and as ordinarily understood, and, if this is true, it cannot be interpreted as meaning the collection of invested capital used to purchase an article bought for resale, which it would be if the Gas Company is required to pay a tax on the purchase price of the gas which it bought to distribute and resell.

The case of *Railway* v. *Shinn,* 52 Ark. 93, 12 S. W. 183, is cited as holding to the contrary. But such is not its effect. There a short line railroad operating between two towns only a few miles apart agreed to pay the operator of a ferry, which the railroad was required to use, one-fifth of the actual gross earnings of the railroad

as ferriage. It was held that the railroad should pay the sum agreed without deduction for hack fare incurred in completing a journey between the two towns. In other words, the operating expense could not be considered in determining the gross earnings. The Gas Company here asks no deduction for operating expenses, but has offered to pay on its gross earnings without credit for that expense.

It will not do to say that the Legislature said one thing, but meant another. We must ascertain the legislative intent from the language employed. Act 493 of the Acts of 1921 (General Acts 1921, page 472), imposing a tax on the gross receipts of certain insurance companies, clearly indicates that when the General Assembly wishes to tax gross receipts, it says so, and we may not interpolate that intention when the language employed indicates an intention to the contrary.

We conclude therefore that the State Revenue Commissioner should have accepted the tender made by the Gas Company in payment of the tax on its gross earnings.

This opinion, when delivered, expressed the views of the majority of the court as it was then constituted. Through a change in the personnel of the court, it does not express the views of the majority of the court as now constituted. It is therefore no longer the opinion of the court. But, inasmuch as it does express the views of Justices McHaney, Butler and myself, the remaining members of the court who originally made it, it is now filed as a dissenting opinion.

Hix *v.* State.

Criminal 3887

Opinion delivered September 24, 1934.

Roy Hix and Otis Crosser were convicted of murder in the second degree, and have appealed.

W. M. Thompson, I. J. Matheney and *J. Paul Ward,* for appellant.

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

SMITH, J. Appellants were jointly indicted, along with Essie Fulbright, for the murder of W. P. Ford, which crime was alleged to have been committed by striking Ford with a rock and thus killing him.

There was a severance by Essie Fulbright, and upon her trial she was convicted of murder in the second degree, and has duly appealed. Appellants were also convicted and given each a sentence of ten years for murder in the second degree.

It was the theory of the prosecution that these parties had robbed Ford, and that the homicide was committed either in the commission of that crime or as the result of a fight after the robbery resulting from Ford's attempt to recover the money stolen from him.

The appeal of Essie Fulbright has been disposed of in an opinion handed down this day by the Chief Justice, which reviews the testimony in that case. The testimony heard at the trial of appellants was not substantially different from that offered in the case of Essie Fulbright, and it will not, therefore, be repeated. Certain other questions which were raised at each of the trials are also disposed of by the opinion in the Fulbright case.

It is very earnestly insisted, for the reversal of the judgment from which this appeal comes, that the testimony does not support the verdict. The insistence is that appellants should have been convicted either of murder in the first degree or of voluntary manslaughter or should have been acquitted.

It is argued that, if Ford was killed in an attempt to rob him, the crime of murder in the first degree was committed, whereas if he was killed in a subsequent fight which Ford brought on in an attempt to recover the money which he claimed had been stolen from him, the homicide would have been only voluntary manslaughter, and that in no event were appellants guilty of murder in the second degree, the crime for which they were convicted and sentenced. It is insisted, therefore, that it was error for the court to give an instruction numbered 12, which defined the crime of murder in the second degree. It is not argued that this instruction erroneously defined that crime, but the insistence is that it was error to submit the question of appellants' guilt of that crime to the jury.

For the reason already stated, the testimony will not be reviewed in this case; but it may be said that the testimony in the instant case is as conflicting as was the testimony in the Fulbright case. According to the testimony offered on appellants' behalf, they did not kill Ford or participate in his murder, and they should therefore have been acquitted. Will Parish was one of the principal witnesses for the State, and he admitted having made, prior to the trial, statements conflicting with his testimony at the trial. He testified that he was a partisan of Ford's during the fight, and that after the fatal blow had been struck Ford's assailants debated what they would do with him. He testified that he was placed on the floor of the car between the seats and that "They were on top of me between the seats, like I was hog tied," and he was carried for some miles from the scene of the encounter, where he was dumped out of the car with the warning that if he told what had happened he would be killed.

There were conflicts in the testimony which it was the peculiar province of the jury to consider and to reconcile if they could be, and, as there was testimony legally sufficient to have supported a conviction of the highest degree of homicide, there was no error prejudicial to appellants in charging upon the lower degrees of that crime. *Arnold* v. *State*, 179 Ark. 1066, 20 S. W. (2d) 189, and cases there cited. A general charge upon the law of homicide and the distinctions between the degrees thereof was given, and no insistence is made that the law was not correctly declared in the instructions.

Subsequent to the adjournment of the term at which the trial was had and the sentence pronounced, a motion for a new trial was filed on the ground of newly-discovered evidence. On this motion appears the notation of the trial judge that it was overruled as having been filed out of time, and for the additional reason that it alleged no facts entitling appellants to that relief. We concur in this ruling for both reasons assigned by the trial court. *Incorporated Town of Corning* v. *Thompson,* 113 Ark. 237, 168 S. W. 128; *Thomas* v. *State,* 136 Ark. 290, 206 S. W. 435; *Collatt* v. *State,* 165 Ark. 136, 262 S. W. 990. The testimony set out in this motion is either cumulative of other testimony heard at the trial (*Dillard* v. *State,* 174 Ark. 1179, 298 S. W. 27) or tending to impeach such testimony (*Hayes* v. *State,* 169 Ark. 883, 277 S. W. 36).

No error appearing, the judgment must be affirmed, and it is so ordered.

BRIDGE TIRE COMPANY *v.* MASSACHUSETTS BONDING & INSURANCE COMPANY.

4-3532

Opinion delivered October 1, 1934.

Warner & Warner, for appellants.

Joseph R. Brown and *Beloate & Beloate,* for appellees.

JOHNSON, C. J. This action was instituted by appellants, Bridge Tire Company, Roy M. Johnston and Ben B. Johnston, against appellees, Massachusetts Bonding and Insurance Company and R. E. Patterson, to enforce an alleged liability for dishonest use and misapplication of funds, merchandise and personal property belonging to appellants and to establish liability against a fidelity bond executed by appellee, Bonding & Insurance Company, by the terms of which appellants were indemnified against dishonest misuse of funds and property by Patterson amounting to larceny or embezzlement. The fidelity bond provides:

"Whereas, Ray E. Patterson, Fort Smith, Arkansas, hereinafter called the 'employee,' has been employed as manager by Bridge Tire Company, Fort Smith Arkansas, hereinafter called the 'employer,' and has been required to furnish a bond for his honesty in the performance of his duties in the said position.

"Now, therefore, in consideration of a premium paid for the period from the 1st day of March, 1928, to the 1st day of March, 1929, at twelve o'clock noon, it is hereby agreed that, subject to the conditions set forth in this

bond, the Massachusetts Bonding & Insurance Company hereinafter called the 'surety,' shall within three months next after proof of loss has been furnished to it, as hereinafter set forth, reimburse the employer to an amount not exceeding five thousand and 00/100 dollars ($5,000), for such pecuniary loss as the employer shall sustain of money, securities or other personal property belonging to the employer or for which the employer is responsible, by any act or acts of larceny or embezzlement on the part of the employee while in the performance of the duties of the office or position in the service of the employer as hereinbefore stated, and which shall have been committed during the life of this bond and discovered within six months after the expiration or cancellation thereof, or within six months after the death, dismissal or retirement of the employee from the service of the employer prior to such cancellation, subject to the following express conditions, which shall be conditions precedent to any recovery hereunder."

The chancellor, after hearing the evidence, found as follows:

"The court finds that there was no effort of defendant, Patterson, to cover up or disguise any of his acts or transactions; that he was negligent and exercised poor judgment, but that not one of the items of shortage sued for is impressed sufficiently with dishonesty or fraudulent intent on defendant Patterson's part to constitute either larceny or embezzlement, as used in the terms of the bond sued on. It is therefore considered, ordered, adjudged and decreed that plaintiff's complaint be dismissed for want of equity, and that defendants recover their costs herein."

The undisputed evidence reflects that, beginning in the year 1928, Mr. Patterson, the manager of appellants business in Fort Smith, began paying his personal obligations from his employer's funds. For instance, on January 23, 1929, he paid to Sutton Chevrolet Company, out of his employer's funds, $33.50 and charged this item upon the books of his employer to "service auto expense," when the fact was and is that this was a payment on his personal automobile and a discharge of his

individual liability. On January 4, 1929, Patterson paid to Stein Wholesale Dry Goods Company $6 out of his employer's funds and charged it upon his employer's books as "sundry expense," when the fact was this item represented the purchase price of one pair of blankets purchased for Patterson's personal use. On December 12, 1928, Patterson paid out of his employer's funds to Morris Morton Drug Company, $16.50 and charged same on his employer's books to "sundry expense," when in truth and fact this item represented the purchase price of one tea set purchased for Patterson's individual use. On August 10, 1931, Patterson paid out of his employer's funds the sum of $13.55 to Armour & Company and charged same on his employer's books to "sundry expense," when in truth and fact the charge was for a bill of groceries purchased and used by Patterson personally. On May 17, 1932, Patterson deducted $9.10 from his gross pay roll and charged this item to cash disbursements and never accounted to his employer therefor. The items just referred to will serve to show the trend of all transactions complained of and the kind and character of testimony which the chancellor construed as being insufficient to warrant a finding of liability against the fidelity bond.

The fair and reasonable construction of the fidelity bond is that the bonding company guaranteed the honesty and fidelity of Patterson in performance of his duties as employee to his employers against furtive or dishonest misuse for his own benefit of funds or property placed in his custody amounting to larceny or embezzlement. *Equitable Surety Co.* v. *Bank of Hazen,* 121 Ark. 422, 183 S. W. 743; *U. S. F. & G. Co.* v. *Bank of Batesville,* 87 Ark. 348, 112 S. W. 957; *Fidelity & Deposit Company of Maryland* v. *Cunningham,* 177 Ark. 638, 7 S. W. (2d) 332; *Fidelity & Deposit Company of Maryland* v. *Cunningham,* 181 Ark. 954, 28 S. W. (2d) 715; 19 Cyc. 518, and cases there cited.

It is true we held in *U. S. F. & G. Company* v. *Bank of Batesville, supra,* and other subsequent cases that fidelity bonds restricted by their terms to larceny or embezzlement of the employee did not cover every loss

which might be sustained by their employer, but when the loss is due to dishonest misuse or dishonest misapplication of the funds or property by such employee which amounts to larceny or embezzlement when used in their generic sense as distinguished from a criminal technical sense, liability should and does follow.

Neither can we agree that this fidelity bond does not cover the losses due to Patterson's dishonest misuse of the funds, because he was a partner and interested in the business, because the insurer was fully advised of this fact prior to executing the bond, and it will not now be heard to say that it is not liable thereon, thereby nullifying its obligation from its inception. *American National Ins. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82; *Travelers' Protective Ass'n of America* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Metropolitan Ins. Co.* v. *Minton,* 188 Ark. 456, 66 S. W. (2d) 627; 14 R. C. L., p. 1166, and cases there cited.

Next appellees urge that the chancellor's finding of no liability against appellees should not be disturbed because not against the preponderance of the evidence. As heretofore pointed out, Patterson's liability for practically all, if not all, the items in controversy were admitted by him, but he seeks to avoid responsibility therefor by showing that he reimbursed his employers for the funds and merchandise dishonestly misused and misapplied. The burden of showing reimbursements was upon Patterson and the insurer, and, after most careful consideration of all the testimony introduced, we have come to the conclusion that appellees have not discharged this burden. True, Patterson and his wife say they have reimbursed the employer for all misused and misapplied funds and merchandise, but no receipts, vouchers, proof, canceled checks, book entries or other corroborating facts or circumstances are offered in support of their general statements of reimbursements, and we are unwilling to accept their general statements as proof sufficient to overcome the *prima facie* case made by appellants.

We now proceed to the only remaining question, the amount to which appellants are entitled to recover. The general course of dealings by Patterson with the prop-

erty and funds intrusted to his care and management is exemplified by the items heretofore set out, and we shall deal with all remaining items in a general way only tested by the rules of law heretofore stated. The aggregate of all items falling within the rule stated is $3,413.67, and judgment should have been rendered for this sum in the lower court.

For the reason stated, the cause is reversed, and judgment will be entered here in favor of appellants, and against appellees for the amount indicated.

ADAMS *v.* MITCHELL.

4-3507

Opinion delivered October 1, 1934.

F. G. Taylor, for appellant.

C. O. Raley and *G. B. Oliver, Sr.,* for appellees.

SMITH, J. Appellant brought suit in ejectment to recover the possession of the southeast quarter of the southwest quarter of section 35, township 20 north, range 4 east, and pleaded as the source of his title a deed from the State based upon a tax sale to the State for the nonpayment of the 1926 taxes thereon. Before the trial he amended his complaint to allege the ownership of the southwest quarter of the southwest quarter of the same section under a deed to him from M. S. Smith and wife.

The transcript does not contain the answer filed in the cause, but it does contain a pleading entitled "amendment to the answer," and it contains also an answer to the cross-complaint filed by the defendant, but it does not contain the cross-complaint itself. The case is briefed, however, as if all the questions herein discussed had been put in issue by proper pleadings, and we shall so treat them.

As to the tract of land last described in the amended complaint, the following facts were developed. Smith had mortgaged the land to Henry Lepp, and, while Smith was confined in the State penitentiary, suit was brought against him to foreclose the mortgage. A decree of foreclosure was rendered as prayed, pursuant to which the commissioner appointed to execute the decree sold the land to Lepp, the mortgagee, and upon the confirmation of the report of sale a deed was executed to Lepp, which was duly approved by the court.

Attack was made on this foreclosure proceeding, and the deed executed pursuant to it on the ground that the decree had been rendered upon improper and insufficient service. We do not discuss the facts upon which that contention is based, for the reason that the court found that no defense against the foreclosure suit was shown. Smith admitted that he owed the debt which the mortgage was given to secure, and the court therefore properly refused to vacate the decree of foreclosure and the proceedings thereunder. This action must be affirmed, as the rule is well established that, before one many question the service upon which a judgment or decree was rendered, he must show the existence of a defense to the suit which terminated in the judgment or decree. *More-*

land v. *Youngblood,* 157 Ark. 86, 247 S. W. 385; *King* v. *Dickinson-Reed-Randerson Co.,* 168 Ark. 112, 269 S. W. 365; *Minick* v. *Ramey,* 168 Ark. 180, 269 S. W. 565; *C. A. Blanton Co.* v. *First Nat. Bank,* 175 Ark. 1110, 1 S. W. (2d) 558.

There was a proceeding to amend the original decree, and an amended decree was rendered, which we must accept as reflecting the final action of the court. This amended decree adjudicated the fact that the plaintiff acquired no title to the land described in the deed to him from Smith, for the reason that Smith had lost his interest in the land through the foreclosure proceeding hereinabove referred to, which the court refused to vacate for the reason that "no defense to the original suit by Henry Lepp against said M. S. Smith is set up or shown."

As to the tract of land first described in the original complaint, it may be said that the record is somewhat confused, and two writs of certiorari have been sued out and returned to clarify the record. The last return of the clerk upon these writs shows certain errors in the original transcript, and we must take the final certificate of the clerk as to the record made at the trial from which the appeal comes as correct.

There was filed with the original complaint, and as an exhibit to it a deed from the State "for forfeited lands sold" to plaintiff, which recites that the land there described was forfeited to the State for the nonpayment of the taxes for the year 1926. The exhibit of this deed to the complaint shows that it is a copy of the deed as recorded in deed record book 28, page 380, and the original of the deed does not appear to have been offered in evidence. As thus exhibited, the deed recites that it was based upon a forfeiture to the State for the nonpayment of the taxes due for the year 1926.

There appears, however, in response to one of the writs of certiorari, what is now certified to be a correct copy of the deed as recorded in deed record book 28, at page 380, which shows that the State's deed was based upon a forfeiture for the nonpayment of the 1924 taxes. But it was shown at the trial from which the appeal

comes that the taxes on the entire southwest quarter, which embraces the land herein described, have been paid, as evidenced by tax receipt No. 860, issued on March 31, 1925, for the year 1924. As the taxes had been paid, the sale to the State for their nonpayment was, of course, void, and the deed based thereon from the State conveyed no title.

Upon this showing the court correctly refused to award the possession of the land to the plaintiff; and also correctly refused to render judgment in plaintiff's favor for the sum paid by him to the State for his deed from the State.

The cause had by consent been transferred to equity, where the deed from the State was canceled and held for naught, and, as the decree dismissing the complaint as being without equity is correct, it must be affirmed, and it is so ordered.

RIGGS *v.* BUCKLEY.

4-3545

Opinion delivered October 8, 1934.

G. L. Grant, for appellants.

James B. McDonough, for appellees.

SMITH, J. A complaint containing two counts was filed on December 14, 1932, against J. H. and A. M. Buckley by the City National Bank of Fort Smith, for itself individually and as agent and trustee for certain named plaintiffs, among whom were J. A. Riggs and

P. L. Riggs, his wife, who filed an answer and cross-complaint against the bank and against I. H. Nakdimen as its president. This pleading filed by Riggs and his wife contained allegations which will be later discussed. Testimony was heard upon the issues thus joined, and the court made certain findings, which are set out in the decree from which this appeal comes, which are supported either by the undisputed testimony or by what we conceive to be the preponderance thereof, to the following effect.

On February 14, 1931, J. H. Buckley and A. M. Buckley, who are brothers, borrowed from the City National Bank, as agent, the sum of $5,000 for the specific purpose, then made known to the bank, of buying certain property then about to be sold under a partition proceeding. The Buckleys became the purchasers of the property and obtained the loan from the bank to pay for it. The loan was evidenced by five notes, each for the sum of $1,000, all dated 2-14-1931, and all falling due 2-14-32, and to secure their payment the Buckleys executed to the bank, as agent, a deed of trust covering the property thus purchased. This deed of trust recited that it was given to secure, not only the $5,000 thus loaned, but also "any and all other indebtedness that may be due or owing to the mortgagee from the mortgagor." The court found that after the execution and delivery of the notes and the deed of trust securing them, the notes—all of them—were sold by the bank to one Hank Volle, who is now the owner of the notes, and that the bank has no interest in them.

It was further found that A. M. Buckley had acquired the interest of his brother, J. H. Buckley, in the lots, and had paid the interest on the notes and had otherwise complied with the terms of the deed of trust, and that Volle, the owner of the notes and the deed of trust, is not a party to this proceeding and is not asking the foreclosure of the deed of trust or other relief, but that the bank is asking its foreclosure to secure the "other indebtedness" due it at the time the deed of trust was executed. The court found that, when said five notes and deed of trust securing them were executed on 2-14-31,

J. H. Buckley was at that time indebted to the bank in the sum of $25,900, evidenced by two notes, one for $10,000, and the other for $15,900. The court also found that when the two notes last mentioned were executed Buckley was worth a sum of money so greatly in excess thereof that security was not regarded as necessary, and none was taken, but because of the decline in values, then in progress, the bank, on August 1, 1931, took a mortgage from J. H. Buckley on a large amount of real property.

The court found that, as the bank had no interest in the five notes of J. H. and A. M. Buckley owned by Volle, it had no right to foreclose the deed of trust given to secure them in satisfaction of other indebtedness due by J. H. Buckley to the bank, and that the count praying its foreclosure for that purpose should be dismissed for want of equity. There is no appeal by any one from that part of the decree.

It was further found that on August 1, 1931, J. H. Buckley, being indebted to the bank in the sum of $10,000, evidenced by ten notes each for $1,000, all dated August 1, 1931, and all due August 1, 1932, executed a mortgage to the bank upon six parcels of real estate. The bank sold all ten of these notes except note No. 7, which it still owns. Note No. 5 was sold to J. A. Riggs and his wife, and the decree ordered the foreclosure of the mortgage to enforce the payment of all ten notes. The bank had made a collection of $587.80, hereinafter referred to, and it was ordered that this sum be credited upon the ten notes ratably.

It was further decreed that the balance due the bank from J. H. Buckley, then unpaid, amounting to $18,400, but which was not specifically named in the mortgage as being secured by it "is subordinate to the claim of the plaintiffs above named whose notes are named in the mortgage." In other words, the holders of the ten notes for a thousand dollars each had a lien upon the land described in the mortgage to secure their payment which was superior to any lien which the bank might have for any other debt due it, and it was provided that the owner

of each of these ten notes "has the right to bid at said sale [foreclosure sale by the commissioner] and to purchase the property, and, in the event that the property is purchased by any of the plaintiffs, said plaintiff will not be required to give bond for the proportionate amount of the said plaintiff's judgment against said property."

The cross-complaint filed by Riggs and wife against the bank and Nakdimen contained allegations to the following effect: They had for a number of years been depositors of the bank, and were accustomed to advise with Nakdimen about their investments, and had on a number of occasions bought notes owned by the bank on Nakdimen's recommendation. They bought note No. 5 for $1,000, hereinabove referred to, for its face value and accrued interest, upon the representation of Nakdimen that it was secured by a first mortgage lien upon valuable lands located in Fort Smith, when it was not in fact so secured. They allege the insufficiency of security to pay all ten of the thousand dollar notes, and they pray judgment against the bank and Nakdimen for the amount of their note No. 5.

It will be remembered that there has been no sale under the decree of foreclosure, and we do not, therefore, know to what extent, if any, the owners of note No. 5 will be damaged by reason of their purchase thereof. J. H. Buckley testified that the fair market value of the lands described in the mortgage dated August 1, 1931, was on that date $37,000, and a real estate dealer who has no interest in the litigation placed the value on the same date at the sum of $56,600. It does not appear just when note No. 5 was sold, it being alleged that it was sold on the ..... day of ....., 1931.

Dr. J. H. Buckley testified that he had been adjudged a bankrupt at the time his deposition was taken. He also testified that on August 1, 1931, he owned stock in a corporation then worth $16,000, which he could have sold a year earlier for $28,000, but which was worthless at the time of giving his testimony, but he thought he was worth fifty to sixty thousand dollars net on August 1, 1931.

The ten one thousand-dollar notes were written on blank forms across the back and face of which there was

printed the words "Real Estate First Mortgage Coupon Note," but these words were not written into the body of the note. J. A. Riggs testified that he supposed the mortgage was a first lien upon all the lands which it described, but he did not testify that Nakdimen made that representation. He did testify that Nakdimen "told me there was a mortgage on all Dr. Buckley's property, and I accepted it on that recommendation."

Riggs made no inquiry or investigation as to whether the mortgage was a first lien on all the property which it described until after Buckley had been adjudged a bankrupt, when he "ran the records," as he expressed it, and found that upon parcel No. 4 of the land there was a first mortgage to Charlie Jewett, securing a loan of $10,500, and that the land had been sold at the foreclosure sale of that mortgage to Jewett for $5,000, and that as to parcel No. 6 Buckley owned only an undivided one-fifth interest, which was sold with the other interests at a partition sale, and that Buckley's interest brought at this sale only $587.80. This is the sum above referred to which the court ordered credited upon the ten notes ratably.

In testifying about the mortgaged property and its value, the witnesses referred to the various lots as parcels Nos. 1, 2, 3, 4, 5 and 6, and we shall employ the same descriptions. Parcel No. 6 was not valued by Dr. Buckley in his estimates of value, but he placed a value of $14,000 on parcel No. 4, which, if deducted from his total estimate, would leave a remaining value of $23,000, and witness Little valued parcels 4 and 6 at $35,000, and, if these values are deducted from his total estimate, $21,600 remains.

It is not contended that Nakdimen made any specific representation as to the extent of Buckley's interest in any of the parcels of land, but only that he represented that the mortgage covered all of Dr. J. H. Buckley's land. This representation was not false, but was true. Nor is it contended that Nakdimen made any representation that the mortgage constituted a first lien on all the parcels of land which it described. Riggs' impression that it did appears to have been based upon the printed

words appearing upon the face and back of the note reading "Real Estate First Mortgage Coupon Note."

Riggs and his wife do not own any of the five notes referred to in count No. 1 of the original complaint, and are not, therefore, interested in that mortgage. But the circumstance of its execution does tend to show the good faith of the bank and its president, for that loan was made only about six months before the mortgage dated August 1, 1931, was taken, and no security for the five thousand dollar loan was given except only a mortgage upon the land which that money was borrowed to buy.

In this connection, it may be said that, while the adjudication of Dr. J. H. Buckley to be a bankrupt is conclusive evidence of his insolvency, it does not follow that Riggs and his wife will sustain a loss by reason of their purchase of the note. It was decreed that the mortgage of August 1, 1931, secured first the ten notes of a thousand dollars each, and that any security for the remaining debt due by Buckley to the bank was subordinate thereto, and the bank has not appealed from that decree, and if the property shall sell at the commissioner's sale for even half what its market value was represented to be on August 1, 1931, all ten of the thousand dollar notes will be paid in full. There is therefore no showing that the note owned by Riggs and his wife is worthless, or that it is worth less than its face value, and for this reason, if for no other, the court was justified in dismissing —as it did—the cross-complaint of Riggs and his wife against the bank and Nakdimen as being without equity. *May* v. *Dyer,* 57 Ark. 441, 21 S. W. 1064.

Moreover, we do not think there was shown to exist any such confidential relation between Riggs and Nakdimen as the representative of the bank which would justify Riggs in failing to exercise an intelligent judgment in purchasing the note. *Cherry* v. *Brizzolara,* 89 Ark. 309, 116 S. W. 668. A reading of the note itself would have shown that it did not recite that it was secured by a first mortgage on all the lands described in the mortgage. On the contrary, the recital of the note in this respect, which appears just above the signature of the makers, is that

"This note is secured by property in the city of Fort Smith," which recital was true. Nakdimen was not asked and did not state that the mortgage here sought to be foreclosed was a first mortgage upon all of the lands described therein, but stated only that the mortgage described all the lands which Dr. Buckley owned, and that statement was not shown to be false.

There is no contention that there was any guaranty of the payment of the note. On the contrary, when the note was sold to Riggs and his wife, it was indorsed as being transferred "without recourse."

It appears to be a fact that the mortgage was a first lien upon five of the six parcels of land, and this lien, under the decree of the court, secures first the ten one thousand dollar notes, and none of the proceeds of the foreclosure sale may be credited to the other indebtedness due the bank until these notes have been first paid.

We find no testimony in the record to sustain an action for deceit by showing a lack of good faith and the making of false and fraudulent representations, and the decree of the court must therefore be affirmed, and it is so ordered.

BOLING *v.* STATE.

Crim. 3900

Opinion delivered October 8, 1934.

Oscar Fendler and *W. A. Jackson,* for appellant.

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

HUMPHREYS, J. Appellant was indicted for murder in the second degree in the Chickasawba district of

Mississippi County for shooting and killing Paul Cody, and, upon a trial of the cause, was convicted of voluntary manslaughter, and adjudged to serve a term of four and one-half years in the State penitentiary, from which judgment he has duly prosecuted an appeal to this court.

The only assignment of error insisted upon by appellant for a reversal of the judgment is that the court permitted the jury to separate for the night after the cause had been submitted to them. Upon the conclusion of the arguments, the court ordered that the jury be kept together, over the objection of appellant, who had filed a motion requesting that they be permitted to separate. The sheriff in charge of the jury reported to the court that it was impossible to obtain accommodations over night for the jury in a body; whereupon, by and with the consent of Mr. Cooper, one of appellant's attorneys of record, an order was made permitting them to separate. The appellant, who was out on bond, was not present when this order was made. Some three hours after the jury had rendered its verdict of conviction, the appellant entered his objections and exceptions of record to the order of the court allowing the jury to separate the night before.

As authority for his contention that the court committed reversible error in allowing the jury to separate for the night, appellant cites § 3136 of Crawford & Moses' Digest, which reads as follows: "If the indictment be for a felony, the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or if on bail shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered until the presence of the defendant is obtained."

The statute, of course, was passed for the benefit of defendants, but there is nothing in the statute preventing a defendant from waiving his presence when substantive steps are taken in the progress of his case. When one of appellant's attorneys consented to the order for the separation of the jury over night, it, in effect, was a

waiver of appellant's presence. The record does not show to the contrary, so the presumption must be indulged that the attorney had the right to waive appellant's presence. *Scruggs* v. *State,* 131 Ark. 320, 198 S. W. 694.

No error appearing, the judgment is affirmed.

LOUISIANA OIL REFINING CORPORATION *v.* SCROGGINS.

4-3547

Opinion delivered October 8, 1934.

Ingram & Moher and *Buzbee, Harrison, Buzbee & Wright,* for appellant.

M. F. Elms, for appellee.

BUTLER, J. This suit was begun in the justice of peace court on the account and affidavit filed by Everett Scroggins for balance of wages alleged to be due him by the Louisiana Oil Refining Corporation. A written answer was filed to the affidavit in which the corporation denied that it was indebted in the sum claimed or in any sum, or that the plaintiff was ever employed by it. The

answer averred that the plaintiff was employed as a truck driver by one A. R. McKewen, that the corporation was not a party to this contract of employment, and that plaintiff had never performed any services for it.

The case was tried anew in the circuit court on appeal from the judgment rendered in the justice court, which trial resulted in a verdict and judgment in favor of the plaintiff. From that judgment is this appeal.

The amount sued for is not in dispute, but on the trial of the case it developed that the plaintiff based his right to recover from the defendant corporation on two propositions; first, that he was an employee of the corporation and that the amount claimed was for unpaid wages, and, second, that if he was not an employee of the corporation, but in fact the employee of McKewen, the defendant was nevertheless liable because it had agreed to pay for the services then rendered and to be rendered by plaintiff. The defense interposed was, as stated in the answer filed in the justice court, a denial that plaintiff was an employee of the defendant and that defendant was not bound by any promise to pay the debt because its agent who made the alleged promise had no authority to act for and bind the defendant in that regard, and that, even though the agent might have had such authority, the oral agreement was void and in violation of the statute of frauds.

On the evidence adduced, these issues were submitted to the jury on instructions, the correctness of which is not challenged, but we are asked to reverse the judgment and dismiss the case on the ground that the court erred in failing to direct a verdict for the defendant at its request. The contention is that, if an agreement was made by a representative of the appellant to pay the salary due appellee or to thereafter become due, such agreement was required to be in writing by the statute of frauds, and, being oral, is void; that the evidence fails to show that there was in fact any such promise.

Appellant relies on § 4862, Crawford & Moses' Digest, which provides that no action shall be brought to charge any person upon any special promise to answer for the debt of another unless the agreement or prom-

ise shall be made in writing, and signed by the party to be charged or some person authorized by him. *Zimmerman* v. *Holt,* 102 Ark. 407, 144 S. W. 222; *Patten* v. *Robbs,* 175 Ark. 784, 300 S. W. 388. The rule announced in these cases is not different from that early announced by this court in *Kurtz* v. *Adams,* 12 Ark. 174, which rule has been consistently followed in subsequent cases. *Chapline* v. *Atkinson,* 45 Ark. 67; *Gale* v. *Harp,* 64 Ark. 462, 43 S. W. 144; *Jonesboro Hdw. Co.* v. *Western Tie Co.,* 134 Ark. 543, 204 S. W. 418; *Becker, etc., Co.* v. *Parker Hdw. Co.,* 146 Ark. 539, 226 S. W. 177; *Oil City Iron Works* v. *Bradley,* 171 Ark. 45, 283 S. W. 362; *Lesser-Goldman Cotton Co.* v. *Merchants' & Planters' Bank,* 182 Ark. 150, 30 S. W. (2d) 215. The principle announced in those cases may be thus stated: Where there is a primary debt which has been antecedently contracted, the promise to pay such debt is original when based on a new consideration moving to the promisor and beneficial to him. When such is the case, the promisor comes under an independent duty of payment, irrespective of the liability of the principal debtor. This rule has been applied in a case where one agreed, in consideration of work to be done, for another to pay the promisee what was then due under her employment by the person for whom she had been working and she accepted the promisor as her debtor. *Jewett* v. *Warriner,* 237 Mass. 36, 129 N. E. 296. The rule has also been applied in a case where the defendant, being interested in effecting the consolidation of two newspapers, verbally agreed to pay indebtedness for printing done by the plaintiff for one of the papers as well as future indebtedness if plaintiff continued printing. *Washington Printing Co.* v. *Osner,* 99 Wash. 537, 169 Pac. 988.

In *Oil City Iron Works* v. *Bradley, supra,* the plaintiffs were employed by R. C. Houston to drill an oil well. Houston fell behind in the payment of their wages and plaintiffs notified him that they were going to quit work. An agent of the iron works told them that said works had sold Houston the drilling rig for which he owed a balance on the purchase price, and that; if they would continue work and finish the well, the Iron Works would

see that they were paid for their labor. It was contended, in a suit brought by plaintiffs against the Iron Works, that the promise, being to pay the debt of another and verbal, was void under the statute of frauds. The court held that these facts were sufficient to take the promise from within the inhibition of the statute, and warranted the jury in finding that the Iron Works was primarily to be benefited by plaintiffs' continuing in the work of drilling the well and brought the case within the principles laid down in the decisions heretofore cited.

In the case at bar, there was testimony to the effect that McKewen was the general agent of the corporation which was engaged in selling its products, consisting of gasoline, motor oil, etc., in the city of Stuttgart. The corporation owned the station and retained title to all products handled by it until sold and delivered. For his services in the general supervision of the work, McKewen was to receive a certain commission out of which he was to pay his helpers. Scroggins, one of the helpers, was an experienced salesman and not only drove the truck which delivered the oil and gasoline, but it was also his duty to make sales of such products on a credit or for cash and to collect therefor. He had been engaged in that service at Stuttgart for two years or more. When sales were made on credit, he would deliver the invoice of the corporation, and, when collections were made, he would take checks made payable to the corporation and deliver them to McKewen. McKewen would indorse the name of the corporation upon these checks and deliver them to the bank. Through a period of time McKewen had been falling behind in paying his employees, and was due Scroggins and another employee a considerable sum for past-due wages. Conditions became such that these two visited the division manager of the corporation at his office in Little Rock, who, after some conversations, the details of which are not given in the testimony, agreed that, if they would continue to work, he would see that they were paid. He told them not to take any action until the Monday following when the matter would be straightened out. On that day an auditor of the corporation

went to Stuttgart and took up the matter of adjustment of the balances due the employees and found the sum of $158.05 due them. He told them to "go on back to work, and everything would be fixed up all right." They continued to work until McKewen was let out by the corporation and a temporary agent was installed in his place, under whom they continued to work for a time.

Under the circumstances surrounding this transaction, there are sufficient facts to justify a finding that it was to the interest of the corporation for Scroggins to continue selling the products of the corporation and to collect therefor, for by this the corporation would be directly benefited, and the promise therefore not void as a collateral undertaking but enforceable as a primary obligation.

It is next argued by appellant that there was no testimony to the effect that appellant ever agreed to pay the back salary of the appellee Scroggins, or any future salary he might earn. In order to constitute a promise, no specific words are required. It is merely a declaration of an intention to do or to forbear from doing at the request of, or for the use of, another, and may be inferred without the use of the word "promise." The particular language which was used by the agent as an inducement for Scroggins to return to work is that "he would see they got their money." One of the principal definitions of the word "see" is "to bring about—to effect," and in ordinary conversation it is used as an equivalent of the word "guarantee." In this sense it was used by the agent of the Oil City Iron Works (*Oil City Iron Works* v. *Bradley, supra*) when he told the plaintiffs that the Iron Works "would see they got paid for their labor."

In *Housely* v. *Strawn Merc. Co.,* (Tex. Civ. App.) 291 S. W. 864, and in *Lesser-Goldman Cotton Co.* v. *Merchants' & Planters' Bank, supra,* it was held that an oral promise to "guarantee" was equivalent to a promise to pay a debt. Our conclusion is that there was sufficient evidence to establish a promise on the part of the agent of the corporation to pay Scroggins his wages, and that under the authority of the cases cited there was a suffi-

cient consideration for the promise to bring it from within the inhibition of the statute.

The judgment of the trial court will therefore be affirmed.

FRIES *v.* PHILLIPS.

4-3540

Opinion delivered October 8, 1934.

Robert Bailey, for appellants.

Reece Caudle, for appellee.

BAKER, J. This is an appeal from the circuit court of Pope County, in a cause wherein a controversy has arisen between appellants and Nora Phillips, appellee, as to the right of appellants to adopt a child, Dolores Sulzer, whose parents, Joseph Sulzer and Myrtle Phillips Sulzer, are both dead; the said Dolores Sulzer being a niece of appellants and a grandchild of Nora Phillips.

The cause originated in the probate court of Pope County, in which county the appellants filed their veri-

fied petition, therein stating that Dolores Sulzer was born on March 30, 1928, of Joseph Sulzer and Myrtle Phillips Sulzer; that Myrtle Phillips Sulzer has predeceased her husband by several months. Joseph Sulzer died March 5, 1933, at Harlingen, Texas. His wife, the mother of Dolores, had been in the hospital for several months prior to her death, and Nora Phillips, the grandmother of the child, had cared for it a larger part of the time since its birth, and particularly during the period the child's mother was confined to the hospital. Prior to the death of the mother of the child, it is alleged in the proof that the mother and father both had asked the appellee to take the child and rear it, and prior to the death of Joseph Sulzer, but after the death of his wife, he had written several letters and sent telegrams to his sister, Catherine Fries, requesting that she come and get the child and take it to her home in California.

The Fries lived within about four blocks of her father and mother, William Sulzer and wife, who were also the father and mother of Joseph Sulzer. The Sulzers and Fries were ordinarily well-to-do people, having good homes and pleasant surroundings.

An older child of Joseph Sulzer and his wife, a boy, had been given to the father and mother of Joseph Sulzer and Mrs. Fries, and had been taken by them to California and was living with them. It was the intention of the appellants herein to adopt Dolores and take her to their home in California, and they had left their home and had gone to southern Texas for the purpose of getting the child, but found that the appellee had left her husband in Texas and had taken the child to Pope County.

After getting to Pope County, the appellee, Mrs. Phillips, had taken the child to the home of her brother and mother, who lived a few miles from Russellville. Mrs. Phillips' mother, the child's great-grandmother, is an old lady about eighty-two years of age, receiving a Federal pension of $50 a month. The brother of Nora Phillips is on a small tract of land, is not indebted in any amount, except for taxes, and the four of them are living together in a small four-room house.

A younger brother of Mrs. Phillips had been working for some of the governmental agencies and had but recently returned to this home, living there at the time the trial was had in the circuit court.

At the time Mr. and Mrs. Fries filed the application to adopt the child in probate court of Pope County, the probate judge made an order fixing the date for the hearing and directed the sheriff to bring the child to probate court on a day fixed in the order.

At the time of the hearing, Mrs. Nora Phillips, the appellee, filed a response to the application of Mr. and Mrs. Fries, denying the right of Mr. and Mrs. Fries to adopt the child and praying that she be permitted to adopt it. The probate court made an order permitting Mr. and Mrs. Fries to adopt Dolores. An appeal was prayed to the circuit court by the appellee herein. In the circuit court the matter was submitted to a jury, and the jury returned its verdict in favor of Mrs. Phillips, the appellee. Upon this verdict the court rendered judgment, with findings of fact as follows:

"That the child is a minor, five years of age, and the daughter of Myrtle Phillips Sulzer, who died July 11, 1932, and Joseph Sulzer, who died March 5, 1933; that the said child, Dolores Sulzer, is a resident of Pope County, Arkansas; that Catherine Fries, sister of Joseph Sulzer, deceased, and her husband, Xavier Fries, are residents of Oakland, California, and that Mrs. Nora Phillips, mother of Myrtle Phillips Sulzer, deceased, and grandmother of Dolores Sulzer, is a resident of Pope County, Arkansas. The court further finds that the minor, Dolores Sulzer, is now and has been, of necessity, continuously since her birth, in the care and custody of petitioner, Mrs. Nora Phillips, the appellee herein, and that it is to the best interest of the minor, Dolores Sulzer, that she remain with petitioner, Mrs. Nora Phillips, until further orders of the court."

The court then ordered and adjudged that the petition of Catherine Fries and Xavier Fries, be denied, and that petition of Nora Phillips for adoption also be denied, but that Mrs. Nora Phillips have custody of the minor, Dolores Sulzer, until further orders of the court,

and retained jurisdiction of the case to make such further orders as might be proper.

Considerable testimony was taken, touching largely upon the proposition of the desires of the father and mother of the child, as to what person should have its care and custody. This evidence was conflicting, and, presumptively, the court submitted to the jury whatever questions it was thought expedient to be settled by the jury. The instructions are not brought forward in the abstract. Therefore, necessarily, we must further presume that whatever instructions were given, correctly submitted each point in controversy.

Motion for a new trial was filed and overruled. The appeal was prayed and granted. The motion for new trial, however, is not brought forward in the abstract. Three matters, however, are argued in the brief as reasons why we, as a matter of law, should reverse the case.

First is the asserted desires of Joseph Sulzer, father of Dolores, that his sister and brother-in-law have custody of Dolores for the purpose of rearing her. The love of the father for the child is earnestly argued, but the evidence, as abstracted, as to his conduct toward the child, and also as to what his desires were, we find, is conflicting, and the jury's verdict upon that question is conclusive. We deem it unnecessary to set out this testimony.

The next, or main question, that is argued is that the welfare of the child should be the controlling factor in the rendition of the decision. We have already stated sufficient facts concerning Mr. and Mrs. Fries; and it has already been shown that the appellee, Mrs. Nora Phillips, had the custody of this child and has practically reared it. The appellants would have us infer that she most probably left southern Texas and made her trip to Pope County in order to avoid having the child taken from her upon the arrival of Mr. and Mrs. Fries, who went from California to Texas for that purpose. The inference may be a correct one, and we are willing to assume that it was, but, if so, it tends to prove at least that Mrs. Phillips had a very strong affection for her

grandchild, and that she was willing to suffer almost any discomfort or inconvenience in order that she might have the child with her and under her control.

It is forcefully presented that the two children should be brought up together, but it was the father who brought about their separation and whose own conduct made it impossible for them to be together. The children do not know each other, and the condition of each is now, and probably has been, far from ideal, but the courts must deal with conditions as they find them at the time causes are presented.

It is argued we should be controlled by the order of the probate court, as in the case of *Deffenbaugh* v. *Roden,* 182 Ark. 348, 31 S. W. (2d) 406. The question there decided was whether or not the appellee had a right to appeal from an order of adoption made by the probate court, the appellee not being a party to that proceeding but having filed another and independent petition for adoption of the same children. The appellee also appealed from an order denying the right of adoption upon her application, and the circuit court overruled a motion filed by the appellants to dismiss appellee's appeal from the probate court, because of the fact appellee was not a party to appellant's proceeding in the probate court. The court decided that one question and also made comment on the fact that the probate court, being acquainted with the facts, most probably, was right in permitting the appellants to adopt the two children.

The case here presents a different condition. Mrs. Phillips made herself a party to the proceeding by filing a response to appellants' petition to adopt, and she also prayed for the adoption on her own behalf. By making herself a party, she had a right to appeal and to a trial in the circuit court upon this appeal.

Upon conflicting and controversial testimony, properly submitted, we cannot, and do not, find any error in the trial court. It is unnecessary to set forth the evidence adduced at that trial, or to argue the same, for the reason that in this court we cannot try the case *de novo.*

The judgment of the circuit court is such that, the trial judge has retained jurisdiction, so as to control the custody of the child. We are impelled to defer to the discretion and judgment of that court.

The judgment of the circuit court is therefore affirmed.

CLARK *v.* AMERICAN EXCHANGE TRUST COMPANY.

4-3660

Opinion delivered October 8, 1934.

C. B. Nance and *R. V. Wheeler,* for appellant.

J. H. Carmichael and *Sam Rorex,* for appellee.

PER CURIAM. Appellee moves the dismissal of the appeal herein because filed one day too late. The facts are the six months provided by statute for lodging appeals in this court expired on Sunday, August 26, 1934, and this appeal was lodged here on Monday following. Under authority of *Bank of El Paso* v. *Neal,* 181 Ark. 788, 27 S. W. (2d) 1024, this appeal was lodged here one day too late and must be dismissed.

The view here expressed does not conflict with the opinion of this court in *McNutt* v. *State,* 163 Ark. 122, 258 S. W. 1. In the case last cited we were dealing with a statute which required an act to be done within a certain number of days, whereas the statute here under consideration requires the act to be done within a certain number of months, and this marks the difference in construction and interpretation as determined by practically all, if not all, the courts.

Let the appeal be dismissed.

SMITH, J., (dissenting). In dismissing this appeal because the transcript was not filed until Monday, Aug-

ust 27, 1934, for the reason that the six months expired on August 26, which day was Sunday, the majority have followed the dissenting opinion of Chief Justice McCulloch in the case of *McNutt* v. *State,* 163 Ark. 122, 259 S. W. 1, rather than the opinion of the majority of the court in that case written by Justice Hart.

That case recognized that there was a division in the authorities, and the dissenting opinion of Chief Justice McCulloch makes that fact clearly appear. In his dissenting opinion it was said: "It seems clear to me that this court, in holding that Sunday is to be excluded when the last day for appeal falls on that day, is deciding contrary to the almost unanimous decisions of other courts, and I think the ruling is contrary to the express language of the statute, which requires that the appeal must be perfected within sixty days. In excluding Sundays we are reading something into the statute which cannot be found there, for the manifest purpose of the lawmakers in framing this statute was not to allow sixty juridical days within which to perfect an appeal, but to fix a period of time, namely, sixty calendar days, within which an appeal must be perfected. The fact that, in some instances, we have statutes requiring appeals and such other proceedings to be completed within a very short time, should be very persuasive to the Legislature, either to lengthen the time or to exclude Sundays, but it affords no reason why we should read something into the statute which is not found in its language."

However, this argument made by the learned Chief Justice did not convince the majority, and his view was not adopted by the other members of the court, and it occurs to me that the only question now presented is whether we should adhere to the majority opinion, or should recede from it and adopt the view so ably expressed in the dissenting opinion.

It is true the McNutt case, *supra,* was a criminal case, whereas the instant case is not; but this fact makes no difference. The rule for computing time is the same in both.

It is true also that the statute construed in the McNutt case related to the number of days within which

an appeal must be perfected, whereas the statute here considered relates to the number of months within which to perfect an appeal; but it is respectfully submitted that this difference is of no controlling importance. The opinion of the majority in the McNutt case was based upon the ground that, both at common law and by statute in this State, Sunday is not a juridical day, and that when the last day allowed by law for lodging a transcript in the office of the clerk of this court falls on Sunday, the transcript may be filed on the following Monday. The transcript in that case was not filed within sixty days, as the statute there construed required, but the failure so to file was excused because the last day on which it should otherwise have been filed was a Sabbath day, which we said was *dies non.*

If August 26, 1934, had not been a Sabbath day, the transcript could, without doubt, have been filed on that day. That fact is not questioned. But inasmuch as that day was not a juridical day, the transcript could be legally filed, under the authority of the majority opinion in the McNutt case, *supra,* on the following day.

Bank of El Paso v. *Neal,* cited in the majority opinion, does not hold to the contrary. It was decided in that case that an appeal granted on January 16, 1930, from a judgment rendered July 15, 1929, was not taken within six months as required by § 2140, Crawford & Moses' Digest, but the preceding day in that case, the 15th, was not a Sabbath day. As a matter of fact, it was a Wednesday. The holding in that case, as applied to the instant case, means only that the transcript should have been lodged with the clerk of this court on or before August 26, 1934, provided August 26 had not been a Sabbath day. Filing a day later, under the authority of that case, would have been a day too late but for the circumstance that this day was a Sabbath day, a *dies non,* and it could therefore under the majority opinion in the McNutt case, *supra,* have been filed on the following day, but not later than that day.

The case of *Armstrong* v. *McGough,* 157 Ark. 173, 247 S. W. 790, supports the view I have just expressed.

That case involved the payment of rent to keep in force a mineral lease in which time had been made of the essence of the contract, under the terms of which the rent was payable on or before September 11, 1921. That day was a Sabbath day, and the payment was not actually made until the following day, September 12. The chancellor held that the payment had not been made in apt time. In reversing that holding we there said: "The general rule with regard to contracts is that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. The majority rule is that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted, but when the last day for performance falls on Sunday, it is not to be taken into computation."

A number of cases are there cited in support of that declaration of the law, and the cases support the declaration made. But, whether they in fact accord with the majority view as there stated or not is now unimportant, as we then laid down the rule to be followed in this State, and now, for the sake of uniformity and certainty in the administration of the law in this State it should be adhered to. An examination of this Armstrong case, *supra,* will disclose the fact that the delayed payment there made was to be made within twelve months to extend the lease for another year. It appears therefore so far as the Sunday law is concerned, that it is immaterial whether the act to be done is to be performed within a given number of days, or a given number of months; if the last day of performance falls on the Sabbath, performance may lawfully be made on the next ensuing day.

There is no good reason to have one rule to be applied in the case of contracts and a different rule to be applied to the same state of facts in the construction of statutes. The true rule, if we are to follow our own

cases, is that (in the construction either of a contract or of a statute) if the last day of performance falls on the Sabbath, the act required may be performed on the first day thereafter.

This appeal was therefore in my opinion, lodged in apt time, and should not be dismissed.

CRAIN *v.* ST. FRANCIS LEVEE DISTRICT.

4-3577

Opinion delivered October 8, 1934.

Daggett & Daggett and *Coleman & Riddick,* for appellant.

Burk Mann, J. T. Coston and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

PER CURIAM. Appellee moves the court to dismiss the appeal herein for the following reasons: First, a summons was not served on it in apt time; second, J. H. Crain has no right to appeal because he was not a party to the suit in the lower court.

The second contention that J. H. Crain has no right to appeal because he was not a party to the suit in the lower court is predicated upon the following facts and circumstances. On December 8, 1933, appellant James Baker filed his complaint against appellee seeking injunctive relief. On the same day answer was filed by

appellee, and on the following day, December 9, the cause was submitted to the chancellor in vacation and a decree was entered dismissing the complaint for want of equity. This suit was instituted by Baker as a taxpayer of the levee district. Baker did not pray an appeal from the adverse judgment, and thereafter J. H. Crain, a taxpayer of the district, filed an intervention in said cause in his own behalf, and in behalf of all other taxpayers in the district praying that the cause be determined upon its merits and, in the event the decree could not be set aside, that he be permitted to appeal to the Supreme Court of this State. This intervention was never passed upon by the chancellor.

The appeal was afterwards perfected by Baker, but he moved its dismissal, and thereupon Crain asserted the right to prosecute the appeal in the place and stead of Baker.

Under the law, J. H. Crain has the same right to prosecute an appeal from an adverse judgment rendered in a taxpayer's suit that the original plaintiff had.

Section 1098 of Crawford & Moses' Digest provides: "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

Following the rule stated above, we held in *Howard-Sevier Rd. Imp. Dist.* v. *Hunt,* 166 Ark. 62, 265 S. W. 517, that: "Since Kennedy and the others who instituted the original action attacking the validity of the assessment of benefits as a whole, which appellants are here seeking to enforce, represented the appellees and all the taxpayers and property owners of the district who were in the same class, it follows, from our statute and the above authorities, that the appellees were parties to that original action the same as if they had been made so by name."

From the rule thus stated, it appears that J. H. Crain, being a taxpayer of the district, was a party to the action as effectually as if he had been made so by name.

It is unnecessary for us to determine whether or not the summons has been served in apt time, because appellee, by appearing herein and bringing into question the capacity of Crain to maintain and prosecute this appeal, has entered its appearance generally and for all purposes. *Federal Land Bank* v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696.

It follows from what we said that the motion to dismiss the appeal must be denied.

W. B. WORTHEN COMPANY *v.* DELINQUENT LANDS.

4-3635

Opinion delivered October 15, 1934.

Rose, Hemingway, Cantrell & Loughborough, for appellants.

S. L. White, for appellees.

HUMPHREYS, J. This is an appeal from a decree of foreclosure in favor of appellants of certain lands in Improvement District No. 513 of the city of Little Rock, Arkansas, on account of the failure to pay delinquent assessment of benefits to appellants. Appellants are appealing from the decree in their favor because the court refused to incorporate into the decree a penalty of 20 per cent., costs, a reasonable attorney's fee, and, if payment were not made within ten days, the property should be sold on 20 days' notice, and that, if the owner did not redeem from the sale within two years by the payment of the purchase price and 10 per cent. interest, the commissioner should deliver to the purchaser a deed, and that, immediately upon the delivery of the certificate of purchase after the sale should be confirmed, the purchasers should have possession pending redemption without accountability for rents. These requested provisions were in accordance with the statutes in force and effect at the time the district was organized in 1930, and at the time the bonds were issued and sold to construct the improvement. These remedial provisions of the statutes were amended or repealed by acts 278, 252 and 129 of the Acts of the Legislature of 1933 so as to provide a penalty of 3 per cent., no attorney's fee, twelve months for payment, six months' notice of sale, redemption within four years by payment of the purchase price and 6 per cent. interest, and no right to possession without accountability for rents pending redemption.

In rendering the decree of foreclosure, the court followed the remedial provisions contained in acts 278, 252 and 129 of 1933, so the only question presented upon appeal and insisted upon by appellants for a reversal of the decree, is whether the later acts are in contravention of article 2, § 17, of the Constitution of Arkansas and article 1, § 10, of the Constitution of the United States, which forbid the passage of any law impairing the obligation of contracts, and of the Fourteenth Amendment to the Con-

stitution of the United States, which forbids any State to deprive any person of his property without due process of law. An inspection of the acts of 1933 called in question will disclose that they are entirely remedial in their nature and do not attempt to take away any of the vested rights of appellants such as their lien and right to foreclose same, but simply reduce the penalty and extend the time required to foreclose in case of default and to redeem from a sale and are, in our judgment, reasonable changes to meet the exigencies of the depression and to give property owners a reasonable time and opportunity to save their homes. The constitutionality of act 278 of 1933 was attacked from every conceivable angle in the case of *Sewer Improvement District No. 1 of Wynne* v. *Delinquent Lands,* 188 Ark. 738, 68 S. W. (2d) 80, and this court upheld the act. In deciding that case the authorities were fully reviewed, and it is unnecessary to review them again. Suffice it to say that the case referred to governs and controls the instant case. There is no difference between the three acts in tenor and effect; so the reasoning as to the validity of act 278 is applicable to acts 252 and 129.

No error appearing, the decree is affirmed.

McHaney, J. I dissent for the reasons stated in my dissenting opinion in *Sewer Imp. Dist. No. 1 of Wynne* v. *Delinquent Lands,* 188 Ark. 738, 68 S. W. (2d) 80, and am authorized to say that Mr. Justice Smith and Mr. Justice Baker concur therein.

Johnson, C. J., (concurring). I concur in all that is said in the court's opinion and in addition thereto I assign the following reasons supporting or tending to support the opinion: Act 278 of 1933 was before us for consideration in *Sewer Imp. Dist. No. 1 of Wynne* v. *Delinquent Lands,* 188 Ark. 738, 68 S. W. (2d) 180, and we there declared its provisions not in conflict with the State or Federal Constitutions, and I have nothing to add to the opinion in that case. Acts 252 and 129 of 1933 have not been before us prior to the opinion herein, therefore these elucidations.

Act 252 of 1933 has the effect of allowing property owners in all municipal improvement districts in this State four years from date of judicial sale in which to redeem. Appellant's contention is that this act increased the period of redemption from two years (which was allowed under the law when their bonds were issued) to four years, thereby impairing the obligations of their contract. This contention is without merit. Section 5644 of Crawford & Moses' Digest, which is a section of the municipal improvement district act of 1915, by plain terms gives to property owners in all such districts five years in which to redeem from such sales. Appellants contend however, that the time given an owner to redeem, by the section *supra,* was reduced to a period of two years by act 359 of 1925. Section two of said act of 1925, which is asserted to have effected the change from five years to two years is as follows:

"Hereafter all persons shall have the right to redeem from the sale for taxes of road, drainage, levee of [or] other improvement districts at any time within two years from the date when such lands are sold by the Commissioner making the sale, and not thereafter; provided, that the provisions of this section shall not apply to property which shall have become delinquent or have been forfeited prior to the passage of this act."

In *Roberts* v. *Owen,* 183 Ark. 6, 34 S. W. (2d) 752, we expressly declined to determine whether act 359 of 1925 was applicable to municipal improvement districts, and this question has not yet been decided. If the act of 1925 is not applicable to municipal improvement districts, property owners in such districts had five years to redeem when appellant's bonds were issued and sold, and act 252 of 1933 of which appellant now complains had the effect of reducing the period of redemption instead of increasing it as urged by appellant.

Section 2 of act 359 of 1925 needs no interpretation. It provides that it is applicable to "road, drainage, levee of [or] other improvement districts." Had it been intended to apply to paving, sewerage, water and such municipal districts, the Legislature could and would

have so said in plain language. The only conceivable reason asserted as to its applicability to municipal improvement districts is "of [or] other improvement districts," but this phrase has reference to other improvement districts of the same kind as those specifically enumerated. The rule of *ejusdem generis* has ever been applied by us under such circumstances. *Jones* v. *State,* 104 Ark. 261, 149 S. W. 56; *State* v. *Gallagher,* 101 Ark. 593, 143 S. W. 98; *Lee* v. *Huff,* 61 Ark. 494, 33 S. W. 846; *Eastern Ark. Hedge Fence Co.* v. *Tanner,* 67 Ark. 156, 53 S. W. 886; *Matthews* v. *Kimball,* 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; *St. L. I. M. & S. R. Co.* v. *Love,* 74 Ark. 528, 86 S. W. 395; *State* v. *C. R. I. & P. Ry. Co.,* 95 Ark. 114, 128 S. W. 555; 25 R. C. L., § 240, p. 996.

It appears therefore that act 359 of 1925 is not applicable to municipal improvement districts, and for this reason act 252 of 1933 shortened the period of redemption instead of increasing it, and appellant certainly cannot complain of this. Act 129 of 1933 repeals § 5642 of Crawford & Moses' Digest. This repealed section provides: "In all sales made by commissioners under decrees of chancery courts for foreclosure of delinquent special assessments in drainage, levee, and bridge districts, improvement districts in cities and towns, and in all special assessment districts of every kind, the court may approve the sale subject to the right of redemption, and immediately upon such approval the purchaser shall have the right to possession of the lands and premises so sold and may have process therefor, and such purchaser while so in possession shall not be accountable for rents upon redemption."

The language of the section: "The court may approve the sale subject to the right of redemption, and immediately upon such approval the purchaser shall have the right to possession, etc.," clearly vests in the chancery courts of the State a discretionary power in the approval of all sales effected in such courts by municipal improvement districts. It is common knowledge that such sales are not approved in many instances until the time for redemption has expired. No one would assert

that the chancery courts could be subjected to mandamus under this section of the statute and compelled to approve a report of sale prior to the expiration of the period of redemption. Such being the law, appellant took no vested right by reason of said section and cannot complain of its repeal.

After further consideration, I am authorized to say that Justices BUTLER, MEHAFFY and HUMPHREYS concur in these views.

WASSON *v.* TREECE.

4-3553

Opinion delivered October 15, 1934.

W. F. Reeves, for appellant.

S. W. Woods, for appellees.

MEHAFFY, J. The appellees, who are the heirs at law of E. B. Treece, deceased, were the owners of an undivided one-half interest in property in Marshall, Searcy County, Arkansas, and the Bank of Marshall was the owner of the other undivided one-half interest. The Bank of Marshall, in October, 1929, filed a suit in partition against the appellees, and against Patti Treece as guardian for said appellees, who were all minors at that time, in the Searcy Chancery Court, asking for a partition of said property. A decree of partition was ordered by the court, and the property ordered sold, and the same was sold by a commissioner, and the State Bank of Marshall became the purchaser for the sum of $8,000.

On May 1, 1933, Eugene Treece, Winston Treece and Burnelle Treece, adults, and Barton Treece and Francis Treece, minors, by their next friend, Claude Treece, filed suit in the Searcy Chancery Court against Marion Wasson, State Bank Commissioner, alleging that they were the sole heirs at law of E. B. Treece, deceased, and that the property was owned as above set out, and that, prior to the partition, the Bank of Marshall occupied said premises, and paid the guardian of the appellees $30 a month as rental for their interest in the property. They alleged that, after the bank purchased the interest of appellees in said property, A. A. Hudspeth, as cashier of the bank, applied $2,600 of the money belonging to

appellees as payment of certain personal obligations owed by the guardian of appellees, and that the appellees received only $1,400 of the $4,000, and they asked judgment for $2,600, and that it be declared a lien on the undivided one-half interest of the property described.

A demurrer was filed and thereafter a substituted complaint. The appellant filed answer, and the cause was submitted on the following agreed statement of facts:

"It is agreed that the above-named plaintiffs are the heirs at law of E. B. Treece, deceased, who died intestate in Searcy County, Arkansas, before the year 1924, and that he left said children and a widow, Patti Treece, as his sole surviving heirs and widow.

"That in November, 1926, J. E. Treece died intestate, and that E. B. Treece was a son of J. E. Treece, and that among other property which the plaintiffs inherited from their grandfather's estate was an undivided one-half interest in the lot and bank building standing thereon, in Marshall, Arkansas, described as follows:

"Beginning 45½ feet west of the northwest corner of J. W. Coker's house, known as the restaurant, thence south parallel with said house 140 feet to the W. L. Baker property, thence west 25½ feet, thence north parallel with said house to a point due west of the place of beginning, thence east to place of beginning, being a part of block No. 7 in Marshall, Searcy County, Arkansas.

"That the Bank of Marshall, Arkansas, was the owner of the other undivided one-half interest in said lot and improvements, and in October, 1929, filed a suit in partition against the above-named plaintiffs as heirs at law, and against Patti Treece as guardian of said plaintiffs, who were all minors at said time, in the Searcy Chancery Court, asking for a partition of said property.

"That in March, 1930, a decree of partition was ordered by the court, finding that it could not be partitioned in kind, a sale of the property was ordered, and the same was sold by Sam Blair as commissioner

to the First State Bank of Marshall, Arkansas, for the sum of $8,000, on June 16, 1930, which sale was approved by the court and the commissioner ordered to pay all costs and divide the remainder according to the interest of the parties in interest.

"That the costs in said case were as follows:

Allowance to plaintiff's attorney fee	$200.00
Allowance to guardian *ad litem* for defendants	25.00
Commissioner's fee	25.00
Clerk's fees	9.25
Sheriff of Searcy County	3.20
Sheriff of Pope County	.95
Printer's fee	11.25
Total	$274.65

and the First State Bank of Marshall, Arkansas, paid said fees and allowances, canceled notes, stamping the same as paid, including interest to the total amount of $2,740.37, one of said notes for $50 principal and $1.76 interest, being the note of the plaintiff, Eugene Treece, and notes aggregating $2,688.61, being notes signed by Patti Treece, and held by said bank, and turned over to Patti Treece, as the guardian of the plaintiffs, $1,140, on June 25, 1930.

"No payments were made by the purchaser, First State Bank, to the commissioner, except payment of court costs, and the settlement of the balance being between the cashier of the bank and Patti Treece, guardian of plaintiffs.

"That all of the $2,740.37 in notes canceled and marked paid by the bank and delivered to Patti Treece, were signed by Patti Treece alone and individually, except the $50 note signed by Eugene Treece as aforesaid.

"That the commissioner's deed conveying all of said lands to the First State Bank was delivered by the commissioner to said bank and recorded on June 19, 1930, in book 26, page 8.

"Plaintiffs filed this suit asking for judgment against the State Bank Commissioner in charge of the First State Bank of Marshall, Arkansas, on May 1, 1933,

asking judgment for $2,600, and that the same be declared a lien upon an undivided one-half interest in the lands aforesaid, with improvements.

"That the First State Bank of Marshall, Arkansas, became insolvent on September 1, 1931, and was taken over by the State Bank Commissioner, and has been in the hands of said State Bank Commissioner in liquidation ever since. The notice was published as required by law of the time within which claims could be filed under the law, and no claim was filed by the plaintiffs for $2,600 or any other sum, with the State Bank Commissioner, before the filing of this suit.

"Defendant in his answer made Patti Treece a party plaintiff, and had summons served on her, asking that judgment be rendered against her for the amount of the notes which the bank settled with her for, in case judgment was rendered against it, and more than 20 days expired before the regular September term, 1933, of the chancery court, and no answer or other pleadings was filed by her.

"We hereby agree that this cause be submitted to the court for decree in vacation, upon this agreed statement of facts."

The chancellor found that the appellees were the sole owners of an undivided one-half interest in the land described, and found that the Bank of Marshall owned the other one-half interest, and that theretofore the bank had brought a suit, and that the property was not susceptible of division in kind, and ordered the same sold by the commissioner. He further found that $4,000 was due the appellees, and that there was a lien retained on the property for the purchase money; that there was at the time of the decree due appellees in principal and interest the sum of $3,231.80, and decreed that the appellees had a lien on one-half interest for the sum found to be due them, and if said sum was not paid within 10 days the property should be sold for the purpose of paying said sum.

To reverse the decree of the chancery court, this appeal is prosecuted.

It is first contended by the appellant that this is a collateral attack upon the judgment and proceedings had at a former term of court. It appears from the pleadings, however, that this is not an attack upon the judgment at all, but that the judgment is expressly recognized, and all the proceedings up to and including the sale are valid, and this suit is to enforce the lien of said judgment, to compel the purchaser to pay the price of its bid. The evidence shows that the partition suit was regular; that the court ordered a sale, and that the bank became the purchaser. It also shows, however, that the bank never paid any of its bid to the guardian for the heirs, except $1,140. It appears also that at the time of the sale the bank held the personal note of Patti Treece, and, instead of paying to Patti Treece as guardian of the minor heirs, it paid to Patti Treece individually, or rather it applied $2,600 of the purchase price to the payment of her individual note, leaving a balance due the heirs at that time of $2,600.

It is contended that the sale was conducted in compliance with the law, and that the sale, when approved by the court, and the deed made and approved by the court, passed title to the bank, and that this suit for that reason could not be maintained.

It was the duty of the commissioner when the sale was made, to collect the money. It is not claimed that he did this. In fact, the undisputed evidence shows that he collected but $1,140 from the bank.

This court has said: "The payment of the purchase money was a prerequisite to the execution and delivery of the deed, which, not having been done, the sale should be set aside, the deed canceled, and declared void." *Phelps* v. *Jackson,* 31 Ark. 272.

This court has also said, speaking of sale by an administratrix: "She executed a deed to Dyer, but received no money in payment, assuming to collect the sum bid in her individual paper. That she could not do." *Ambleton* v. *Dyer,* 53 Ark. 224, 13 S. W. 926.

In the instant case the guardian sold the minors' land and did not receive the money from the purchaser,

but received her individual note which she owed the bank for $2,600. This she had no right to do. *Grooms* v. *Neff Harness Co.*, 79 Ark. 401, 96 S. W. 135; *Briggs* v. *Collins*, 113 Ark. 190, 167 S. W. 1114.

The bank was represented in all these transactions by its cashier. He had authority to represent the bank, and his actions are binding on the bank. 7 C. J., 549.

The bank knew that the property belonged to the minors; it knew that Patti Treece was their guardian.

"The rule in all these cases, that the purchaser or mortgagee is not bound to look to the application of the purchase money is subject to an obvious exception, that, if the purchaser or mortgagee is knowingly a party to any breach of trust by the sale, or mortgage, it shall afford him no protection. * * * It may be considered as the prevailing doctrine in the American courts that a purchaser from a trustee is not bound to see to the application of the purchase money, except where the sale is a breach of trust on the part of the trustee, and the purchaser has, either from the face of the transaction, or otherwise, notice or knowledge of the trustee's violation of duty; but, if he has such knowledge or notice as makes him a party or privy to the trustee's misconduct, the property will be affected in his hands with the trusts which previously attached to it." *Grider* v. *Driver*, 46 Ark. 109.

The cashier of the bank here not only knew all the facts, but participated in the transaction, and, instead of paying the money to the commissioner for the minors, delivered to the guardian her individual note for $2,600..

It is contended by the appellant that the appellees failed to file any claim with the Bank Commissioner. They were not required to file such claim, because they are seeking to enforce their lien against the property which the bank purchased and never paid for. They are not seeking any claim against the bank or the Bank Commissioner as such.

At the time of the partition suit and sale, all the appellees were minors. The oldest is now 22 years of age.

Section 6961 of Crawford & Moses' Digest provides: "If any person entitled to bring any action under any law of this State be, at the time of the accrual of the cause of action, under 21 years of age, or insane or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three years next after full age or such disability may be removed."

The appellees were not barred from bringing this suit. It is true they, in the original suit, might have asked the court to order a resale of the property, but that remedy is not exclusive. They had a right to bring this action against the purchaser to compel him to complete the purchase by paying the amount of his bid. 35 C. J., 118.

The deed made, under the circumstances shown in evidence, was void, and the decree of the chancery court is correct, and therefore affirmed.

HOLMES *v.* WAGGONER.

4-3685

Opinion delivered October 15, 1934.

Emmet Vaughan, Geo. W. Craig and *W. A. Leach,* for petitioner.

Campbell & Smith, for respondent.

MEHAFFY, J. In the general Democratic primary election held in Prairie County on August 14, 1934, J. F.

Simms and J. J. Holmes were candidates for the office of county and probate judge of said county.

On August 17, 1934, the county central committee canvassed the returns of said primary election and certified J. J. Holmes to be the nominee for said office.

On August 21, 1934, J. F. Simms commenced in the circuit court at DeVall's Bluff, an action against J. J. Holmes to contest the certificate of nomination issued by the committee. Thereafter J. J. Holmes filed a motion to dismiss the action on the ground that the jurisdiction of actions to contest primary elections was not by law vested in the circuit court for the Southern District of Prairie County. The circuit court overruled the motion, and thereupon J. J. Holmes, the defendant in the election contest case, filed in this court an application for a writ of prohibition against W. J. Waggoner, circuit judge of the Prairie Circuit Court, to prohibit said court from exercising jurisdiction in the suit brought at DeVall's Bluff to contest the election.

The only question for our consideration is whether the circuit court at DeVall's Bluff had jurisdiction to try the election contest case.

Section 12 of article 7 of the Constitution of the State of Arkansas is as follows:

"The circuit courts shall hold their terms in each county at such times and places as are or may be prescribed by law."

The Legislature in 1885 passed an act establishing separate courts in Prairie County. The county was by the act divided into two judicial districts, Des Arc being the county seat of the county.

Section 3 of the act provided that the circuit court should hold the same number of sessions in the town of DeVall's Bluff as by law were held at the county seat of said county, and at such times as might be designated by law. There can be no doubt that, under the provision of the Constitution above quoted, the time and place of holding court was designated by this act, and that DeVall's Bluff was designated as the place for holding the circuit court.

Section 24 of article 19 of the Constitution is as follows:

"The General Assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this Constitution."

The initiated act provided for contesting elections. Crawford & Moses' Digest, § 3772. It provides: "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 is contended that the action must be brought at Des Arc, the county seat, and that the circuit court held at DeVall's Bluff had no jurisdiction.

In the case of *Pearce* v. *Doyle,* 145 Ark. 371, 224 S. W. 740, there was an election contest filed in Lawrence County at Powhatan, and summons was served on the defendant in Pulaski County, Arkansas. The defendant in that case challenged the jurisdiction of the court and the validity of the service. It was alleged that all the acts complained of occurred in the Eastern District of Lawrence County, and also that the defendant was a citizen of the Eastern District of Lawrence County, and that the circuit court for the Western District had no jurisdiction. The court said that the appellee set up in his motion the act of 1887 establishing two separate judicial districts in Lawrence County. The Lawrence County act and Prairie County act are identical in the

sections involved. The circuit court dismissed the cause in the case of *Pearce* v. *Doyle, supra,* and an appeal was prosecuted to this court. The court also said: "The court erred in dismissing the appellant's complaint. Section 4 of act 85 of the Acts of 1887, establishing two separate judicial districts for the county of Lawrence (the eastern and the western), and providing that no citizen or resident of one district should be liable to be sued in the other "in any action whatever," had reference to ordinary civil actions. In *Logan* v. *Russell,* 136 Ark. 217-221, 206 S. W. 131, we held that contest proceedings under the law regulating primary elections, *supra,* "do not constitute civil actions within the meaning of our Code of Civil Practice."

Under our primary election law, contests for the office of county and probate judge shall be brought in the circuit court of the county wherein any of the wrongful acts complained of occur. In the case of *Pearce* v. *Doyle, supra,* it was said:

"The Brundidge Act takes no notice of the division of counties into separate judicial districts for the purpose of election contests provided therein, but, for the office of representative, and for county and township offices, the county is considered as an entirety."

In the case of *Logan* v. *Russell, supra,* the court said: "The contest proceedings provided by this statute do not constitute civil actions within the meaning of our Code of Civil Practice. It has been so decided by this court with reference to election contests authorized under another statute. In the case of *Davis* v. *Moore,* 70 Ark. 240, 67 S. W. 311, it was expressly decided that election contests are special proceedings and not civil actions under the Code, and everything must be done therein according to the statute regulating such proceedings where such statute exists. * * * The provisions of the statute under consideration should receive a liberal interpretation so as to effectuate the wholesome purposes intended by its framers, but, the proceedings authorized thereunder being special, we cannot, without doing violence to well settled rules of interpretation, extend

those provisions beyond the plain meaning of the language employed."

The purpose of the primary election law and the provision in that law for contesting elections should receive a liberal interpretation. The law provides that any candidate may contest an election, and that, if for a county office, the action to contest the election must be in the circuit court, and in the county where the election was held. We think, under any reasonable interpretation, the statute means in the circuit court wherever held in the county. The act creating separate judicial districts provides where cases shall be brought, but this means civil actions and not special proceedings.

In a civil action, as a rule, the parties have a right to a jury trial, and there appears to be some reason why it should be tried in the district where the defendant resides. No such reason exists with reference to an election contest or any other special proceeding of this kind. The same judge tries the case, no matter in which district it is brought.

We now hold that an action to contest an election for a county office may be brought in the circuit court in either district, if in a county that has more than one judicial district.

The case of *Cowger* v. *Ellison,* 175 Ark. 478, 299 S. W. 1031, so far as it conflicts with this opinion, is overruled.

The circuit court at DeVall's Bluff has jurisdiction to try the case, and the writ is therefore denied.

DECKER *v.* STATE.

Crim. 3891

Opinion delivered October 15, 1934.

G. L. Grant, for appellant.

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

McHaney, J. Appellant, who is serving a life sentence in the penitentiary, was indicted, convicted and sentenced to ten years imprisonment for permitting a convict to escape, the charging part of the indictment being as follows: "The said defendant, Earl Decker, in the county, district and State aforesaid, on the 5th day of February, 1934, then and there having in custody one B. R. Ballard a convict who had been lawfully convicted for a felony and who had been lawfully sentenced to confinement in the penitentiary, did unlawfully, feloniously, wilfully and corruptly suffer, connive at and permit the escape of the said B. R. Ballard, against the peace and dignity of the State of Arkansas."

The undisputed facts are that appellant, a trusty convict, was sent by the penitentiary authorities to Fort Smith to bring to the penitentiary four convicted felons in a truck. After arriving in Fort Smith, he visited with some women whose husbands were in the penitentiary and proceeded to become more or less intoxicated. He finally went to the jail, received the prisoners, locked them in the truck, and left with them. He then returned to the place where he had been drinking, secured more liquor, took the prisoners and his lady friend riding with him into the drinking establishment where they all became further intoxicated. After a time they finally left with the prisoners properly locked up in the truck and started for Little Rock. After driving some distance, he decided to return for more refreshments, and on this

trip Ballard escaped by crawling through a torn place in the curtain inclosing the truck where the prisoners were kept. At the conclusion of the testimony a directed verdict of not guilty was requested and refused.

Appellant was convicted under the following statute, § 2584, Crawford & Moses' Digest: "Any person who shall wilfully or corruptly suffer, connive at, or permit the escape of any convict sentenced to confinement in the penitentiary shall be deemed guilty of a felony, and on conviction thereof shall be punished by confinement in the penitentiary for not less than five nor more than ten years." Several errors are assigned and argued for a reversal of the judgment and sentence, but we find it necessary to discuss only one of them, that is, that the court should have directed a verdict for appellant.

Under the above statute, the appellant must have "wilfully or corruptly" suffered, connived at, or permitted Ballard to escape in order to be guilty of the offense. It is conceded by the State that it was not "wilfully" done, but it is insisted that it was "corruptly" done. This is a criminal statute, highly penal, and must be strictly construed. In *Atkinson* v. *State,* 133 Ark. 341, 202 S. W. 709, construing an indictment for perjury, this court said: "It is also insisted that the indictment is defective because it does not allege that the testimony was knowingly false. The indictment alleges that it was 'wilfully and corruptly' false. This includes 'knowingly,' for the testimony could not have been 'wilfully and corruptly' false without being 'knowingly' false." In *Tallman* v. *State,* 151 Ark. 108, 235 S. W. 389, 236 S. W. 281, the appellant had been convicted on a charge of malicious mischief for the killing of a dog, under the statute providing that: "If any person shall wilfully, maliciously, or wantonly * * * kill * * * any animal," etc., Reversing the judgment on an instruction that provided that, if the killing was unlawful and done with a deadly weapon, the law presumes it was done maliciously, this court said: "A negligent or careless killing of an animal would be unlawful, and, though done with a deadly weapon, no inference or presumption in law could be in-

dulged that the careless or negligent killing was wilful, malicious or wanton."

In *Jones* v. *State,* 104 Ark. 261, 149 S. W. 56, Ann. Cas. 1914B, 302, this court held, under the statute providing for removal of an officer from office, that the word "corruption," as used in the statute, was intended to be used in its more comprehensive sense and not merely as relating to official delinquencies; but in *Winfrey* v. *State,* 133 Ark. 357, 202 S. W. 23, it was held that an indictment against an officer for transporting liquor did not authorize a summary judgment of removal, because the act charged could not be said of itself to amount to "gross immorality" or "corruption." See also *McClain* v. *Sorrels,* 152 Ark. 321, 238 S. W. 72, where it was held that a single act of drunkenness did not necessarily involve moral turpitude, so as to constitute "gross immorality" within the meaning of the Constitution and statute authorizing the removal of county and township officers for "gross immorality."

One of the definitions in Bouvier's Law Dictionary of the word "corruption," of which the word "corruptly" is the adverb, includes bribery. The word "corruptly" implies knowledge, for a thing could not be done corruptly and ignorantly at the same time. The word "wilfully" means intentionally or by design. *Aubrey* v. *State,* 62 Ark. 368, 35 S. W. 792; *Tallman* v. *State, supra.* It therefore appears to us that an act may be done wilfully without being corruptly done, but that an act cannot be done corruptly without being wilful. We are also of the opinion that the word "corruptly," as used in the statute, means by some consideration or promise moving to the person charged. If this be the meaning of these words as used in said statute, then it is perfectly clear that appellant is not guilty. The only misconduct proved against appellant was drunkenness on that occasion. If a single act of intoxication was not sufficient to involve moral turpitude, amounting to "gross immorality," authorizing removal from office, as held in *McClain* v. *Sorrels, supra,* then it is difficult to perceive why a single act of drunkenness on this occasion should involve

moral turpitude, amounting to corruption, authorizing a sentence to the penitentiary for five to ten years.

Appellant's conduct was highly improper and perhaps grossly negligent. But it isn't shown that this caused the escape of the prisoner or contributed to it. The undisputed proof shows that the prisoners were locked in the truck by appellant, and that he threatened them with his pistol, warning them against any attempt at escape. The fact that one had escaped was discovered a few minutes thereafter, and he immediately began a search. He returned the other prisoners to jail and gave the alarm, and a search was instituted. The prisoner was recaptured a few days later and taken to the penitentiary.

We are therefore of the opinion that the evidence fails to establish the charge within the meaning of the statute. The judgment will be reversed, and the cause remanded for a new trial.

SMITH, J., dissents.

ARKANSAS POWER & LIGHT COMPANY *v.* GRAVES.

4-3555

Opinion delivered October 15, 1934.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

T. E. Abington and *Tom W. Campbell,* for appellee.

McHaney, J. Appellee recovered judgment for $3,000 against appellant for personal injuries she alleged she sustained while riding as a passenger on appellant's street car on the 15th Street car line in the city of Little Rock, on May 30, 1931. She is the only witness who testified as to how the alleged injury occurred. The operator of the street car was dead at the time of trial and made no report of an accident on said date. Only one other passenger was on the car, and he was not available as a witness. Appellee testified that she boarded the car at the end of the line at 25th and Summit. As they were traveling east on 16th Street, she noticed the motorman writing in a small book and not keeping a lookout, and, just as the car entered the intersection of 16th and Battery, the latter being a boulevard stop, the motorman noticed that he was about to collide with an automobile traveling on Battery Street, and that he made an emergency stop which was so sudden and violent as to throw her forward against the window frame and seat in front of her, causing the injuries of which she complains.

For a reversal of the judgment against it, appellant assigns as error the giving of appellee's instructions Nos. 1 and 2. These instructions will be copied by the

reporter in a footnote to this opinion. The criticism made of No. 1 is that the only issue made by the pleadings was the failure of the motorman to keep a proper lookout, and that said instruction not only submitted that issue, but went further and submitted "the false issue as to whether or not the motorman was negligent in stopping the car suddenly in an effort to avoid an imminent collision." It is insisted that it was the motorman's duty to stop as quickly as possible under the circumstances, and that no liability can be predicated on the fact that he made a quick and sudden stop. In other words, "the motorman could not do right and wrong at the same time." A number of cases are cited from other jurisdictions holding to the effect that liability against a street railway company cannot be predicated on an injury caused by a sudden stop in order to avoid a collision in an emergency created by the act of some third person or agency over which the motorman had no control. For instance, in the case of *Cleveland City Ry.*

Co. v. *Osbourn,* 66 Ohio State 45, 63 N. E. 604, the appellee was a passenger on a street car which was brought to a sudden stop in order to avoid a collision with a bakery wagon which was driven on the track directly in front of the street car. From a judgment based on the sudden stop, the court on appeal held that it was the duty of the motorman to stop in order to avoid a collision with the wagon,—an emergency created by the act of a third person. Recovery was denied, the court saying: "The judgment of the lower court presents the anomaly of requiring of one the strict performance of an act as a legal duty, yet requiring it at his peril. One cannot do right and do wrong at the same time." Here the facts are entirely different. An emergency was created or arose, not by any act of a third person, but by the negligence of the motorman himself in failing to keep a proper lookout and in failing to bring his car to a stop in the usual and customary way at a boulevard stop. It was his duty to bring his car to a stop at 16th and Battery, whether an automobile was crossing the street car track at that time or not, and had he kept a proper lookout, he no doubt would have done so in the usual way. Having created the emergency by his own negligence, appellant cannot escape liability thereon. We therefore hold said instructions were proper under the facts of this case.

Error is also assigned for the refusal of the court to give requested instructions 9, 11 and 12. We do not set them out for, in so far as 9 and 11 were correct, they were fully covered by other instructions given. No. 12 would have told the jury that they could not compare the negligence of appellee, if any, with that of appellant, if any, but that, if appellee were negligent and such negligence contributed to her injuries in any slightest degree, she could not recover. Instructions were given on contributory negligence, and it was not necessary to repeat them.

No error appearing, the judgment must be affirmed.

GHENT *v.* STATE USE SCHOOL DISTRICTS.

4-3559

Opinion delivered October 15, 1934.

M. E. Vinson, for appellant.

J. L. Bittle and *Wm. T. Hammock,* for appellee.

BUTLER, J. The appellee school districts obtained a judgment in the Cleburne Chancery Court against the treasurer of the county and his bondsmen. An execution was regularly issued on January 5, 1933, and returned by the sheriff indorsed: "Returned unserved as Legislature relieved Shemwell and his bondsmen. W. B. Ghent, sheriff." On April 25, 1933, a second execution was issued and delivered to the sheriff, who, on May 31 following, returned the execution unserved and indorsed: "This execution which came to my hand on the 26th day of April, 1933, is hereby returned unsatisfied because, (1), the fees for making levy and for advertising have not been paid nor tendered me; and because, (2), I am advised that under act of the 1933 Legislature of the State of Arkansas, the defendants were relieved from liability." On June 13, 1933, a third execution was issued and tendered to the sheriff on June 17, which was not served. Appellees instituted a proceeding by which they sought to compel the sheriff by mandamus to serve the execution.

At the trial the court found that the executions, which were copied in the complaint, were delivered or tendered to the defendant and the requisite fees for the service thereof were paid or tendered to him. The court made other findings of fact and declarations of law which we deem immaterial at present, and held that the petitioners (appellees) were entitled to the relief prayed, and ordered the writ of mandamus to issue.

A number of assignments of error are contained in the motion for a new trial, but we need notice only the following contentions that mandamus does not lie in this case. These are that to issue the writ was to compel the sheriff to do an act forbidden by law; that the petition was insufficient because it failed to allege that the petitioners had no other adequate remedy; that discretionary powers will not be controlled by mandamus; that the allegations of the response were admitted to be true by the demurrer filed thereto, and that therefore the judg-

ment sought to be enforced by execution was nullified by an act of the Legislature; that, as the execution was not in the hands of the sheriff, the mandamus would require him to do an impossible thing, and that, payment or tender of fees for service being necessary, if not paid or tendered, mandamus would not lie to compel the sheriff to act.

An answer to all of these contentions is that the petitioners had a legal right, were entitled to the specific remedy invoked to enforce it, and the sheriff was under the imperative duty to enforce this specific remedy but failed to do so. The court specifically found that the executions were issued and delivered to the sheriff and the fees paid or tendered, and the evidence, although in conflict, was ample to sustain the findings of the court. The sheriff was not clothed with discretion with respect to the levy of the execution. It was regular on its face, issued pursuant to the judgment of a court of competent jurisdiction, and was to enforce a legal right already established. It has often been held, and is no longer a controverted question, that when a public officer is called upon to do a plain and specific public duty which is required by law and which requires no exercise of discretion or official judgment, a writ of mandamus is an appropriate remedy to compel the performance of the duty when it is neglected or refused. It is true, as contended by the appellant, that mandamus will not issue where the petitioner has another and adequate remedy, but the modes by which a petitioner may enforce a judgment suggested by the appellant, *i. e.*, garnishment, an action against the sheriff and his bondsmen, and a transfer of funds by the county court from the funds belonging to the agencies of the county which were beneficiaries of money improperly paid by the treasurer—are not adequate remedies within the meaning of the law. It might be that, by one of the methods pointed out, they might secure the amount of the judgment awarded by the court, but the statute gives to the judgment creditor the specific remedy of execution which he is entitled to have enforced by the sheriff, notwithstanding the fact that he

might have other means by which his judgment may be collected.

As stated, the petitioner had a legal right and a specific remedy to enforce the same, and, under the rule announced in *Board of Improvement* v. *McManus,* 54 Ark. 446-48, 15 S. W. 897, it was entitled to a writ of mandamus to compel the sheriff to perform his duty. The act commanded by mandamus was not one forbidden by law, but rather one required by it, and the averments in the petition of the judgment, the issuance and deliverance to the sheriff of the writ of execution, and his failure and refusal to levy the same, were sufficient to allege that petitioner had no other adequate remedy. The term, "adequate remedy at law," has a well-defined legal meaning and is a remedy which is plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked. In this case the particular duty sought to be enforced by mandamus was the levy of the execution. An adequate remedy, as contemplated by the law, must be one which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance. This is the reason why the particular remedies pointed out by the appellant, if effective in the end, would not be adequate remedies so as to preclude resort to mandamus.

It was not the business of the sheriff to consider the effect of act No. 58 of the Acts of 1933, referred to in his indorsement, but to levy the execution, and then, if the judgment debtor was aggrieved, his remedy was ample to protect his interests without the aid of the sheriff. The order of the court to the effect that the sheriff levy the execution "to be issued and delivered to him," under the peculiar facts in this case, was not a commandment to do an impossible thing as contended by him. That this is true is so obvious nothing more need be said regarding this contention.

Much has been said in the briefs of appellant and appellee relative to the validity or invalidity of act No. 58 of the Acts of 1933, but the question as to its consti-

tutionality need not now be decided for the reason that, whatever may be the effect of that act it did not relieve the sheriff of his duty to obey the law.

We find no reversible error. The judgment and order of the trial court is therefore affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* MANN.

4-3663

Opinion delivered October 1, 1934.

Rose, Hemingway, Cantrell & Loughborough, for petitioner.

Frauenthal & Johnson and *Walter L. Pope,* for respondent.

BAKER, J. This is a petition filed by Equitable Life Assurance Society of the United States praying that a writ of prohibition issue to prevent Richard M. Mann, judge of the Pulaski Circuit Court, Second Division, from further proceeding in the cause of Robert E. Mattison, *non compos mentis,* by Paul Belding, his next friend,

against the Equitable Life Assurance Society of the United States.

The complaint in the cause in the second division of the circuit court of Pulaski County was filed on April 3, 1934. It alleges that R. E. Mattison, a *non compos mentis,* by his next friend, Paul Belding, is a citizen and resident in the city of Little Rock, county of Pulaski, Arkansas, and that the defendant is a corporation organized and existing under the laws of the State of New York, duly authorized to transact business of life and disability insurance in the State of Arkansas. Other facts are alleged as tending to show liability of the defendant to the plaintiff.

The complaint states that on January 1, 1921, plaintiff became physically and mentally incapacitated to such an extent that he was wholly unable to engage in any occupation or perform any work for compensation of financial value; that the plaintiff has at all times since that date been wholly, physically and mentally incapacitated to such an extent that he is now suffering total and permanent physical and mental disability.

Motion was filed by the petitioner named herein to quash the summons and service thereof on April 23, 1934. It entered its appearance solely for the purposes set out in the motion, alleging that it had obtained permission to do business in the State of Arkansas pursuant to the provisions of § 6063 of Crawford & Moses' Digest, and that it has stipulated that legal process served upon the Insurance Commissioner of the State of Arkansas shall have the same effect as if personally served upon the defendant within the State. It alleges that the policy upon which the plaintiff had filed suit was delivered to him in the State of Tennessee, at a time when the plaintiff was a citizen and resident of the State of Tennessee, and that the same is a Tennessee contract. It also alleged that, at the time of the institution of the suit in the circuit court, Mattison was not a citizen or resident of the State of Arkansas, and at the time of the filing of the motion he was not such a citizen or resident.

On May 8 motion was filed in the case pending in the circuit court to substitute Paul Belding as guardian and

curator of R. E. Mattison as party plaintiff, said Paul Belding having been appointed by the probate court of Pulaski County on the 7th of May, 1934.

Evidence was heard upon the motion to quash. Paul Belding testified that he met R. E. Mattison about the 15th of October, 1932, entered into a contract with him to file suit against the insurance company; that he made a trip with Mattison through the States of Mississippi and Alabama, and finally to Memphis, gathering affidavits as to his condition and in preparation for the suit. He testified that Mattison had a type of insanity called psychosis; that he had been under treatment of Dr. Wallace at Western State Hospital in Bolivar, Tennessee, and had been paroled; that the parole had been issued prior to the time of making this trip; that Mattison had been in Little Rock, and endeavored to open a business at 812 Main Street; that on account of the fact that his health seemed to be again breaking, or a relapse seemed to be setting in, Mattison returned to the hospital at Bolivar, Tennessee, on the 7th of March; that he had left Little Rock voluntarily; that he is still in the hospital in Tennessee; that at the time he was attempting to go into business in Little Rock he had taken up his residence in that city as a citizen; that he had formerly lived in Little Rock, and had been in business as a tailor; that he, the witness, was with Mattison a great deal of the time, had conversed with him, and that Mattison had sufficient mental capacity to form an intent to make Little Rock his home; that it was the intention of Mattison to return to Little Rock when he felt sufficiently restored.

Dr. W. W. Wallace, a physician of the Western State Hospital at Bolivar, Tennessee, knew Mattison, and stated that he was first admitted to the institution on May 3, 1929, by reason of a previous adjudication of insanity; that he was paroled on August 15, 1931; that after his parole he returned to the hospital September 19, 1931, and remained there until September 25, 1933, on which date he left; that his condition had improved and five days later, on September 30, he was paroled.

The adjudication of insanity was had in the county court of Shelby County, and no subsequent adjudication

was had upon any return to the hospital. His trouble was diagnosed upon entry to the hospital as manic depressive psychosis.

Harry Pfeifer, Sr., testified that Mattison had formerly been in the employ of Pfeifer's in Little Rock; that he had been away many years; that he had returned to Little Rock sometime in the fall of 1933, and that he had samples, and was going out soliciting orders; that he, Pfeifer, had a vacant store at 812 Main Street, and that he delivered the keys to Mattison and permitted him to occupy the store without charge for a time; that he kept the store until he made a trip down to Houston, Texas, or Dallas; that he talked with him on occasions, loaned him a few dollars at times, which he paid back; that Mattison was planning to put in a store or tailor shop and other shops in different cities, and that he was "going to make enough money to endow an orphanage."

There was also offered in evidence the adjudication of insanity made by the county judge of Shelby County, Tennessee. Mattison was committed as a poor person, no one being legally liable under the insanity law for his maintenance, and upon proof and a finding that he had been a resident of Tennessee for twelve months or more before he was adjudicated insane.

This statement, perhaps, does not include all of the facts, nor all of the testimony heard in circuit court, but such a material part thereof as to show the issues on the presentation of defendant's motion to quash, and upon this hearing the learned circuit judge overruled the motion to quash. The sole point in issue, upon this motion to quash, was the place of residence of Robert E. Mattison, the plaintiff in the suit filed in the circuit court.

It is urged by the petitioner that, as the said Robert E. Mattison was a resident of Tennessee at the time of the filing of the suit in the circuit court for the second division of Pulaski County, Arkansas, that court did not acquire jurisdiction. If that were an undisputed question of fact, petitioner's conclusions would be correct. We realize that Western State Hospital, located at Bolivar, Tennessee, is a State institution intended to care for the insane in a particular district in the State of

Tennessee, as fixed by law. Like most hospitals of the kind, the law of that State provides that, to be eligible to enter the said hospital, the patient must be a resident of the State, and, in this particular case, of the district in which it is located. It is urged forcefully that, since he was adjudicated to be insane in 1929, the presumption of insanity continues and particularly by reason of the fact that he has returned, and was at the time of the filing of the suit, and is yet, an inmate of that institution. However, he was paroled the last time in September of 1933, and the effect of such parole is such as to raise another presumption of restored sanity.

In a Tennessee case the court held, that the fact of insanity having been judicially ascertained, the law presumes its continuance until his restoration to sanity, or until a lucid interval, is established by evidence. In the same case the court also said: "But the record contains nothing from which we can presume with certainty that he was discharged by officers of the asylum because they judged him restored to his sanity, but we may regard as probable that such was the fact. If there was such evidence, we should hold it, at least, *prima facie* evidence of restored sanity." *Haynes* v. *Swann,* 6 Heiskell 560, 587.

The evidence in this cause tends to show that Mattison had sufficient intelligence to choose a place of residence, and that he chose Little Rock, Arkansas, as such place of residence.

But he voluntarily returned to the Western State Hospital at Bolivar, nearly a month prior to the institution of this suit, and the most that could be said about his return and reentering the hospital in Tennessee is that there may be a presumption that he again changed his mind to return to Tennessee and reenter the hospital under his former commitment as a resident of that State, but that is a question of fact undetermined, except impliedly settled by the order of the circuit court in overruling the motion to quash.

Such is the face of the record presented to us upon the petition for a writ of prohibition. If this court should take the allegations, as set forth in the complaint,

alleging residence in Arkansas, and the motion to quash, as alleging the residence of the same party in Tennessee, and we then assume to try that issue of fact to determine the jurisdiction of the original cause, our action would be, to that extent, a usurpation of the function of the trial court.

Justice HUGHES, as early as 1892, upon application for a writ of prohibition, wherein the petitioner had alleged the fact that it could not be held to answer in a suit for liability in this State, said in regard to the questions therein raised: "They must be first tried by the circuit court upon the pleadings and the evidence. This corporation says, for instance, that it is not guilty of publishing the libel charged, and, therefore, denies its liability to suit in courts of this State. This may be pleaded in bar, and given in evidence, and, if true, will defeat the plaintiff's claim. It cannot, therefore, be properly a subject of plea to the jurisdiction. In this controversy we must take the plaintiff's cause of action to be such as he alleged it to be in his complaint, otherwise we shall be trying the merits of the controversy for the purpose of determining whether we have power to try them. *Nat. Condensed Milk Co.* v. *Brandenburgh,* 40 N. J. L. 112. The truth of the allegations of the complaint, as well as the sufficiency of them to constitute a cause of action, are not questions now before this court." *American Casualty Co.* v. *Lea,* 56 Ark. 511, 515, 20 S. W. 416.

This cause of action is transitory. If the facts are as they are alleged in the complaint, the action can be tried in the circuit court, where filed. *Scottish Union & Nat. Ins. Co.* v. *Hutchins,* 188 Ark. 533, 66 S. W. (2d) 616. In that case, the petitioner sought to try the question of residence of Bruce, the plaintiff, who filed the suit against the petitioner, and the court distinguished the case, upon the hearing of the petition for prohibition, from the case of *National Liberty Ins. Co.* v. *Trattner,* 173 Ark. 480, 292 S. W. 677.

In *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 751, 12 S. W. (2d) 421, this court said: "The office of the writ of prohibition is to restrain an inferior

tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Order of Ry. Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448, and cases cited."

In the Bandy case, the court said: "Where the court has jurisdiction over the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy."

Again Justice Wood announces the rule in this way: "If the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted; though the superior court should be of opinion that the questions of fact have been wrongly determined by the court below, and, if rightly determined, would have ousted the jurisdiction." *Findley* v. *Moose,* 74 Ark. 217, 220, 85 S. W. 238.

We feel that the foregoing cases announce the rule followed by this court, and that, while other cases in point could be cited, such citations are not necessary.

The writ of prohibition is denied.

LaFargue *v.* Waggoner.

4-3692

Opinion delivered October 8, 1934.

[redacted]

M. F. Elms, A. G. Meehan and *John W. Moncrief,* for petitioner.

G. W. Botts, Geo. E. Pike and *W. A. Leach,* for respondent.

Jeta Taylor, J. E. Yates and *Benson & Woolsey, amici curiae.*

MEHAFFY, J. The primary election was held on August 14, 1934. In Arkansas County there were several candidates for sheriff, and no one of them received a majority of all the votes cast in said primary election for sheriff and collector, and the Democratic Central Committee, on August 15, 1934, decided that C. C. McCallister and Lloyd LaFargue had received the highest numbers of votes cast in said primary election for said office, and they were each declared to be eligible as candidates for the nomination to said office in the run-off primary which was held on August 28, 1934. After the run-off primary the Arkansas County Democratic Committee canvassed the returns and certified that LaFargue had received 2,102 votes and McCallister 2,037 votes, and declared LaFargue the nominee of said primary election.

On September 4, 1934, C. C. McCallister filed a complaint against Lloyd LaFargue in the Arkansas Circuit Court to contest said election and the certificate of nomination. He alleged in his complaint that the plaintiff and defendant, together with J. A. McKay, W. C. Woodson, Eddie Hughes and Abbott Trice were candidates on August 14, 1934, for the Democratic nomination for the office of sheriff and collector of Arkansas County; that neither of the above-named persons received a majority of all the votes cast in said primary election, and, this fact having been ascertained by the Democratic Central Committee, and the committee having ascertained that plaintiff and defendant had received the highest number

of votes cast in said primary election for said office, they were by said committee declared and certified to be eligible as candidates for the nomination to said office in the run-off primary to be held subsequently. Plaintiff and defendant were candidates in said run-off primary held on August 28, 1934. On August 31, 1934, the central committee canvassed the returns and declared that defendant had received 2,102 votes, and that the plaintiff had received 2,037 votes, and declared the defendant the nominee, and so certified him to be the nominee. Plaintiff denied that defendant was the nominee; denied that he had received 2,102 votes, and alleged that in one township 125 qualified electors each cast his ballot for the plaintiff, and that each of said ballots were counted for the defendant. The list of names of these 125 voters was attached as exhibit A to the complaint, and made part thereof. Plaintiff alleges that numbers of other persons voted for the defendant who were not qualified electors. He also alleges irregularities in the handling of the vote of Keaton Township. Irregularities are also alleged in the primary election in the town of DeWitt, and it is alleged that illegal votes were cast and counted for the defendant. It is also alleged that persons living in Prairie Township voted in DeWitt, and voted for the defendant. It is further alleged that of the total number of votes cast in said primary election, plaintiff received 2,237, and the defendant not more than 1,838, giving the plaintiff a majority of 399 legal votes, and he asked that the returns of the election be purged of all illegal votes, and that he be declared the nominee. The complaint was supported by more than ten persons, each of whom swore that he was a reputable citizen of Arkansas County, a member of the Democratic party, and qualified elector of Arkansas County.

On September 10, 1934, an amendment was filed by plaintiff, naming the persons whom he alleges voted for the defendant who were not qualified electors. He alleges that plaintiff is a resident of, and qualified elector in Arkansas County, and is and was at the time of the voting, qualified to hold the office of sheriff and collector.

On September 12, 1934, the defendant filed a demurrer to plaintiff's complaint, in which he stated, first, that the complaint fails to state facts sufficient to constitute a cause of action; second, that the complaint fails to state facts sufficient to confer jurisdiction on the court to grant any relief to plaintiff. On the same day, September 12, defendant filed a motion to dismiss, in which he set up the same grounds that he did in his demurrer, and, in addition to these, that the complaint was not verified as required by law, and that the amendment to the complaint was filed after the expiration of ten days.

Thereafter, on September 17, 1934, the defendant filed an amendment to his motion to dismiss, setting up numerous grounds in addition to what he had already alleged.

On September 21st the court overruled the demurrer and also overruled the motion and amendment to motion to dismiss, and held that the court had jurisdiction to proceed to a hearing and determination of the case. Thereupon the defendant announced that he would apply to this court for a writ of prohibition, and on September 21st filed his petition for a writ of prohibition against W. J. Waggoner, circuit judge, and C. C. McCallister, prohibiting the circuit court from exercising jurisdiction.

The parties have filed lengthy briefs, and we will not undertake to review all the authorities to which attention has been called by the parties.

It is earnestly contended that act No. 38 of the Acts of 1933 does not provide for any contest. It is true that it does not say anything about contesting the run-off primary, but the sole purpose of the original law authorizing a contest is to secure the certification and nomination of the person who has received the highest number of legal votes. Before the passage of act 38 the person receiving the highest number of legal votes in a primary election was declared the nominee and certified as such, although he might not have received a majority of all the votes. There might be so many candidates in the race for any particular office that the one getting the highest num-

ber of votes would have a very small per cent. of the total vote, and it was to remedy this condition that the Legislature passed act 38, the purpose being to certify no one as the nominee of the party unless he had received a majority of all the legal votes cast. The purpose of the primary election law is to enable a political party to hold a legal election and certify the person as nominee who receives the greatest number of legal votes. Act 38 was passed to correct the evil above-mentioned, and is a part of the system providing for primary elections, and must be construed with the original act authorizing primary elections. While the act does not say so in so many words, this is an amendment of the primary election law. Prior to the passage of this act, the law provided for contesting the election.

"In the construction of amendments to statutes, the body enacting the amendment will be presumed to have had in mind existing statutory provisions and their judicial construction, touching the subject dealt with. The amendatory and the original statute are to be read together in seeking to discover the legislative will and purpose, and, if they are fairly susceptible to two constructions, one of which gives effect to the amendatory act, while the other will defeat it, the former construction should be adopted." 25 R. C. L., 1067.

"Statutes must have a rational interpretation to be collected, not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals." 25 R. C. L. 1077.

It would be unreasonable to suppose that the Legislature intended to provide for a run-off primary and prohibit a contest, because, if it prohibits one at all, it prohibits, no matter how much fraud might be practiced in the run-off primary. The purpose of the primary law and the provisions for contesting is to secure fair elections, and the nomination of the candidate who receives the highest number of legal votes. Under the original law, as we have already said, one receiving a plurality,

no matter how small, was declared the nominee. It was evidently the intention of the Legislature to remedy this particular evil, and to amend the general law in that respect. It provides that no person shall be declared the nominee of any political party at any primary election unless such person has received a majority of all the votes cast at such primary election, and that is the only difference between act 38 and the law as it was before.

Act 38 also provides that the second primary election shall be conducted according to the law prescribed for conducting the general primary election, and we think this means that the law prescribed for conducting the general primary election governs in every respect, except that the candidate, in order to get the certificate of nomination, must get a majority of all the votes cast.

The original act provides not only for the election to be held on a certain day, but it also provides that special primary elections may be called to fill vacancies, and that this law shall govern the same as far as applicable. There is nothing in the section providing for special primaries about a contest.

Section 12 of the initiated act provides that a right of action is conferred on any candidate to contest the certification of nomination or the certification of the vote.

There is a well-established principle of law which applies to the construction of constitutions as well as statutes, and that is that a statute extends by inference to cases not originally contemplated, when it deals with a class within which a new class is brought by later statutes. *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74; *Nations* v. *State*, 64 Ark. 467, 43 S. W. 396.

Act 165 of the Acts of 1909 makes primary elections legal elections. The initiated act of 1917 was amended by act 19 of the Acts of 1919, fixing the time to hold the general primary election. This amendment, however, provided for special primary elections to fill vacancies, but nothing was said about a contest. Yet this court has held that the law applies to special elections.

In the case of *Terry* v. *Harris,* 188 Ark. 60, 64 S. W. (2d) 80, the court said: "It is true the election here con-

tested 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."

We have repeatedly held that the statute providing for contesting elections should be liberally construed, the purpose of the contest being to determine which candidate received the greatest number of votes. To hold that a contest could not be had in the run-off primary would defeat the very purpose of the law providing for a contest.

The law provides: "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." That necessarily means any candidate and in any primary election.

Act 38 provides that the second primary shall be conducted according to the law prescribed for conducting the general primary election, and that the candidate receiving the majority of all the votes cast shall be declared the nominee.

"Statutes *in pari materia* are those which relate to the same person or thing, or to the same persons or things, or which have a common purpose; and, although an act may incidentally refer to the same subject as another act, it is not *in pari materia* if its scope and aim are distinct and unconnected. It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established

policy of the Legislature as disclosed by a general course of legislation. With this purpose in view therefore, it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have expired or have been repealed." 59 C. J., 1042.

Manifestly the intention of the Legislature, in enacting the primary election law, was to make the primary election legal, prevent fraud and corruption in elections, to see that the people's choice in the election should have the office, and to provide for a contest wherever charges of fraud or mistake in elections change the result. We think there can be no doubt that it was the intention, in passing act 38, to secure the rights above mentioned, and not to prevent a contest in order to determine whom the people had elected.

It is next contended that the complaint did not state facts sufficient to constitute a cause of action or to give the court jurisdiction. As we have already said, the statute confers a right of action on any candidate. Crawford & Moses' Digest, § 3772.

Section 3773 of Crawford & Moses' Digest provides, among other things: "If the complaint is sufficiently definite to make a *prima facie* case, the judge shall, unless the circuit court in which it is filed is in session or is to convene within 30 days, call a special term," etc.

We have set out above substantially the allegations in the complaint for contesting the election. The petitioner contends that the court has no jurisdiction, first because it is said the complaint is not verified. The statute provides not that the plaintiff shall verify his complaint, but that the complaint shall be supported by the affidavits of ten reputable citizens. This was done.

It is argued that the complaint is not sufficient to give the court jurisdiction because the plaintiff did not set out the number of votes received by each candidate in the general primary election, but the complaint does state that plaintiff was a candidate in the general primary election held on August 14, 1934, and names the other candidates for the office of sheriff and collector in

that election, and states that neither of the candidates received a majority of all the votes cast. This could mean but one thing, and that is that neither of them were nominated in the primary election on August 14. Then he alleges that the committee found that neither of them had received a majority, and also stated and certified that plaintiff and defendant received the highest number of votes in the general primary, and certified each of them as eligible candidates in the run-off primary.

We have held that there is a presumption that the election officers performed their duty, and they therefore would not have certified plaintiff and defendant as candidates in the run-off primary if they had not been entitled to be so certified.

It is also contended by the petitioner that McKay, Woodson, Hughes and Trice were necessary parties to the contest. Neither of these persons were candidates in the run-off primary. It is true that in the original complaint plaintiff did not allege that he was a member of the Democratic Party, but the allegations in the complaint clearly show that he must have been, because he alleges he was a candidate in the general primary, and that the Democratic Central Committee certified him as a candidate in the run-off primary.

There are numerous other grounds set up in defendant's motion to dismiss plaintiff's complaint, which we do not deem it necessary to take up and discuss separately. All the questions raised by defendant in his motion to dismiss were questions that the trial court had a right to inquire into and determine. The trial court had a right to determine the question of its jurisdiction; and wherever the jurisdiction of the trial court depends upon facts, the question must be decided by the trial court, from which decision either party may appeal to this court.

"It is well settled that, if the existence or nonexistence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the opinion that the

claims of fact had been wrongfully determined by the lower court, and, if rightfully determined, would have ousted the jurisdiction." *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 42; *Roach* v. *Henry,* 186 Ark. 884, 56 S. W. (2d) 577; *Crow* v. *Futrell,* 186 Ark. 926, 56 S. W. (2d) 1030.

The questions raised by defendant's demurrer and motion to dismiss were questions for the lower court, questions where the jurisdiction of the court depended upon contested facts. The original complaint stated facts sufficient to constitute a cause of action; and if a motion to make more definite had been filed by the defendant, it is entirely probable that the court would have required the plaintiff to make his complaint more definite and certain, and plaintiff could amend his complaint after the ten days.

This court has several times held that the statute providing for contesting elections should be liberally construed. The purpose of the contest is to determine what candidate received the greatest number of votes; and if there are sufficient facts stated to give the other party reasonable information as to the grounds of contest, then the case should be tried on its merits. If the complaint was indefinite and uncertain, the court should require amendments to make it more definite and certain.

The pleadings in an election contest case should be sufficiently specific to give reasonable information as to grounds of contest. The statute provides that the contest shall be begun within a certain number of days, and this court has repeatedly held that, after the time for filing a contest has expired, the contestant cannot so amend his complaint so as to set forth a new cause of action. He can, however, after the time has expired, amend his complaint by making it more definite and certain, as to any charge in the original complaint, and, if a motion to make more specific is filed, it would be his duty to make the amendment. *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. (2d) 450.

We have also said in *Robinson* v. *Knowlton,* 183 Ark. 1133, 40 S. W. (2d) 450: "Since such contest is generally

held not to be a civil action, subject to rules of pleading in actions at law, but to be a special statutory proceeding, varying in its nature as well as in the sufficiency of the pleadings, according to the statutes of the different States, the same strict, technical accuracy in pleading is not usually required as in civil actions *inter partes*. 20 C. J., 235."

It has been said with reference to the pleadings that the rule must not be so strict as to afford protection to fraud, by which the will of the people is set at naught, nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause. *Bland* v. *Benton,* 171 Ark. 805, 286 S. W. 976; *Gower* v. *Johnson,* 173 Ark. 120, 292 S. W. 382.

We have also said in a recent case: "The statute does not require supporting affidavits of the citizens to these permissible amendments. These amendments may be made without the supporting affidavits and after the expiration of the original ten days, when unreasonable delay in the trial of the cause will not result therefrom." *Robinson* v. *Knowlton, supra; Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. (2d) 319; *Wilson* v. *Caldwell,* 186 Ark. 261, 53 S. W. (2d) 438.

The court of South Dakota, in passing upon the sufficiency of pleadings in an election contest, said among other things: "While the notice does not, in so many words, allege that plaintiff had been a candidate for the disputed office and that his name appeared on the printed ballot as such candidate, it does allege that he is a duly qualified elector of said county and duly qualified to act as county auditor of said county; that the canvassing board had made certain mistakes in counting and canvassing the vote; and that, had it not been for such errors in counting the ballots and other errors and irregularities set forth in said notice of contest, the said election would have resulted in a majority vote for plaintiff, and he would have been declared county auditor of Hanson County. From these facts but one inference can be drawn, and that his name was on the ballot. Otherwise he could not have received any votes at all." *Dobson* v.

Lindekugel, 38 S. D. 606, 162 N. W. 391; *Hadley* v. *Gutridge,* 58 Ind. 302; *Rounds* v. *Smart,* 71 Maine 380.

The court also said in the same case: "The statute should receive a liberal interpretation to the end that such matters may be determined on their merits."

Our conclusion is that the complaint stated a cause of action, and that defendant's remedy was by motion to make more definite and certain.

The writ of prohibition is a discretionary writ. It is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that will be done by such usurpation. *Pacific Mutual Life Insurance Company* v. *Toler,* 187 Ark. 1073, 63 S. W. (2d) 839; *Macon* v. *LeCroy,* 174 Ark. 228, 295 S. W. 31; *United Mine Workers* v. *Bourland,* 169 Ark. 796, 277 S. W. 546; *Metzger* v. *Mann.* 183 Ark. 40, 34 S. W. (2d) 1069.

It follows that the writ must be denied, and it is so ordered.

JOHNSON, C. J., (concurring). I concur with the majority that act 38 of 1933 is amendatory of prior primary election laws and that the initiated act of 1917 as amended by act 19 of 1919 is applicable thereto and gives a right of contest to all defeated candidates at such runoff primary election. For this reason only the application for prohibition should be denied.

The determination by the majority that the complaint of the contestant filed in the Arkansas Circuit Court is sufficient against demurrer is unwarranted. This question is not before us and cannot be until brought here by appeal. *Equitable Life Insurance Society* v. *Mann, ante* p. 751, and cases there cited.

CARADINE *v.* STATE.

Crim. 3895

Opinion delivered October 8, 1934.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellant.

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

MEHAFFY, J. The appellant, Hiram Caradine, was indicted, tried and convicted for robbery, and sentenced to three years in the penitentiary. To reverse the judgment of conviction he prosecutes this appeal.

Dr. C. W. Jones testified in substance that on the morning of January 13, 1934, at about 2:15 o'clock, he was awakened by some one at his door, and when he went to answer the doorbell, he found a man on the porch who informed him that he had been sent to ask the doctor to come to Haskell immediately to see one Louis Westbrook, a patient of his, who, the man said, was seriously ill. The man said he was from Little Rock and had been sent as a messenger. Dr. Jones asked him if he was going back there, and he said, "Yes," and that he would wait for

him at the drug store and ride back with him. The man helped Dr. Jones clean the ice off of the windshield and they drove on highway 67 at about twenty-five miles an hour. Dr. Jones then saw a car coming out behind them, and started speeding up, going about thirty-five miles an hour. They traveled faster than the car behind, and the man, who the doctor afterwards learned, was Virgil Smith, said he was visiting some boys there, and to let him out. They were then close to the old Hot Springs Highway, and at this time the other car was some distance behind. Smith backed out of the door and pulled a gun on the doctor, and told him to raise his hands, and cursed him, and then the other car came up from behind. Some one came running up and ordered witness to get out on the side. The doctor had driven to the side of the road at the intersection to let Smith out. The other man and Smith robbed witness. They took from him a $5 bill and $2 or $3 in silver, searched him for a gun, and Smith came around the car and got in behind the wheel and drove out on the Hot Springs highway. Brooks Brown, the other man, backed up against the windshield and kept witness covered with his gun. The other car then followed them out. They were going about thirty miles an hour. They cursed the doctor. The car behind dropped back and then picked up again, and, as they got past where Connie Smith lived, they turned off on a side road and ordered witness to get out and they tied him to a tree. It was cold, and Dr. Jones asked them to turn his coat collar up. He got loose before they got out of sight and ran up the road to Connie Smith's, and Smith brought him to town. Witness never did see the party who drove the car behind, but knew there was a third party driving the car, as two of them, Smith and Brown, got in the car with him, and the other car followed them about three miles. He does not know whether the appellant was in the car or not. It was a cold night and there was ice on the windshield. The sheriff, Mr. Rucker, got witness' car back. The car was worth about $450. Louis Westbrook lives at Haskell, and witness was their family physician. Witness had no way of identifying the man in the rear car. He did not know Smith and Brown,

but had seen Caradine, the appellant, before. It was Saturday morning, January 13th, when Smith went to witness' house.

While Dr. Jones did not identify Caradine, Fred Newcomb, V. L. Landers, C. H. Womack, Mary Jane Holder and Mary Westbrook all knew the appellant and saw him in Benton on Friday afternoon and Friday night, and it is shown by some of these witnesses that he left the pool hall after twelve o'clock Friday night, and he and Smith and Brown got into a car and rode away, and the same car was seen with three men in it up until two o'clock Saturday morning.

The appellant testified very positively that he had nothing to do with the robbery, and that he left Benton at ten o'clock Friday night and walked home; that he went by his uncle's house and spoke to him, and his uncle testified to the same facts.

The evidence also shows that Smith, Brown and the appellant had been together, and that Smith and Brown had stayed at appellant's house on Thursday night before the robbery.

Appellant contends first that the evidence was not sufficient to sustain a conviction. It is true that Dr. Jones did not recognize appellant, but Fred Newcomb knew Caradine, and testified that Caradine, Smith and Brown came into his filling station Friday night about ten o'clock, and that he spoke to appellant; that they were in a car.

C. H. Womack testified that appellant and Smith and Brown were in his pool room until after twelve o'clock Friday night.

V. A. Rucker, the sheriff, knew the three parties, and after the robbery he was called at about 3:20 in the morning, and afterwards went to Oklahoma and found Dr. Jones' car and also found Smith and Brown.

Mary Jane Holder testified that she knew the appellant and Smith and Brown, and saw Smith and appellant in Benton, Friday afternoon about five o'clock. They were in a car but witness did not know whose car. She had met both Smith and Brown through appellant.

May Westbrook knew the parties and testified that she was at the appellant's home on Thursday morning before the robbery, and that Smith and Brown were also at appellant's home, and that they all left together.

The testimony of the witnesses for the appellant is in direct conflict with the testimony of the witnesses for the State. The witnesses for the State show that the appellant was in Benton after twelve o'clock; their testimony shows that he got in a car with Smith and Brown at 12:20, and the same car was seen by witnesses with three men in it, and while the witnesses did not recognize all three men, they did recognize the car and Smith as the driver. But, if the State's witnesses are telling the truth, then the testimony of the appellant's witnesses could not be true. If appellant was in Benton after twelve o'clock, he could not have left there at ten o'clock, and have been at his home, eight miles from there, at twelve o'clock.

The jury evidently believed the State's witnesses, and, if they did, they could not believe the appellant's witnesses, and it was a question for the jury, and not for this court.

We recently said: "The testimony was entirely circumstantial, but, if believed, it was sufficient to justify the jury in finding the appellant guilty. The jury are the judges of the credibility of the witnesses and the weight to be given to their testimony. Therefore, in determining whether the evidence is sufficient to support the verdict, this court must consider the evidence in the light most favorable to the State, and, when this is done, it cannot be said that the evidence did not warrant the jury in returning the verdict of guilty." *O'Neal* v. *State,* 179 Ark. 1153, 15 S. W. (2d) 976.

We think that the testimony of the State's witnesses that appellant and Smith and Brown got into the car after twelve o'clock and were seen to drive on the streets of Benton, and that thereafter they saw the same car with three men in it, driven by Smith, was sufficient, if the jury believed it, to warrant the finding that the appellant was with Smith and Brown at two o'clock, just before Smith went to Dr. Jones' door.

Appellant cites and relies on *Bowie* v. *State,* 185 Ark. 834, 49 S. W. (2d) 1049. The court there was discussing circumstantial evidence, and it said, among other things: "This character of evidence, however, has certain disadvantages. A jury has not only to weigh the evidence and the credibility of the witnesses, but to draw just conclusions from the circumstances in proof, and in doing so it may, by want of due deliberation, make hasty and false deductions and be swayed in its judgment by prejudice or partiality. This demands that in a case depending upon circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused."

Among the circumstances relied on in this case are the following, about which there can be no dispute: the appellant was raised in Haskell community; he knew Dr. Jones and Louis Westbrook, and knew that Jones was Westbrook's family physician; he was with Smith and Brown Thursday night at his home; he was with them in Womack's pool hall Friday night until after twelve o'clock; he left the pool hall and got into the car with Smith and Brown; they drove away together, three of them being in the car; they were seen driving on the streets of Benton several times after that; the same car was seen with three men in it as late as two o'clock; Smith and Brown did not know Jones, and shortly after two o'clock Smith went to Jones' door and told him that Westbrook at Haskell was seriously ill, and wanted him to go at once; he and Dr. Jones started in Dr. Jones' car; another car followed them; when they got about one-half of the way to Haskell, Smith got out of the car and drew a gun and Brown came up from the rear car, and they robbed Dr. Jones and tied him to a tree, and then drove Jones' car away, and the other car followed; Smith and Brown neither were in the other car; somebody was in the other car and started it and drove it, following Dr. Jones' car.

We think the circumstances show conclusively that this driver of the other car was appellant. There can be

no reasonable doubt that it was the appellant, if the witnesses for the State have told the truth, and, as to whether they have or not, the jury, and not this court, is the judge.

This court recently said: "The court correctly refused to direct a verdict for appellant, Oliver, for the reason 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."

The appellant was convicted on circumstantial evidence, but there is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and, if the jury believes from the circumstances introduced in evidence beyond a reasonable doubt that the defendant is guilty, it is the duty of the jury to find him guilty, just as it would if the evidence was direct. There is no greater degree of certainty in proof required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the guilt of the defendant beyond a reasonable doubt. *Scott* v. *State,* 180 Ark. 408, 21 S. W. (2d) 186; 2 Nichols' Applied Evidence, § 4, 1065; Underhill's Criminal Evidence, 14 and 16; *Spear* v. *State,* 184 Ark. 1047, 44 S. W. (2d) 663; *Kellogg* v. *State,* 153 Ark. 193, 240 S. W. 20; *Williams* v. *State,* 153 Ark. 289, 239 S. W. 1065.

It is next contended by appellant that instruction No. 2 should not have been given. It reads as follows: "You are instructed that if you should find from the evidence in this case beyond a reasonable doubt that the defendant, Hiram Caradine, in Saline County, Arkansas, and within three years next before the filing of the indictment of the case, did, as alleged in said indictment, by force or intimidation steal, take and carry away feloniously and violently the said automobile and seven dollars lawful money of the United States, the personal property of one Dr. C. W. Jones, you will find the de-

fendant guilty and fix his punishment in the State penitentiary at a period of not less than three years nor more than twenty-one years."

No error was committed in giving this instruction. *Maxwell* v. *State, supra.*

This court does not pass on the credibility of the witnesses nor the weight of their testimony. These are questions for the jury.

We find no error, and the judgment is affirmed.

JOHNSON, C. J., (dissenting). I cannot give my assent to the affirmance of this case. Human rights and liberties should not be taken upon mere conjecture and speculation. Until recently human rights to life, liberty and property were thought to be sacred, but such inroads have recently been made upon these sacred rights that they now appear to be forgotten. The Declaration of Rights provides in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * * and be confronted with the witness against him. When jury verdicts are permitted to stand which rest solely upon conjecture and speculation, this wholesome constitutional guarantee is violated.

Moreover, § 3184, Crawford & Moses' Digest, provides, where there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal.

Since statehood, and long prior thereto, it has been the rule in this State that in all criminal cases dependent upon circumstantial testimony the guilt of the accused must be established to the exclusion of every other reasonable hypothesis. *Cohen* v. *State,* 32 Ark. 226; *Benton* v. *State,* 30 Ark. 328.

In the instant case, giving the testimony upon behalf of the State full credence, it falls far short of the established law. No witness saw the accused after about 12 o'clock prior to the robbery, and the victim does not insinuate that the accused had anything to do with the crime. True, accused was seen in Benton on the night before the robbery, but, even so, the robbery was committed some eight miles from Benton. It is true that accused was born and reared near Benton, but, even so,

thousands of other law-abiding citizens were likewise so born and reared, including the learned Justice who has written the majority opinion. It is also true that appellant knew both Brown and Smith immediately prior to the commission of the crime, but just why he should be convicted of this crime because of this is not reflected in the opinion. If appellant is to suffer because of his acquaintance with Brown and Smith prior to the commission of the alleged crime, then of necessity the fathers and mothers, brothers and sisters, and all acquaintances of Brown and Smith should likewise be indicted, tried and convicted.

In the majority opinion much stress is laid upon appellant's testimony in reference to his whereabouts on the night of the robbery. It may be that appellant committed perjury while testifying, but just why this should be considered on this appeal is not pointed out in the opinion. I have always understood that the burden was upon the State to establish the guilt of an accused beyond a reasonable doubt, and this is the only legitimate question before us on this appeal. The weakness of the State's case should not be bolstered up by the falsity of the accused's defense. The question and only question presented here for consideration is, was appellant present, aiding, abetting or assisting in the robbery of Dr. Jones? If he was, he should be convicted. If not, he should be acquitted. No witness testified as a fact or detailed any circumstances tending to show that appellant was present or that he aided, abetted or assisted Brown and Smith in the commission of this crime. No witness by testimony got appellant nearer the scene of this crime than Benton or saw him, for that matter, within three hours of the commission of the crime. The illogic of the situation is apparent. The mere fact that appellant knew Brown and Smith prior to the commission of the alleged crime is not even a circumstance tending to establish his guilt. The mere fact that appellant was in Benton the night preceding the commission of the crime does not prove or tend to prove his connection therewith. The mere fact that appellant was seen in company with Brown and Smith some hours prior to the

commission of the robbery is a mere circumstance tending to show his lack of discretion in selecting his associates and is no evidence of his guilty knowledge of the alleged crime. Neither should appellant be convicted merely because he was reared in Saline County or happened to be in Benton the night preceding the robbery. Human liberty is now jeopardized by a verdict which rests solely upon conjecture, surmise and caprice.

When *Fox v. State,* 156 Ark. 428, 246 S. W. 863, was affirmed in this court, and human liberty was taken upon the testimony of a rabbit hound, corroborated however by finding stolen merchandise upon the premises of the accused, it was generally thought by the profession that the limit had been reached. Subsequently in *Jones* v. *State, post* p. 825, when this court affirmed a judgment and verdict which rested solely upon the smell of whiskey corroborated by the discovery of some broken glass in the appellant's car, I thought assuredly the limit had been reached, but alas, these cases are merely the beginning of a crusade against human liberty.

If the doctrine now announced is adhered to by this court, no citizen's liberty is secure, but rests wholly and solely upon the prejudices and passions of juries, actuated by good or bad motives and limited only by fear of reprisals. Indeed, the time has come when we should re-dedicate the Declaration of Rights and give to constitutional government its paramount purpose, and only justification—the protection of human liberty, the right to own property and the pursuit of happiness.

This case should be reversed and dismissed.

ARKANSAS FOUNDRY COMPANY *v.* AMERICAN PORTLAND CEMENT COMPANY.

4-3526

Opinion delivered October 8, 1934.

Barber & Henry and *J. A. Tellier,* for appellant.

Shaver, Shaver & Williams, for appellee.

McHaney, J. This is an action by appellant to enforce a mechanic's lien on the buildings and improvements constituting the plant of appellee, American Portland Cement Company, and on one acre of land on which a portion of said plant is located, on an account for $33,908.90 for labor and material furnished and sold by appellant to said appellee. The account with affidavit for lien was filed with the circuit clerk of Little River County July 11, 1930, and showed that material and labor were

furnished between February 28, 1929, and May 23, 1930, the last material sold being on the latter date. The affidavit for lien stated that the materials furnished were used in the construction of the buildings and improvements located on seven forty-acre tracts, describing them by legal descriptions in sections 16, 21 and 28 in township 12 south, range 32 west, which together made a tract of land one-fourth mile wide and one and three-fourths miles long running north and south. Within fifteen months thereafter, on June 15, 1931, appellant brought suit to foreclose its lien and for judgment against said appellee, and in apt time an answer of general denial was filed. Thereafter appellant on November 7, 1932, amended its complaint giving a detailed description by metes and bounds of the exterior boundary of the land on which the plant was constructed consisting of 3.34 acres actually covered by the improvements constituting the plant. It then described in detail the exterior boundary line of a strip of ground one foot wide surrounding the 3.34-acre tract above mentioned containing .99 of an acre. A second paragraph in said amendment describes by metes and bounds a one-acre tract on which a large portion of the cement plant is located, stating that the plant covers more than one acre. It prayed, first, that it be decreed a lien on the buildings and improvements and on the actual land covered by the plant and the .99 of an acre surrounding it; or, second, in the alternative, that it have a lien on the plant consisting of various connected buildings and plant equipment and upon the one-acre tract last above mentioned. Thereafter on November 21, 1932, a consent decree was entered giving appellant judgment against said appellee for $32,309.04, with interest at 6 per cent. from February 1, 1930, and a lien was fixed "upon the buildings, erection, improvements and plant of the American Portland Cement Company located upon the following described land, to-wit"; (describing the same seven forty-acre tracts as originally described in the complaint). The decree then continues: "And it is agreed between the plaintiff and defendant, in addition to the lien upon the said plant, that the plaintiff is to have a lien upon the following de-

scribed land upon which a portion of the plant is located, *i. e.,* upon one acre surveyed and described as follows:'' describing a tract of land lying nearly north and south, 726 feet long by 60 feet wide, and being the acre described in paragraph 2 of the amendment to the complaint. The decree further recites an agreement to stay execution for six months during which time the cement company might satisfy said judgment by paying appellant 50 per cent. thereof in cash and 50 per cent. in first mortgage real estate bonds, ''of the present issue,'' which should be a first lien against its properties after satisfaction of the judgment then rendered. Decree was entered accordingly.

The bonds mentioned ''of the present issue'' referred to bonds secured by a deed of trust dated October 6, 1931, and recorded October 13, 1931, in which appellee Duke was named trustee.

Appellee cement company failed to pay the judgment above mentioned within the six months as provided in said decree, and on May 22, 1933, appellant had a special *fieri facias* issued against the lands and improvements described in the decree of November 21, 1932, and, upon the motion of the cement company to recall same, the court made an order granting another stay of execution of three months from May 22, 1933, upon the payment to appellant of $500 in cash which was then made in open court, and if it should pay $5,000 at the end of three months, then another stay of three months should be granted, or six months from May 22, at which time it should pay appellant the balance of its judgment, interest and costs, else execution should issue therefor. Before the expiration of the time for payment of the $5,000, certain persons intervened, claiming title to certain machinery sold the cement company under title retaining notes and praying appellant be enjoined from levying execution on the property to which they claimed title. The court enjoined appellant from levying on the property claimed by interveners. Appellee Duke was made a party by interveners, and it developed on the hearing of appellant's motion to dissolve the temporary

restraining orders that he was claiming title superior to the lien of appellant. Thereafter issue was joined by appropriate pleadings between appellant and appellee Duke, the latter contending that he was a necessary party to all the proceedings had, and that, since he had not been made a party until October, 1933, he was not bound thereby; that no *lis pendens* notice was filed of the materialman's lien, and that he had no notice of appellant's claim of lien at the time of the execution and recording of the deed of trust to him; that the affidavit for lien filed by appellant on July 11, 1930, did not properly describe any particular one acre of land on which appellant sought to establish a lien and was void for that reason; that he was not a party to the suit to foreclose said lien and was not bound; that the complaint in said action did not describe the land sought to be charged with said lien, and that the amendment describing one acre was not filed until more than fifteen months after the affidavit for lien was filed and the proceedings thereunder were void; and other grounds to defeat the lien were set up. He alleged the mortgage to him is a prior and paramount lien on the plant and lands of the cement company because a valid mechanic's lien was not established.

On the issues thus joined between appellant and Duke, hereinafter referred to as appellee, the court found, on evidence in which there is very little if any dispute on the vital questions, that appellee's deed of trust is a valid and subsisting lien on the property of the cement company, subject to the title of certain interveners in certain specific personal property, and that it is prior and paramount to the lien and judgment of appellant as theretofore decreed by the court on November 21, 1932. It further held that appellant did not have a mechanic's or materialman's lien against said lands, premises, improvements or property of the cement company, and that its petition and action against appellee should be dismissed for want of equity. This appeal followed.

We have stated the case rather fully in order to give a history of the litigation. The questions involved are principally, if not entirely, questions of law which

have frequently been decided by this court. One of the contentions by counsel for appellee is that the description of the land in the affidavit for lien and in the original complaint was too indefinite and uncertain, did not describe any particular acre of land and, therefore, no valid mechanic's lien could be predicated thereon. Section 6906, Crawford & Moses' Digest, provides that persons furnishing labor or material for any building, erection or improvement upon land, "upon complying with the provisions of this act, shall have for his work or labor done or materials * * * furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor, on which the same are situated to the extent of one acre." Section 6922, Crawford & Moses' Digest, provides that the lien claimant shall file with the circuit clerk "a just and true account of the demand due and owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit." The affidavit for lien filed states that the materials furnished, as shown by the itemized statement and duplicate invoices, "were furnished for and were used in the construction of the plant and buildings" of the cement company located on seven forty-acre tracts described, and a lien was claimed on said property, on both improvements and land. We are of the opinion that the affidavit for lien sufficiently described the improvements of the cement company as to afford information concerning the situation of the property to be charged with the lien, and that it is sufficient to enable any one familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others. This is the test many times announced and followed by this court. *Barnett Bros.* v. *Wright,* 116 Ark. 44, 172 S. W. 254; *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901; *Ferguson Lumber Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; *Georgia State Savings Ass'n* v. *Marrs,* 178 Ark. 18, 9 S. W. (2d) 785; *Brown* v. *Turnage Hardware Co.,* 181 Ark. 606, 26 S. W. (2d) 1114. In the case last cited 360 acres were

described in the affidavit and complaint by governmental subdivisions, and the decree adjudged "a lien upon one acre of the 360 acres * * * being that part upon which his homestead was situated." This court held the lien good against a charge of insufficient description. In that case, the late Chief Justice HART, speaking for the court, after quoting from *Arkmo Lumber Co.* v. *Cantrell, supra,* said: "In the application of this principle (relating to sufficiency of description as above announced), the fact that the claim filed under the statute described more land than is subject to the lien does not defeat the lien as to the amount of land subject thereto under the statute where the claim and the account filed with it, duly verified as required by statute, indicate the improvement so that it can be identified by persons of ordinary intelligence. To hold otherwise would subject substance to form, and deny the lien to persons clearly entitled thereto under the statute." If the improvements are sufficiently described, then the law fixes the amount of land to be covered by the lien, and it is a mere matter of surveying to determine the correct description.

Nor was it necessary to file a *lis pendens* notice. The lien statute provides what shall be done to preserve the materialman's lien, and, when the statute is complied with, all persons dealing with the property subject to such lien must take notice thereof. In this case, the mortgage was not executed until long after the lien was filed, and was not recorded until two days after the 15 months time in which to bring a suit to foreclose had expired. A subsequent purchaser must take notice of the right to file a lien within 90 days after any work or labor has been performed or material furnished, even though the record fails to show such lien. *Owen* v. *Continental Supply Co.,* 175 Ark. 741, 300 S. W. 398; *Bell* v. *Koontz,* 172 Ark. 870, 290 S. W. 597.

It is also insisted by appellee in support of the judgment of the trial court that appellant did not file its claim for lien within 90 days after the last material was furnished, and it is argued that the last materials furnished under the contract were in January or February,

1930, and that the two items furnished on April 29, and May 23, were not furnished under the original contract and were but "extras," and that since the affidavit for lien was filed on July 11, thereafter, the material furnished up to January or February, 1930, was not within the lien. The law in this State in this regard has been well settled since the case of *Kizer Lbr. Co.* v. *Mosely,* 56 Ark. 516, 20 S. W. 409, where the court said: "If the materials were furnished under one contract, he should file the account within ninety days after the last was delivered; but if the materials were furnished under separate and distinct contracts, it should be filed under each contract within the time limited. *Livermore* v. *Wright,* 33 Mo. 31; 2 Jones on Liens, paragraphs 1431-1434, and cases cited. If, however, he began to furnish 'without any specific agreement as to the amount to be furnished' or the time within which they were to be furnished, and there was a 'reasonable expectation that further material' would 'be required of him,' and he was 'afterwards called upon from time to time to furnish the same,' he should file it within ninety days after the last item was delivered. In such a case, if the materials were 'furnished at short intervals, and were appropriate to the condition and progress of the building, a presumption would arise that it was understood from the beginning that the 'materialman was to furnish the same' for the construction of the building as the same should be required; and the account therefor should be considered as one continuous account and one demand; and the last item thereof would be 'the date from which the limitation of the time of filing' should be taken." *Marianna Hotel Co.* v. *Livermore F. & M. Co.,* 107 Ark. 245, 154 S. W. 952; *Van Houten Lumber Co.* v. *Planters' National Bank,* 159 Ark. 535, 252 S. W. 614; *Planters' Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 280 S. W. 999. The undisputed proof shows that there was no contract for any definite amount of material, but on January 19, 1929, appellant submitted a proposal to the cement company to furnish it a lot of steel, consisting of an approximate number of tons for different purposes at a unit price of a specified

amount per cwt. No written or oral contract to furnish any particular quantity of material was entered into. The cement company accepted the proposal, and thereafter it began ordering out the material as the construction of its plant progressed. The fact that the word "extras" appeared on the invoices for the items shipped in April and May, 1930, is explained by the fact, as were a number of other invoices for items shipped in 1929 and prior to February, 1930, that they were less than carload lots and under such conditions the cement company was required to pay the freight thereon. The testimony shows that the items in the whole account constituted a continuing and running account up until May 23, 1930, and that there was reasonable expectation that these latter items would be required and would be ordered. We therefore hold that the affidavit for lien was filed in ample time, the ninety days running from the date of the last item on the account.

Another argument made to uphold the decree of the trial court is that "no sufficient action was brought within the statute of limitations." It is conceded that the suit was filed within fifteen months after filing the lien as required by § 6926, Crawford & Moses' Digest, but it is insisted that neither the affidavit for the lien nor the complaint disclosed any particular one acre of land or any particular building, erection or improvement upon which a claim for lien was made. We cannot agree with appellant in this contention. As we have already pointed out, the affidavit for a lien and the complaint sufficiently identified the improvements located upon the land, on both of which a lien was sought, on the land to the extent of one acre given it by law. The amendment to the complaint which did describe the one acre of land by metes and bounds was not the commencement of a new action, but only more particularly described the land upon which a lien was sought.

It is also contended that appellee Duke was a necessary party, and, not having been made a party by appellant, the proceedings as to him were void. We cannot agree. At the time appellant's affidavit for lien

was filed, and at the time the suit to foreclose the lien was filed no mortgage had been executed, and, of course, none recorded. The decree foreclosing said lien was entered thereafter. But the decree itself recognizes the fact that there was a mortgage at that time, but that it was inferior to the lien of appellant. Said decree speaks of "bonds of the present issue" and provides that the cement company might pay its debt partly with such bonds. The lien of the deed of trust or mortgage being inferior to that of appellant, appellee Duke's rights are not affected because he was not made a party, for he still had his equity of redemption, just as any other junior lienor had who was not made a party to the foreclosure of the prior lien.

Other incidental questions are argued in support of the decree, all of which we have carefully considered and find them without merit. We have reached the conclusion that appellant is entitled to a lien upon all the improvements into which any of its material or labor entered and into the one acre of land described and upon which a lien was fixed in the original consent decree set aside by the subsequent decree and that appellant is also entitled to a judgment against the American Portland Cement Company for the full amount of its debt, less the $500 payment made as above mentioned to obtain a stay of execution, with interest from the first day of February, 1930, at 6 per cent. per annum as decreed by consent in the original decree.

The decree of the chancery court will be reversed, and the cause remanded with instructions to enter a judgment for the amount above indicated, such judgment to bear interest from that date at 6 per cent., and to fix a lien upon all the plant, buildings, erections, improvements of the appellee cement company and for a lien upon the one acre of land as described and decreed in the said original decree which shall be superior and paramount to the lien of appellee Duke under his deed of trust, or any others claiming any interest under him or under said American Portland Cement Company since the accrual of the lien herein established, and that appel-

lant shall recover all its costs herein expended. It is so ordered.

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

NEWTON *v.* STATE.

Crim. 3903

Opinion delivered October 15, 1934.

W. E. Haynie and *M. Rountree,* for appellant.

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

JOHNSON, C. J. Appellant was indicted by the Clark County Grand Jury for the crime of first degree murder for the killing of one Barefield. Upon trial he was convicted as charged in the indictment and his punishment assessed at life imprisonment in the State penitentiary, and this appeal follows.

The evidence upon behalf of the State tended to show, and the jury was warranted in finding, the following:

On March 8, 1933, appellant and his wife were together in the business section of the town of Gurdon, and visited in the law office of Ed Haney about 3 or 4 o'clock in the afternoon. Leaving this place, which was upstairs on the east side of the railroad tracks, they traveled in a westerly direction across the railroad tracks to the business section on the west side. Barefield, the deceased, likewise was in Gurdon on this date, and both appellant and Barefield evidently contemplated trouble. About 5 o'clock appellant and his wife passed Barefield while all parties were traversing a walkway—appellant and his wife proceeding in a westerly direction and Barefield in the opposite direction. From this point the evidence is in irreconcilable conflict. That upon behalf of the State tended to show that Barefield endeavored to pass around Mrs. Newton when appellant drew his gun and began firing upon Barefield, and, after he had fallen prostrate to the ground, appellant again fired into his body. The testimony upon behalf of appellant tended to show a persistent and aggravated interference by Barefield with the domestic relations between appellant and his wife covering a long period of time, which, if believed by the jury, would have certainly warranted a much milder verdict than the one returned. It would serve no useful purpose to set out in detail the testimony of witnesses, and the above statement will suffice to show the outstanding facts and circumstances surrounding the killing.

Appellant's first contention for reversal is that the trial court erred in overruling his application for change of venue. The testimony heard by the trial court upon this application is not preserved in the bill of exceptions, therefore, under a long line of decisions of this court, we can not review his findings of fact. In other words, in the absence of the testimony heard by the trial court, we must presume the evidence heard warranted the conclusion reached. *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Strong* v. *State,* 85 Ark. 536, 109 S. W. 536;

Duckworth v. *State,* 86 Ark. 357, 111 S. W. 268; *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376.

The next assignment of error relates to the action of the trial court in continuing the cause and setting it for trial in the absence of appellant. When the cause was continued and set for trial, appellant was at liberty upon bond, and was therefore voluntarily absent. The record discloses that the court set the case for trial in the absence of the defendant, but in the presence of his attorneys. In *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507, we stated the rule, reading from the second headnote, as follows:

"A defendant who was out on bail cannot complain that the examination in chief of a witness for the State was conducted in his absence if he was voluntarily absent, and his attorney was present, and if defendant never asked that the examination in chief of such witness be retaken."

The rule as stated in the case, *supra,* has been consistently followed by us since its rendition. No error is made to appear because of this assignment.

Next, it is urged that the trial court erred in qualifying the jurors, Ed Williams, Otis Francis, C. W. Cypert and Carmie Cox because they had served upon a regular panel of either the grand or petit jury within the past two years. This assignment of error is made to appear by the affidavit of one of the attorneys for appellant filed after the verdict of the jury was returned. The bill of exceptions does not disclose that the named jurors were interrogated in reference to their services as jurors within two years prior to their acceptance in this case, therefore their disqualification, if any, does not appear. It is the established doctrine in this court that it must appear from the bill of exceptions that the juror imposed himself upon the court and defendant by misrepresenting the facts, and this question can not be raised after the trial, when the defendant did not avail himself of the opportunity, on the examination of the jurors on their *voir dire,* to ascertain if they possessed the necessary qualifications. *Doyle* v. *State,* 166 Ark. 506, 266 S. W.

459; *James* v. *State,* 68 Ark. 464, 60 S. W. 29; *Tell* v. *State,* 129 Ark. 180, 195 S. W. 32; *Patton* v. *State, ante* p. 133, 70 S. W. (2d) 1034. It does not appear from the bill of exceptions that the named jurors imposed themselves upon the court or appellant, therefore no prejudicial error is made to appear.

Appellant next urges that the trial court erred in permitting the jury to separate after final submission of the cause. We have construed § 3187, Crawford & Moses' Digest, as vesting in the trial courts discretionary power in reference to the enforcement of the rule against the separation of the jury prior to or after submission of the cause to the jury. *Johnson* v. *State,* 32 Ark. 310. In the later case of *Reeves* v. *State,* 84 Ark. 569, 106 S. W. 945, we stated the rule as follows:

"The rule announced in the cases above referred to, which were cases where the court had ordered the jury kept together, is that in criminal cases, where evidence is adduced tending to show that the jurors have been exposed to improper influences, the burden is upon the State to show that they were not in any way influenced, biased or prejudiced by such exposure, and that, in the absence of such showing by the State, the verdict will be set aside. The rule is otherwise where the court exercises its discretion in permitting the jurors to separate. In such cases the burden is upon the defendant to show that they were improperly influenced by the exposure."

Appellant makes no showing that the jurors while separated were exposed to improper influences; therefore no prejudicial error is made to appear by this assignment.

Finally, it is insisted that the trial court erred in giving and refusing to give certain instructions. We have carefully considered all requested, granted and refused instructions and have concluded that the issues presented were properly submitted, and no error was committed in this regard.

It follows that the judgment must be affirmed.

HOME LIFE INSURANCE COMPANY *v.* WARD.

4-3551

Opinion delivered October 15, 1934.

A. D. DuLaney, for appellants.

Ovid T. Switzer and *Y. W. Etheridge,* for appellee.

SMITH, J. This appeal presents no question which has not already been decided adversely to the contentions here made. The suit is based upon the identical group policy of life insurance No. 26,595 which was sued on in the case of *Home Life Insurance Company* v. *Keys,*

187 Ark. 796, 62 S. W. (2d) 950. The present appeal is from a judgment on the same policy. The only difference is in the name of the employee, the date of disability, and the time of bringing suit. The policy, which had been kept in force by the Crossett Lumber Company for the benefit of its employees, expired on December 31, 1930. Keys, the plaintiff in the case just cited, who was disabled from and after October 12, 1929, died March 9, 1931, and proof in support of his claim was not submitted to the insurer until May 5, 1932. In the instant case the insured became disabled in June, 1929, but furnished the insurer no proof of the disability until August 17, 1933. The only difference is that in the instant case a somewhat longer period of time elapsed than in the Keys case, but this is immaterial under former decisions of this court, as the proof was furnished and the suit was commenced before the bar of the statute of limitations had fallen. In the very recent case of *Missouri State Life Ins. Co.* v. *Foster,* 188 Ark. 1116, 69 S. W. (2d) 869, it was said: "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."

Other questions discussed in appellants' brief relating to the liability of the insurer in the instant case are disposed of in the Keys case, *supra,* in which case the headnote reads as follows: "Under a policy of group insurance providing that, upon proof that an employee insured thereunder has become wholly and permanently disabled and thereby prevented from pursuing any gainful occupation, he will be regarded as a claimant, and the company waives payment of premiums thereafter, *held* that the insurance company became liable when an employee became totally and permanently disabled during the life of the policy, though proof of such disability was not furnished until after the policy had been canceled."

There were questions of fact in the instant case as to when the insured became totally and permanently disabled, and as to the continuance of the disability, but these questions were submitted under correct instructions, and are concluded by the verdict of the jury, inasmuch as the testimony is legally sufficient to support the finding that the insured became permanently disabled while the policy was in full force and effect, and was shown to be permanently and totally disabled at the time of the trial.

The testimony on the insured's behalf was to the effect that he was an ignorant and illiterate negro, who had no means of earning a livelihood except by his manual labor, and that he had become unable to work. It is insisted that instruction numbered 3 submitting this issue is erroneous. This instruction reads as follows: "The jury are instructed that total disability does not mean absolute physical disability on the part of the insured to transact any kind of business or work pertaining to his occupation. It is sufficient to prove that the disability wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his work or the execution of them in the usual or customary way or when common care and prudence would require a man in his condition to stop doing the kind of labor he had performed before he became disabled."

The objection now made to the instruction is that it permits a recovery upon the showing that the insured is unable to perform "the kind of labor he had performed before he became disabled," without requiring the showing that he is unable to perform other kinds of gainful labor. There was no specific objection to the instruction, and, in the absence of such an objection, we do not think the instruction is defective in the respect stated. The testimony was to the effect that the only kind of labor the insured had performed, or knew how to perform, was manual labor, and the testimony as to his disability related to his ability to perform such labor generally, and not merely the kind of labor he was performing when he became disabled. If, therefore, it had been be-

lieved that the instruction construed the policy as if it were one of occupational insurance, that objection should have been specifically made.

It is finally insisted that the court erred in refusing to give appellants' instruction numbered 5, which was to the effect that the recovery could in no event exceed "the aggregate sum of the monthly payments provided for in the policy after August 15, 1933 (the date upon which proof was furnished), to date," and for this reason the statutory penalty of 12 per cent. should not have been imposed, and no attorney's fee should have been allowed. It appears, however, from what has already been said, that the right of recovery begins, not on the date the proof was furnished, but, as was said in the Foster case, *supra,* "upon causation of the injury (or disability)." This being a case in which the insurer has denied any and all liability under the policy, the right existed to sue, not merely for installments of benefits, but for the total indemnity for which the policy provides. *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912.

The penalty was therefore properly imposed, and the attorney's fee was properly allowed.

The judgment must therefore be affirmed, and it is so ordered.

SMITH, J., (on rehearing). We are asked to modify the judgment in this case to the extent of allowing only the present value of the installments to be paid under the policy of insurance, rather than the total amount thereof, as was done under the original opinion. This request is made upon the authority of the case of *Metropolitan Life Ins. Co.* v. *Harper, ante* p. 170, where it was held that the present value—and not the total value—of the installments should be paid. In that case, however, the insured, who had become disabled, was alive, and, under his policy, was entitled to benefits to be paid weekly for a given period. But in the brief which raises the question here stated, it is conceded that: "If Ward had died while his policy was in force, he would have been entitled to $1,800 (the amount recovered)." This admission is based upon the provision of the policy of

insurance to that effect reading as follows: "In the event of the death of the insured during the period of total permanent disability, any installments remaining unpaid shall be payable to the designated beneficiary."

The original opinion affirmed the finding that the insured did die while the policy was in effect, and there is no occasion, therefore, to modify the original opinion, and the motion for rehearing is therefore overruled.

RCA PHOTOPHONE, INC., *v.* SHARUM.

4-3560

Opinion delivered October 15, 1934.

Cunningham & Cunningham, for appellant.

Mamie McKenzie Crump and *Beloate & Beloate*, for appellee.

BAKER, J. This is a replevin suit brought by appellant against appellee to recover possession of certain electric sound reproducing motion picture equipment, used by the appellee in his theater at Walnut Ridge. A description of the property is unnecessary. The plain-

tiff alleged in its complaint that the value of the property is $800, and that it is entitled to the immediate possession of the same, and prayed for the recovery and $250 damages. It set up its title in the equipment under a lease, copy of which was made an exhibit to the complaint. It pleaded also that the appellee executed two notes, one for the payment of $25 weekly on each consecutive Saturday for a period of twelve weeks, commencing on the 12th day of June, 1931, and the second note for the payment of $52 weekly on each consecutive Saturday for a period of 74 weeks commencing on Saturday, the 9th day of September, 1931, and that the appellee was in default in the payments, the first default being for a balance of $7 on the 19th day of September, 1931, and $52 each Saturday from that date until March 12, 1932, making a total default of $1,307. As we understand appellant's presentation of the case, these notes were set up, and the defaults shown in order to show the breach of the contract by which the property was leased to the appellee, and that appellant, on account of the said defaults, was entitled to retake the property, in accordance with the lease contract signed by appellee.

Appellee answered the complaint and denied that the appellant was entitled to the possession of the equipment or for judgment for damages and costs; denied that the equipment was leased or that he executed the promissory notes; and pleaded further that, if there was a contract, it was a contract of sale and not a lease, the title being retained until the purchase money was paid. He alleged further, by way of cross-complaint, that on the 8th of March, 1932, the equipment mentioned in the complaint was in the Sharum Theater, owned and operated by him, and that, among other things, the property was equipped with certain sound equipment, without which the theater could not operate, and that on that date the appellant by its agent, Hughes, had taken from the theater a certain part of this sound equipment, disabling the sound system to such an extent that it could not be used, and that, on account of the removal of such part, the optical sound system, he was unable to operate his theater; that he had pictures booked and paid for

until March 8, 1932, and for each evening thereafter for two or three weeks; that he was playing to a large house, making a profit of $75 per week and would have continued to make such profit, except for the fact that he was compelled to close the theater by reason of the taking away of the sound system part so removed. He pleaded that, by the removal of this part of the equipment, he lost $225 profit; that he was required to pay for pictures he did not use during said period, in the sum of $450; that on account of being unable to operate for a period of three weeks his business was almost ruined; that for a period of four months thereafter he lost $50 a week on account of poor attendance caused by the closing of his theater, and finally that he had been damaged in the sum of $125 per week to the total of $2,000, and profits, which he should recover, in the amount of $600, and other items totalling finally the aggregate amount of $6,275, for which he prayed judgment.

As an amendment to the cross-complaint, the appellee set up the fact that the plaintiff had no right to the property, and that he was not in arrears; that the plaintiff had promised to refinance defendant's account and to reduce the price of the equipment mentioned in the complaint, and that the terms had been agreed upon, and that it was in violation of this agreement that the plaintiff, the appellant herein, took possession of the property. Answer filed to the cross-complaint denied the material allegations.

Upon trial of the case verdict was for defendant, Sharum, and his damages fixed at $225, and judgment for appellee for said sum. If this judgment be sustained, appellee would be entitled, upon proper motion, to the return of the sound equipment taken from his theater.

This is a sufficient statement of the case, except as to the matter of the contract which will be discussed in the opinion.

The plaintiff, appellant herein, asked for certain instructions. Number one is as follows: "The contract in this case calls for a forfeiture and the right to repossess the property by the plaintiff at any time when

the defendant was in arrears, and the undisputed evidence shows that he was in arrears at the time the property was taken, and you should therefore find for the plaintiff."

The court refused to give this instruction, but gave other instructions upon which the case went to the jury.

There are certain undisputed matters of fact, asserted by the appellant and admitted by the appellee, which, taken in consideration with the contract, settle each controversy presented to this court.

The contract provides, among other things, for rights and remedies on behalf of the lessor or appellant. The parties to the contract anticipated, among other things, that there might be defaults, and that, in the event of such defaults, indulgencies might be granted, and the effect of such defaults and indulgencies and the rights and remedies of each party are set out in the contract, should any of these conditions arise.

We quote from the provisions of the contract: Section 5. "Exhibitor (Sharum) accepts the terms, covenants, and conditions in this agreement set forth and agrees to perform the same in the time and manner provided. Exhibitor hereby agrees to pay for the rental and license to use the equipment, premium for insurance (all of which shall be considered as rental), and for service, the total of the amounts payable under the following selected plan, and exhibitor also agrees that said amounts except service charges shall be due and payable to RCA Photophone without set-off or counterclaim on the execution and delivery of this agreement, but for the convenience of exhibitor RCA Photophone hereby agrees to permit exhibitor to pay said sums in accordance with the terms of plan three hereby selected by exhibitor, which permission may be terminated at the option of RCA Photophone in the event of failure by exhibitor to make any of the payments when and as provided by said plan." Plan three provides for rental of standard and additional equipment, if any, premium for insurance required by RCA Photophone for the period of the agreement, and services charges for the first two years. Exhibitor will make the following payments which, subject to the pro-

vision of this section, may be made as follows: down payment of $44.60 herewith, receipt of which is hereby acknowledged; weekly payments of $43.85 payable on Saturday of each week for 104 consecutive weeks commencing on the first Saturday following the installation date.

Section 18 provides that, upon the expiration or termination of the agreement, exhibitor will deliver the equipment to RCA Photophone free from all claims and demands, and pay transportation to a point not more distant than the point from which the equipment was shipped, and, "upon default of exhibitor under any provision of this agreement and/or the expiration or termination of this agreement, RCA Photophone may repossess the equipment or any part thereof and shall have the irrevocable right to enter the theater or any other premises where the equipment shall then be, and, without notice or legal proceedings, repossess, and remove the equipment or any part thereof, and exhibitor will cooperate in such repossession and removal and pay any and all expenses of RCA Photophone in connection therewith."

A part of § 20 provides: "No agreement altering, modifying or extending the terms of this agreement shall be valid unless in writing duly signed by the parties by their duly authorized officers."

The original contract provided for the payment, at the end of each week, of a larger amount than the $25 per week, as set out in one note, and the $52 per week, as set out in the other note. The testimony of the parties is fairly clear, but Sharum had defaulted in his payments, and rather persistent efforts had been made for collection; that the notes set out in the complaint and affidavit were given by Sharum as the new method of making payment upon the original contract, which was in no sense otherwise changed or altered. This was done for the accommodation of Sharum to enable him, for a time at least, to pay his indebtedness already in default, and to save himself from the loss of the use of the property. These facts, as they appear from the record, considered most favorably for the benefit of Sharum, show

that he was in default, though the time had long since elapsed within which some of these installments were to be paid.

Appellee says that the only contract he signed was the one exhibited by the plaintiff, appellant herein, and also that the testimony of Heyl, as to the amount of his indebtedness was substantially correct. Heyl says that on March 8, 1932, the date Hughes got possession of a part of the machinery, Sharum was in default $1,307; that on August 7, 1931, the payment of $25 was made, and this left the defaults of July 18, July 25, and August 1. On the 24th of August, Sharum was in default five payments, and on August 31 Sharum sent in $100, still leaving him in default for August 22, 29 and for September 5, and on October 13, 1931, in arrears $439. That was prior to the time that the last or final series of $25 notes were to be paid. The new notes called for $25 for fifteen weeks from January 23, 1932, and $42 for ninety-four weeks from April 30, 1932, but no payments were ever made on these notes. The other payments above mentioned had been credited on the indebtedness that had been existing, and which was evidenced by former notes and the contract.

Sexton, witness for Sharum, and Archer, the sheriff, also witness for Sharum, testified that Sharum admitted the arrearages in payments. Sharum says he doesn't know how much he was in arrears. He asserted that the negotiations were going on in which he was insisting that he was entitled to a 40 per cent. reduction in the original contract price, but he had not secured any contract or agreement allowing that reduction.

Upon the record, as presented here, there was such default in the payments as to entitle the plaintiff, appellant herein, to retake the property. Under the contract it had the right to do so, or to take any part of it.

There had been no action or conduct on the part of the plaintiff, such as to fix the course of dealing contrary to the express terms of the contract. There had been persistent efforts on the part of the appellant to collect its debt, and equally insistent demands on the part of the appellee that he was entitled to a change of

the original contract, a modification thereof, which is admitted had never been made.

Although appellant had the right granted to it under the terms of the contract to enter upon the premises and take therefrom the machinery or any part thereof, we disapprove the surreptitious and deceitful manner of appellant's agent in gaining entrance to the theater and taking therefrom a part of this machinery then in the possession of Sharum. But no damage resulted from this entry in itself. If there was any loss suffered by Sharum, it did not arise out of the manner of obtaining entrance to the building. Whatever loss Sharum may have suffered, if any, arose out of the fact that the appellant took from the machine a part of it so as to disable it completely. It had a right to do that. It is inconceivable that damages can be predicated upon the enforcement of the right, when the enforcement is done in accordance with the agreement of the parties.

It follows, therefore, that the court should have instructed a verdict for the appellant, and, under the case as developed at the time, instruction No. 1, as asked for by appellant, or one to the same legal effect, should have been given, and a judgment should have been rendered for the property sought to be recovered in the action of replevin.

So much of the contract sued on as has been presented to this court is enforceable, and there is no evidence of change or modification, except as to installments to be paid, and we have sought only to declare the rights and remedies of the parties as they have themselves expressed them. The appellee, no doubt, honestly feels that he is entitled to some reduction, but that is not evidenced by his contract, nor by any amendment to it, and the parties have expressly contracted that "no agreement, modifying or extending the terms of the contract, or agreement, shall be valid unless in writing and duly signed by the parties, or by their duly authorized officers." That part of the contract just quoted would, at least, exclude evidence of any other agreement or understanding had as between Sharum and the agent of appellant at the time this contract was reduced to writing

and signed. As the case is presented here, Sharum is only contending that negotiations were under way, but not completed, for some modification or change.

We have carefully considered the case cited by appellee, *General Motors Acceptance Corporation* v. *Hicks, ante* p. 62. That case is easily distinguishable from the instant case. Mrs. Hicks, in that case, was in default of her payments one month. This default had occurred many months prior to the time of the taking of the Frigidaire sold her, and upon which she was making regular monthly payments. It was a course of conduct that had been pursued for such a length of time that she had a reasonable right to believe that the default would not be taken advantage of, so long as she kept up, with reasonable regularity, the payments falling due each month. In fact, she was assured, by the seller of the Frigidaire, to whom the original contract had been delivered, that this method of payment was satisfactory. This dealer still had an interest in the paper, because he was a guarantor of her payments by his indorsement and transfer of it to the General Motors Acceptance Corporation. Without reasonable notice to her of an intention to do so, the General Motors Acceptance Corporation procured entrance to the building, by breaking in, where the Frigidaire was stored, seized upon it and took it away. Mrs. Hicks was permitted to recover for the conversion of this property and also for other property lost by her on account of the fact that the agent of the General Motors Acceptance Corporation negligently left the doors open and other of her property was left unprotected, and it was stolen while so exposed. There was a performance in this case, except as to the one payment, which was in default some months previous.

In the case now under consideration, there is persistent and continuous default, with equally persistent efforts on the part of the plaintiff to make collection; the distinction being that in the Hicks case there was a waiver and in the instant case there was not.

This case is reversed and remanded for a new trial.

GRIBBLE *v.* STATE.

Crim. 3901

Opinion delivered October 15, 1934.

M. E. Vinson and *Reece Caudle,* for appellant.

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

BAKER, J. On the 27th day of February, 1934, the grand jury of Cleburne County returned into open court an indictment charging Leonard Gribble, the appellant, with murder in the first degree. It was alleged that on the first day of December, 1932, the appellant shot and killed Aubrey Kever. The indictment was in the usual form and not questioned, as to its sufficiency, in any particular. The cause came on for trial, and on March 1, 1934, the jury returned into court the following verdict: "We, the jury, find the defendant guilty and fix his punishment at 5 years in the Arkansas Penitentiary." The verdict was

signed by the foreman and the court rendered judgment upon it on the 3d day of March, 1934. The motion for a new trial was filed in due time, overruled and appeal has been duly granted.

The facts necessary for the discussion of the case and errors alleged and set up in motion for new trial are about as follows: On December 1, 1932, Oren Kever and Aubrey Kever, together with their uncle, Willie Southerland, went to Leonard Gribble's place of business in Heber Springs, and immediately upon their arrival a controversy arose, and Gribble ordered them to take their truck, which they had driven to his garage, or filling station, and move it away.

Prior to that time Aubrey Kever and Leonard Gribble had had some disturbances, and at one time, fixed by different witnesses at a period from two to four years prior thereto, had gotten into a fight, and Gribble had struck Kever with a wrench. Gribble testified that almost constantly since that time he had been pursued and taunted by Kever, who was always seeking a renewal of the former difficulty; that on the occasion of the fight, when he had struck him with the wrench, Kever was drinking, and that he had led him away from his garage two or three times, but that Kever followed him back, and assaulted him by kicking him, and that he, Gribble, was trying to close the door of his office, or shop, to prevent Kever from entering, and was finally compelled to strike Kever with a wrench, in order to protect himself, and he had finally called officers to take Kever away. About the first of the next month he had met the two Kever brothers on the sidewalk, and that Aubrey, particularly, had tried to fight, but he (Gribble) finally got away from him; that later, Kever had come to his place of business and a Mr. Rackley took him away on that occasion, and that Kever left threatening him with the words "I'll get you in time"; that a short time before the killing Aubrey Kever had tried to block the highway with a truck to keep Gribble from getting by. That there were not two months in the two years from the time of the first disturbance but that Aubrey Kever came in contact with him. He had heard of the trouble Kever

had had with Obrie Logan, with the Birds, and several others; that on this occasion, the day of the killing, when Aubrey Kever, Butch Kever and Willie Southerland drove up to his place of business, he waited until they had gotten out of the truck and walked around by the truck, and that he then went out, spoke to them, and asked what he could do for them. Aubrey asked for Fitzgerald, and, upon his answer, Aubrey said: "I don't care nothing about talking to you"; that his response was, "If that's the way you feel about it, go ahead and much obliged"; that he started then to pass between Aubrey Kever and a concrete pillar; that Kever blocked his way; that he turned and went around another way and Kever started after him; that Kever then said that he had hit him once with a wrench and wanted to know if he thought he could do that again; that he asked him to leave; that Kever did not stop but started running in; that he ordered Kever to stop; that he did not; that Kever had his hands in his pockets; that the other two, Oren Kever and Southerland, had gotten in the truck and went driving away. In the meantime Gribble had picked up his shotgun, which was inside his office and that, when Kever refused to stop, he shot him.

Considering the evidence as offered, it tended to show that Kever, the man who was killed, was frequently in disturbances with other people in the community; that he was somewhat persistent in trying to follow up and settle his original quarrel with Gribble, and some of the evidence is to the effect that at the time he was killed he had, perhaps, gone to Gribble's garage to see Fitzgerald, at Fitzgerald's suggestion, to collect from Fitzgerald some amount of money owing him by Fitzgerald, but we think that the evidence, with a fair degree of clearness, shows that Gribble did not know that that was the purpose of the visit there, and that he had a right to presume that Kever had returned for the sole purpose of renewing the old difficulties. Attention is called to this fact for the reason that it arises in one of the assignments of error set up in the motion for a new trial, which will be discussed later.

The foregoing is a sufficient, statement of the facts to permit a discussion of the questions presented to us in the motion for a new trial.

The first matter discussed in appellant's brief is the form of the verdict: "We, the jury, find the defendant guilty and fix his punishment at five years in the Arkansas Penitentiary." The question raised under this allegation of error arises out of the construction of § 3205, Crawford & Moses' Digest, which reads as follows: "The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of crime shall be found by such jury."

The form of verdict, above quoted, does not say in express language whether the defendant is guilty of murder in the second degree or voluntary manslaughter. If the effect of it should be determined by reference to the penalty of five years in the penitentiary, then it is insisted, as we understand from appellant's argument, that the jury might have meant a conviction for murder in the second degree, the lowest penalty for which is five years in the penitentiary. But the penalty for voluntary manslaughter is from two to seven years. The court holds that, by the omission from the verdict of a statement showing the degree of the offense, it was the intention of the jury to acquit the appellant of murder in the first and second degrees; that the mandate of the statute, above quoted, is such that, had it been the intention of the jury to convict the appellant of murder, it would have said by the verdict: "We, the jury, find the defendant guilty of murder in the second degree, and fix his punishment at five years in the Arkansas Penitentiary," and that by the omission of the words "of murder in the second degree," it is clear that the effect of the verdict was, first, an acquittal of murder, and, second, a conviction for the next highest offense, voluntary manslaughter.

The writer of this opinion is not in full accord with the reasoning of a majority of the court.

It must be agreed, however, by all, that upon a conviction for murder, the statute requires that the verdict of the jury shall state in express terms the degree of the offense,—that is, whether it be murder in the first degree or murder in the second degree. If acquitted of murder, then the next offense, which is included in the indictment, is voluntary manslaughter, and there is no mandate, by statute or otherwise, requiring that the jury shall state the degree of the offense upon which he is convicted, except in murder, and the general verdict, as returned by the jury in this case, is sufficient. Appellant's case has been briefed on this point, upon the theory that the only interpretation to be placed upon the verdict must arise out of the verdict itself, and that, inasmuch as the five year sentence is affixed to it, and that is the lowest penalty for murder in the second degree, it must have been the intention of the jury to convict the defendant of murder in the second degree. Of course, if that were true, the verdict as returned could not be a basis for a valid judgment. This contention is not without authority to support it. 2 Bishop's New Criminal Procedure (2d ed.), p. 870; *Curtis* v. *State,* 26 Ark. 439; *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829; *Wallace* v. *State,* 180 Ark. 627, 22 S. W. (2d) 395.

It therefore follows that the only conclusion that can be reached as to this general verdict, without impeaching it, and that is not our duty or obligation, must be to interpret it that the jury found the defendant guilty of voluntary manslaughter and the penalty fixed by the jury is not inconsistent with this holding.

It is upon this point only that the writer has not been in complete agreement with the other members of the court.

This construction and interpretation of the verdict, by the court relieves it of the provisions of the statute, and the alleged error is not prejudicial.

Other questions argued for the reversal of the case is the alleged error of the court in excusing juror John Ghent, juror George Carr, and juror F. W. Davis. These are three jurors, who were excused by the court, as stated in the motion for a new trial, for what is alleged to be

insufficient cause therefor. The examination of these jurors, upon *voir dire,* is not brought forward in the bill of exceptions. We do not know, and cannot ascertain from the transcript filed in this case, the nature or extent of the examination of these jurors, nor can we determine whether or not there was any abuse of the court's discretion, and it must be presumed by us that the discretion of the court was properly exercised.

It is also alleged, in assignment No. 8, that the juror, Chastain, upon his examination, stated that he was not related to any party in interest, either by blood or marriage, and that the defendant, appellant herein, has since been informed and believes that said juror's statement was not correct, but that he is related to the Kever family, and that this fact was unknown to the defendant at the time of the trial.

The same holding as to the examination of this juror, is proper as was stated in the matter of the three above mentioned, whom the court excused. No fact is shown in the bill of exceptions as to the examination of this juror. The bill of exceptions is entirely silent.

It is alleged also, in assignment No. 9, in the motion for a new trial, that one of the jurors, John Bettis, after he had been examined and accepted to try the cause, and had been admonished by the court not to separate himself from the others, did separate himself from the other jurors, as they filed into the jury box and were seated, and went downstairs, below the court room, in conversation with Ray E. Shelby, who had taken more than a passing interest in the trial of the case against the defendant. There is no record made of this incident; at least, it is not brought up in the bill of exceptions. It is not shown that the court's attention to such matter was called, or whether any examination was made of it, if noticed by the court, nor is it shown that the defendant at the time objected. We have only the statement contained in the motion for a new trial.

An opinion as to the qualifications of jurors, and objections made after the trial, as to their fitness or eligibility, or otherwise, was handed down by us on this date, in the case of *Newton* v. *State, ante* p. 789, and

it disposes of the objections to such alleged errors in this appeal.

Error is also alleged in permitting the witness, Floyd Reed, to testify over the objections of the defendant, to the effect that Fitzgerald, in the absence of defendant, had invited Aubrey Kever to Gribble's place to collect some money said to be due him. We see no prejudice in this matter. We presume it was intended to show by this testimony that Kever went to Gribble's place on an errand of peace and not otherwise. It is apparent that Gribble did not know this fact, and that he had a right to presume, and probably did presume, that Kever came there in a fighting mood, and with the intention only of creating a disturbance, or for a fight with the appellant. Gribble was given the advantage of such presumption, under proper instructions. At least, no question is made of any instruction given or refused, and he had the right to have that matter submitted to the jury.

It is also alleged in assignments Nos. 12 and 13 that there was error in permitting the prosecuting attorney to ask the defendant why he did not have a subpoena issued for a certain witness. We are at a loss to see how this question could be prejudicial, and there seems to be nothing from the defendant's answer, which would indicate that it was, and also the prosecuting attorney was permitted to ask the defendant how many times he had been married. There is no showing how any prejudice could arise from the question or from the answer made. There is no implication in the question to affect injuriously his character or standing in the community, or any answer that might have been elicited that would have done so. Marriage is not a prohibited status, nor would the questions tend in any way to excite in the minds of reasonable jurors any feeling of distrust or otherwise impeach in any particular the good standing of the appellant.

It frequently happens, and trial judges soon learn, that it is sometimes more expedient to permit attorneys, in the heat of trials, to wander somewhat far afield. It may save time, expense and delay more than would the most exacting niceties and requirements if they were at-

tempted, on all occasions, to be enforced. At any rate, unless some prejudicial error appears, we must yield to the sound discretion of the trial courts in such matters, where there is no affirmative showing of an abuse of that discretion, which abuse operates to the prejudice of the appellant, we cannot criticize their conduct. It follows therefore that this cause must be affirmed.

It is so ordered.

DIXON *v.* STATE.

Crim. 3896

Opinion delivered October 22, 1934.

P. L. Smith, for appellant.

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

SMITH, J. This appeal is from a judgment sentencing appellant to a term of seven years in the State penitentiary upon conviction under an indictment charging him with having shot and killed Le Roy Scott. The testimony on the part of the State was to the effect that appellant overtook Scott, who was escorting one Alberta Furlow to an entertainment, and shot Scott without provocation after the latter had run some distance along the road in which all three of the parties—all of whom were colored—were walking. Appellant admitted having fired the fatal shot, but testified that he fired after Scott had assaulted him with rocks, which were thrown at him by Scott, one of which struck his hand and bruised it badly. According to the testimony of Alberta Furlow, appellant spoke angrily to deceased when they were overtaken in the road by appellant, and deceased said, "Go on, Jesse, I am not bothering you," and appellant said, "You is the one I wants to see." Following this remark appellant presented a gun, which Alberta had not previously seen, as it was after darkness had fallen. Deceased ran and was pursued up a hill by appellant, and after they had run far enough to be out of sight, but not out of hearing she heard deceased say, "I will run no further; shoot, damn you!" And the fatal shot was immediately fired. When Alberta reached the scene of the shooting, deceased was dying, and he died without speaking to her.

There was testimony corroborating and other testimony contradicting the testimony given by Alberta, but it is unimportant to set it out, as the question of her veracity was one for the jury, and her testimony above recited was sufficient to sustain, not only the verdict returned, but would have supported a conviction for the highest degree of homicide.

Alberta was a married woman, but had not lived with her husband for several years. She was asked if she had not, after leaving her husband, lived with deceased as his wife, both in this State and in the State of Oklahoma. She denied that she had. Rass Richerson, her brother-in-law, was called as a witness and was asked whether Alberta and deceased had cohabited as man and wife, but an objection was sustained to the question,

whereupon appellant's attorney stated that, if permitted to answer, the witness would state that Alberta and deceased had lived together, posing as husband and wife.

The record reflects that the objection to the question was sustained upon the theory that the relationship inquired about was a collateral matter, which was concluded by the denial of Alberta. We do not concur in that view. The testimony should have been admitted as bearing upon the bias of Alberta in weighing her testimony. In the case of *McCain* v. *State,* 129 Ark. 75, 195 S. W. 363, a witness for the State in a homicide case was asked if he had not stated, after the killing, that, if the defendant had not shot the deceased, he (the witness) would have done so. The witness denied making the statement, and another witness was called to prove that he did make the statement, but the trial court declined to admit that testimony. In holding this ruling to be error calling for the reversal of the judgment, it was there said: "In defense of the action of the court, the rule is invoked that, where a witness is cross-examined on a matter collateral to the issue, his answer can not subsequently be contradicted by the party asking the question. But this rule is not applicable here, for the bias of a witness is not a collateral matter, and, if the witness gives a false answer to a question which would reveal the bias, the falsity of the answer may be shown by other testimony." (Citing cases.)

Appellant was asked upon his cross-examination if he had not shot at another colored man named Boss Sheridan. It was not contended that he had been convicted for so doing. *Carr* v. *State,* 43 Ark. 99. Inasmuch as this incident occurred more than twenty years before the trial, we think it was too remote to have any probative value, and should have been excluded for that reason. Section 1123 of Chapter on "Criminal Law," 16 C. J., page 581; *Taylor* v. *State,* (Tex.) 179 S. W. 113; *Beck* v. *State,* 141 Ark. 111, 216 S. W. 306.

He was also asked if he had not shot at Oliver Hankins, a white man. He denied that he had shot at Hankins, but admitted that he and Hankins had a difficulty a few years before the trial, but he was not permitted to

offer the explanation that he was only fined for a simple assault, as Hankins admitted at the trial that he (Hankins) was at fault in that difficulty. Trial courts have a wide discretion in the admission of testimony of this character in determining whether proof of moral delinquencies is or is not too remote to have probative value. We think the admission of the testimony in relation to the difficulty with Hankins was not an abuse of this discretion; but we are also of the opinion that, after permitting the State to prove there had been such a difficulty in the cross-examination of appellant, he should have been permitted to make the explanation which he offered to make.

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

FREEMAN *v.* JONES.

4-3690

Opinion delivered October 22, 1934.

W. H. Gregory, for appellant.

Brundidge & Neelly and *Rose, Hemingway, Cantrell & Loughborough*, for appellees.

HUMPHREYS, J. The question involved on this appeal is whether the city of Searcy may issue revenue bonds to procure $45,000 with which to construct additional sewer mains, and a disposal plant to dispose of the sewage from all the sewer mains in said city, including the present mains, which were built by Sewer Improvement District No. 1 in the year 1900, and which were taken over by the city for the purpose of maintenance and operation, provided the bonds are made payable solely from the revenues of the new improvements.

When the sewer system was constructed, a small septic or disposal plant was built to dispose of the sewage. The septic plant is worn out and allows raw sewage to pass through it into a branch running around the east side of the city and north into Gin Creek. These streams are dry most of the time during the summer months, and the raw sewage collects in pools, endangering the health of the inhabitants as well as emitting offensive odors. The State health authorities have condemned the septic tank as being a menace to the health of the community. Neither the city nor the improvement district has the money to build a disposal plant of sufficient size to carry the increased load due to the growth of the city. There is a large territory within the city that cannot be served by the sewer system as originally constructed, and the proposal is to build new mains through this territory and, instead of tying the old mains into the old septic tank, to connect them with the new mains, which are to be built out to and tied into the new disposal plant in the country. The proposal is to charge each house serviced exclusively by the new mains and disposal plant $1 a month, and those situated in the original district 50 cents a month for the use of the new mains and disposal plant. In keeping with this proposal, said city passed an ordinance authorizing appellees to issue revenue bonds for $45,000 payable to the Public Works Administration of the United States, which are to be paid out of the proceeds to be derived from the monthly charges aforesaid for the use of the mains and disposal plant, the Public

Works Administration of the United States having agreed to pay par for the bonds and in addition to make a free grant of $10,000 to the city to aid in the construction of said mains and disposal plant, the estimated cost thereof being $55,000. Appellant, an owner of property in the city, instituted this suit to enjoin appellees from issuing the bonds and proceeding with the construction of the new mains and disposal plant on the ground that the city was without authority to construct the improvement, and issue revenue bonds to pay for same.

The ordinance was passed pursuant to act 132 of the Acts of the Legislature of 1933. Section 1 of said act provides: "That every city (of either the first or second class) and town in the State of Arkansas is hereby authorized and empowered to own, acquire, construct, equip, operate and maintain within and/or without the corporate limits of such city or town, a sewage collection system and/or a sewage treatment plant or plants, intercepting sewers, outfall sewers, force mains, pumping stations, ejector stations and all other appurtenances necessary or useful and convenient for the collection and/or treatment, purification and disposal, in a sanitary manner, of the liquid and solid waste, sewage, night soil and industrial waste of such city or town, * * * and to issue revenue bonds to pay the cost of such works and property, * * * payable solely from the funds provided under the authority of this act."

This section of said act is unambiguous, and in unmistakable language authorizes a city of the first or second class or any town in the State of Arkansas to construct a sewage collection system within or without the city limits and to issue revenue bonds to pay the cost of same out of the proceeds to be derived from the new construction. Appellant contends that no authority exists under the statute for a city to build additional sewer mains and disposal plants to connect with and dispose of sewage from mains built and owned by an improvement district, and not owned by the city itself. In other words, the interpretation of the statute by appellant is that, before a city can construct additional mains and disposal plants which are necessary, it must

acquire the ownership of the original sewer system, which was held for operation and maintenance. We find nothing in the act to that effect. The construction of the new mains and disposal plant and the ownership of them by the city does not in any wise disqualify the city from continuing to hold the original sewer system for operation and maintenance. It does not destroy any interest the improvement district may have, if any, in the original sewer system. Making use of the new construction as an outlet for the original sewer system does not impair the usefulness of the original system. The most that can be said of it is that the new construction is an aid and help to the old system without becoming an integral part of it. It appears that the old system can serve only a part of the city, and certainly the statute should not receive an interpretation which would prevent the city from constructing a sewage system to serve other territory in the city without first becoming the owner of the original system. We interpret the statute as conferring authority upon cities and towns in Arkansas to construct sewer systems wherever and whenever needed, and to issue revenue bonds to pay for the construction thereof out of proceeds to be derived from the new construction itself.

Act 132 of the Acts of 1933 authorizing the passage of the ordinance in question does not offend against amendment No. 13 of the Constitution of 1874 for reasons appearing in the case of *Snodgrass* v. *Pocahontas, post* p. 819, this day handed down.

It does not appear that the charges made against the owners of the several houses in the city are unreasonable, and it goes without saying that cities and towns may impose a reasonable charge upon owners of property connected with a sewer system owned or operated by the city or town.

No error appearing, the decree is affirmed.

SNODGRASS *v.* POCAHONTAS.

4-3691

Opinion delivered October 22, 1934.

A. J. Cole, for appellant.

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

MEHAFFY, J. In the year 1917 there was organized in the city of Pocahontas, a city of the second class, an improvement district for the purpose of installing a waterworks system. Benefit assessments against the real estate within the district were levied, bonds sold, and the waterworks installed. A sufficient amount of benefit assessments were collected, to retire the bonds, and the last bond matured and was paid in 1927. Upon the completion of the waterworks system, it was taken over and managed by the city council of the city of Poca-

hontas. The users of water paid rentals, the same being paid into the treasury of the city of Pocahontas.

The State Board of Health issued an order requiring the city to remove the intake pipe, through which the water was taken from Black River, to a point some distance upstream from where it was located. The order of the Board of Health was issued for the purpose of obtaining pure water, water that had not become polluted by waste matter reaching the river from the city.

It is claimed that the machinery used in the pumping plant installed in 1917 is antiquated, worn, and needs replacement, and that when the intake pipe is moved upstream, it will be necessary to build a new pumping house and install new machinery therein; that these new constructions and changes will cost approximately $31,500.

The city of Pocahontas has arranged to issue bonds to be retired solely from the rentals collected from the waterworks plant. An ordinance was passed pursuant to the provisions of act 131 of 1933. The ordinance provides that the value of the present system is $8,000, and the value of the new construction is $31,500, making a total value of $39,500. This ordinance binds the city to set aside for use solely for the purpose of paying said bonds, 79.75 per cent. of the revenues derived from the waterworks system, it being estimated that this percentage is the proportion of value that the improvements have to the value of the existing plant.

The city of Pocahontas is about to borrow money from the Federal Emergency Administration of Public Works of the United States of America, and issue bonds, pledging the rentals to be received from the users of water, for the payment of said bonds.

Suit was brought in the Randolph Chancery Court praying that a permanent injunction be issued enjoining and restraining the appellees from proceeding under said ordinance, and from taking any further steps looking to the issuance of revenue bonds under act 131 of 1933.

The appellees filed a general demurrer which was sustained by the court, and the complaint dismissed, and the case is here on appeal.

As stated by the appellant, the question before the court is whether or not the city of Pocahontas has authority under act 131 of 1933, to construct the betterments and improvements contemplated by the city.

Section 1 of said act 131 provides: "That any city or incorporated town in the State of Arkansas may purchase or construct a waterworks system or construct betterments and improvements to its waterworks system as in this act provided." The said act then provides for the manner in which the city may purchase or construct the improvements.

It is contended by the appellant that the authority of the city of Pocahontas to purchase or construct the improvements does not exist, and several cases are cited and relied on. We do not discuss these cases for the reason that said act 131 expressly authorizes cities to construct waterworks systems and betterments and improvements, and prescribes the manner in which these things may be done, and this act was held constitutional, except as to the provision of the act exempting the bonds from taxation, and that provision was held void.

Attention was called to the provision in the statute making the provisions and sections of said act severable, and the court said, speaking of acts 131 and 132 of 1933: "These acts are both complete and capable of being executed in accordance with the legislative intent expressly declared in the section quoted, and the acts must therefore be upheld, notwithstanding this exemption and its consequent unconstitutionality as applied to persons or agencies whose property would otherwise be subject to taxation." *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. (2d) 5.

It is next contended by the appellant that the city of Pocahontas has no authority because it does not own and operate the system. It is admitted that, if the city had acquired the waterworks system and had title thereto, and were operating the same, there could be no question of its authority to proceed to construct improvements and betterments. The waterworks system of Pocahontas was installed and operated by an improvement district in 1917. Bonds were issued and the prop-

erty assessed for the purpose of paying the bonds, and the bonds were all paid, the last one being paid in 1927. The city of Pocahontas in 1927 took over the waterworks system, and has operated it since that time, and the betterments and improvements, which are entirely new, are estimated to be 79.75 per cent of the value of the entire plant.

Among other things, act 131 provides: "Whereas, there are now in use works (owned by others than municipalities) of the character authorized by this act which require immediate repairs, improvements and/or extensions that can not be effected or accomplished because of the inability to finance same under existing laws, though the necessity for such repairs, improvements and extensions menaces the public health and safety; and this act provides a method whereby such works could be acquired by municipalities, and the necessary repairs, improvements and/or extensions promptly made."

It has been held by this court that when improvements of this kind have been completed, they become subject to the control of the city, and that the board of commissioners thereafter have no authority to bind itself as a board. In other words, the improvement was controlled by the city, and it had a right to make improvements, betterments and additions, just as it had authority to construct a new plant.

In the case of *Mississippi Valley Power Co.* v. *Board of Improvement Waterworks Dist. No. 1,* 185 Ark. 76, 46 S. W. (2d) 32, the court held against the contention of the appellant here.

Besides, the debts of the improvement district all having been paid, and the system turned over to the city in 1927 and operated by the city since that time, the improvement district had no interest whatever in it. But, if it had an interest, the city was maintaining the plant as well as operating it, and the improvements and betterments involved here constitute a separate, distinct improvement, which the city had a right to make.

Section 10 of act 131, among other things provides for acquisition or construction of a waterworks system in a municipality which has not theretofore owned and

operated a waterworks system, that in the ordinance declaring the intention to issue bonds, and providing details in connection therewith, the council shall provide, find and declare in addition to the other requirements set out in the statute, the value of the then existing system and the value of the property proposed to be constructed, and the revenues derived from the entire system when the contemplated betterments and improvements are completed shall be divided according to such values and so much of the revenue as is in proportion to the value of such betterments and improvements, as against the value of the previous existing plant as so determined, shall be set aside and used solely and only for the purpose of paying the revenue bonds issued for such betterments, together with costs, etc.

The council of Pocahontas made the estimate of the value of the properties, and the ordinance provides for setting aside and using solely for the payment of the new improvements, that per cent. of the revenue which the new construction bears to the whole property.

The ordinance provides for the issuance of the proper revenue bonds or other evidence of indebtedness exclusively against the plant and income therefrom, and further provides that it will set aside and use only and solely for the purpose of paying revenue bonds, 79.75 per cent. of the revenue derived from the waterworks system. In other words, they provide for issuing evidence of indebtedness to be paid solely from the revenue of the new improvement. That is, they take that per cent. of the revenue which the value of the new improvement bears to the value of the whole plant, and pledge that to secure the payment of the indebtedness.

Amendment No. 13 to the Constitution provides, among other things, that a city or town shall never issue any interest-bearing evidences of indebtedness except bonds to pay for indebtedness existing at the time of the adoption of the Constitution of 1874, but provides that cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purpose approved

by such majority at such election as follows. It then provides among other things, for purchasing, extending, improving, enlarging, building or construction of waterworks, etc.

But these bonds can be issued only by and with the consent of a majority of the qualified electors voting at the election.

Constitutional provisions should receive a reasonable construction, the purpose being to ascertain the meaning of the framers of the provision of the Constitution, and the intention of the electors in adopting the provision. It was manifestly the intention of the framers of Amendment 13 to prohibit cities and towns from issuing interest-bearing evidence of indebtedness, to pay which the people would be taxed, or their property appropriated to pay the indebtedness, or any indebtedness that placed any burden on the taxpayers. It was not the intention to prohibit cities and towns from making improvements and pledging the revenue from the improvements so made alone to the payment of the indebtedness.

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court therefore should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any sought to be prevented or remedied." 12 C. J., 700.

The construction of a constitutional provision should be uniform, so that it will operate at all times alike and in the same manner with reference to the same subjects. 12 C. J., 718.

Amendment No. 13 has heretofore been construed by this court, and it has been held that where the debt is to be paid out of the receipts derived from the operation of the system, and not out of funds belonging to the city, the indebtedness is valid and not prohibited by Amendment 13. *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. (2d) 1037; *Jernigan* v. *Harris, supra.* Therefore the pledge by the city of Pocahontas of the revenue derived from the improvement to pay the price of the improvement is valid.

It appearing that the improvement is to be paid solely from revenue derived from the improvement, the case must be affirmed.

JONES *v.* STATE.

Crim. 3897

Opinion delivered July 2, 1934.

John Owens, for appellant.

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

SMITH, J. Appellant was tried and convicted in the court of a justice of the peace upon a charge of transporting intoxicating liquors, and duly appealed to the circuit court, where he was again tried and convicted, and he has prosecuted this appeal to reverse the judgment of the circuit court. A reversal of the judgment is asked upon the ground that the evidence was insufficient to sustain the conviction, and no other question is presented.

The sheriff of the county and his deputy suspected that appellant had whiskey in his automobile, and they followed him in their car as he drove out of the town of Murfreesboro in his. They followed him for about a mile out of town on the road to the diamond mine. Appellant stopped on the side of the road, and got out of his car, but when he saw the officers approaching he got back in the car and started driving off. He drove only a short distance, when he was commanded to stop his car, and upon the failure of appellant to obey the command the sheriff fired his pistol. Appellant then stopped his car, and when the officers went to it they found the floor of the car wet with whiskey and a lot of broken glass and the rim of a fruit jar on the floor of the car.

It is not certain when the whiskey was placed in the car, but it is not only fairly inferable but the conclusion appears to be inescapable that when appellant realized he was being followed he sought to dispose of the whiskey, and breaking the jar which contained it was the method employed for that purpose. If the liquor was in the car—and it was—although the vessel which contained it had been demolished, it had necessarily been transported for some appreciable distance, and the verdict may not, therefore, be said to be unsupported by sufficient testimony.

The case on the facts is not unlike that of *Walbert* v. *State,* 176 Ark. 173, 2 S. W. (2d) 17. There officers had followed a car in which it was suspected that intoxicating liquor had been transported for a quarter of a mile. When the car was overtaken no liquor was found in it, but liquor was found near the place where the car had previously stopped. It was held that this testimony was sufficient to support the finding that the liquor had been transported in the car.

In the case of *Locke* v. *Fort Smith,* 155 Ark. 158, 244 S. W. 11, it was said: "* * * the Legislature only intended to make criminal the removal of intoxicating liquors from one locality in the State, or in a city or county, to another locality in the State, or city or county. These places must be separate and distinct from each other, or the offense under the statute is not complete. To constitute the offense the liquor must be in the act of being conveyed from one objective point to another. The name of one or even both of the places might be unknown, but it must be shown, inferentially at least, that the defendant was in the act of carrying the intoxicating liquor from one place or locality to another in order to render him guilty under the statute, or under an ordinance based upon the statute. We think this holding is in accord with *Hager* v. *State,* 141 Ark. 419, 217 S. W. 461."

It is unimportant therefore that the testimony in the instant case does not sufficiently show at what point or place the whiskey was put in the car or its destination. It was being transported, and had been transported, and

the fact that the container was broken and the whiskey had wasted and spread out on the floor of the car did not affect the criminality of the act.

The judgment must therefore be affirmed, and it is so ordered.

DOWNEN *v.* MCLAUGHLIN.

4-3694

Opinion delivered October 22, 1934.

C. T. Cotham, for appellant.

A. T. Davies and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

MCHANEY, J. This case is similar in some respects to those of *Freeman* v. *Jones, ante* p. 815, and *Snodgrass* v. *Pocahontas, ante* p. 819, this day decided. The city of Hot Springs proposes to issue 4 per cent. bonds to the amount of $175,000 to enlarge certain parts of the main sewers built by improvement districts in 1884 on Central and Park avenues, and which have been rebuilt twice since by the city with its own funds; to construct two sewage disposal plants outside the city; and to extend the main sewers to the disposal plants. Authority so to do is claimed under Amendment No. 13 to the Constitution. An election was called and held pursuant to ordinance on December 5, 1933, in which a large majority of the qualified electors voting approved the bond issue and the levy of a special tax on the real and personal property to pay said bonds.

The total cost of doing the proposed work is in excess of $300,000. The city has made a contract with the

Public Works Administration of the United States, whereby the Government will buy said bonds at par for cash, and, in addition, will make a free grant to the city of $43,000. The Department of the Interior will donate $82,000, making a total of $300,000. The plans prepared by the city engineers and approved by the city council, call for an estimated expenditure, in constructing the two disposal plants and in extending the main sewers to said plants, of $261,471, and for enlarging those parts of the main sewers on Central Avenue from Superior Bath House to Arbor Street and on Park Avenue from Arbor Street to Mt. Valley Street, the estimated cost is only $39,295, or a total estimated cost of $300,766.

Appellant brought this action to enjoin the issuance of said bonds and the levy of a tax on his property, claiming "that there is no authority under Amendment No. 13 for a city to issue bonds and levy a tax to pay for constructing the sewers and disposal plant to connect with and dispose of the sewage from or for enlarging parts of sewer mains built by improvement districts and not by the city itself, and that therefore said bonds and tax levy are void."

Appellees answered asserting power and authority and the reasons for the necessity of the improvement, to which a demurrer was interposed and overruled. Appellant elected to stand on his demurrer, and his complaint was dismissed for want of equity.

The questions presented by this appeal, as stated by counsel for appellant, are "whether the city of Hot Springs has the authority to issue bonds and levy a tax for constructing sewers and disposal plants to connect with and dispose of the sewage from the sewer mains built by improvement districts and for enlarging parts of main sewers built by the improvement districts." It is conceded that the city could make these improvements to a sewer system owned by the city. The question is: Can the city make these improvements to a system built by improvement districts?

As to that part of the proposed improvements consisting of the construction of two disposal plants and the laying of new sewer mains connecting all the old mains

in the city (built by improvement districts) with such disposal plants, the case is ruled by the decision of this date in the Searcy case, *Freeman* v. *Jones,* No. 3690, *ante* p. 815. The cases are identical in this regard. Only the method or manner of raising funds to retire the bonds is different. There a monthly service charge is made. Here the electors by vote have levied a tax. As to that part of the proposed improvement consisting of laying additional or new mains alongside of the old mains on Central and Park avenues, there can be no question about the power of the city to do so. As shown above, these particular sewers were constructed in 1884 and were taken over by the city to maintain and operate. The city has twice rebuilt them with its own funds. To all intents and for all purposes, the city is the owner thereof and may operate, improve and reconstruct them so as to serve the best interests of the people of the city. See act 349 of Acts of 1927, p. 1107. There is nothing in the case of *McCutcheon* v. *Siloam Springs,* 185 Ark. 850, 49 S. W. (2d) 1037, that militates against this holding. While the sewers were built by improvement districts, the city is the actual owner now, and it is required to operate and maintain them.

The city has literally complied with Amendment No. 13 to the Constitution, and this amendment specifically confers power on cities of the first and second class "for the construction of sewers and comfort stations," and for the issuance of bonds to pay therefor and the levy of a tax to retire the bonds. Here the city is constructing sewers, and it can make no difference that the sewers so constructed tie into sewers theretofore built by improvement districts.

Let the decree be affirmed. It is so ordered.

JOHNSON *v.* DERMOTT (1)

No. 4-3582

PARKER *v.* LITTLE ROCK (2)

No. 4-3581

Opinion delivered October 22, 1934.

[redacted]

Golden & Golden, for appellants.

John Baxter, John Sherrill and *Frank Wills,* for appellees.

[redacted]

Fred A. Isgrig and *Harry Robinson,* for appellant.

Ed. I. McKinley, Jr., and *Carl F. Jaggers,* for appellees.

BUTLER, J. In the case first styled, the appellants, who allege that they are owners of real estate in the city of Dermott, brought suit against the mayor and recorder and members of the city council of Dermott, and against A. Prothro, as the only surviving member of the Board of Waterworks Improvement District No. 1 and of Light District No. 1 of the city of Dermott, to enjoin

the performance of a contract between the city of Dermott and the Federal Emergency Administration of Public Works in Washington, D. C.

On the same day the complaint was filed, the appellants filed an amendment thereto, and to the complaint as amended appellees demurred. The demurrer was sustained, and the appellants, electing to stand on the allegations of their complaint, have appealed.

The substantial allegations admitted by the demurrer to be true are these: In 1903 the city of Dermott granted to W. H. Lephiew an exclusive franchise to construct a water and light system within its borders, and on the 15th day of January, 1908, for value, the city procured the cancellation of the franchise and took over the equipment and distribution system constructed by Lephiew to furnish water and light to the city. In the same year two improvement districts were organized each including the entire area within the corporate limits of the city, styled respectively, Water Improvement District No. 1 and Light Improvement District No. 1. Assessments of benefits were levied to construct each improvement, and in 1909 bonds were issued and sold by the districts in the aggregate sum of $23,000. A small part of the assessments was collected, the exact amount of which it is impossible to ascertain. However, there could have been not more than one annual assessment of benefits collected, as the city took over the improvements in 1909, since which time no other assessments have been collected.

On the 13th day of March, 1929, the city purchased six acres of land, the conveyance being made to the "Incorporated Town of Dermott, its successors or assigns." On this property the city dug the wells and erected the tank for the storing of water to be distributed to its citizens and built a brick building for housing the light plant. The purchase money for the Lephiew franchise, the equipment installed by him, and the six acres of land was derived from, and paid out of, the general revenue of the city. Since 1909 the city has operated both the water and light systems as municipal enterprises without objection from any source and without collecting

further assessments of benefit and has paid the bonded indebtedness and all other obligations of the districts out of the general revenues of the city. Beginning with the year 1909, and since that year, the city applied the income derived from the water and light systems to the general revenues of the city, and as it grew it extended the facilities of both plants commensurately, so that now these systems are worth in excess of $100,000, and, since 1909, the improvement districts have not attempted to function in any particular.

The city of Dermott, on November 29, 1926, entered into a lease agreement with the Arkansas Power & Light Company to maintain and operate the light plant and to furnish the service for which it was designed. This contract is now in force, and the light plant is being operated under the provisions of this lease.

From these allegations, it appears that the city of Dermott is not operating the water and light systems as trustee for the improvement districts, but as owner, and such it appears to be in fact.

The city applied to the Federal Emergency Administration of Public Works at Washington, D. C., for a loan from the proceeds of which it is proposed to construct a city hospital. The application for the loan has been approved, and it was required of the city that it enact an ordinance embodying therein the terms of the contract upon which the loan was to be made. Pursuant to this requirement city ordinance No. 442 was duly enacted, which recites at length the terms of the loan and the manner of its disbursement and repayment. Upon the question of the security therefor, the contract, as it appears in the city ordinance above referred to, contains the following recital: "(h) Security. Special obligations of the borrower, secured by a first lien upon, and payable from, a first pledge of the gross revenues of the municipal waterworks system, after deduction of reasonable operation, maintenance, and repair expenses, and additionally secured by a first pledge of the lease rentals from the municipal electric light system."

Plaintiffs seek to enjoin the erection of the hospital under the provisions of the ordinance, and question the

power of the city to make the contract which it evidences, or to give the pledge for the repayment of the loan recited above. The complaint praying that relief recites the fact that, since taking over the two plants and discharging their obligations, the city has used for its own purposes the revenues derived from the plants in excess of the cost of maintenance and operation, and that it is proposed to devote and pledge this excess to the repayment of the Federal loan.

It may be said that it is the city's duty to see that these plants are maintained and operated, and that it may not apply to any other municipal purpose any of the revenues derived from these plants, or either of them, required for the purpose of maintenance and operation. But it may also be said that the loan agreement and the city ordinance recognize this obligation and pledge only the excess revenues "after deduction of reasonable operation, maintenance, and repair expenses" of the waterworks system. The lease of the light plant imposes these charges on the lessee, Arkansas Power & Light Company, as a part of the consideration for that lease, so that no sum is pledged until these charges have been first paid.

It is also alleged in the complaint that the city has been using, and proposes to use, as a part of its general revenue, the profits derived from the operation of these plants after maintenance has been provided for. We know of no constitutional or statutory objection to this being done.

In the case of *Bourland* v. *Southard,* 185 Ark. 627, 48 S. W. (2d) 555, it was alleged that a city improvement district of the city of Fort Smith had improved a street in that city with the proceeds of a bond sale. The city commissioners were ex-officio commissioners of the city improvement district in that city, and had taken over the maintenance of the street as a part of their statutory duty. All the obligations of the district had been paid, including the bonds which it had issued, and there remained on hand about $1,200 which had been derived from the collection of betterment assessments against the real estate located in the city improvement district. The city was using this money along with the general

revenue for general city purposes, and the owners of property within the improvement district brought suits for an accounting of the revenues of the district and to restrain their diversion. In granting the relief prayed it was there said that the property owners in a local improvement district have an interest in the funds of the district, and that it is an impairment of their vested rights to divert the betterment assessments which had been collected to uses other than for the benefit of the owners, and that "the commissioners cannot therefore lawfully expend any of the money of the improvement district for general expenses of the city or for paying employees or officers of the city. If they could require the improvement district to pay any part of the expenses of the city, they could require it to pay all. The taxpayers of the district can be required to pay the assessments only because their property is benefited equal to the amount they have to pay."

We have before us an entirely different question in the instant case. There is involved here no issue of the improper diversion of betterment assessments, as no assessments of betterments are being collected against the property in the district and none have been for a number of years past. In the discharge of the duty to maintain and operate, the city has a discretion as to the manner in which that duty shall be discharged. If the plants are operated at a loss after the city has taken over their operation, it must bear that loss. If a profit is derived after maintenance and operation expenses have been paid, it may use that profit for its general purposes. This profit may, therefore, be treated as a part of the city's income. It was expressly held in the case of *Cumnock* v. *Little Rock,* 154 Ark. 471, 243 S. W. 57, that a city has the power to erect a city hospital, and it may use this general revenue to pay the expenses incurred in that behalf.

We conclude, therefore, that it is not beyond the power of the city to enter into a contract to erect a hospital and to segregate the revenues arising from the water and light systems and to pledge these excess revenues for that purpose. But this power may not be exer-

cised in violation of Amendment No. 10 to the Constitution. Any contract which the city makes in regard to uncollected revenues from any source must be construed with reference to this amendment. Parties cannot, by pleadings or stipulations of any kind, abrogate this amendment which will be read into any contract which the city may make. This amendment provides that the fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, and that no allowance shall be made "for any purpose whatsoever in excess of the revenues from all sources for the fiscal year in which said contract or allowance is made." Beyond this inhibition there is a lack of power to contract.

We have considered this amendment as applied to a great variety of questions, and it will serve no useful purpose to review these cases. In one of them—that of *Polk County* v. *Mena Star Co.*, 175 Ark. 76, 298 S. W. 1002—we considered the question of the priority of a county's obligations where it was unable to pay them all, and we there held, in effect, that those expenses must be first paid which were incurred in the discharge of the essential functions of the county government. We there said that such expenses as assessing and collecting taxes, holding courts, and feeding and keeping prisoners, and certain other obligations which are authorized and imposed by statutory mandate, must be paid before other expenses, even though permissible—if the county could pay for them—but which are not indispensable, may be paid for.

And so also with the cities of the State. They cannot contract away their right to exist and to perform the essential functions for which they do exist. These essential expenses must first be paid. When they have been paid, other revenues not exceeding the total annual revenues may be devoted to other public purposes—such as erecting a hospital.

In this connection it may be said that the complaint alleges that the city has a contract for the maintenance of the hospital after its erection without cost to the city, but the city does propose to borrow money for the purpose of erecting the hospital and to repay it in the

manner indicated. It has this authority provided in so doing it does not impair its power to perform the essential functions of its government and existence.

Upon the assumption that the city will have the revenue under the allegations of the complaint which the demurrer filed thereto admits, the decree overruling the demurrer is sustained.

What we have just said disposes of the appeal in the case of *Parker* v. *Little Rock.* That case involves the application of the city of Little Rock, a city of the first class, for a Federal loan with which to construct and equip an airport and the suit, in that case, sought to enjoin the city from entering into a contract with Federal Emergency Administration of Public Works to obtain a loan for that purpose.

Act No. 135 of the Acts of 1929 (Acts of 1929, page 705) authorizes cities of the first class to own, maintain, and operate airports in the manner therein provided. The city of Little Rock appears to have availed itself of the provisions of this act, and now proposes to borrow money, as above stated, for use in the proper equipment of its airport. To repay this loan, the city proposes to pledge the earnings of the airport and to transfer money from its general revenue fund to an airport fund in the event the revenue of the municipal airport will not be sufficient to pay the expenses of operation and maintenance, and also to pay $3,800 per annum from its general revenue fund, or so much thereof as may be necessary, to repay the proposed loan. The city may do this, but in the event only, as herein previously stated, that it has this money after paying the expenses of its municipal government incurred in the performance of its essential statutory functions.

Subject to this limitation, the decree in each case is affirmed.

JOHNSON, C. J., (dissenting). Because of its insidious characteristics, cancer is said to be the worst enemy to mankind extant. So it is with judicial interpretations and manipulations of constitutional mandate. These cases are notable examples of this insidious and malignant growth.

Davis v. *Gaines,* 48 Ark. 370, 3 S. W. 184, is a fair example of the beginning of this malignant disease, and our reports from volume 130 until now are full of outrages perpetrated by reason thereof. Although innocent in the beginning, this court found itself in a position from which it could not extricate itself, and the final result was that the farm lands of this State were bonded for millions of dollars which wrought bankruptcy and ruin to a great majority of our overwhelming farm population. Another notable example of judicial construction to promote expediency is *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, wherein this court determined that future county revenues might be pledged to secure funds to construct courthouses in the teeth of the fact that this was expressly prohibited by Amendment No. 11 to the Constitution of 1874. It is now a demonstrated fact that a serious mistake was effected by reason of this opinion, and that the simple upholding of the amendment would have resulted in benefit to all. Other examples might be cited but these will suffice to demonstrate the wisdom of following constitutional mandate. To halt these conditions the Legislature of this State, as agent for the people, has been busy for the past several years in an honest endeavor to bring prosperity out of desolation and ruin. The people took upon themselves the task and promulgated constitutional amendments to check this condition of affairs of which Amendment No. 13 of the Constitution of 1874 is a worthy example. Section 1 of this amendment, in part, provides:

"Neither the State nor any city, county, town or other municipality in this State shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the State shall never issue any interest-bearing treasury warrants or scrip. Provided that cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question

at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows:"

Although this amendment was approved by a majority of the people in this State on October 5, 1926, its wholesome provisions have been ignored in the majority opinion.

It appears from the language of the amendment that no bonds may be issued by a municipality in this State save by a vote of the people who are called upon to pay the bills. The majority seem to be of the opinion that, merely because the bond issue here complained of is not violative of Amendment No. 10 of the Constitution, this is all-sufficient. It occurs to me that Amendment No. 13, which is later in point of approval, is of equal importance to that of Amendment No. 10 and should not be ignored under the circumstances here presented.

My conception of constitutional government is that the will of the people is supreme, and when the people have spoken out upon any subject their will should not be ignored. Governments are instituted for the protection of the will of its people, and this is true, even though such expressed will of the people may abolish our sacred form of government. Section 1 of art. 2 of the 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."

I assert without fear of contradiction that the people had the inherent right to promulgate and pass Amendment No. 13 and thereby prohibit municipalities in this State issuing bonds except by a vote of the people, and, since they have done so in no uncertain terms, their will should be respected by the courts.

In the Little Rock case thousands of dollars of the general revenue of the city is pledged to pay this bond issue. The will of the people of Little Rock has never been consulted about this pledge. I can not conceive of a more deliberate violation of constitutional mandate.

Likewise, in the Dermott case, general revenue is pledged over a term of years to pay a bond issue about which the citizenship of Dermott was never consulted.

The majority opinion is bottomed upon the case of *Cumnock* v. *Little Rock,* 154 Ark. 471, 243 S. W. 57. A sufficient answer to the applicability of this case is that it was decided on July 3, 1922, and Amendment No. 13 did not become effective until October 5, 1926, more than four years after the rendition of the opinion in this case.

My conception of the law is that Amendment No. 13 provides a plain, adequate and exclusive remedy to municipalities for the purpose therein indicated. No subterfuge should be tolerated by the courts to avoid its plain mandate.

The views here expressed in no wise conflict with previous holdings of this court, to the effect, that municipalities may pledge future revenues accruing from a new improvement when such indebtedness created the improvement, but, when general revenues of the municipalities are pledged, a very different question is presented.

For the reasons stated, I respectfully dissent.

I am authorized to say that Mr. Justice MEHAFFY concurs in my views.

BOHLINGER *v.* CHRISTIAN.

4-3698

Opinion delivered October 22, 1934.

Pettit & Meek, for appellant.

Majors & Robinson and *Strait & Strait,* for appellee.

BUTLER, J. Yell County is entitled to two representatives. Following the general Democratic primary, held August 14, 1934, the Democratic Central Committee of that county met on August 17 after the election to cast the returns thereof and issued certificates of nomination for the offices of representative to E. H. Cheyne and to the appellee, J. A. Christian.

The appellant brought this suit against the appellee, contesting his right to the nomination. He alleged that E. H. Cheyne, J. A. Christian and himself were candidates for the nomination for said two offices, and that the candidates received—Cheyne, 2,652 votes; appellee, 2,489; and the appellant 1,754; that the appellee was ineligible to hold the office of representative and was not entitled to the certificate of nomination. Certain specific grounds of ineligibility were alleged.

The appellee demurred to the complaint and, without waiving his demurrer, filed an answer thereto. The case was submitted to the court on an agreed statement of facts, and the court rendered a judgment in favor of the appellee on the merits without passing upon the demurrer. It was agreed as a fact that, according to the official election returns, the candidates received, respectively, the number of votes alleged in the complaint.

On appeal many authorities are cited by the appellant to sustain his contention that the appellee is ineligible to receive and hold the nomination for representative, and much of his brief is devoted to arguments supporting that contention.

At the threshold of the case, however, appellant is met with the proposition that, before he can contest appellee's nomination, he must allege and show that he, himself, was entitled to that nomination. By act 38 of the Acts of 1933 it is provided that: "No person shall be declared the nominee of any political party at any primary election for United States Senate, United States House of Representatives, State, district or county office unless such person has complied with every requirement of all laws applicable to primary and other elec-

tions, and has received a majority of all the votes cast at such primary election for all candidates for such office."

It seems to be the theory of the appellant that he has received a majority of the votes cast because the votes cast for an ineligible candidate should not be counted. We are unable to agree with this contention.

In support of the contention that he received a majority of the votes cast within the meaning of the law, appellant argues that the decisions cited by appellee have no application. We see nothing in the act relied on to support the argument made, but are of the opinion that the principles announced in those cases are unimpaired and applicable here. The only difference in our primary election laws with respect to the number of votes necessary to entitle a candidate to nomination is that, before the act of 1933, a plurality of the votes cast for any given office entitled the candidate receiving the same to the nomination, while now the candidate to be nominated must receive "a majority of all the votes cast at such primary election for all the candidates for such office." This change in the law in no wise affects the rule first announced in the case of *Swepston* v. *Barton*, 39 Ark. 549, that "when a vote for an ineligible candidate is not declared void by statute, the votes he receives, if they are a majority or plurality, will be effectual to prevent the opposing candidate being chosen, and the election must be considered as having failed."

In *Storey* v. *Looney*, 165 Ark. 455-8, 265 S. W. 51, this court said: "The question necessarily presents itself in the beginning, whether or not appellant is in an attitude to contest the certificate of nomination awarded to appellee. * * * In order to make a contest for nomination, appellant must show that he is entitled to the nomination himself, which he fails to do. * * *"

The doctrine announced in the case of *Swepston* v. *Barton, supra*, was reaffirmed in *Collins* v. *McClendon*, 177 Ark. 44, 5 S. W. (2d) 734, in the following language: "The real issue in this cause was, which candidate received a majority of the legal votes cast? If Barton did not obtain such a majority, but his competitor was in-

eligible, it by no means follows that he, as the next in the poll, should receive the office. 'The votes are not less legal votes because given to a person in whose behalf they cannot be counted.' "

Of the total number of votes cast for representative the appellant received only 1,754, which, as appears from facts already stated, was not a majority. Therefore, under the principles announced in the cases cited, neither by the pleadings nor proof is the appellant entitled to wage this contest. As said in *Saunders* v. *Haynes*, 13 Cal. 145, quoted with approval in *Collins* v. *McClendon*, *supra*: "An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake. The votes are not less legal because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people have designed to reject."

The result of our views is that the judgment of the trial court is correct, and it is therefore affirmed.

COLEMAN *v.* SHERRILL.

4-3706

Opinion delivered October 22, 1934.

Dene H. Coleman and *W. K. Ruddell,* for appellants.

W. M. Thompson and *L. B. Poindexter,* for appellees.

Neil C. Marsh, Henry Moore, Jr., Fred S. Armstrong, Tom W. Hardy, Wilbur D. Mills, Brundidge & Neelly, Miller & Yingling and *Culbert L. Pearce, amici curiae.*

BAKER, J. By petition filed on the 5th day of September, 1934, E. C. Parsons *et al.* being more than 15 per cent. of the legal voters of Independence County, Arkansas, invoked the aid of Amendment No. 7 to the Constitution of the State of Arkansas to initiate the Independence County Salary Act, which was designated as "Initiative Act No. 1 of Independence County, Arkansas," with the title: "An act to fix the salaries and expenses of county officers and to fix the manner in which such compensations and salaries shall be paid and to re-

duce the cost of county government, and for other purposes."

On the 18th day of September, 1934, the county clerk decided the petitions were insufficient and defective, and on that day notified W. M. Thompson, one of the attorneys, representing the petitioners, that he had so found, and gave as his reasons therefor: "(1) That the petitions were filed with the county clerk and not with the county judge; (2) That the exact title to be placed upon the ballot was not submitted with the petition; (3) That the exact title to be placed upon the ballot was not submitted to the election commissioners; (4) That the title of said act as contained in said petition was insufficient and defective and not complete enough to convey an intelligible idea, and scope and import of the proposed law and not free from misleading tendencies." These findings were not signed by the clerk. On the 22d day of September the county judge of Independence County considered the matter and found that there were thirteen petitions containing 573 names, praying that there be submitted to the people at the next general election, to be held November 6, 1934, the question of the adoption of the proposed Initiative Act No. 1 for Independence County, and upon this hearing ordered that the clerk certify to the county board of election commissioners of Independence County said Initiative Act No. 1, using as a ballot title the title of the act.

Attacking this order, the appellants herein filed a complaint in the chancery court against J. Ed. Sherrill, county judge, and Edgar Baker, the county clerk, and against the three members of the board of county election commissioners, and pleaded the facts as have been herein set out, alleging that said order was made after the county clerk had declared the petitions to be insufficient and defective, and had notified the sponsors of that fact, and alleging that the act of the county court was contrary to, or, at least, not authorized by Amendment No. 7, and prayed that the order made by the county court be declared void; and that the court enjoin and restrain the county clerk from giving notice by publication, and from certifying to the election commissioners

any copy of said petition, and to enjoin the election commissioners from placing said Initiative Act No. 1 upon the ballot.

Several of the petitioners made themselves parties, filed answer to this complaint, and also filed a cross-complaint against the county clerk and the election commissioners for Independence County. In this they stated that the plaintiffs were taxpayers and legal voters; that the petitions were filed with the defendant, Edgar Baker, as county clerk; admitted that the county judge, J. Ed. Sherrill, had made the order which was made part of the complaint; denied that this order was contrary to Amendment No. 7; denied that it was made after the county clerk had found the petitions insufficient and defective. They alleged that the petitions were sufficient, and that they contained in themselves a valid ballot title, and that petitioners were entitled to have the matter placed upon the ballot to be voted upon at the next general election. They alleged also that they were entitled to have the actions of the county clerk reviewed by the chancery court, and that the county clerk should be required to certify the proposed act to the election commissioners; prayed that the election commissioners and the county clerk be required to do all and singular the duties required of them under the Constitution of the State and the laws thereof, and to certify the results of the election upon said Initiative Act No. 1, and for all other proper relief.

Upon the trial of the matter in chancery court, the court found: (1) That the filing of the petitions with the county clerk was a substantial and sufficient compliance with the provisions of Amendment No. 7; (2) That the title of the act contained in the petition filed with the county clerk is a substantial compliance with the provisions of Amendment No. 7 of the Constitution, with reference to the filing of a ballot title; (3) That it was not necessary that the ballot title be filed with the board of election commissioners at the time of filing the petition; (4) That the ballot title contained in the petition is sufficient and complete; (5) That said petitions contain the signature of more than 15 per cent. of the legal

voters of Independence County; (6) That the order of the county court approving said petitions and ordering the election thereon was not null and void.

The court dismissed the complaint for want of equity, and ordered and decreed that the county clerk certify the proposed act as being sufficient, and that defendants in the cross-complaint do and perform all duties as required of them by law to the end that said initiative act be placed upon the ballot for the purpose of allowing the same to be voted upon by the legal voters, as to its adoption or rejection at the next general election. It is from this order that the appeal is prayed.

The appeal brings up for our decision the following questions: First, was the title of the act, if it be treated as a ballot title, sufficient? Second, if sufficient, shall the title of the act be treated as the ballot title?

Both questions should be answered in the affirmative.

On the question of the sufficiency of the ballot title, it is argued that § 3 of the act provides for the creation of a new office, a custodian of the county buildings, offices and grounds, at a salary of $50 per month. Section 6 of the act provides that the offices of sheriff and tax collector be severed, and provides for the appointment of a tax collector by the Governor to serve until his successor is elected and qualifies. Section 7 provides that, instead of the sheriff receiving a salary, he shall remain on a fee basis, and the same section provides that the county should furnish bedding, clothing, medicine and medical treatment for prisoners. Section 8 of the act, in addition to fixing the salary of the tax collector, provides that all penalties and fees attaching upon nonpayment of delinquent personal property taxes shall go to the collecting officer who enforces payment. Section 15 provides that all contracts and purchases for supplies and equipment for the several county offices and institutions, amounting to $30 or more, shall be made by the county court, upon invited bids and to the lowest bidder; that most or all of these provisions of the measure are not mentioned or suggested by the ballot title, which should, on account thereof, be declared invalid.

Amendment No. 7 contemplates a liberal construction and, if substantially complied with, the proposition should be submitted to the vote of the electors. It provides "that the sufficiency of local petitions shall be decided in the first instance by the county clerk * * * subject to a review by the chancery court," and also "that, if the sufficiency of the petition is challenged, such cause shall be a preference cause and shall be tried at once, but the failure of the courts to decide prior to the election as to the sufficiency of any such petition shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people."

As said in *Shepard* v. *McDonald,* 188 Ark. 124, 64 S. W. (2d) 559: "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." In order that the right to legislate for themselves may be exercised, the people have reserved to themselves the right to pay or give compensation for the circulation of petitions and have provided against otherwise unwarranted restrictions interfering with the freedom of the people to enact their own local measures.

The amendment provides for advertisement or publication, "that all measures submitted to the vote of the people by petition under the provisions of this section shall be published as is now or hereafter may be provided by law." But it was not intended that the officer to whom the petition was submitted should have entire or exclusive control of the petition, but remedies were provided whereby such petitions could be brought before the electors of the next general election.

Having in mind these and other provisions of Amendment No. 7, it becomes apparent that a liberal construction, or interpretation, in order to make effectual the purposes intended, is required. We therefore hold that the title of the act set forth in the beginning of this opinion is sufficient as a ballot title to apprise the people of the general purposes of the proposed law. It is true

that from the title all of the matters dealt with in the petition cannot be ascertained. It does not set forth the fact that the offices of the sheriff and tax collector are to be held by different officers, nor the fact that the county is employing a custodian, or janitor, for its public buildings, and it might perhaps, with equal reason, be suggested that it does not state what any officer would be paid. It does, however, show that, instead of the fee system now prevailing, a salary system is proposed for adoption, and that the expenses of the county offices would be controlled, and that its purpose is to reduce the cost of county government, and "for other purposes." Of course, the expression "and for other purposes," separated from the text, would mean very little, but read with the ballot title the voter would understand that related matters or items of the cost of county government were subjects of legislation. Notice is given to those who do not desire to read more than a ballot title that the proposed change from the present system has for its general purpose a reduction of the expenses of county government, and that, if the proposed act receives a majority vote, there will be a readjustment of the compensation paid public officers, and of other expenses.

The real objection urged to the title of the act, which we are now treating as the ballot title, is the fact that it is not sufficiently elaborate. Any other ballot title would be susceptible of the same criticism unless it were in itself a complete abstract of the act, which would be impracticable under ordinary conditions. It can be said, however, with certainty, that there is nothing in the ballot title that is deceptive or misleading. It is sufficiently complete to apprise any elector of the general purposes of the act.

In the case of *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. (2d) 356, the ballot title proposed for the referendum of the act of the Legislature of 1931, amending § 3505 of Crawford & Moses' Digest, was so framed that a voter might understand that the act was such as to permit the granting of decrees of divorce to applicants who have resided in the State for a period of three

months, or more, without proof of any of the causes for divorce. Such was the vice of that ballot title.

It did not submit the proposition of the three months period of residence in the State, instead of a year, as under the law was required to be alleged and established by proof, in addition to the cause of divorce.

The amendment provides also that: "All measures submitted to the vote of the people, under provisions of this section, shall be published as is now or hereafter may be provided by law." It may be observed that if the ballot title were intended to be so elaborate as to set forth all the details of the act, the publication, or advertisement, might, for that very obvious reason, be omitted. Perhaps, no set rule or formula can be announced as to what a ballot title shall contain, but it may be safely stated that, if it shall identify the proposed act and shall fairly allege the general purposes thereof, it is sufficient.

Any voter, not already having knowledge of the intention of the proposed law sufficiently satisfactory to him, upon the mere reading of the title, would no doubt gain such further information as he might desire from due advertisement of it in his county.

It is seriously argued that the county judge had no right or jurisdiction to act upon the petition, under act 356 of the Acts of 1927. It is unnecessary in this case to decide the powers of the county court or county judge, as this petition was filed with the county clerk and the question was reviewed by the chancery court after the county clerk had held the proposed act insufficient and defective and set out his reasons therefor.

Section 3 of the proposed act provides for the appointment, by the county judge, of a custodian for the county buildings, at a salary of $50 per month; such custodian to be recommended by two-thirds of the elective officers, and it is made the duty of the custodian to maintain the county buildings, offices and grounds in proper, sanitary and suitable conditions, and § 6 of the proposed act provides for a severance of the offices of sheriff and tax collector, and for the appointment by the Governor, of a tax collector, until an election can be had, or until such tax collector shall have been elected and qualified.

These must be held more as relating to matters of form, rather than substance, and on that account may be both treated together. By reading § 3 of the act, it is readily determined that the custodian is a janitor, who will look after and keep the public buildings in proper, sanitary and suitable condition. It is not urged or suggested that this is any added expense over and above that now prevailing. In fact, the only difference from the ordinary present management in a matter of this kind is that at least two-thirds of the elective officers must nominate the janitor prior to the county judge's appointment.

The severance of the sheriff's office from that of the tax collector is not a creation of a new office, nor is it shown or suggested that this will not redound to the best interests of the county. The two offices are distinct, but, in most instances, both have been filled by the sheriff and his deputies. In this case the people may exercise the right reserved to them and pass the proposed act, and afterwards elect a tax collector, or they may prefer that the sheriff continue to collect taxes.

There is no dearth of authority relating to titles of acts of the Legislature or of city ordinances. Perhaps they do not relate to initiative or referendum measures, but, nevertheless, are in point for those who may be interested in further academic research.

The general rule has been announced by the Maryland courts. It is one of the States in which there is a constitutional requirement to the effect that acts of the Legislature or city councils shall be confined to one subject set out in the title of the act or ordinance. Chief Justice McSherry says: "It has never been understood that the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the satute relates * * *. When the general subject is indicated, no detail matters need be mentioned in the title. 'The primary object of the provision, undoubtedly, is to exclude all foreign, irrelevant, or discordant matter from the statute and to confine the statute to the single subject disclosed in the title.' *Phinney* v. *Trustees*, 88 Md. 636, 42 Atl. 58." *Mayor of City of Baltimore* v. *Stewart*, 92 Md. 535, 48 Atl. 165, 168. *Mayor and City Council*

of City of Baltimore v. *Fuget,* 164 Md. 335, 105 Atl. 618-622.

In answer to the second question above, as follows: "Second, if sufficient, shall the title of the act be treated as the ballot title?" we suggest that Amendment No. 7 makes no provision or requirement that the measure proposed shall be given a title. In fact, the mandate for a ballot title is such as to permit the petitioners to file a separate instrument indicating the ballot title, as was done in the cases of *Westbrook* v. *McDonald,* 184 Ark. 740, 44 S. W. (2d) 331, and *Shepard* v. *McDonald,* 188 Ark. 124, 64 S. W. (2d) 559, and, by the same authority, when done in that manner, the instrument fixing the ballot title becomes a part of the petition, so, if the ballot title is a part of the petition, the requirement has been met.

We hold therefore that when, in a local measure presented by petition, the title of the measure, when given one, is incorporated in, and made a part of the petition, the said title becomes and is the ballot title.

It is urged further that there was no submission of the ballot title to the county board of election commissioners. Amendment No. 7 does not require, in the matter of county or municipal measures, that the ballot title should be submitted to the board of election commissioners simultaneously with the filing of a petition. It may be done at any time prior to the time of the preparation and printing of the ballots, and, if so done, it becomes the duty of that board to place the same upon the ballot. The members of the board of election commissioners of Independence County are defendants on the cross-complaint and were so ordered by the chancellor trying the cause.

We hold therefore that the title of Initiative Act No. 1 under consideration is sufficient as a ballot title, that there was no error in the decree in so holding, and in ordering the board of election commissioners to place the same on the ballot.

The case is therefore affirmed.

THOMPSON *v.* WISEMAN.

4-3565

Opinion delivered October 29, 1934.

[redacted]

R. Leon Day and *Sam Robinson,* for appellants.

Hal L. Norwood, Attorney General, *Earl R. Wiseman* and *Charles W. Mehaffy,* for appellee.

JOHNSON, C. J. Appellants own and operate in public places in this State certain miniature pool tables, marble tables and various types of vending machines controlled by coin slot devices. By acts 158 and 167 of

1931, amended by act 137 of 1933, the privilege of operating these devices in this State is subjected to a tax.

This suit was brought by appellants against appellee Revenue Commissioner to restrain and enjoin him from enforcing said acts because, as it is alleged, act 158 of 1931 is unconstitutional and void because in conflict with the fourteenth amendment to the Constitution of the United States, and is contrary to and in conflict with § 5 of article 16 of the Constitution of this State; that act 158 of 1931 is void because it did not receive the necessary vote required by § 31 of article 5 of the Constitution upon passage through the respective houses of the General Assembly; that act 158 is discriminatory against coin operated pool tables, and in favor of standard pool tables, and is therefore void; that act 167 of 1931 repealed act 158 of 1931, in so far as said act 158 applies to miniature pool tables.

Appellee's demurrer was sustained to this complaint, and this appeal seeks review thereof.

The reasons why these acts are conceived to be contrary to the Fourteenth Amendment of the Constitution of the United States are not pointed out in briefs, therefore we shall pretermit any discussion thereof.

Appellants' contention that said acts are contrary to and in violation of § 5 of article 16 of the Constitution of 1874 can not be sustained. This section of the Constitution provides: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper."

Appellants' contention is grounded upon the legal proposition that the Constitution of 1874 limits the taxing power of the State in two particulars, namely: First, a tax must be *ad valorem,* equal and uniform; secondly, that the State can not lay a tax for State revenue pur-

poses upon occupations of common right. The contention that the tax here levied is not *ad valorem,* equal and uniform has no application to the question here under consideration. The tax here levied is upon the privilege of operating pool tables, miniature pool tables or other devices controlled by coin slot machine devices, and such a tax is expressly authorized by § 5, article 16, of the Constitution as heretofore quoted. We stated the applicable rule in *Fort Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679, as follows:

"The subject-matter of this statute comes, we think, within the general law making power of the Legislature, and, if there be limitations forbidding the exercise of this power in that respect, it must be found in the Constitution. But there is none. Our Constitution expressly provides that the Legislature shall have power to tax privileges in such manner as may be deemed proper."

Again, in *Floyd* v. *Miller Lumber Co.,* 160 Ark. 17, 254 S. W. 450, we stated the applicable rule in reference to the severance of growing timber from the soil as follows: "Following the lead of the Supreme Court and the trend of our own decisions, and for purposes of uniformity, a thing to be desired, a majority of the court, including the writer, have concluded that the tax imposed by the acts is a privilege and not a property tax. As a privilege tax it is clearly and definitely authorized by the Constitution."

Appellants especially rely upon *Stevens & Wood* v. *State,* 2 Ark. 291, and subsequent cases of similar effect, as authority for their position that the tax here levied is a property tax.

It is true we held in *Stevens & Wood* v. *State, supra,* that all property in this State must be taxed according to its value, and that the tax thereon must be equal and uniform throughout the State, but we also said in this connection that when property was acquired it must be so kept and disposed of as not to injure any paramount legal right of another or affect injuriously the public morals or public good.

It is perfectly clear that the holding of this court in the last case cited was that the ownership of a pool

table was not *per se* a privilege, but that its use might be determined a privilege and regulated as such. The distinction here pointed out is fully recognized in all our subsequent cases on this subject.

Neither can we agree that the privilege here taxed is an occupation of common right. We have heretofore distinguished the meaning between the words "privilege" and "occupation" as follows: "The words 'pursuits and occupations' are synonymous, and are used in their common acceptation to denote the principal business, vocation, employment, calling or trade of individuals that but for some constitutional or statutory inhibition could be exercised and enjoyed as of common right, but the word 'privilege' as used in the Constitution of 1868 is not synonymous with the words 'pursuits and occupations'."

The slot machine devices here in use are automatic and self-operating, therefore need no one to attend upon them, if needed this be important, while being operated; therefore no occupation of common right is here involved. Moreover, the law is well settled in this State that the police power may be exercised by the Legislature for the protection of the health and morals of the people unrestrained, unless such regulations are so utterly unreasonable in their nature and purpose as to unnecessarily and arbitrarily interfere with or destroy personal property and rights without due process of law. See *Little Rock* v. *Reinman,* 107 Ark. 174, 155 S. W. 105, which was affirmed by the Supreme Court of the United States in 237 U. S. 171, 35 S. Ct. 511.

The acts here under consideration were a reasonable exercise of the police power, and in no wise interfere with the rule in reference to occupations of common right.

Next, it is urged that act 158 is void because not passed by a majority vote of two-thirds of both Houses of the General Assembly. This exact question was before us in *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000, and we there decided the question as follows: "It is conceded that the first two items, viz., charity fund and common school equalization fund, come respectively under the phrases 'defraying the necessary expenses of

government' and 'to sustain the common schools,' but it is insisted that the concluding part of the section providing that the remainder of the fund be used solely for the purpose of reducing the State tax on property amounts to a violation of the constitutional provision, because such use is not for any enumerated purpose in the section, and is therefore in violation of the constitutional provision, because the act was not passed by two-thirds majority vote in each House of the Legislature. A majority of the court does not agree with this contention."

The doctrine here announced in no wise conflicts with the opinions in *Beloate* v. *Kaufman,* 117 Ark. 352, 175 S. W. 87, or *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77. In the last mentioned cases, we were dealing with a question altogether different from the one here under consideration. A mere reading of the respective cases will differentiate the conclusions reached.

The contention that this legislation is discriminatory in favor of standard pool tables and against miniature slot operated devices is likewise without merit. If the privilege of operating pool tables is one which may be granted or withheld by the Legislature, then certainly when the privilege is granted it may be upon such terms as the Legislature may prescribe.

It is also urged, that act 167 of 1931 repeals act 158 of 1931. If repeal exists, it must be by implication and not direct, as act 167 carries no repealing clause. We have always held that repeals by implication are not favored. *Baker* v. *Hill,* 180 Ark. 387, 21 S. W. (2d) 867; *Massey* v. *State,* 168 Ark. 174, 269 S. W. 567, and cases there cited.

Without setting out in detail the provisions of said acts, it may be said that act 158 lays a tax upon the privilege of operating standard pool tables. Act 167 lays a tax upon the privilege of operating miniature pool tables, vending machines, marble machines or any other machine operated by an automatic coin slot device. We can not perceive any invincible repugnancy between the two acts, and are unwilling to hold that act 167 is a

substitute for act 158; therefore the one does not repeal the other.

The chancellor's determinations conforming to the views here expressed, the decree based thereon must in all things be affirmed.

McCuiston *v.* White.

4-3566

Opinion delivered October 29, 1934.

Frank C. Douglas, for appellant.

J. S. Abercrombie, for appellee.

Smith, J. It was adjudged in the decree from which this appeal comes that the tax sales of a certain lot in the city of Blytheville were void. One of these sales was had on June 2, 1930, for the nonpayment of a sewer district tax, and the second sale of the lot was had on June 17, 1930, for the nonpayment of a paving district tax.

At the time the suit was brought which questioned the validity of these sales a tender was made of a sum of money sufficient to redeem the lot from both said sales if redemptions were permissible. The decree recites that this money had been deposited in the registry of the court in an effort to redeem said lot, and the clerk was ordered to pay the money in his hands over to the plaintiff, who had purchased the lot from each of the improvement districts. The lot had, at each sale, been sold to the improvement district in whose behalf the sale was made, for the lack of other bidders.

It is unnecessary to determine whether the sales were valid or were void, as the right to redeem from the sales had not expired at the time the redemption tenders were made; indeed, the right of redemption has not yet expired. There was passed at the 1915 session of

the General Assembly act No. 43 (Acts 1915, page 123), entitled, "An act to regulate sales by commissioners in chancery for special assessments and redemptions therefrom." It is provided in the portion of this act which appears as § 5644, Crawford & Moses' Digest, that the owner of property sold for the nonpayment of betterment assessments "shall have the right to redeem from said sale at any time within five (5) years" by payment to the clerk as commissioner of the sum of money then required to effect a redemption. The decree here appealed from recites, as has been stated, that there was a tender and a deposit of the required amount of money.

It was held in the recent case of *W. B. Worthen Company* v. *Delinquent Lands, ante* p. 723, that this statute, in so far as it applied to municipal improvement districts, had not been repealed by subsequent legislation, but was still in full force and effect as applied to municipal improvement districts.

As the effect of the decree is to accord this right of redemption, it must be affirmed, and it is so ordered.

McHaney and Baker, JJ., dissent.

El Dorado Building & Loan Association *v.* Union Savings Building & Loan Association.

4-3556

Opinion delivered October 29, 1934.

Archie D. Murphy and *Coulter & Coulter,* for appellants.

Marsh & Marsh, for appellees.

HUMPHREYS, J. The issues of this appeal are whether, first, a contract providing for the Union Savings Building & Loan Association of Little Rock, Arkansas, to absorb the assets of the El Dorado Building & Loan Association of El Dorado, Arkansas, was void; and, second, whether a secret contemporaneous agreement for the Union Savings Building & Loan Association to pay W. F. Matthews $11,000 out of the assets it should receive from the El Dorado Building & Loan Association for consummating the main contract was void. The contracts were entered into on the 15th day of March, 1932. The main contract, in effect, provided for all the assets of the El Dorado Building & Loan Association, except $125,000 worth of real estate, to be turned over to the Union Savings Building & Loan Association, said real estate being reserved for division *pro rata* between the stockholders of the guaranty stock upon surrender of their stock for cancellation. The total amount of its guaranty stock was $100,000. The consideration of the main contract was that the Union Savings Building & Loan Association should carry out and perform all the contracts of the several investment stockholders of the El Dorado Building & Loan Association, such as receiving the dues, paying the dividends thereon, etc. The

total amount of investment stock was $316,839.70. No indemnity or security was given by the Union Savings Building & Loan Association for the faithful performance of the contract on its part. Pursuant to the agreement, all the assets of the El Dorado Building & Loan Association were transferred and conveyed to the Union Savings Building & Loan Association, except the real estate reserved and divided *pro rata* among the guaranty stockholders of the El Dorado Building & Loan Association, and $11,000 in money and real estate was turned over to W. F. Matthews out of the assets of the El Dorado Building & Loan Association for negotiating and consummating the deal; whereupon, on December 31, 1932, the El Dorado Building & Loan Association filed its certificate for dissolution. The Union Savings Building & Loan Association collected the monthly dues on the installment investment stock and paid dividends for a short time on the fully paid investment stock that it had obligated itself to pay under the contract, and that it ceased to pay after March 1, 1933, at which time it went into liquidation. The investment stockholders were not convened to approve the contract, and same was not ratified by the consent of the shareholders holding a majority of the shares in each of the respective contracting associations. The contract was approved by the directors and guaranty stockholders but no others. The negotiations on the part of the Union Savings Building & Loan Association in making and executing the contract were conducted by G. Russell Brown with W. F. Matthews representing the El Dorado Building & Loan Association, and the agreement relative to the commission is as follows:

"As a side agreement and inducement to W. F. Matthews, secretary of the El Dorado Building & Loan Association, I have agreed that we shall pay to him, for his services in connection with the transfer of these assets, the difference between a hundred and twenty-seven and a hundred and thirty-eight thousand dollars, which is to be paid as follows: Forty-six hundred dollars cash and sixty-four hundred dollars in real estate which is owned by the company."

The above memorandum was marked "confidential" and was handed by Brown to the president of the Union Savings Building & Loan Association. When the Union Savings Building & Loan Association went into liquidation, certain investment stockholders for themselves and others similarly situated brought this suit in the second division of the chancery court of Union County to set aside the main and contemporaneous contracts on the ground that they were contrary to law and void. The allegations of the complaint were controverted, and, upon a hearing of the cause, the trial court rendered the following decree:

"The contract in suit was void *ab initio;* that it was never ratified, and that the plea of estoppel is not well founded; that plaintiffs (and the other stockholders similarly situated) recover the property conveyed to W. F. Matthews, and recover judgment against him for the amount of cash paid to him in connection with the transaction between the two associations; that all the property reserved to the guaranty stockholders be recovered of and from them, and that all conveyances affecting any of the property conveyed by the El Dorado Association be canceled; that the Union Savings Building & Loan Association, and all other parties fully account for all properties received by them from the assets of the El Dorado Building & Loan Association."

An appeal has been duly prosecuted to this court from said decree.

The absorption of the assets of the El Dorado Building & Loan Association by the Union Savings Building & Loan Association was attempted under act 128 of the Acts of 1929. Section 6 of that act prohibits the withdrawing of guaranty capital stock until final liquidation of an association, and requires that the funds derived from the sale of such shares shall be set aside, and be a permanent and fixed guaranty to all other shareholders and certificate holders that the association will fulfill its agreement with them as per terms of the contract issued to them. The contract in question provided for the withdrawal of certain real estate to liquidate the guaranty stock, and was withdrawn and divided between the hold-

ers thereof contrary to the provisions of the act. The contract also violated § 22 of act 128 of the Acts of 1929, which required the consent of the shareholders holding a majority of the shares in each of the contracting associations in case of a merger. Appellants insist that § 22 had reference to shareholders who had a right to vote under the by-laws of the associations, and have called our attention to the by-law of the El Dorado Building & Loan Association allowing guaranty shareholders only to vote. The act does not so state, but, on the contrary, provides that, before there can be a merger of two associations, the consent of the shareholders holding a majority of the shares in each of the contracting associations must be obtained. The character of contract entered into was prohibited by act 128 of the Acts of 1929 and was void *ab initio* and was incapable of ratification.

W. F. Matthews was acting in a fiduciary capacity, and had no right to appropriate assets belonging to his employer as a commission for negotiating and executing a contract prohibited by law, and especially when this commission was paid him secretly and without the knowledge of the guaranty stockholders, as shown by the record in this case.

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

ALPHIN *v.* TATUM.

4-3701

Opinion delivered October 29, 1934.

McKay & McKay, for appellant.

Alvin Stevens, Mahony & Yocum, C. B. Crumpler and *Compere & Compere,* for appellees.

MEHAFFY, J. In May, 1927, William Peterson entered into a written contract with the county judge of Union County and the commissioners of public buildings of said county to erect a courthouse according to certain plans and specifications. Peterson was to receive as compensation, the sum of $692,500, which was paid by warrants drawn on the county treasury and payable out of the county general revenue fund. $95,000 was payable on demand, $45,000 payable August 1st each year from 1928 to 1940, inclusive, and the remaining warrant of $12,500 payable on August 1, 1941.

A suit was filed by taxpayers of Union County to restrain the county judge and commissioners of public buildings and the contractor from proceeding further in the erection of the court house. This suit was decided October 24, 1927, and this court held that the contracts and warrants were valid.

There is still due, according to the complaint in this case, $327,500, maturing at the rate of $45,000 on August first of each year for the years 1934-1940, inclusive, and $12,500 maturing August 1, 1941.

On July 24, 1934, a contract was made and entered into by and between Union County, acting through the county judge, who was authorized by resolution of the levying board of said county, and Roy E. Smith as trustee for R. N. Garrett and others, being the owners and holders of all the outstanding court house warrants.

The contract recites, among other things, that all of the courthouse warrants mentioned above have been paid and canceled except the warrants maturing in the years 1934-1941, inclusive, in the sum of $327,500; that these warrants are now owned by persons on whose behalf Roy E. Smith is acting. The contract also recites that the revenues of the county have, since the date of the first contract, decreased to such an extent that they are insufficient to pay the maturities of said court house warrants, and to pay the necessary operating expenses of the county government.

It is proposed to refund the warrants so as to make them payable as follows: the warrants due August 1, 1934, to August 1, 1938, inclusive, $20,000.25; the war-

rants due August 1, 1939, to August 1, 1946, $25,249.59; and the warrant due August 1, 1947, $25,502.03. That is, one warrant is payable annually as above stated until the entire debt is paid. The outstanding warrants now are as follows: August 1, 1934, to August 1, 1940, $45,000. That is, $45,000 is due annually until 1940, and on August 1, 1941, there will be due $12,500. It is proposed to exchange these warrants for the above warrants of smaller amounts.

When the case involving the validity of the contract to build the courthouse, and the validity of the warrants issued in payment of same was decided by this court, the court held that the contract and warrants were valid. *Lake* v. *Tatum*, 175 Ark. 90, 1 S. W. (2d) 554.

The appellant contends that Amendment No. 10 to the Constitution of the State of Arkansas impliedly repeals §§ 1994, 1996, 1997 and 1998 of Crawford & Moses' Digest. These sections provide for the calling in of outstanding warrants, and the first part of Amendment No. 10 provides for conducting the counties on a sound financial basis, and prohibits the making of certain allowances and certain contracts. It is unnecessary to discuss this first part of the amendment because the warrants issued in payment of the courthouse have already been held valid by this court. The amendment, however, contains the following section:

"Provided, however, to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, counties, cities and incorporated towns may issue interest-bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax in addition to that now authorized, not exceeding three mills, may be levied for the time as provided by law until such indebtedness is paid."

It is contended by the appellant that the sections of Crawford & Moses' Digest above referred to are repealed by Amendments Nos. 10 and 17 to the Constitution. These amendments to the Constitution do not repeal the sections of the digest mentioned. While Amendment No. 10 requires the affairs of counties and municipalities to be conducted on a sound basis, and prohibits making

debts beyond the revenue of the county, it also provides that, to secure funds to pay the indebtedness outstanding at the time of the adoption of the amendment, counties and municipalities may issue interest-bearing certificates of indebtedness for the payment of which they may levy a tax, not to exceed three mills, in addition to the tax now authorized by law.

Union County is not proposing to issue interest-bearing evidences of indebtedness or to levy a tax in addition to that now provided by law, but the only thing it is undertaking to do is to make the annual payments smaller so that they may be met and paid from the revenue of the county. There is no constitutional provision prohibiting a contract of this kind.

If it were sought or intended to levy an additional tax this could only be done by complying with the provisions of Amendment No. 10. Union County is not undertaking to construct, reconstruct or extend any county courthouse or county jail, and not undertaking to levy a tax as provided in Amendment No. 17. In order to issue interest-bearing evidences of indebtedness or levy a tax, these amendments to the Constitution must be complied with, but, as the county is not undertaking to do any of the things mentioned in these amendments, they have no application. These amendments were discussed at length in the case of *Carter* v. *Cain*, 179 Ark. 79, 14 S. W. (2d) 250, and it would serve no useful purpose to discuss them further here.

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

FLEMING *v.* ROLFE.

4-3715

Opinion delivered October 29, 1934.

Campbell & Smith and *C. W. Norton,* for appellant.

Marvin B. Norfleet and *Hargraves & Johnson,* for appellee.

BUTLER, J. At the primary election held in St. Francis County on August 14, 1934, the appellant, Charles Fleming, and the appellee, E. A. Rolfe, were candidates for the Democratic nomination for the office of county judge of said county. On the returns of the election the central committee found that E. A. Rolfe had received a majority of the votes cast and issued to him its certificate of nomination. The appellant, Fleming, filed his complaint contesting the right of the appellee to the nomination, to which was appended in the form and manner required by law the affidavit prescribed, subscribed to by nineteen affiants. To that complaint the appellee filed a motion to strike and dismiss the complaint on the sole ground that the affiants were incompetent to make the affidavit in that they were not familiar with the allegations made in the complaint; that within two years past they had violated §§ 3 and 4 of the rules of the Democratic Party by failing to support the regular Democratic nominee at a general election; that they were not qualified electors with the meaning of § 3772 of Crawford & Moses' Digest.

A response was filed to that motion, and, after hearing testimony, the court overruled the contentions contained in the motion to dismiss, that (B) "the affiants do not know and are not familiar with the facts made and set out in the complaint"; and that (C) "each of the affiants had violated the rules of the Democratic Party within the last two years by supporting other than a Democratic candidate."

The court, however, sustained the motion of the appellee on the theory that 13 of the affiants were not qualified electors under § 3772 of the Digest, for the reason that some of them had failed to assess a substantial portion of their personal property, that one had failed to assess her personal property when her poll was assessed, and that others had failed to state in their assessment lists that they had no personal property.

The appeal presents for our determination the single question of whether or not the judgment of the trial court, holding that the affidavit was subscribed by less than ten qualified electors within the meaning of the law, is correct. The appellee seeks to justify the action of the court on the authority of *Collins* v. *Jones,* 186 Ark. 442, 54 S. W. (2d) 400, and *State* v. *Chicago Mill & Lbr. Corp.,* 187 Ark. 65, 52 S. W. (2d) 951. He points out certain language used in the case of *Collins* v. *Jones,* which he contends sustains his contention, particularly the following sentence: "One may assess who has no property subject to taxation, and one does assess that makes that statement and signs the blank assessment list showing no property subject to taxation." The question presented here was not before the court in *Collins* v. *Jones.* That case involved the validity of a number of votes cast by married women, and of those of certain persons who procured their names to be placed by the clerk on the assessment record without making any assessment of personal property. The attack made was that, although the poll taxes of these voters had been paid, they had not been properly assessed; and that they had been assessed with, and paid, no taxes other than their poll taxes. The facts were that the husbands of these women, after having assessed their property and poll tax, returned to the assessor and informed him that they had failed to assess their wives with a poll, and that he (the assessor) then went to the county clerk's office and added their names to the book. Others brought their copies of assessment lists, and when these copies showed two polls the assessor would list the wife as having been left off through error. These lists were all brought to the

assessor after April 10 with no names subscribed except those of the husbands.

In passing on that question, we there said: "We agree with the circuit judge that these assessments did not comply with the law. None of these assessments were made until after April 10, at which time the provisions of § 3778, Crawford & Moses' Digest, applied. Even those assessments which were not brought in 'in bunches,' and which had not been mutilated, did not show the name of the second person assessed. The law appears to contemplate a separate assessment of each taxpayer, of all males and of all females, who wish to become qualified electors by paying a poll tax."

The only other question decided by the court in *Collins* v. *Jones, supra,* was whether or not the trial court properly excluded from the count of legal electors the names of persons which had been placed on the tax books by the county clerk without requiring any assessment to be made of personal property. We held that this action of the court was proper, and, in so doing, said: "The fact—if in any case it was a fact—that these persons had no property subject to taxation would have been no reason for not placing their names on the tax books; but, nevertheless, they were required to sign a tax list showing the property, if any, owned by them." The court did not say or mean, by the language quoted, that the person had to inscribe on the list, "no personal property," or other words of similar import.

In *State* v. *Chicago Mill & Lbr. Corp., supra,* the questions involved related only to the assessment and collection of revenues and not to the qualification of electors and therefore have no application to the case at bar.

We are of the opinion that when a person signs and delivers an assessment list in which he fails to assess any personal property whatever, it is sufficient to show that he has none, within the meaning of *Collins* v. *Jones, supra,* and when property is owned by an elector and omitted from his assessment lists, while it may subject him to the penalty provided by law, it does not prejudice his right to vote. In other words, one who signs an assessment list, assessing his poll, and gives it to the as-

sessor and thereafter pays his poll tax within the time required (not being otherwise disqualified) is a qualified elector. The laws relating to assessment of property for taxation are primarily intended for the collection of revenue and ample provision is made for the discovery of all omitted property and adequate penalties provided for those who wilfully fail to assess, or give fraudulent statements of value.

It is contended by the appellee that the court's action was proper, not only for the reason given by it, but for the further reason that the assessor failed to administer the oaths to the persons assessing in the manner provided by law and failed to sign the jurat. The failure of an officer to perform his duty does not deprive a citizen of his right to the elective franchise, and we hold the argument of the appellee unsound.

Appellee has filed a motion to dismiss the appeal because of the failure of the appellant to abstract the testimony relating to the question decided by the court against him, but he has made, in his abstract and brief, no reference to any exception saved by him to the action of the court, and has failed to pray a cross-appeal from the finding of the court in those particulars. The presumption is that the court's decision was supported by the proof, and it was the duty of the appellee, not the appellant, to bring up these questions for review, if he felt aggrieved.

The judgment of the trial court is reversed, and the cause remanded with directions to reinstate the complaint, and for further proceedings.

CHERRY *v.* LEONARD.

4-3734

Opinion delivered October 29, 1934.

Verne McMillen, for appellant.

Trieber & Lasley, Walter L. Pope, Attorney General, and *Robert F. Smith,* Assistant, for appellees.

Owens & Ehrman and *Griffin Smith, amici curiae.*

BAKER, J. The appellant filed his suit in Pulaski Chancery Court praying for a restraining order to prevent the State Treasurer from paying out certain moneys, upon order of the Refunding Board, in the purchase of tenders of bonds, made to the Refunding Board, and which that board desires to accept. Plaintiff alleged that he is a resident of Pulaski County, and that he is a taxpayer and interested in the contemplated acts of the State Treasurer and Refunding Board, which conduct complained of, he says, is in violation of the provisions of act No. 11, approved February 12, 1934; said act having been passed at the special session of the Legislature held in 1934.

Plaintiff alleges that said act No. 11, by the provisions of § 47, makes an appropriation of $100,000 for redeeming State highway refunding bonds and State toll bridge bonds during the period beginning the 1st day of January, 1934, and ending the last day of June, 1934,

and an additional appropriation of $350,000 for redeeming road district refunding bonds during the period beginning with the first day of January, 1934, and ending with the last day of June, 1934; and an appropriation of $20,000 for redeeming certificates of indebtedness during the period beginning with the first day of January, 1934, and the last day of June, 1934; an appropriation of $15,000 for redeeming funding notes issued to contractors during the period beginning with the first day of January, 1934, and ending with the last day of June, 1934; that said § 47 also makes an appropriation for all of said purposes in the total amount of $970,000 during the fiscal year beginning with the first day of July, 1934, and ending with the last day of June, 1935. The total appropriation made by said § 47 is $1,455,000.

Plaintiff states further that by the terms of said § 47 of said act No. 11 the appropriation made for use during the period beginning the first day of January, 1934, and ending the last day of June, 1934, has expired.

That the Refunding Board on the 27th day of July, 1934, passed a resolution authorizing the State Treasurer to draw a voucher for the full amount of the appropriation made for the period from January 1, 1934, to the last day of June, 1934, for the purpose of redeeming bonds that might be purchased by the State Treasurer on the 19th day of September, 1934. Plaintiff states that at the time said resolution was passed by the Refunding Board there had been no bonds offered for tender, and, under the terms of the call made, there could be no bonds offered for tender and no purchases made until the 19th day of September, 1934.

Plaintiff further states that neither the Treasurer nor Refunding Board has a right to use any portion of the moneys appropriated by the provisions of said § 47 of said act No. 11 for the period beginning with the first day of January, 1934, and ending the last day of June, 1934.

Plaintiff further states that, under the provisions of § 37 of said act No. 11, no refunding obligations can be purchased by the State Treasurer until there shall be on hand in the State Highway and Toll Bridge Refunding

Bond Redemption account and in the other redemption accounts, provided for in said act, funds in excess of the amount necessary to pay the interest and principal falling due in any fiscal year. That the State Treasurer is preparing to purchase bonds offered for redemption on September 19, 1934, when there are on hand funds in excess of the amount necessary for the semi-annual payments on refunding obligations next to accrue after the date of the acceptance of said tenders.

Plaintiff further alleges that the State Treasurer should not purchase any refunding obligations until there shall be on hand in the State Highway and Toll Bridge Refunding Bond Redemption accounts funds in excess of the amount necessary to pay the interest and principal falling due in the fiscal year, which ends June 30, 1935, and that at the present time there is on hand no funds in excess of said amount when there is taken into consideration all payments falling due on highway obligations during said fiscal year, there being on hand a sufficient amount of funds with which to purchase refunding obligations in the amount of $1,350,000 when there is provided, only for the semi-annual payments next to accrue; that the Treasurer and the Refunding Board should provide for all payments falling due in the fiscal year before using funds with which to purchase refunding obligations under the provisions of said act No. 11.

To this complaint a demurrer was interposed, sustained by the court, and the plaintiff refusing to plead further, the complaint was dismissed. The plaintiff, by his appeal, brings to this court, the matters alleged in his complaint.

It is necessary that we construe those particular sections of act No. 11 relied upon by the plaintiff, the appellant herein.

Act No. 11 is the result of settlement and compromise between the State of Arkansas and bondholders, holding State highway bonds, toll bridge bonds, and road improvement district bonds, which were assumed by the Martineau Act, passed in 1927, and other creditors.

We think it unnecessary to go into the complete and detailed history of the so-called Martineau Act and the amendments thereto, and the subsequent acts, in an effort to set out all of these obligations. It will be sufficient, however, to say that at the time of the passage of act No. 11, under consideration, the State had already defaulted in payments of its several obligations. Decreased revenue available for payment of these obligations, and extremely heavy bonded indebtedness, were such that, under the conditions that prevailed, suits had been filed and the funds of the State, whatever they were, were held under orders impounding the same, and it was seeming impossible, under the then existing statutory authority, for the State to meet its obligations.

After a long period of negotiations between the officers and agents of the State and committees of bondholders, certain facts were recognized that made it necessary to refund all of this indebtedness. The road improvement district bonds had, as their security, lands of taxpayers along, and adjacent to, the highways built by the improvement districts. An effort to enforce liens of the bondholders against these lands necessarily meant that the property owners, who were in most instances not able to pay the assessments, would not pay State and county and school taxes, and on that account the resources of the State, from which a large part of its revenue is derived, would be further destroyed, and the ability of the State to meet its obligations be so hopelessly impaired as to leave all creditors without remedy. These conferences between officers and agents of the State and bondholders' committees, were in full recognition of these general facts and other conditions equally potent and affecting both debtor and creditor alike. The ultimate result of these negotiations was act No. 11, which a special session of the Legislature was called to pass, and, when passed, to become a contract and settlement as between the State and its creditors.

It is on account of these facts that the writer of this opinion approaches his task with some degree of trepidation.

It is a well-recognized theory that in all conferences and negotiations of this kind, having the viewpoints of all of the varied interests represented, the result would ordinarily be entirely satisfactory, but it is also a matter of common knowledge possessed by those who are skilled and who are trained by experience and study that most instruments prepared under such conditions frequently are mere vehicles to bring forward, in certain parts thereof, individual ideas of some of those taking a part therein, as distinguished from the composite or combined judgment and decision of the entire body, and, by reason thereof, there may ultimately be some matters not in harmony with others, if not in direct conflict.

We think that, by mistake and oversight, certain matters appear in act No. 11 not intended to be there, but which were probably in some of the original drafts of the proposed act as it was in the course of study and preparation.

A careful reading of act No. 11 indicates that it was intended to be practical, so that it would work out and dispose of these troubles, aiding both the State and bondholders. It was not intended by either of the parties that there should be changes or amendments. Section 44 of the act expressly provides that it should be a contract between the State and its creditors, including the affected improvement districts, and that the terms of the contract, or contracts, should never be impaired by any subsequent legislation. The only purpose, under the circumstances, which judicial construction could serve ought to be for mutual benefit of the contracting parties.

Having all of these matters in mind, we consider the act, by beginning with § 2, which section creates an account in the State Treasury known as the State Highway Fund.

"The first charge upon the State Highway Fund shall be the cost of maintaining the State Highway system and the operation and maintenance of the toll bridges, and the Treasurer of State shall transfer from said State Highway Fund to the Highway Maintenance Fund 25 per cent. of the total amount credited to said State Highway Fund during any fiscal year, such credit

to be not less than $166,666 monthly and not more than $100,000 for each fiscal year may be appropriated for the operation and maintenance of said toll bridges."

The second paragraph of § 2, containing these provisions, indicates clearly that the contracting parties recognized the fact that all revenues must be obtained primarily by the maintenance of the State Highway System and in a condition so that the roads can be reasonably well used. It was known that local citizens would not buy cars or pay license fees, or buy gasoline upon which tax could be collected, unless there were roads upon which they might be operated, and travelers would avoid the State if highways were not such as to invite the traffic.

The next paragraph of § 2 provides for the transfer of certain funds to take care of certain conditions then prevailing, and the third paragraph of § 2 provides that all highway revenue credited to the State Highway Fund, in excess of the transfers and appropriations above provided for, shall next be applied in payment of interest upon the bonds and other obligations authorized to be issued or paid under the provisions of the act. The term "interest" as used shall be deemed to also include an amount equal to 3 per cent. per annum of the total par value of the road district refunding bonds, series B, issued hereunder. Any balance remaining after providing for the semi-annual payments next to accrue, shall be credited to and paid by the Treasurer of State into certain special accounts, created in the State Highway Fund, and for purposes as stated.

The first of these special accounts is to be known as the State highway refunding bond redemption account, and percentages for allocation of funds for the years of 1934, 1935, and 1936 are provided in that paragraph and also the amounts annually thereafter, and these amounts were pledged for the payment or redemption of the principal of State highway refunding bonds, series A and B, State toll bridge refunding bonds, series A and B, and DeValls Bluff Bridge Refunding bonds were in the same manner provided for by the act.

The second special account was created to be known as the Road District Refunding Bond Redemption Account, and percentages for allocation of funds were provided for in like manner as in the Highway Refunding Bond Redemption Account, but not in the same amounts, which were pledged for the payment or redemption of the principal of Road District Refunding Bonds, series A and B, and the State thereby covenanted with the holders of Road District Refunding Bonds that the amount in said Road District Refunding Bond Redemption Account should never be less than $500,000 during any fiscal year, and in like manner there was provided an account to be known as the Funding Notes Redemption Account, and, in addition, a Refunding Certificates of Indebtedness Redemption Account.

It will be observed from the reading of the act, and the foregoing statement of the effect of paragraph 2, that the several accounts created out of the State Highway Fund could come into being only after highway maintenance had been provided for, and after making allocation and provision for the payment of interest upon bonds and other obligations to be paid under the provisions of the act, and whatever was then left, was intended to be used to create the special accounts just above mentioned.

Trouble, however, seems to arise when we read § 37 of the act, which provides that "whenever in any fiscal year there shall be on hand in the State Highway and Toll Bridge Refunding Bond Redemption Account funds in excess of the amount necessary to pay the interest and principal falling due in such year, such excess, or remaining, funds shall be applied by the Refunding Board in the purchase of State highway refunding bonds, series A and B, and State toll bridge refunding bonds, series A and B, and DeValls Bluff Bridge Refunding Bonds, at the lowest prices submitted, not exceeding par and accrued interest, in the manner provided by the act."

It must already be apparent that the above mentioned special Refunding Bond Redemption Account is created out of the balance or surplus remaining after interest and other debt service obligations, for the next

fixed semi-annual payment shall have been provided for out of the general State Highway Fund. These special refunding redemption accounts were intended to be used in the purchase of bonds to be issued under this refunding act when tendered to the Treasurer under the conditions set forth in the act. It certainly was the purpose of the contracting parties that the State should have the right to pay for, and that the bondholders should have the right to tender, their bonds to be purchased by the State out of these special refunding accounts. The refunding accounts represent the amounts not needed after provisions shall have been duly made for maintenance of highways and for payment of interest and other obligations, as fixed in § 2, and it was wholly unnecessary to provide again in § 37 for a further reservation in these redemption accounts of interest for one fiscal year. It is expressly stated in § 2 of the act that the interest shall be allocated prior to the passing of any funds to the redemption accounts. The interest, annually, on all obligations would be in excess of three million dollars. The statement is sufficiently accurate for the purpose of this opinion. If it were the intention of the contracting parties that there should be an accumulation of funds for debt service of three million dollars annually, after these payments had already been provided for in § 2 of the act, then such a provision is unreasonable. The theory is without explanation that three million dollars should be held in the State Treasury for the payment of the debts, by reason of which both parties must lose, and by reason of which neither could gain in point of profit or security. The parties certainly did intend, as shown by the entire spirit of the act and its otherwise harmonious provisions, that the State should use these funds in these redemption accounts for the purpose of purchasing such bonds as might be tendered at prices deemed advantageous to the State, and in that way save to the State enormous amounts which would otherwise be paid in interest, and also operate to the benefit of those holding the bonds, by enabling the State to become more able, from time to time, as bonds are purchased, to meet its obligations.

There is most certainly a well considered, well defined and definite plan contained in the act, and the purpose of the act, approved by all of the parties, should not be permitted to be defeated and be made of no effect by this one provision for an unnecessary accumulation to pay obligations otherwise provided for in the act. The words "in excess of the amount necessary to pay interest and principal falling due in such year," and after the following word "such" the word "excess," in § 37, are unnecessary, and if permitted to remain in the act, will prove extremely injurious to the State, damaging the bondholders generally, and will operate to the defeat, for practical purposes at this time, of the legislative intent. To leave these words in the act, as written, would perhaps only affect the State Highway Bond Redemption Account, and Toll Bridge Redemption Account.

The second paragraph of § 37 relates to the Road District Refunding Bond Redemption Account and permits the use of funds available in this account to purchase Road District Refunding Bonds, series A and B.

If the offending words are necessary to the State Highway Bonds, it would be of vastly more importance that the same provision be incorporated as to the Road Improvement District Bonds, but these words were omitted in the provision relating to Road Improvement District Bonds and also omitted in the matter of Refunding Certificates of Indebtedness Redemption Account, and also omitted in the matter of Funding Notes Redemption Account, nor can these words, by interpretation, be, by any reason, read into the act as relating to these last several refunding bond accounts just mentioned.

It must appear to any one reading § 37, which is a provision for the use of the surplus funds, that the creation of these several redemption accounts and an allocation of these funds for the respective purposes set forth, that it was not the legislative intent to interject a phrase to defeat the purpose of the statute. Since that provision is contradictory, it must be treated as surplusage and the effect of the ruling of the chancery court upon that proposition, in so finding, is correct.

Our position is well stated in the following quotation from one of the briefs furnished us: "In the decision of the issues involved in this appeal, the determination of the intentions of the Legislature is the primary factor. This court has frequently announced the doctrine that omitted words in legislative acts will be supplied and that unnecessary or contradictory clauses in acts will be deleted and disregarded in order to give effect to the clear legislative intent.

"In the case of *Snowden* v. *Thompson,* 106 Ark. 517, 153 S. W. 823, the court quoted from the earlier case of *Garland Power & Development Co.* v. *State Board of Railroad Incorporation,* 94 Ark. 422, 127 S. W. 454, as follows: 'In order to conform to the legislative intent, errors in an act may be corrected or words rejected and others substituted.'

"In the case of *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646, the court again quoted this language with approval, and stated: 'The whole subject was reviewed in the case last cited and the doctrine was made plain that the duty of the courts in interpretation of statutes was to endeavor to ascertain from the language used the true intention of the lawmakers, and, when that intention was ascertained, to disregard everything which was in conflict with that intention, and, if necessary, to omit words or substitute others so as to make the statute harmonize with the manifest will of the lawmakers.'

"The case last cited is that of *State ex rel.* v. *Trulock,* 109 Ark. 556, 165 S. W. 16.

"The more recent case of *Hazelrigg* v. *Board of Penitentiary Commissioners,* 184 Ark. 154, 140 S. W. (2d) 998, adheres to the rule above announced, citing the former cases above mentioned and many others."

One other question is submitted to us for determination, and that arises under § 46 of act No. 11. The provision of paragraph (a) is to the effect that there is appropriated, payable from the State Highway Fund, for the maintenance and repair of the toll bridges owned by the State for the period beginning January 1, 1934, and ending June 30, 1934, the sum of $25,000; and for the fiscal year ending June 30, 1935, the sum of $50,000.

This is an example of several different items of appropriations.

The writer must confess that the wording of these appropriations is such as to give trouble, but the language used as to these appropriations must be construed "by the law of reason," and this may be done under the same authority as we have just above cited. It certainly cannot be found harmonious with the spirit of the act to say that it was the purpose of the Legislature to create and establish dead funds. It must have been the purpose, and we so hold, that the dates fixed in the language of these appropriations, in this particular act, was intended to fix merely the amount of money appropriated out of such funds as might arise during the particular period set out in the act and that it did not intend to say, and it does not say, expressly or impliedly, that such sums of money must be used, as being appropriated for use only during that particular period. The Legislature knew something of the financial condition of the State. It did not want the appropriations fixed for use through and to the end of the biennial period to be taken out of the first moneys that might be collected, but intended to fix amounts to be taken out of funds arising during the several periods, and such funds are certainly available to the end of the period. This is the only conclusion that can be arrived at in harmony with the evident and expressed purpose of act No. 11. We believe this to be the legislative intent; that it is in accordance with the terms of the agreement and contract between the State and its creditors; that it in no manner impairs the act in any respect.

It follows therefore that the chancellor was correct, and the case is affirmed.

SHANK *v.* TODHUNTER.

4-3907

Opinion delivered October 29, 1934.

W. T. Pate, Jr., Robert J. Brown, Jr., and *Blake C. Cook,* for appellant.

Walter L. Pope, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

BAKER, J. Mark Shank was convicted of murder in the first degree in the Saline Circuit Court, and condemned to be executed. After he was sent to the penitentiary in Jefferson County, application was made to S. L. Todhunter, superintendent of the Arkansas State Penitentiary, requesting that he select a jury of twelve men from the regular panel of Jefferson County petit jury to hold an inquisition as to the present sanity, or insanity, of the said Mark Shank. The petitioner sought the aid of § 3251 of Crawford & Moses' Digest. The section is as follows: "When the sheriff (superintendent of the

State Penitentiary) is satisfied that there are reasonable grounds for believing that the defendant is insane, or pregnant, he may summon a jury of twelve persons on the jury list drawn by the court, who shall be sworn by the sheriff (superintendent of the State Penitentiary) well and truly to inquire into the insanity or pregnancy of the defendant and a true inquisition return," etc.

S. L. Todhunter, the superintendent, denied the application of petitioner asking the inquisition. Then this suit was filed in the circuit court of Jefferson County, and on Wednesday, July 25, March term of the circuit court, the court upon a hearing, found that the petitioner was not entitled to the relief prayed for, the issuance of a mandate ordering the said S. L. Todhunter to proceed under § 3251 of the Digest to hold the said inquisition. It is this order, made by the circuit court of Jefferson County, that we are asked to review.

The case of *Shank* v. *State* was before this court on May 14, 1934, and the conviction of Shank was affirmed. See *ante* p. 243.

The defense offered upon the trial of Shank for the murder charge was his insanity. This question was very thoroughly presented and considered on the trial of the case, and the jury found against the contention of the appellant.

The allegations in the instant case are to the effect that Shank is now insane, and that on that account he should not be electrocuted. There were submitted to the superintendent affidavits of four physicians. Each of the affidavits was substantially the same in form as the other and to the effect that the affiant had observed and examined Mark Shank, confined in the death cell at Tucker to await execution; that from personal observation and careful study of his family, and personal history, it was the opinion of the physician that Shank is now insane and affected with an incurable mental disease.

Since the judgment of the circuit court of Saline County imports a verity to the effect that Shank was not insane at the time of the trial, it is argued, but not stated, that if he is now insane, such insanity has come about since the trial and conviction. The only proof of present

insanity arises out of the affidavits. Because of its *ex parte* nature, proof of controverted facts, by affidavit, is sometimes not very satisfactory or conclusive. It usually states, as these affidavits do, conclusions of the affiant, without a development of the facts upon which affiant predicates his statement. The physicians say that they have observed and examined Shank, and, from personal observation and careful study of his family and personal history, they form the opinions expressed as to his insanity. All of the family history and also personal history of Shank that was available was presented at his trial at the time of his conviction. We do not say now that, if a hearing were had at this time, this evidence would not be available to determine his present condition, but we are saying that it was not the intention of the statute to permit, or allow, the sheriff, or, in this case, the superintendent of the State penitentiary, to try again the questions already determined by the trial court, and reviewed and affirmed by the Supreme Court. If Shank's insanity had not been presented to the court at any time, and had not been tried, a somewhat different situation would have been presented.

No affidavit contains a statement of any fact observed, upon which the opinion of the physicians is based, or that tends to show any real difference in the condition of Shank at this time and at the time of his trial and conviction. From the record before us, we do not know and cannot find any such alleged fact. If his actual condition now be the same as it was then, and there is nothing to show that it is different, the facts have already been determined. This, no doubt, was the viewpoint of the learned trial judge, when he denied the prayer of the petitioner to issue a mandate to require the superintendent to hold the inquisition.

The situation in this case is somewhat incongruous. There is no specific allegation that Shank has become insane since the date of his trial. There is the allegation that he is now insane. If his present condition is not now the same that it was at the time of his trial and conviction, the facts showing this changed condition could have

been alleged and, no doubt, proof could have been offered upon it. That was not done.

The court held in the case of *Howell* v. *Kincannon,* 181 Ark. 58, 24 S. W. (2d) 953, that, since the passage of act No. 55 of the Acts of the General Assembly of 1913, the Superintendent of the State penitentiary should hold inquisitions which were formerly held by sheriffs, under §§ 3250 and 3251 of Crawford & Moses' Digest, and that this gave to an insane condemned person who has no further recourse in law a remedy where none other existed, and the reason for so holding is set out in the following language: "At the time this statute was passed the sheriff was the executioner, and had the custody of the person of the defendant from the date of judgment to that of execution, and he was therefore the only one who could have full and free access to the presence of the defendant, and observe him during the time of his confinement before execution; and, since by the enactment of act No. 55, *supra,* all these duties and opportunities for observation have passed from the sheriff to the keeper of the penitentiary, the only way by which those sections of our Code, *supra,* can be given any practical effect is by substituting the keeper of the penitentiary for the sheriff."

A casual reading of the statutes relied upon would indicate that, under ordinary conditions at least, the inquisition to determine insanity arising after the sentence of death seems to be upon the initiative of the Superintendent of the Penitentiary. Since the Superintendent is presumptively, at least, a man of somewhat keen observation, discriminatory powers, good judgment, his observation and judgment would be such that, upon the institution of inquisition by him, most careful consideration would be accorded to his views, but, on the other hand, his refusal to proceed under this statute necessarily demands a showing, by affirmative proof, of an abuse of discretion, or an unquestioned neglect of duty, before his conduct may be made the subject of judicial criticism.

The superintendent of the penitentiary was requested to hold such inquisition. He refused. He would

not initiate one. His refusal is in writing, and this matter comes to us upon an allegation that he has abused, or, at least, neglected to exercise, whatever discretion may be lodged in him by the statute, and that is the only question we have to determine. The affidavits, though made by men of the highest type and character, do not state facts sufficient to warrant an interference. After a careful consideration of the law argued in the briefs, we are impelled to agree with the trial court.

The judgment is affirmed.

BROWN *v.* MISSOURI PACIFIC TRANSPORTATION COMPANY.

4-3543

Opinion delivered October 15, 1934.

Gerland Patten and *Sam E. Montgomery,* for appellant.

S. Hubert Mayes, for appellee.

JOHNSON, C. J. Appellant and appellee, respectively, own and operate motor trucks and busses for hire in this State. About 7:30 P. M., January 25, 1930, while appellant's truck was returning to Little Rock traversing the Hot Springs Highway at a point some miles out of Little Rock a collision of appellant's truck and appellee's bus occurred which resulted in damages to both vehicles. This suit was instituted by appellant against appellee

on January 23, 1933, to compensate the alleged damage to his truck, and on June 13, 1933, appellee answered the complaint by general denial, and in addition thereto affirmatively alleged damages to its bus in the collision through the negligence of appellant. Appellant demurred to appellee's cross-complaint and assigned as cause that the cross-complaint reflected upon its face that the damage complained of by appellee occurred more than three years prior to the filing of the cross-complaint. The demurrer was overruled, and appellant excepted, and this is the first contention urged for reversal. The trial court committed no error in overruling the demurrer. It has long been the law in this State that a counterclaim arising out of tort, even if barred by the statute of limitations, is available and may be employed by way of recoupment against a suit for the recovery of damages. *Huggins* v. *Smith,* 141 Ark. 87, 216 S. W. 1; *Missouri & N. A. Ry. Co.* v. *Bridewell,* 178 Ark. 37, 9 S. W. (2d) 781.

Moreover, it is immaterial that the counterclaim appeared as an affirmative plea by appellee, as pleadings are liberally construed to effectuate justice between the parties. After the demurrer was overruled, the cause proceeded to trial, which resulted in favor of appellee. No complaint is urged as to instructions given and refused, but it is finally insisted that the court erred in permitting witnesses to testify in reference to the allegations of the cross-complaint. This contention presents the identical question presented on demurrer. Certainly, if the demurrer was properly overruled, appellee had the right to prove the allegation of his cross-complaint for recoupment purposes.

No error appearing, the judgment is affirmed.

MUSTAIN *v.* STATE.

Crim. 3899

Opinion delivered October 15, 1934.

Ezra Garner, for appellant.

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

BUTLER, J. The appellant, H. A. Mustain, shot and killed one Ray Wilson, who, together with others, was stealing sugar cane from Mustain's patch. He was indicted for the crime of murder in the first degree and convicted of involuntary manslaughter. On the trial he interposed as a defense that the homicide was the result of a misadventure, and therefore excusable, and complains here of instruction No. 8, given by the court on motion of the State, insisting that the giving of this instruction was error. That instruction is as follows: "You are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant armed himself with a shotgun and went to his cane patch and lay in wait for the deceased and his companions, with the specific intent to take their lives, and fired the shots with the intent to carry out that attempt, then he is precluded from interposing the defense of justifiable or excusable homicide."

Counsel for appellant argues that this instruction placed the burden of proof upon the appellant to prove that he did not arm himself and lie in wait at the cane patch with the intent to take the life of the deceased, and that he did not fire the fatal shot with the intent to carry out that purpose. The instruction is not open to this criticism, for it definitely places upon the State the burden of proving all of these facts beyond a reasonable doubt.

It is further argued that this instruction precluded the appellant from offering any testimony relating to his defense and casts upon him the burden of proving his innocence. Neither is this objection well taken. The instruction goes no further than to preclude the appellant from interposing the defense of excusable homicide if the jury should find from the evidence beyond a reasonable doubt that the fatal shot was fired under circumstances which would make the slayer guilty of murder in the first degree. Appellant did, in fact, introduce testimony without objection, which, if accepted in its entirety by the jury, would have established his innocence. The instruction was not prejudicial for the reason that the jury found in the killing none of the elements necessary to constitute murder in the first degree, but that the homicide was involuntary manslaughter. For this reason we deem it unnecessary to set out the testimony tending to establish the crime of murder in the first degree.

As noticed, the defense was that the killing was accidental and incident to a lawful act done with due care. This defense was submitted to the jury by full and fair instructions given at the request of the appellant. To establish his defense, he testified that he had discovered that his cane was being stolen; that he went to the cane patch on the afternoon of the homicide and waited a short distance away in order to discover and apprehend the thieves; that after a time, from the movements of the cane and voices heard, he discovered the thieves were depredating again; that he saw one by the name of McMahen coming toward him with a quantity of cane in his arms; that witness called upon him to halt, but, instead

of doing so, he turned and fled in the opposite direction; that when he did this witness fired his shotgun to the left of McMahen to frighten and stop him, but with no purpose of actually shooting him. Witness did not see Wilson and did not intend to shoot him or any one else.

There was testimony on behalf of the State tending to contradict that of the appellant and, in effect, that appellant was armed with a shotgun loaded with buckshot; that he had stated to a neighbor during the afternoon of the day of the shooting that he intended to kill any one he caught in his cane patch; that, after the shooting, when appellant had notified the sheriff and carried him to the cane patch, appellant stated to a deputy who was present that when he saw a person coming out of the patch with cane in his arms he called to him to stop and when this person did not obey he shot him and then shot again; that then he saw another boy, and if he had had another shell he would have shot him, too. This testimony refutes the contention of the appellant that the verdict of the jury was contrary to the law as given by the court and to all the evidence.

Another ground urged for reversal set up in the motion for a new trial and supported by the affidavit of the foreman of the jury was that the verdict was the result of a compromise by which some of the jurors were forced to, and did, surrender their conscientious convictions. On this ground it is sufficient to say that the only evidence offered was the affidavit referred to, which was incompetent under § 3220 of Crawford & Moses' Digest. This section, providing in substance that grounds for a new trial cannot be established by the testimony of a juror except where the verdict was made by lot, has been frequently construed and upheld by this court. Among the decisions is that cited by the appellee, *Moon v. State,* 161 Ark. 234, 255 S. W. 871.

No prejudicial error appearing and the testimony being sufficient to sustain the verdict, the judgment of the trial court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PIPKIN.

4-3558

Opinion delivered October 22, 1934.

[redacted]

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

Miller & Yingling and *W. R. Donham,* for appellee.

JOHNSON, C. J. On July 17, 1931, appellee was engaged in service as a brakeman on one of appellant's freight trains operating between Poplar Bluff, Missouri, and North Little Rock, Arkansas. This train carried interstate shipments, and was therefore engaged in interstate commerce. In making a stop of the train at Hoxie in this State for the purpose of setting out certain freight cars which contained freight consigned to Hoxie, and was being transported in interstate commerce, appellee received the injuries here complained of. This suit was instituted by appellee against appellant under the Federal Employers' Liability Act to compensate his alleged injuries. In effect, the complaint alleged that the engineer on said train carelessly and negligently made

only one application of the air with full force in effecting the stop at Hoxie, when the usual and ordinary manner of effecting such stops should have been to apply the air gradually, causing the front of the train to suddenly stop, and the rear cars in said train to jam and violently run into and upon the cars ahead. That appellee was riding upon the rear platform of the caboose in a place where his duties required him to ride, and the sudden and violent stop of the train caused the caboose upon which he was riding to come to a violent and sudden stop which threw appellee against the end thereof and upon certain metal attachments upon the rear platform thereof, in such manner to cause his injuries.

The testimony in behalf of appellee tended to show that, upon arrival of the train at Hoxie, and while it was running at a rate of speed of eight or ten miles per hour, the engineer caused to be made one application of the air instead of making a gradual application thereof, which caused the front cars of the train to suddenly stop, and the rear cars and caboose to suddenly and violently jam into the cars in the front of the train, which train consisted of approximately one hundred cars. That the impact was of sufficient force to tear the bunkers loose from the sides of the caboose; that the water barrel was dislodged from its fastenings to the side of the caboose, and was thrown to the floor with such violence as to burst it into pieces; that the coal bin was torn from its fastenings and scattered the coal therein contained over the floor of the caboose. Appellee testified that, by the force of the shock and jar of the sudden and violent stop, he was thrown from his standing position on the rear platform of the caboose against the end wall thereof, and against and upon certain metal attachments thereto, and was injured thereby. He further testified that he had been engaged in railroading for the past twenty-five years, and knew the proper and customary manner in effecting such stops with similar trains, and that this train should have been stopped by leaving the throttle open and applying the air gradually or about five to seven pounds at intervals, but that this was not done by the engineer.

We shall not detail the testimony in reference to appellee's injuries or the compensation awarded therefor, as no question is presented in reference to the amount awarded if liability exists. Appellant contends that the evidence adduced in appellee's behalf is insufficient to support a verdict of liability. The evidence, in effect, is not dissimilar in any material respect from that reviewed by us in *Missouri Pacific Railroad Company* v. *Montgomery,* 186 Ark. 537, 55 S. W. (2d) 68, wherein we determined that it presented a question of fact for the consideration of the jury as to whether or not there was liability predicated upon such facts. The Montgomery case, *supra,* was presented to the Supreme Court of the United States by an application for certiorari, and a review thereof was denied. 289 U. S. 747, 53 S. Ct. 690.

A number of cases are urged upon us for consideration which are contended impair our holding in the Montgomery case, among which are *Gulf, M. & N. R. Co.* v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, and *Chicago, M. St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564. It may be said that the Montgomery case and the instant case may easily be distinguished from the cases cited, and it would serve no useful purpose to undertake a detailed discussion of the facts and merits of the respective cases. We believe the doctrine announced in the Montgomery case, *supra,* is sound and are not inclined to impair its effect.

To the same point appellant contends that appellee's injury, to-wit: hernia, was not caused by the sudden and violent impact of the cars; therefore it is not liable for this injury. Appellee testified that, prior to the sudden impact of this train, he was a stout, and able-bodied man, capable of doing, and did do manual labor without inconvenience, and that immediately after this impact he became nauseated and suffered severe and excruciating pain until the protrusion appeared in his abdomen a day or two later; that he was bruised across the lower part of his abdomen and in the groin by reason of the impact, and was forced to undergo an operation just a few days thereafter to correct the hernia produced thereby. Dr. Parmley testified that hernia is sometime

caused by direct trauma. True, eminent physicians for appellant controverted this testimony, but this made only a question for the jury's consideration, and its findings thereon are binding upon this appeal.

Next, it is urged that appellee assumed the risks of his alleged injuries. This contention is based primarily upon the testimony of appellee to the effect that he knew that the engineer made rough stops. On this phase of the case, the court gave to the jury, upon appellant's request, instructions number 10 and 12, as follows:

Instruction No. 10 reads as follows: "The court instructs you that, while the brakeman does not ordinarily assume the risk of injury on account of negligence on the part of his employer or fellow-servant, yet, in this case, if you find from the evidence that the engineer was in the habit of making violent and sudden stops while operating the train on which plaintiff was employed, and if you further find from the evidence that the plaintiff had knowledge of this fact, and that with this knowledge continued in the employment of the defendant with said engineer, then you are instructed that he assumed the risk of being injured on account of such violent and sudden stops as may have been made by the engineer, unless you further find that the said jar or jerk was extraordinary and unusual for said engineer to make."

Instruction No. 12 reads as follows: "The jury are instructed that, when the plaintiff entered the employment of the railroad company as a brakeman to do and perform such work as was required by him as such employee, then, in accepting such employment, he assumed all of the risks and danger incident to and connected with such employment, and, if you find from the testimony that the plaintiff's injury was occasioned from the operation of a freight train, and that the same was operated with ordinary care, and as such trains are usually handled and operated, then your verdict will be for the defendant."

In reference to the contention here made, we have stated the rule to be that assumed risk is predicated upon the knowledge of the employee of the risks to be encountered and his consent to be subject thereto. Negli-

gence on the part of a fellow-servant is not an incident of the employment; and the servant does not assume the risks thereof, unless they are obvious and patent. *Chicago, Rock Island & Pacific Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197. The testimony here shows that appellee had no warning to judge of the danger to which he was exposed by reason of the negligent act of the engineer in making only one application of the air with full force. At any rate, this was a question of fact for the jury's consideration, and their adverse finding thereon is conclusive upon this appeal.

Lastly, it is urged that reversible error was committed in the giving and refusing to give certain instructions. We have carefully considered all the instructions requested, granted, and refused, and it is our conclusion that the case was properly submitted under instructions which conform to previous opinions of this court.

The verdict of the jury, being supported by substantial testimony, must be affirmed.

TURNER *v.* HOT SPRINGS STREET RAILWAY COMPANY.

4-3567

Opinion delivered November 5, 1934.

W. D. Swaim, for appellant.

Sydney S. Taylor and *Martin, Wootton & Martin,* for appellee.

JOHNSON, C. J. To compensate an alleged injury, appellant brought this suit against appellee in the Garland Circuit Court and alleged: That on December 29, 1932, while a passenger upon one of appellee's street cars, which was being operated in the city of Hot Springs for such purposes, she stepped upon a piece of ice or frozen snow negligently left in the vestibule of said car by appellee which caused her to slip and fall, and thereby she was seriously and permanently injured. In reference to the circumstances under which she was injured, appellant testified:

That on the date named in the complaint she was a passenger upon one of appellee's street cars which was being operated in the city of Hot Springs for such purposes, and while debarking therefrom she stepped down into the vestibule of said car, and her left foot slipped and "went out from under me like lightning," and thereby received a very hard fall. She then detailed the extent of her injuries, but we deem it unnecessary to here set out this testimony. Dr. Evans testified that he assisted in the removal of Mrs. Turner from the street car on the day she was injured, and that he saw a "number of small pieces of snow and ice, thin in form, like it had been kicked off the shoe heel or shoe sole," lying in the vestibule of the street car.

This, in effect, is all the testimony offered by appellant in reference to the receipt of her injuries and circumstances under which they were received. In passing, it may be said that the testimony tended to show that appellant was seriously and permanently injured by reason of the fall received. The trial court, upon the evidence thus adduced, directed a verdict in favor of appellee, and this appeal is prosecuted seeking reversal.

The trial court was correct in directing a verdict for appellee, because the testimony adduced by appellant was not sufficient to show that the injuries received were

proximately due to any negligence of appellee. No witness testified that appellant's fall was proximately due to the small pieces of snow and ice afterwards seen in the vestibule of the street car. It is true, the jury might have guessed or speculated that her fall was caused by stepping upon the small pieces of ice and packed snow in the vestibule of the street car, but, on the other hand, it was equally as probable that her fall was caused by packed snow or ice which had accumulated on her own shoes. The point is, juries are not permitted to guess or speculate as to the proximate cause of an alleged injury, the burden resting upon appellant to show by a preponderance of the evidence that her injuries were caused by some negligent act or omission of appellee. *Covington* v. *Little Fay Oil Co.,* 178 Ark. 1046, 13 S. W. (2d) 306; *Kirkpatrick* v. *American Railway Express Co.,* 177 Ark. 334, 6 S. W. (2d) 524; *Missouri Pacific Rd. Co.* v. *Horner,* 179 Ark. 321, 15 S. W. (2d) 994; *International Harvester Co.* v. *Hawkins,* 180 Ark. 1056, 24 S. W. (2d) 340; *Ft. Smith L. & T. Co.* v. *Cooper,* 170 Ark. 286, 280 S. W. 990; *Denton* v. *Mammoth Springs Electric Light & Power Co.,* 105 Ark. 161, 150 S. W. 572.

In the recent case of *National Life & Accident Ins. Co.* v. *Hampton, ante* p. 377, 72 S. W. (2d) 543, we stated the applicable rule as follows: "It is the well-settled doctrine in this State that a jury's verdict can not be predicated upon conjecture and speculation," and continuing we adopted the rule as announced by the Supreme Court of the United States in *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658, 21 S. Ct. 275, as follows: "It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Moreover, where it conceded that appellant's fall and consequent injuries were due proximately to her slipping upon the small pieces of ice and snow seen by Doctor Evans in the vestibule of the street car, this would yet be insufficient to show negligence upon the part of appellee. Before negligence could be inferred, it must have been made to appear from the evidence that appellee permitted this accumulation of ice and snow or that it had been in the vestibule of the car such length of time as to afford an opportunity for removal and a neglect so to do. *Riley* v. *Rhode Island Co.*, [29 R. I. 143, 69 Atl. 338] 15 L. R. A. (N. S.) 523, and case note.

No error appearing, the judgment is affirmed

N. O. NELSON MANUFACTURING COMPANY *v.* BENJAMINE.

4-3570

Opinion delivered November 5, 1934.

George A. McConnell, for appellant.
James R. Yerger, for appellee.

SMITH, J. This is a suit by appellant to enforce a materialman's lien, and there appears to be no substantial conflict in the testimony, which is to the following effect: F. P. Pierce, operating as Pierce Lumber Company, was engaged in the retail lumber business, and in connection with that business sold building supplies, much of which he had bought from appellant over a period of several years. These supplies were sold on an open account, which appears to have been mutually satisfactory. The lumber company was regarded as a good customer. J. W. McLeod was the appellant's traveling salesman and representative in that territory.

Pierce testified that he had an arrangement with a building contractor under which he "guaranteed the maximum amount of cost (of building material) for the benefit of selling my stuff," but that he occasionally took building contracts to be performed by himself. He took such a contract to build a residence for H. C. Benjamine. Before the completion of the building Benjamine decided that he wanted an "Arcola heating plant" installed. This was in addition to the original building contract. It so happened that McLeod was in that territory at that time, and he and Pierce went with Benjamine to figure on the cost of installation. The necessary measurements and calculations were made and the price was agreed upon. Benjamine inquired at the time as to whom payment should be made, and stated that he was prepared and willing to make payment then and there. McLeod answered: "Make it to Mr. Pierce; he is our representative. We have sold goods to him for a long time, and we are not afraid of him." The heating plant was installed, and Benjamine paid Pierce for it. Pierce was adjudged a bankrupt, and failed to pay appellant, whereupon this suit was brought to enforce a lien.

It was shown by appellant that McLeod was a traveling salesman, having authority only to receive and transmit orders for acceptance, to be filled after acceptance, and that he had no authority to make collections. It was shown, however, that McLeod had made collections which had been received and credited by appellant,

but this was done by the receipt and transmission of checks payable to appellant's order.

The decree recites a finding of fact substantially as stated above, and this finding is not contrary to a preponderance of the evidence. Indeed, it appears to be supported by the undisputed evidence. Upon this finding the court held that appellant was estopped to deny that payment had been made, and denied the claim for a lien or for a judgment against Benjamine for the debt, and this appeal is from that decree.

For the reversal of this decree, cases are cited defining the authority ordinarily possessed by traveling salesmen. Of these the case of *United States Bedding Co.* v. *Andre,* 105 Ark. 111, 150 S. W. 413, is chiefly relied upon. In that case a traveling salesman made a contract to post advertisements of the articles which he was selling. In holding that the salesman had no authority to make the contract, it was there said: "The purpose for which a traveling salesman is employed is to solicit orders and make sales of goods; unless he is specially authorized to do so, he has no implied authority to do any act other than is usually done by other salesmen of like character; that is, to do those things and make those agreements which are necessary and usual to accomplish the purpose of this agency. Being employed for one purpose, he has no authority to do another, either actual or implied." For the reason stated it was held that the salesman had no authority to make the contract to post the advertisements.

But this opinion states the law to be that the agent has the authority to do those things which are essential to effect the purpose of the agency, and while an agent may not have the authority to make collections of the purchase price upon taking an order for future delivery, he does have the authority to make agreements as to the price, the time and place of delivery, and the terms of payments to be made.

In the volume on Agency in Restatement of the Law (American Law Institute), it is said, at § 55 thereof, that: "Unless otherwise agreed, authority to contract for a purchase or sale includes authority to enter into nego-

tiations for and to complete the purchase or sale, including therein usual or other appropriate terms, and, if a writing is required or is usual, to execute such writing."

In Clark & Skyles on the Law of Agency (§ 245) it is said: "Where an agent is employed generally to sell goods, as incident to his general authority, he has power to fix the terms of sale, including the time, place and mode of delivery, the price, quality, and quantity of the goods, and the time and mode of payment, to the extent at least of what is customary and not extraordinary."

It was not shown to be contrary to any custom, nor does it appear to have been extraordinary, for McLeod to have directed Benjamine to make payment to Pierce, appellant's customer and representative to whom the material was sold, and to whom it was delivered, and whose account was represented as being satisfactory, and to whom other material had been sold and delivered by appellant.

In the very recent case of *McMillan* v. *Marathon Oil Co.*, 188 Ark. 937, 68 S. W. (2d) 473, it was said that: "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 co-extensive with its apparent scope."

McLeod was an admitted agent clothed with the actual authority to sell the heating plant, and we think the court was warranted in finding, as was found, that it was within the apparent scope—if not within the actual scope—of the agent's authority to agree upon the manner of payment. *Harrison Nat. Bank* v. *Williams*, 3 Neb. (Unoff.) 89 N. W. 245; *Putnam* v. *French*, 52 Vt. 402, 38 Am. Reps. 682; Mechem on Agency, vol. 1 (2d ed.), §§ 854 and 871; *International Harvester Co.* v. *Smith*, 51 Fla. 220, 40 Sou. 840; *Fayetteville Wagon Co.* v. *Kenefick Construction Co.*, 76 Ark. 615, 88 S. W. 1031; *Lovett* v. *Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707; *Superior Mfg. Co.* v. *Russell*, 127 Ga. 151, 56 S. E. 296.

It was said, in the case of *A. J. Chestnut Co.* v. *Hargrave*, 177 Ark. 687, 7 S. W. (2d) 800, that: "In short, the general rule in this State is that the principal is

bound by the acts of his agent which are within the real or apparent scope of his authority," and the cases there cited fully sustain the rule announced.

It requires no citation of authorities to support the conclusion that, if the debt was paid, there could be no judgment therefor, nor lien to enforce its payment. We conclude therefore that the decree is correct, and it is affirmed.

McHaney, J., dissents.

Knowlton *v.* Walton.

4-3712

Opinion delivered November 5, 1934.

Ed I. McKinley, Jr., and *J. H. Carmichael*, for appellant.

W. G. Riddick, Floyd Terral, Louis Tarlowski and *E. G. Shoffner*, for appellee.

HUMPHREYS, J. This is a proceeding by mandamus brought in the Second Division of the circuit court of Pulaski County to compel the mayor of Little Rock to call a special election on a petition, and an amendment thereto filed on August 29, 30, 1934, seeking to change the form of government of said city under the provisions of act 311 of the Acts of the Legislature for the year 1931.

A response was filed to the petition, and an intervention was filed by a taxpayer attacking the constitutionality of said act. A demurrer to the intervention was filed.

The trial court heard the case upon the pleadings and agreed statement of facts, resulting in a dismissal of the intervention and a granting of the petition for mandamus.

Both the respondent and intervener have duly prosecuted an appeal to this court. The agreed statement of facts appears in appellant's abstract as follows:

"It is agreed that petitioner herein is a taxpayer of the city of Little Rock.

"That respondent is mayor of the city of Little Rock.

"That on August 29, 1934, a petition signed by 107 qualified electors of the city of Little Rock, Arkansas, was presented to respondent under the provisions of act 311 of the Acts of Arkansas for the year 1931, requesting and asking him to call an election at which the electors of the city of Little Rock should be permitted to vote upon the question of changing their form of government to the so-called city manager-commission form, and upon the question of naming seven qualified electors proposed in said petition as a charter committee whose duty it would be, among other things, to draft a new charter and system of laws for said city in case the said city manager-commission form of government should be adopted, and said charter committeemen should be elected at said election, upon a ballot containing two lines, 'FOR HOME RULE' and 'AGAINST HOME RULE,'

and naming the said seven proposed charter committeemen to be voted upon.

"That on the next day, August 30, 1934, an additional and supplemental petition was presented to said respondent in the same language and proposing the same seven charter committeemen, before any action had been taken by said respondent upon the petition first presented, and before any similar petition had been presented to him, signed by 144 qualified electors of the city of Little Rock, or a total of 242 such signatures upon the whole petition.

"That at the time said petition was filed the law required the signatures of only 70 qualified electors.

"That said respondent has failed and refused to call an election responsive to said petition, and to issue a proclamation setting the date thereof as required by law; that the persons proposed in said petition for an election mentioned as a proposed charter committee are qualified electors and landowners within the city of Little Rock, and that an exact copy of said first and supplemental petition mentioned in said petition for mandamus is attached hereto Exhibit A.

"It is also agreed that subsequent to the filing of the petition on August 29, 30 the respondent publicly called, at the request of interested citizens, a mass meeting for the purpose of causing the circulation of another petition under act 311 of 1931, containing different names of proposed charter committeemen; that between the call for said mass meeting and September 4, 1934, respondent was active in securing the assent of persons to be placed upon said new petition as proposed charter members; that said meeting was held in the city of Little Rock on the evening of September 4, 1934, at which it was voted by parties attending to circulate such other petition, and seven qualified persons, some of whom had assented at the request of respondent to the placing of their names on such petition and ballot as proposed charter committeemen, were elected as such. The respondent attended said meeting and was active in the same, and aided in accomplishing its object.

"That, as a result of this meeting, a petition was circulated between the 4th and 7th of September, 1934; that it contained the signatures of 108 qualified electors of the city of Little Rock, but that it contained the names of a proposed charter committee different from those proposed in the first petition already on file with the respondent in all but two instances.

"That said petition was filed with respondent on September 7, 1934, and that on the same date the Pulaski Chancery Court, at the complaint of the petitioner herein, issued a temporary injunction, which was served upon respondent the same day, enjoining him from calling an election responsive to said petition or issuing his proclamation fixing the date thereof, and that said action is still pending.

"That the petitioners who signed said last mentioned petition are not the same persons who signed the first petition.

"That a bond for costs of holding an election, if granted, was filed with the last-mentioned petition and certificate of genuineness of signatures accompanied said last-mentioned petition.

"That an extra copy of said last-mentioned petition with signatures omitted is attached hereto marked Exhibit B."

The constitutionality of the act is assailed by the intervener on the ground that it is a special or local act because it provides for a change of the form of government in cities only that have 50,000 or more inhabitants. Reasonable classifications based upon population in the enactment of laws do not offend against the amendment to the Constitution prohibiting the Legislature from passing special or local laws. If the classification is reasonable and prospective, the law is general, but, if unreasonable and arbitrary, the law is special or local. In the cases of *Childers* v. *DuVall,* 69 Ark. 336, 63 S. W. 802, and *Montgomery* v. *Little,* 69 Ark. 392, 63 S. W. 993, classification based on population in the enactment of valid laws was recognized, and both cases were cited with approval in the recent case of *Blytheville* v. *Ray,* 175 Ark. 1089, 1 S. W. (2d) 548, the latter case having been

decided more than a year subsequent to the passage of Amendment No. 14. We find nothing in this record indicating that the classification contained in act 311 is unreasonable or arbitrary. The Legislature may have ascertained that the commission form of government was not workable or practicable in cities of less than 50,000 inhabitants. In classifications as a basis for the enactment of laws, the Legislature must be allowed a wide latitude of discretion and judgment. *Bollinger* v. *Watson,* 187 Ark. 1044, 63 S. W. (2d) 642.

We find nothing in the Initiative and Referendum Amendment to the Constitution limiting the power of the Legislature to pass an act authorizing a city to change its form of government at a special election to be called by its mayor on petition of a certain number of voters therein.

Said act 311 of 1931, being a general and valid law, is wholly independent of the provisions of the Initiative and Referendum Amendment to the Constitution, and is not and cannot be aided by it, for said act is complete within itself. Act 311 of 1931 sets out its own procedure for putting it into operation, which is entirely different from the procedure provided in the Initiative and Referendum Amendment.

Respondent also contends for a reversal of the judgment because it was within the alleged discretion of the mayor to call the election upon either of the petitions before him. We cannot agree with respondent. It was his duty to call the election upon the first legal petition filed before him. The petition filed with him on August 29, 30, 1934, complied with said act 311 in all respects, and it was his bounden duty to call the election on said petition, and not on the petition filed before him at a later date. *Lenon* v. *Tunnah,* 174 Ark. 765, 297 S. W. 819.

Respondent contends that the petition filed on August 29, 30, 1934, was fatally defective because not verified and because no bond was filed obligating the petitioners to pay the costs of the special election. Said act 311 makes no such requirements. It does however obligate the petitioners for the expenses incident to the special election, and they must deposit a sufficient sum to

defray the expenses of the special election with the election commissioners prior to the date thereof; also no election can be held for the want of funds.

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

MEHAFFY, J., not participating.

WINTON *v.* IRBY.

4-3722

Opinion delivered November 5, 1934.

F. G. Taylor and *G. B. Oliver,* for appellant.

O. T. Ward, T. A. French, Wm. F. Kirsch and *Maurice Cathey,* for appellee.

MEHAFFY, J. Appellant and appellee were candidates for the office of county and probate judge of Clay County in the run-off Democratic Primary held August 28, 1934. The Democratic Central Committee canvassed the votes, and certified that the appellee received 1,284 votes and the appellant 1,262.

The appellant filed a complaint in the Clay Circuit Court contesting the certification and nomination of the appellee, and alleged in substance that, according to the certificate of the central committee, the appellee had received 22 votes more than appellant. He alleged that in Oak Bluff Township, the vote, as tabulated by the central committee, gave appellant 57 votes and the appellee 349 votes. He further alleged that 200 of the votes for the appellee in said township, were cast by persons who did not have legal poll tax receipts made out in the manner and form required by law; that 25 persons voted for appellee in said township who claimed to have arrived at 21 years of age since the last assessing time, and that they did not subscribe to affidavits stating such facts to be true. He also alleged that 50 votes in said township were cast for appellee by persons who had no poll tax receipts. Substantially, the same allegations were made as to Blue Cane Township, Lidell Township, Wilson Township and Payne Township. He then alleges that he received a majority of 200 of the legal votes cast in the election for the office of county and probate judge.

There were eight paragraphs in the complaint, and paragraph No. 8 stated that the appellee was ineligible for the office of county and probate judge, that he had been convicted of embezzlement in the Federal court.

On motion of appellee, the court struck out paragraph 8. This, the appellant alleges, was error. Paragraph 8 did not state a ground for contest. A candidate contesting a primary election must show, in order to succeed, that he has received a majority of all the votes cast at such primary election. The real issue is, which candidate received a majority of the legal votes cast? If his competitor was ineligible, this would not entitle the contestant to receive the certificate of nomination,

unless the contestant received a majority of the legal votes. *Bohlinger* v. *Christian, ante* p. 839; *Swepston* v. *Barton,* 39 Ark. 549; *Collins* v. *McClendon,* 177 Ark. 44, 5 S. W. (2d) 734. The trial court therefore did not err in striking paragraph 8 from appellant's complaint.

The appellee also filed a demurrer to plaintiff's complaint alleging that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and dismissed plaintiff's complaint.

The second amendment to plaintiff's complaint, which was stricken out by the court, was simply an amendment making the complaint more specific, and plaintiff should have been permitted to file the amendment.

The appellant prosecutes this appeal to reverse the judgment of the court in striking out paragraph 8, in refusing appellant leave to amend his complaint, and in sustaining a general demurrer to the complaint. The complaint stated facts sufficient to constitute a cause of action. The real question in the case, is whether the contestant received a majority of the legal votes. If he did, he is entitled to the nomination, and, if he did not, he is not entitled to the nomination although the other votes were cast for an ineligible candidate.

The appellant alleged that he was a qualified elector, and that he and the appellee were candidates for the office of county and probate judge, and that the certificate of nomination was given to appellee, and that appellant received more legal votes than appellee. These allegations were sufficient to make a *prima facie* case.

Section 3773 of Crawford & Moses' Digest, provides: "If the complaint is sufficiently definite to make a *prima facie* case, the judge shall, unless the circuit court in which it is filed is in session or is to convene within thirty days, call a special term," etc.

This court has said: "The pleadings, in an election case, should be sufficiently specific to give reasonable information as to the grounds of contest. The statute provides that the contest shall be begun in a certain number of days, and this court has held that, after the time for filing a contest has expired, the contestant cannot so

amend his complaint or petition as to set forth any new cause of action. He can, however, even after the time has expired, amend his complaint by making it more definite and certain as to any charge in his original complaint, and, if a motion to make more specific is filed, it would be his duty to make the amendment." *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. (2d) 450.

It is also said in the Robinson case: "Since such contest is generally held not to be a civil action subject to the rules of pleading in actions at law, but to be a special statutory proceeding, varying in its nature as well as in the sufficiency of the pleadings, according to the statutes of the different States, the same strict technical accuracy in pleading is not usually required as in civil action *inter partes.*" *LaFargue* v. *Waggoner, ante p.* 757.

The court therefore erred in sustaining the demurrer, and erred in refusing to permit appellant to amend his complaint, but did not err in striking out paragraph 8 of plaintiff's complaint.

Appellee prosecutes a cross-appeal and urges that the court erred in finding that B. B. Spence made the supporting affidavit. B. B. Spence testified that he lived in Piggott, Arkansas, and that he signed the affidavit in Mr. Winton's office. He was asked: "Did you swear to it," and he answered, "Yes, sir." When asked: "Before whom?" he answered: "Mr. Ray Winton." He also testified that he never made any formal oath, but explained this by stating that he did not hold up his hand. He met the notary public on the street and told him that he had signed the affidavit.

When Spence was recalled, he was questioned at length, and said he did not remember very distinctly about what happened. The certificate of the notary public showed that Spence had signed and sworn to the affidavit. The court thereupon held that the evidence showed that Spence had made the affidavit.

The weight of the evidence and the credibility of the witnesses were for the sole determination of the trial court, and we have many times held that in cases in the circuit court the finding of fact by a trial court

is as binding here as the verdict of a jury. *Holman* v. *Armstrong,* 187 Ark. 958, 63 S. W. (2d) 339.

We recently said: "When a case is submitted to the trial judge, his finding of fact is as conclusive as the finding of a jury." *Bridges* v. *Shapleigh Hdw. Co.,* 186 Ark. 993, 57 S. W. (2d) 405. *American Ins. Co.* v. *Brown,* 184 Ark. 978, 44 S. W. (2d) 346.

The judgment on cross-appeal must be affirmed, and the judgment on appeal reversed and remanded with directions to overrule the demurrer, permit plaintiff to file his amendment, and for further proceedings according to law and not inconsistent with this opinion.

It is so ordered.

GRAVES *v.* SIMMS OIL COMPANY.

4-3544

Opinion delivered November 5, 1934.

Lawrence E. Wilson and *Jones & Jones,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellee.

McHaney, J. The subject-matter of this litigation has heretofore been considered by this court in three separate cases. The first was *Mason* v. *Graves,* 265 S. W. 667, not officially reported, 167 Ark. 678, 265 S. W. 667; the second was *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; and the third was *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359.

Appellant was formerly Mary Murphy, the widow of Larkin Murphy who died intestate in the year 1878, the owner of 160 acres of land in Ouachita County, and leaving surviving him appellant and two children, Joe and Drucilla. This land constituted the homestead of Larkin Murphy, and Mary, his widow, continued to occupy it as a homestead after his death. She thereafter married Graves, and three children, Luther, Mary and Martha, were born of this union. In 1884, on the application of Mary Murphy Graves, widow of Larkin Murphy, the probate court entered an order vesting the title to said land in Mary Murphy Graves on the ground that the value of the whole estate of Larkin Murphy was less than $300. In the case of *Hildebrand* v. *Graves, supra,* it was held that this order was void because the land constituted the homestead of Larkin Murphy, who left minor children.

In 1897 appellant conveyed the middle one-third of said tract, fifty-three and one-third acres, to Will Newton, who had married Drucilla Murphy, by deed purporting to convey the fee simple title. By deeds of 1905 and 1911 purporting to convey a like title, she conveyed the west one-third of said tract to Luther Graves, a son by her second husband. She occupied the house on the east end of the tract, called the home tract. In 1913 she made a gift to her daughters, Mary and Martha of the east one-third of said tract, to Mary the west half of the east fifty-three and one-third acres, and to Martha the east half thereof. Mary had intermarried with Henry Murphy at that time. These daughters made improvements on the tracts given them by their mother, entered into possession thereof, and have lived thereon since that time; their mother, appellant, living with them. On May 22, 1922, appellant executed deeds to Mary and

Martha to the respective parts she had theretofore given them, which deeds were shortly thereafter placed of record,—that to Mary being recorded May 30, and that to Martha June 3, 1922. On June 12, 1922, one P. T. Hildebrand secured a deed from Drucilla Newton, the sole heir at law of Larkin Murphy, then living, to the whole 160-acre tract, and on June 17, 1922, he secured a deed from appellant's daughters, said Mary and Martha, to the same tract. On June 20, 1922, Hildebrand executed an oil and gas lease to George R. Gordon, and through mesne conveyances and assignments, title to the lease vested in appellee on July 29, 1922. Hildebrand reconveyed the land their mother had deeded them to Mary and Martha, excepting the mineral rights. On June 22, he executed to Mary and Martha mineral deeds, subject to said lease, covering an undivided half interest in two 20-acre tracts. Thereafter, oil was discovered in large quantities on said land, that is, the east one-third of said tract, by appellee, which gave rise to this and the former litigation heretofore mentioned.

This action was brought by appellant in September, 1933, in which she asserted a claim of dower. She alleged that the oral gifts to her daughters, Mary and Martha, were upon condition that they were to take effect only upon her death, and that she retained and reserved to herself during her life all her rights, interests and property in said tracts so given, and all the rents and profits therefrom, with the right of occupancy and possession, and all taxes to be paid in her name, with all rights of homestead, dower, etc., and that she executed and delivered the deeds of conveyance to Mary and Martha upon like conditions. She sought a recovery of and from appellee of the value of the oil which it is alleged it had wrongfully taken from the east one-third of said original tract. Appellee answered admitting some of the allegations of the complaint and denying others. It set out its title as above mentioned, for which it paid a valuable consideration and pleaded that it was an innocent purchaser. It also pleaded estoppel on a number of grounds, including the former litigation herein men-

tioned, and other litigation, as also the statute of limitation, adverse possession and laches.

Trial to a jury resulted in a verdict and judgment for appellee.

There is some contention made on this appeal that there was no delivery of the deeds executed by appellant on May 22, 1922, to her daughters Mary and Martha, and for this reason no title passed to them. While the complaint alleged the execution and delivery of said deeds, appellant testified that she took the deeds, after their execution, home and put them in a trunk. Her testimony as to the nondelivery thereof to the grantees is very vague and uncertain. Appellant is quite old, lacking in memory and deaf, and testified through an interpreter. She was supported somewhat by her daughters. But the fact remains, however, that she had in 1913 made a parol gift of the same land conveyed by said deeds to her said daughters, put them in possession and permitted the making of improvements thereupon, which had the effect of giving them the fee title. We so held in *Murphy* v. *Graves,* 170 Ark. 180, 379 S. W. 359. In that case Bennie Murphy, son of Joe Murphy and grandson of Larkin, sought to recover his deceased father's interest in all the land, and it was held that he was barred by the statute. It was there held that appellant had abandoned her homestead right by her attempted conveyances of 1905 and 1911 as to the portions of the land described in said deeds, and the court continued: "The question presents itself whether or not the oral gift of the remainder of the land to the two daughters of Mary Graves (Mary and Martha) constituted an abandonment. We are of the opinion that it did. An oral gift of land is not enforceable unless there is actual possession delivered followed by the making of valuable improvements by the donee. *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *Brown* v. *Norvell,* 96 Ark. 609, 132 S. W. 922; *Williams* v. *Neighbors,* 107 Ark. 473, 155 S. W. 917; *Causey* v. *Wolfe,* 135 Ark. 9, 204 S. W. 977. The executed oral gifts of land were as effectual to divest title as a written conveyance." It was then said that Bennie Murphy's right of entry, "was

complete upon the abandonment of the homestead right by the widow, and the statute of limitations began to run against him at that time. The widow (Mary Graves) also had an unassigned dower right, but this did not bar the right of entry of the heirs so as to prevent the statute of limitations from running. *Griffin* v. *Dunn,* 79 Ark. 408, 96 S. W. 190; *Fletcher* v. *Josephs,* 105 Ark. 646, 152 S. W. 293."

Therefore, appellant's daughters, Mary and Martha had acquired the legal title to their respective tracts of the east one-third of the 160 acres prior to the execution by appellant of the deeds to them in 1922. We think it must be held that these deeds conveyed her unassigned dower right in said tracts. If so, then these conveyances were not to strangers to the title, but to the owners of the legal title, and, both the legal and the equitable title being in them, the unassigned dower right was extinguished, and their deeds to Hildebrand conveyed the whole title, both legal and equitable.

For this reason alone, the court should have directed a verdict for appellee as requested by it. It becomes unnecessary to discuss the other interesting points so ably argued by counsel on both sides.

Let the judgment be affirmed.

CITY NATIONAL BANK *v.* WOFFORD.

4-3707

Opinion delivered November 5, 1934.

[redacted]

W. L. Curtis and *James B. McDonough,* for petitioners.

Hill, Fitzhugh & Brizzolara, for respondent.

BUTLER, J. Mrs. J. A. McCann and D. H. Moores filed suit against the City National Bank of Fort Smith and I. H. Nakdimen. There were separate suits, but the cases are similar, the allegations of the two complaints being practically identical except in two particulars, which will be later noticed. The allegations in brief were to the effect that plaintiffs were customers of the bank which had, from time to time, been investing the surplus of the complainants in securities selected by it and its president, Nakdimen. They were not advised of the value of these securities, but relied solely on the advice of the president of the bank in making investments. In all instances the president represented that the securities purchased for them were "gilt edged" and "as good as gold"; that is to say, that the character of the investments was safe and conservative.

Pursuant to such course of dealings, the complainants purchased from the bank through its president certain bonds of the East Oklahoma Publishing Company, paying par and accrued interest, Mrs. McCann purchasing bonds of the first issue of $75,000, and Moores buying bonds of a second $50,000 issue. For a time the interest was collected by the bank and deposited to their account,

and long after the purchase of the securities they were informed of certain facts which made them doubt the value of the securities, and, on learning that bankruptcy proceedings had been instituted against the publishing company, they made investigation as to the solvency of said company and market value of the bonds. They charged that the president of the bank had promoted the incorporation of the publishing company; that he had purchased several newspaper plants in Oklahoma for $69,000, formed the said publishing company, capitalized it at $90,000 of which $45,000 was issued to him, and nothing was paid by him and the corporators therefor; that said newspaper plants constituted the sole assets of the corporation, and that immediately after its formation it issued $75,000 of bonds secured by mortgage upon said plants made to the Sallisaw State Bank of Oklahoma of which Nakdimen was president. The bonds involved in Mrs. McCann's suit were a part of said bond issue.

The Oklahoma Constitution prohibits the issue of stock except for money, labor done, or property actually received, and the statutes of that State render stockholders liable for the debts of a corporation to the extent of the amount unpaid on said stock.

The bonds provided that no recourse should be had for the payment of the principal or interest thereon against past, present or future stockholders, directors or officers of the company by virtue of the statutes and Constitution of Oklahoma, or by the enforcement of any penalty or assessment or otherwise. The mortgage securing said bonds has many exculpatory provisions which materially impair the rights of the holders of the bonds, and gives undue privilege and unreasonable immunities to the trustee. Plaintiffs were not familiar with the force and effect of the provisions in the bonds and mortgage, and, if they had read the same, they would have conveyed no definite meaning to their minds as to the effect upon their securities.

It was alleged by plaintiff McCann that the transaction by which she was induced to, and did, purchase the bonds was fraudulent in that the defendants failed

to inform her that the $75,000 issue was made by a company owning property not exceeding $69,000 in value secured by mortgage on property not exceeding $65,000 in value, ostensibly by a corporation whose capital stock amounted to $90,000 when it had no capital paid in; further, in failing to advise plaintiffs of the clause relieving the stockholders of liability, which had the effect, together with the other circumstances relating to the securities, of rendering the investment a poor one, and not of the character represented by defendants to the plaintiffs that they were making with their money. This entitled the plaintiffs to a rescission and a return of the money invested.

In the Moores complaint the additional allegation was made that a year after the company had issued the $75,000 bond issue it bought three certain newspaper plants at a price far below $50,000, and that the price paid was not in excess of the market value of same; that on October 1, 1929, the publishing company issued $50,000 in bonds purporting to be "first mortgage serial bonds," and these were secured by a deed of trust similar to the one securing the first bond issue, the same bank being named as trustee; that the defendant bank purchased for him $9,000 of these bonds. The property securing this issue was three plants acquired after the first bond issue, and all property included in the deed of trust securing that issue. The mortgage contained covenants that the mortgagor owned the absolute title, free and clear of all incumbrances, liens or charges, and that it was, and would be, kept a first lien upon the trust estate.

That the bonds purporting to be thus secured were not in fact as covenanted, but were only a first mortgage on three plants, and a second mortgage on the remainder of the plants—that is, there were nine plants described in the deed of trust which the mortgage warranted was a first lien on all, but which in fact was only a first lien on three.

That the recitals of the bonds and mortgage were false in so far as they stated that they were first liens on the property; that these were known to be false by defendants when they sold the second bond issue.

Included in Mrs. McCann's complaint was the allegation that the bank and its president, Nakdimen, purchased two notes for her, executed by W. L. Sharp, which were represented to be a good investment, and secured by a first mortgage on valuable property, whereas, in fact, the security was never adequate; that said notes were due November 1, 1928, a year after the purchase by her, but the principal has not yet been paid and interest only until October 1, 1932; that the total bond issue on the Sharp transaction was $10,000; that $1,000 has been paid on the principal, no part of which has been paid to her, and that she is entitled to her *pro rata* share thereof. She alleged that the notes were not such an investment as represented, and that she is entitled, under the agreement between her and the bank, to a repurchase by it of said notes, which she tendered with her complaint.

Based on the allegations of these complaints, the plaintiffs joined in a petition for the production of books, papers and documents of the bank and Nakdimen relating to the transactions involved in the complaints. In the petition it was alleged that all of the transactions and matters relating thereto are contained in the books, papers and documents of the bank and Nakdimen, and that the plaintiffs are entitled to an examination and inspection of them in advance of trial so that they may properly present the facts found therein to the court; that an accountant should be appointed to examine and inspect the books and documents, and to ascertain the facts "hereinafter called for, whichever may seem to the court the best method of ascertaining the facts." It was alleged that the matters sought to be inquired into were material to the plaintiffs' causes of action and the defenses interposed herein by the answers. (The answers filed by the bank and Nakdimen contained specific denials of each and all the allegations of the complaints.)

First. It was alleged in the petition that an examination of the books of Nakdimen for a short period prior to October 1, 1928, will disclose the truth or falsity of the allegations respecting the purchase price paid by Nakdimen for the publishing plants, and it was prayed

that the court order him to submit his books and papers relating to the purchase of said plants for examination by an accountant with directions to the accountant to ascertain what amount was paid for said plants, to whom paid, and when.

Second. That defendant bank's books be examined to ascertain whether the sum paid by Nakdimen for the publishing plant passed through said bank, and, if so, that a full account of the transactions shown on its books be ascertained and reported by the accountant.

Third. That it is material to the issues to ascertain the truth or falsity of the allegations in the pleadings relating to the purchase and amount of the bonds involved, and that plaintiffs, through their accountant, examine the books and papers of the defendants with respect to these allegations and ascertain the facts relating to the sale of said bonds, and, if sold to the plaintiffs, whether or not handled individually by Nakdimen. Whether the bank or Nakdimen owned the bonds sold to the plaintiffs, or any part of said bond issue at the time of their sale, and that it should be ascertained from said books to whom the proceeds of the bonds sold to plaintiffs and other bondholders were paid, and what commission, if any, was charged the East Oklahoma Publishing Company for the sale of the bonds to these plaintiffs and other bondholders.

Fourth. That it is material to the issues to ascertain if the bank acquired the bonds sold to plaintiffs or other bonds of which plaintiffs' bonds, respectively, were a part, and, if it did not acquire said bonds, in whose behalf it was acting in making the sale.

Fifth. That the account between the defendant bank and East Oklahoma Publishing Company is material so far as the same may show that the bank was lending money to said Publishing Company and receiving payment from the sale of said bonds for money owing by the company to it, and, if the books of the bank failed to disclose these facts, then the books of Nakdimen should be examined.

Sixth. That the request made was an examination of the books of defendants relative to the account between

Nakdimen and the Publishing Company, in so far as it relates to the amount paid for the purchase price of the plants which he sold to the Publishing Company, and how, and from what source, the Publishing Company derived the money it paid him for said purchase price when the same was received by him; and, if it was from the proceeds of the bond issues described in the complaint, with a full statement of the transactions between him and said company in regard to said bond issues to be made by the accountant which should include any assessment paid upon his stock, if any, and dividends received therefrom, if any.

Seventh. The request was made for a full statement by the accountant of the account between the bank and the Publishing Company from the date of its organization to the present, showing the amount of indebtedness owed the bank by said company, what payments were made to it and what indebtedness, if any, the company now owes the bank and what securities the bank holds for said indebtedness.

Eighth. In relation to an allegation in the complaint of plaintiff McCann regarding the sale of notes of W. L. Sharp "which were in the main denied in the answer," request was made that it be ascertained by the accountant from the books of the bank or Nakdimen, which was the seller of the notes to plaintiff, the total amount of the mortgage indebtedness against the lands mortgaged to secure said notes, who owns the other notes secured by the said mortgage, the amount paid by plaintiff for the notes purchased by her, what disposition was made of the money paid for the purchase price, and what amount, if any, Sharp owed the bank prior to the sale of the notes to plaintiff and others; and a full statement of an account between Sharp and the bank and the disposition made by the bank of the proceeds of the notes which were sold to plaintiff McCann and others.

Ninth. In the case of D. H. Moores, it was alleged that as a part of its business the bank was engaged in selling securities to its customers and the public, receiving a commission and in many instances being benefited by such sales. It was stated that the truth of the allega-

tions which were denied by the answer be ascertained and request was made that the accountant be directed to ascertain these facts from an examination of the books of the bank.

Tenth. That it be ascertained from an inspection of the account between the Sallisaw State Bank (the trustee in the deed of trust to secure the bond issues of the East Oklahoma Publishing Company) and City National Bank what bonds, either of the first or second issue of the East Oklahoma Publishing Company, were handled or sold on commission or otherwise by the City National Bank for account of Sallisaw State Bank.

Over the objections and exceptions of the defendants, the court granted the petition for the production of the books, papers and documents as prayed except as to the ninth paragraph and endeavored to limit the scope and effect of its order by certain preliminary directions providing "that the accountant shall only examine so much of the books, papers and documents as necessary to obtain the information required, and may transcribe so much thereof as necessary or make memoranda or a summary thereof, and shall not transcribe, copy, or make memoranda or summary of any other matters than those specifically called for in the nine paragraphs hereinafter set out." The accountant was further ordered, if, in his examination of the books, papers and documents, he should discover matters not related to, or mentioned in, the matters herein inquired of, he shall not disclose such matters to the plaintiffs, their counsel or any other person, and that a violation of this direction should be a contempt of court.

The order further provided that the examination called for should be made by the accountant in the bank at reasonable hours to suit the convenience of its officers and should be made in the presence of a representative of the bank and that a like procedure should be pursued in the examination of the books of the defendant Nakdimen, this examination to be either at his office in the bank or at any place most convenient to him with the right for him to be present in person or by a representative during the examination. It provided further that if

the bank or Nakdimen should refuse access to any of the books, etc., which the accountant should consider material in his investigation, he should at once report said fact fully to the court.

The defendants brought this action against the chancellor praying for a writ of prohibition seeking to prevent the enforcement of the aforesaid order.

The majority of the court is of the opinion that this is a proper case for the writ prayed, because the trial court has exceeded its authority and there is no other remedy which will afford defendants protection against the wrong. As interpreted, the petition and the order of the court based thereon would subject the defendants and their affairs to an unwarrantable intrusion and investigation and affect not only the rights of the defendants themselves, but of many persons doing business with the defendant bank which the bank is entitled to have protected. It is thought that, from the very nature of the investigation sought, many matters would come under the observation of the accountant wholly unconnected with the matters in dispute in this case, and that, while the trial court has endeavored to limit the scope of the inquiry by the accountant and prescribes penalties for his failure to observe the directions of the court, these precautions are wholly inadequate if the accountant is minded to observe irrelevant matters and convey the information thus obtained to others. It is obvious that this could be done by the accountant in such subtle fashion that no proof could be made of his disobedience of the orders of the court, and at most but a well-grounded suspicion attach.

The view is taken that the petition fails to make a substantial showing that the books sought to be examined contain material evidence supporting the allegations of the complaint. No particular books are pointed out, but the petition asks and the court permits the accountant selected to range at will among the books and papers of the defendants to discover, if he can, evidence which plaintiffs suspect is contained in some book or books to support the allegations of their complaint. The opinion is that the effect of the court's order would, and does,

authorize a "fishing examination" and offends against the rule that the materiality of the books and papers is not a question to be decided by the applicant but rather by the court.

The rule against which the order is deemed to offend is cited by the defendants and is found at page 1092, 10 R. C. L., as follows: "But a party to a pending action has no right to call for books, papers and documents as to his adversary merely for the purpose of entering into a 'fishing examination' of them. To authorize their production there must be a substantial showing that the book, paper or document sought for contains material evidence in support of the cause of action or defense of the party asking for it. A mere suspicion that it contains such evidence does not warrant an order for its production. The enactments upon the subject generally make it a condition that the books, etc., required shall contain evidence relating to the merits of the case."

Section 1393 of Elliott on Evidence provides: "The fundamental requirement as to the sufficiency of the motion or petition is that it must be shown upon good and sufficient cause that the books, papers or documents sought to be produced or inspected contain evidence material and pertinent to the issues and on behalf of the applicant. * * * It is not sufficient to allege generally the materiality of the books or documents, as this would not only be the averment of a conclusion, but would permit the question of materiality to be decided by the applicant instead of by the court. Hence it is not sufficient to allege that such books or papers contain evidence relative to the merits of the action, but it must be made to appear wherein such relation consists. In other words, the rule, as stated by the court is: 'It is well settled that an order for discovery and inspection will never be granted unless the necessity therefor is clearly shown.' "

And § 1396 of the same authority provides: "Another essential requirement of the motion or petition is that it shall definitely and sufficiently designate or describe the books, papers or documents required. A general reference is not sufficient; both the petition and the

order should specify, with reasonable certainty, the book or paper which is to be produced."

The view is taken by the majority that, if the petition was otherwise unobjectionable, it is premature. Plaintiffs should first endeavor to establish the allegations of their complaints by the testimony of witnesses and by an examination, by deposition or otherwise, of the defendant Nakdimen and the officers of the defendant bank, thereby laying a foundation for the request for the production and examination of the books. The rule stated in § 1410, Elliott on Evidence, is: "If the discovery is plainly attainable by competent and available testimony other than that of the party, a production of books should not be allowed without special circumstances. If it is attainable by an examination of the party as a witness, it should also be refused except upon special ground."

It follows from the views expressed—which are those of the majority and not of the writer, and with which he does not agree, that the writ should be granted, and it is so ordered.

BLOCKER *v.* SEWELL.

4-3724

Opinion delivered November 5, 1934.

[redacted]

James D. Shaver, James H. Williams and *Will Steel,* for appellants.

Ben Carter, for appellees.

BAKER, J. Citizens and taxpayers of Miller County filed their petition with the county clerk in that county to initiate a salary act for county officers. This salary act was filed in thirty-eight parts on September 4, 1934, and there was noted on the petitions a filing mark of the county judge of the same date it was filed with the county clerk.

On September 9 the clerk decided the sufficiency of the petitions and approved them, and on September 10 an order was made by the county court, directing the county clerk to give notice, over the signature of the county judge and county clerk, by publication and directing the clerk to certify the submission of the proposed act to the county board of election commissioners of Miller County, Arkansas, with directions to submit to the electors of Miller County the said "initiative act No. 1 of Miller County, Arkansas. An act to fix the salaries and expenses of county officers and to fix the manner in which such compensations and salaries shall be paid and to reduce the costs of county government, and for other purposes.

"For initiative act No. 1 of Miller County, Arkansas,

"Against initiative act No. 1 of Miller County, Arkansas."

The notice of publication was signed by Sewell as county judge and Ben Wilson as county clerk.

This suit filed in the Miller Chancery Court was instituted by certain citizens and taxpayers against Sewell, as county judge, and Wilson, as county clerk, and against the election commissioners of the county and their successors, challenging the sufficiency, legality and

constitutionality of the salary act proposed to be submitted at the general election on November 6. The several objections urged in the complaint will appear, sufficiently in detail, in the opinion covering propositions urged in the brief.

A restraining order was prayed to prevent the certification and placing of the proposed act upon the ballot to be voted upon at the general election.

Certain other citizens and taxpayers intervened, made themselves parties, demurred specifically to each paragraph in the complaint and at the same time filed an answer. The answer denied all of the allegations of the complaint.

Ben Wilson, county clerk, was sworn and testified substantially to the facts as set forth in this statement, introducing a copy of the petition containing the affidavits of the parties circulating them and showing the respective filing marks of himself and the county judge and also the order of the county judge, the effect of which has been stated, and also the certificate of the clerk, upon his examination of the petitions, which certificate was dated the 10th day of September, and filed with the petitions. This certificate was to the effect that the petition bears the signature of 1,031 persons, shown by affidavit attached, to be legal and qualified voters and electors of Miller County, and further that in the last preceding general election in Miller County, Arkansas, the total vote cast for the circuit clerk of Miller County, Arkansas, was 663. His finding was that more than 1,031 legal voters had signed the initiative petitions, and that the petitions were sufficient to order said proposed act to be submitted to the people for adoption at the general election to be held in Miller County.

The first proposition argued in appellant's brief is that there was no ballot title. The matter of a ballot title and the sufficiency thereof was decided by us in the case of *Coleman* v. *Sherrill, ante* p. 843. In that opinion we held that the title of the proposed act, as set forth in the petition, was a ballot title and that it was sufficient. The title of the proposed act in this case is essentially of the same form and effect, and it can not be helpful to render

another opinion. The title of the proposed act is the ballot title, and is sufficient.

The next matter suggested is to the effect that there is no sufficient affidavit of the parties who circulated the petition. There were thirty-eight separate parts of the petition filed, and, as we understand the record in this case, there was an affidavit attached to each of the thirty-eight parts thereof. Amendment No. 7 provides that each part of the petition shall have attached thereto the affidavit of the persons circulating the same and to the effect that all signatures thereon were made in the presence of the affiant and that to the best of affiant's knowledge and belief each signature is genuine and that the person signing is a legal voter. One affidavit to each of the parts is all Amendment No. 7 calls for, and there is no requirement that each page of the said petition shall have attached to it a separate affidavit, though, of course, if a part consisted of only one page, as circulated by one solicitor, then the person circulating the petition would make the affidavit as required. A part, however, may consist of many pages circulated by one person.

It is also objected in regard to the affidavit that it contains no expression of "belief that each signature is genuine." The affiant did swear that each of the parties making the affidavits signed the petition, and each of the other petitioners signed his or her name thereunto in his presence, and also the belief that each stated his or her name, residence, post office, and voting precinct correctly, and that each of them is a legal voter in Miller County, Arkansas. This is not the exact language of that part of Amendment No. 7 under the head of "verification," but this affidavit contains words of equal import or meaning. The affiant says that they signed in his presence. His belief is that each has stated his or her name, residence, post office and voting precinct correctly and that each was a legal voter. If this affidavit means anything, it meets the objection made and the effect is that the signatures are genuine.

There is no such sanctity in words that we feel impelled to enforce their use when substantially the same thing is otherwise stated. This court has watched with

jealous care the enforcement of the law of acknowledgments, but, in requiring always a substantial compliance with the statutes, has permitted the use of "signed said deed" for "executed the deed"; "freely and of her own consent and not by persuasion or compulsion by her husband" for "without compulsion or undue influence of her husband." *Little* v. *Dodge*, 32 Ark. 454.

Chief Justice HART, in *Fidelity & Deposit Co. of Maryland* v. *Rieff*, 181 Ark. 798, 803, 27 S. W. (2d) 1008, said: "As we have already seen, all that has ever been required with reference to the ordinary acknowledgment of a deed or mortgage is a substantial compliance with the statute."

We said, in the case of *Coleman* v. *Sherrill, ante* p. 843, that Amendment No. 7, in order to effectuate the purposes intended, would be liberally construed. It must be seen that in the strict enforcement of statutes, mandatory in effect, substantial compliance only is meant, so that we hold a substantial compliance here must be sufficient. We have no desire to make a fetish of the word "genuine."

The next contention is that the petitions were not filed in time, and it is argued that under act 356 of 1927, page 1159, the petition shall be filed with the county judge, at least sixty days before the election at which it was to be submitted. Whether necessary or not, that was done. The petition was filed first with the county clerk, as provided in Amendment No. 7 and on the same day it bears the file marks of the county judge. The filing with the county clerk was on September 4. This was certainly more than 60 days prior to the date of the election. The amendment provides that the sufficiency of all such local petitions shall be decided, in the first instance, by the county clerk, and that matters of county initiative acts are subject to review by the chancery court. The county clerk acted upon the petition, approved it, held it sufficient, and, since Amendment No. 7 is self-executing, it could have been then placed upon the ballot without the aid of act 356 of 1927.

We are perfectly well aware of the fact that act 356, above mentioned, provides that the petition shall be filed

with the county judge, and § 2 of that act provides that the county judge shall submit all such petitions to election commissions. Whatever force and effect the act may have as distinguished from the provisions of Amendment No. 7, the county judge, in addition to what the clerk did, acted upon the petitions, directing them to be submitted to the election commissioners, but it is not necessary at this time that we decide anything with reference to act 356.

The proposed initiative act is criticized, and it is alleged that in its operation it will result in a diversion of taxes, contrary to constitutional provisions. That may or may not be true, but that question is not before us at this time for several reasons. The first is that the proposed act may not be adopted by Miller County. If it should be adopted and objections then be raised, and a case be presented upon the proposition as to a wrongful diversion of funds, that question will then be determined.

The only other proposition remaining is the fact that the petition for the proposed act asked that the act be submitted at the next general election to be held on November 5, 1934. Amendment No. 7 provides, of course, that measures to be initiated shall be submitted only at the general election. There is no election to be held on November 5, 1934. When the petitioners prayed for the submission of the act at the general election, they fixed the date, just as definitely as the date for the holding of the election is fixed by law. A mere clerical error will not be allowed to defeat the measure when no prejudice could have possibly resulted.

We find no error in the order and decree of the chancery court. The case is affirmed.

CONWAY COUNTY BRIDGE DISTRICT *v.* WILLIAMS.

4-3557

Opinion delivered November 12, 1934.

Owens & Ehrman, E. L. McHaney, Jr., and *E. A. Williams,* for Conway County District, appellants, and *Hays & Smallwood, Schott & Goodier, Reece Caudle* and *J. B. Ward,* for Yell and Pope District, appellants.

F. D. Majors, J. G. Rye, Audrey Strait and *W. P. Strait,* for appellees.

JOHNSON, C. J. Appellees, the county judge and certain citizens and taxpayers of Conway County, instituted this proceeding in the Pulaski Chancery Court against Roy V. Leonard, State Treasurer, and the county treasurer of Conway County, to prohibit the respective treasurers paying over to Conway County Bridge District certain funds accumulated in the State Treasurer's hands under authority of act 11 passed at the special extraordinary session of the General Assembly of 1934. The complaint alleged the source of the accumulated fund and that the disposition thereof as provided for in § 23 of

said act, in so far as it undertook to donate same to the Conway County Bridge District, was in violation of the 14th Amendment to the Constitution of 1874, which prohibits local legislation. Subsequently an intervention of certain interested parties was filed by Pope and Yell county citizens against Yell & Pope County Bridge District which sought similar relief. Thereafter, the Conway County Bridge District and Yell & Pope Bridge Districts intervened in said cause and asserted their respective interests in said fund, and in addition thereto denied the invalidity and unconstitutionality of § 23 of said act.

The case was submitted for trial and decree upon an agreed statement of facts and certain oral testimony then and there produced and heard, but we deem it unnecessary to here set out in detail the facts adduced. The chancellor determined that that portion of act 11 of 1934 contained in § 23 thereof, which undertook to allot a certain part of the county highway improvement funds to bridge districts was in violation of Amendment No. 14, and therefore unconstitutional and void, and thereupon permanently restrained and enjoined the disbursements of said fund or any part thereof to the two bridge districts, and this appeal comes therefrom.

Section 23 of act 11 of 1934, a part of which was declared unconstitutional and void by the trial court, reads as follows:

"Section 23. Paragraph (e) of § 1 of act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(e) All net tax derived from motor vehicle fuel under the provisions of paragraph (c) of this act shall be divided: Ninety-two point three per cent. (92.3%) shall be deemed State highway revenue, and seven point seven per cent. (7.7%) shall be deemed county highway improvement revenue, and shall be credited by the Treasurer of State to the 'county highway fund.' Said county highway fund shall be segregated, set apart and placed in trust for the sole, separate and exclusive use of the several counties of this State to be apportioned under the existing laws, and the State expressly covenants that it

will not permit the percentage herein allotted to the county highway fund to be reduced. Providing that the refund going to any county in the State having a bridge district where the bridge is across a navigable stream, as defined by the Department of Commerce of the United States Government and is located not less than seven miles from the county seat of said county, and constitutes a continuation of a State highway, the funds going to the county under the terms of this act shall be allotted to the bridge commission to be applied to the retirement of the bridge district bonds, and the county treasurer shall pay such funds to the proper trustee for such application. Provided further that this amendment does not apply to toll bridges. Provided that one-half of the refund going to any other county in this State other than the counties herein classified or in which the refund is controlled by any existing legislation shall be allotted to the bridge commission of any bridge district where the bridge constructed by the district is across a navigable stream as defined by the Department of Commerce of the United States Government and constitutes a link in a State highway, and where said bridge is situated not less than one mile from the county seat."

It appears from the section of the act just quoted that the Legislature divided the net tax derived from motor vehicle fuel into two funds, namely: State highway revenue and county highway improvement revenue. It also appears that the county highway improvement revenue as therein created is dedicated to the several counties of the State to be apportioned under existing laws, provided, however, the fund going to any county having a bridge district, where the bridge is across a navigable stream * * * and is located not less than seven miles from the county seat of said county and constitutes a continuation of a State highway, the funds going to the county under the terms of this act shall be allotted to the bridge commissioners to be applied to the retirement of the bridge bonds, and the county treasurer shall pay such funds to the proper trustee for such application. Provided further that this amendment does not apply to toll bridges, and provided further that one-half of the refund

going to any other county in this State other than the counties herein classified or in which the refund is controlled by any existing legislation shall be allotted to the bridge commission of any bridge district where the bridge constructed by the district is across a navigable stream as defined by the Department of Commerce of the United States Government and constitutes a link in a State highway, and where said bridge is situated not less than one mile from the county seat.

From the language quoted, it definitely and certainly appears that the benefits granted by the State to bridge districts is restricted as follows: First, only to districts where the bridge spans a navigable stream; secondly, the bridge must not be within one mile of a county seat; third, such bridge must not be a toll bridge.

The restriction that the bridge of a benefited district must span a navigable stream localizes the benefits to such districts as border navigable streams, and we judicially know that many bridge districts in this State do not border such streams and will not do so within any reasonable future time. The restriction that the bridge in the district to be benefited must not be a toll bridge further restricts the applicability of said section by excluding from its benevolent purposes all bridge districts in the State which collect tolls. The further elimination of all districts where the bridge is situated within one mile of the county seat further restricts the applicability of the benefits of said section.

Appellants' first contention is that the two bridge districts here under consideration, and which are benefited by § 23, are a part and parcel of the State highway system and therefore legislation in reference to such districts affects the people of the State as a whole and therefore such legislation is general in effect, though local in its immediate application. To support this contention, *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, is urged upon us as authority therefor. This case determined only that statutes establishing or abolishing separate courts relate to the administration of justice and are therefore neither local nor special in their operation.

Moreover, the contention here urged was tacitly decided adversely to appellants' contention in *Board of Commissioners of Red River Bridge District* v. *Wood,* 183 Ark. 1082, 40 S. W. (2d) 435, wherein we decided that an act of the General Assembly which was confined in its operation and effect to this bridge district was local and therefore void under the 14th Amendment. The similarity of the conditions dealt with in the Red River Bridge District case and those under consideration here may be summarized as follows: § 23 of act 11 of 1934 seeks to relieve taxpayers of the respective bridge districts from the legal obligation of paying a certain percentage of their assessments of benefits, whereas in the Red River Bridge District case it was sought to refund to taxpayers of the district certain benefits theretofore paid. Thus it definitely appears that the two acts have the identical purpose and effect, that of relieving taxpayers in a restricted area and excluding all other taxpayers not so fortunately situated, though within the general class.

Next, it is urged that the Legislature has the inherent power to make reasonable classifications and to pass laws applicable only to such designated class, conditioned only that such law must apply to all within the designated classification. We have so decided in many cases and among which are the following: *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707; *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327; *Knowlton* v. *Walton, ante* p. 901, and cases therein cited. The rule thus announced is grounded upon the proposition that such classification does not permanently exclude other persons and things within the general class, but on the contrary is prospective in view that such persons or things temporarily excluded may in the future come within its operation.

Here the questions arise, first, does the provision here under consideration make a reasonable classification? and, secondly, does it apply to all within the general classification, or will it do so at any reasonable future time? Admittedly, no bridge district in this State may be benefited by § 23 unless the bridge spans a navigable stream, thereby arbitrarily excluding all bridge districts in the State save those adjacent to or bordering

upon such streams; and this is true, even though such bridge may be more than one miles from the county seat, and may not be a toll bridge. Also a bridge may not be a toll bridge and may be situated across a navigable stream, yet it is excluded if situated within one mile of the county seat. Moreover, the bridge may be more than one mile from the county seat and situated across a navigable stream, yet it is excluded from benefits under § 23 if it happens to be a toll bridge.

This suffices to show the unreasonable and arbitrary classification made by the Legislature and the subtle methods adopted to make local legislation appear in the guise of general enactment.

We have uniformly held that the subject of legislation, in order to be general law, must operate uniformly upon every person or thing of a designated class throughout the territorial limits of this State. *Little Rock & Fort Smith Ry. Co.* v. *Hanniford,* 49 Ark. 291, 5 S. W. 294, and *Little Rock* v. *North Little Rock,* 72 Ark. 195, 79 S. W. 785; *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 617; *Board of Commissioners of Red River Bridge District* v. *Wood, supra.*

Our holding in *Leonard* v. *Luxora, etc.,* 187 Ark. 599, 61 S. W. (2d) 70, is decisive of the question of classification here under consideration as follows:

"There is nothing in the terms of the act to distinguish Mississippi County from other counties in the State that have either a greater or less population, and have one or more judicial districts. There is no reason in the nature of things why an act of this kind should apply to Mississippi County and not to other counties in the State. It is therefore an arbitrary and unnatural classification, and there is no natural connection between counties having more than one judicial district and 65,000 population, and the division of the county highway funds. The act therefore cannot be upheld on the ground of classification."

In *Webb* v. *Adams, supra,* we had under consideration an act which from its title and terms appeared to be general in its operations and effect throughout the State,

but a certain provision thereof exempted certain school districts situated in the State, and we there held that the exemption rendered the act local in its application and effect, and therefore, under Amendment No. 14, unconstitutional and void.

For the reasons stated, we conclude that the legislative classification here under consideration was unreasonable and arbitrary and its effect was to exclude bridge districts located in this State which fall within the general classification of such districts and is therefore unwarranted.

Finally, it is insisted that the conclusion here reached nullifies and destroys the whole of § 23 of act 11 of 1934. Not so. Section 54 of act 11 of 1934 provides, if for any reason any section or provision of this act shall be held to be unconstitutional, it shall not affect the remainder of this act, etc. It therefore appears that the Legislature had in mind that some of the provisions or sections of said act might be declared unconstitutional and void by the courts and in advance evinced its purpose to pass said act regardless of the conclusions reached by the courts. We think therefore that the Legislature would have passed act 11 of 1934 as readily without the provision herein held to be unconstitutional and void as it did with it included. *Alsup* v. *State,* 178 Ark. 170, 10 S. W. (2d) 9.

Moreover, we have many times decided that where the unconstitutional portion of an act is severable, and there is a complete act without it, the fact that one section or one portion of it violates the Constitution does not necessarily invalidate the entire act. *Cone* v. *Garner,* 175 Ark. 860, 3 S. W. (2d) 1; *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000.

For the reasons stated, the decree of the Pulaski Chancery Court is in all things affirmed.

SMITH and MCHANEY, JJ., dissent.

KIRBY *v.* KIRBY.

4-3586

Opinion delivered November 12, 1934.

George R. Steel, for appellant.
Tom Kidd, for appellee.

JOHNSON, C. J. The unfortunate marital troubles of appellant and appellee were thoroughly and sufficiently aired in the case of *Kirby* v. *Kirby,* 184 Ark. 532, 42 S. W. (2d) 995, and the curious are referred thereto for a complete history of the case. It will be noted in the opinion referred to that appellee was awarded the custody of the infant, Nelda Jean Kirby, with the right of visitation at all reasonable times by appellant, and appellant was directed to pay to appellee for the maintenance and support of said infant $15 monthly. To the credit of appellant, it may be said these payments have been promptly met up to this time. Subsequently to the rendition of the opinion, as aforesaid, appellant filed an independent suit for divorce, and a decree in this behalf was duly entered. This proceeding was instituted by appellant against appellee in the Pike County Chancery Court, seeking a modification of the order previously referred to awarding the custody of the child to appellee and directed appellant to contribute $15 per month for the

child's maintenance. Testimony was heard upon the motion by the chancellor, and the previous order was modified to the extent of awarding to appellant the custody of the infant one week out of four, and by reducing the allowance of maintenance from $15 per month to $12.50 per month. Appellant, conceiving that he received insufficient relief, has appealed here.

It is the well-settled doctrine in this State that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity. Act 257 of 1921. *Caldwell* v. *Caldwell,* 156 Ark. 383, 246 S. W. 492; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47.

In *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450, we approved the rule as stated in 9 R. C. L., p. 476, as follows: "A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child."

Without setting out in detail the testimony adduced upon the hearing for the modification of the previous order, it suffices to say that the only material changes established in the circumstances of the parties and the child are that the child is now almost four years of age and was only an infant at the time of the previous order, and the father or appellant has remarried.

We are unwilling to overturn the chancellor's finding of fact in regard to the custody of the child upon the showing made. It is the uniform practice in this court that a chancellor's finding of fact will not be overturned on appeal unless found to be clearly against the preponderance of the testimony. *Eureka Stone Co.* v. *First Christian Church,* 86 Ark. 212, 110 S. W. 1042; *Scott* v. *McCraw, Perkins & Webber Co.,* 119 Ark. 135, 177 S. W. 901; *Vaughan* v. *C. R. I. & P. Ry. Co.,* 120 Ark. 37, 179 S. W. 165.

No error appearing, the decree is affirmed.

FARMERS' BANK & TRUST COMPANY *v.* TAYLOR.

4-3587

Opinion delivered November 12, 1934.

McKay & McKay, for appellants.

Hawkins & Keith, for appellees.

SMITH, J. On November 27, 1922, Mrs. Clara Taylor borrowed $531 from the Bank of Taylor, of Taylor, Arkansas, and to secure the payment thereof executed a deed of trust, by the terms of which she conveyed to a trustee for the bank three lots in the town of Taylor, upon which a small building was located. Before the maturity of the note, the Bank of Taylor borrowed $10,000 from the Farmers' Bank & Trust Company, of Magnolia, Arkansas, and indorsed and delivered Mrs. Taylor's note, along with other notes, as collateral security for that loan. About the time Mrs. Taylor's note fell due, Romie Taylor, her husband, paid the amount thereof to the Bank of Taylor, and at the time of payment was advised that the bank did not have the note in its possession, but that the note would be obtained and delivered to him. He did not inquire where the note was, and was not advised. Soon thereafter the Bank of Taylor became insolvent, and was taken over by the State Banking Department for the purpose of liquidation, and the Farmers' Bank & Trust Company notified Mrs. Taylor that it held this note as collateral. The exact date when the Bank of Taylor was taken over for liquidation does not appear, but the payment by Mr. Taylor was made before that time.

The Farmers' Bank & Trust Company filed suit against Mrs. Taylor on the note and prayed the foreclosure of the deed of trust securing it. M. E. Britt filed an intervention, and was made a party to this suit.

It appears that when Mrs. Taylor's note was pledged by the Bank of Taylor, no marginal notation was made of that fact upon the record where the deed of trust was recorded. But it does appear that, when Mrs. Taylor's husband made the payment above stated, the cashier of the Bank of Taylor indorsed payment and settlement of the note upon the deed of trust and delivered that instrument to Mr. Taylor as having been cancelled and satisfied, and on January 24, 1923, which appears to have been about the date of payment, the vice president and cashier of the Bank of Taylor made an indorsement upon the margin of the record where the deed of trust was recorded, which was duly attested by the clerk and recorder, reading as follows: "I hereby acknowledge receipt in full of the notes set up in this instrument and declare the lien created thereby fully satisfied and released, this the 24th day of January, 1923. (Signed) Bank of Taylor, by L. K. Welborn, V. P. & Cash. Attest: Emmett Atkinson, Clerk."

Mrs. Taylor testified that she thought the debt had been paid, and that she so advised Britt when she sold him the lots covered by the deed of trust. Britt admitted knowing that the deed of trust was of record, but was assured that the debt which it secured had been paid, and he thought Mr. Taylor was in possession of both the note and deed of trust. As a matter of fact, Taylor was in possession only of the deed of trust, but Britt testified: "I thought it was clear. I figured him having the note and mortgage and the record being satisfied, it was clear," but before completing the purchase of the lots Britt went to the office of the clerk and recorder and read the marginal indorsement upon the record, set out above.

The court rendered judgment against Mrs. Taylor for the amount of the note, but refused to decree a foreclosure of the deed of trust, and the Farmers' Bank & Trust Company has appealed from that decree. The

judgment for the amount of the note is correct, and is not questioned.

We are also of the opinion that the court was correct in refusing to decree a foreclosure of the deed of trust. The case of *Kinney* v. *North Memphis Savings Bank*, 178 Ark. 716, 11 S. W. (2d) 486, which has several times been adhered to and followed, is decisive of the question. It was there said: "Section 2 of act 374 of 1917 (which appears as § 7399, Crawford & Moses' Digest) gives to any person who, according to the face of the record, is the owner of any of the liens there mentioned, the right to satisfy the liens of record by indorsements on the margin of the record where the instrument is recorded, and, when this is done, the subsequent purchaser, mortgagee, or the judgment-creditor, is protected against such lien, 'unless there shall appear on the margin of the record where such instrument is recorded a memorandum showing that the said mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby, has been transferred or assigned, which said memorandum shall be signed by the transferrer or assignor, giving the name of the transferee or assignee, together with the date of such transfer or assignment, said signature to be attested and dated by the clerk.' * * * In other words, the assignee of the note or debt secured by the lien takes, by the assignment, the lien securing the debt, but, if he neglects to have indorsed on the margin of the record the memorandum showing that the lien has been transferred to him, he is subject to have his lien defeated if satisfaction of the lien is indorsed on the margin of the record by the apparent owner of the lien." See also *Rockford Trust Co.* v. *Purtrell*, 183 Ark. 918, 39 S. W. (2d) 733; *Vance* v. *White*, 180 Ark. 470, 21 S. W. (2d) 853; *Lehmann* v. *First National Bank of St. Louis*, *ante p.* 604, Hughes on Arkansas Mortgages, § 205.

There having been no compliance with the requirements of § 7399, Crawford & Moses' Digest, Britt acquired title to the lots free from the lien of the deed of trust, and the decree so adjudging is affirmed.

CARTER *v.* WASSON.

4-3574

Opinion delivered November 12, 1934.

[redacted]

E. L. Carter, for appellants.

George R. Steel, for appellee.

HUMPHREYS, J. Appellants became the owners of a note and mortgage executed by W. H. Ferguson and wife to the Conservative Loan Company on January 25, 1931, and maturing on October 1, 1931. The land described in the mortgage as security for the debt is as follows:

Southwest quarter of the southwest quarter of section 35, township 8 south, range 28 west; the northwest quarter of the northeast quarter of section 2, township 9 south, range 28 west, situated in Howard County, Arkansas.

Appellant E. L. Carter, in his capacity as trustee, became the holder of a note and second mortgage executed by W. H. Ferguson and wife upon the same real estate.

Subsequently, W. H. Ferguson and wife executed a third mortgage upon the same lands to the Planters' Bank & Trust Company to secure an indebtedness of $800 to it.

On July 19, 1933, the Planters' Bank & Trust Company purchased a deed to the southwest quarter, southwest quarter, section 35, township 8 south, range 28 west, 40 acres, and the fractional northwest quarter, section 2, township 9 south, range 28 west, 145.01 acres, in Howard County, Arkansas, which had been forfeited for the nonpayment of taxes for the year 1930, said lands being a part of those described in the mortgage.

Appellants brought suit on July 19, 1933, in the chancery court of Howard County to foreclose the first and second mortgages and to obtain judgment for the amounts due on the indebtedness which each mortgage secured and made the State Bank Commissioner in charge of the Planters' Bank & Trust Company a party to the suit, alleging that his interest was inferior to the mortgages held by the appellants. They alleged that the tax sale under which the State acquired title to a part of the lands described in the first and second mortgages was void.

The notes and mortgages were introduced, together with proof of the amount due upon each note. The records of the delinquent list of lands in the clerk's office as advertised for sale were introduced in evidence without objection and are as follows:

Owner's Name	Part of Section	Sec.	Twp.	Range	No. Acres	Total Tax
John Lipscomb	SE SE	35	8	28	40	$ 7.51
Nesbitt & Pate	N½ SE				77	12.73
W. H. Ferguson	E½ SW				80	16.65
Do	SW SW				40	7.51
B. R. Nesbitt	Pt. SW NE				9	2.65
J. T. Collier	Pt. NE NE				8	8.25
C. C. Boyd	Pt. NW NW	36	8	28	¾	4.52
Page 92.						
Rich Jones	NE SW	2	9	28	40	8.63
W. H. Ferguson	Fr. NW NW				31¼	7.32
Do	Fr. NW				145.01	26.90
John Sanders Est.	SW SE				40	6.76
Do	S½ SW				80	15.71
Jno. Lipscomb	Pt. NE SE				33.97	7.51
Do	Pt. SW NE				19.74	4.52
John Sanders Est.	Pt. NE SE	3	9	28	37¼	15.21

Much evidence was introduced responsive to other allegations contained in the complaint of the invalidity of the tax sale which need not be set out and discussed, as we have concluded that the tax sales of the lands in question were void and that on that account the State acquired no title to them which it could convey to the Planters' Bank & Trust Company. The original complaint and the amendment thereto did not specifically allege the invalidity of the tax sale on the ground of the insufficient description of the lands, but, at the conclusion of the testimony, they asked to amend their complaint in this particular. The court refused to allow the amend-

ment or treat the complaint as amended to conform to the proof, which was error.

On a hearing of the cause, the court rendered a judgment for the amount due on the notes and entered a decree of foreclosure in favor of appellants against the northwest quarter, northeast quarter of section 2 aforesaid and found that the tax sale was valid and quieted the title to the other lands described in said mortgages in appellee.

Appellants have prosecuted an appeal to this court from that part of the decree upholding the validity of the tax sale.

By reference to the list of delinquent lands set out above, it will be seen that no dittos appear opposite any of the lands listed and involved in this suit, and that there was a duplication in the assessment and sale of a part of the fractional northwest in what was supposed to be land in section 2, township 9, range 28 west. It appears that the northwest, northwest, 31 acres, was sold for a total tax of $7.32, and then that the entire fractional northwest 145.01 acres, was sold for $26.90, which was $7.32 more than the entire quarter should have been sold for. This rendered the sale of the entire quarter void.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to also enter a decree of foreclosure in favor of appellants on the southwest quarter, southwest quarter, section 35, and the northwest quarter of section 2, all in township 9 south, range 28 west, in Howard County, Arkansas.

DODD *v.* STATE.

Crim. 3908

Opinion delivered November 12, 1934.

O. T. Ward, for appellant.

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

McHaney, J. Appellant was indicted, tried, convicted and sentenced to the penitentiary for one year on a charge of assault to rob one Susie Lloyd. This appeal challenges the sufficiency of the evidence to support the verdict and judgment against him. The Attorney General has confessed error, and this confession must be sustained.

Mrs. Susie Lloyd, the prosecuting witness, testified as follows: "Yes, sir, and when he (appellant) came up tolable close to the front gate, I was on the porch and he said, 'What are you doing with this big snake out here?' and I said 'I didn't know there was one there,' and he got a small stick and started to kill the snake and I gave him a big stick, I carried a big stick out to him and he killed the snake and came in and sat on the porch and sat there and talked awhile,—he talked a little while and after awhile he got up and went down the steps and he just slid his hand down on the banister and turned around, and when he got up and started out I got up and stepped over on the porch and he just turned around and put his hand there and says, 'I want some money' and I says, 'I haven't got no money.' 'Got no money,' he says, 'Oh yes, you have, I have been told,' and I says, 'I have not got no money,' and he says, 'Oh, yes, you have and you will have to get it, I want five dollars,' and don't know how many times he repeated it and I looked down toward the road and I saw some one at the gate, and I said, 'I see some one at the gate.' " She further testified that he had the club with which he killed the snake in his hand, but did not make any motion with the club and was digging with the stick in the ground while he was demanding the money; that he was there perhaps a half hour talking to her before he said anything about wanting money, never did use any rough language or do anything at all

to force her to give him the money. He used no force or violence, nor did he commit any overt act in attempting to get the money. He made no use of the stick that would constitute an assault, nor did he threaten to do so in any way.

Our statute, § 2330, Crawford & Moses' Digest, defines assault as follows: "An assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another."

This court held in *Wells* v. *State,* 108 Ark. 312, 157 S. W. 389, that drawing a knife and advancing toward the prosecuting witness constitutes an assault, although the prosecuting witness fled and the defendant did not follow. In this case, while appellant held the stick with which he killed the snake, it is shown by the prosecuting witness that he made no attempt to use it, nor did he draw the stick back as if to inflict an injury, or advance upon her with the drawn stick. In fact, it is not shown that he was, at any time after demanding the money from her, within striking distance of her. In other words, there must be some overt act in execution of his purpose to rob. As said by this court in *Johnson* v. *State,* 132 Ark. 130, 200 S. W. 982: "Mere preparation for an assault does not complete the offense, but any overt act in partial execution of the design to make an assault completes the offense."

In 2 R. C. L., § 9, p. 533, the rule is stated as follows: "In order to constitute an assault, there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do physical injury to the person of another. The act must be such as will convey to the mind of the other person a well grounded apprehension of personal injury. It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed. It may safely be stated, however, that where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun and the battery is attempted. This principle has been adopted as the correct exposition of the law of assault. There

must therefore be not only threatening words or violence menaced, but the defendant must have committed some act in execution of his purpose. It is not necessary at all that his words should be accompanied or followed by an actual battery, for a mere assault excludes the idea of a battery, but he must either offer to do violence, as by drawing back his fist or raising a stick, or attempt to do it, as by aiming a blow at another which does not take effect because it is warded off by a third person, or by shooting at another and missing the mark."

Under this rule, it is clear that appellant has been convicted of the crime of assault to rob without substantial evidence to support the charge. The confession of error of the Attorney General must be sustained, and the judgment of conviction be reversed, and the cause remanded for a new trial.

It is so ordered.

McEachin *v.* Burks.

4-3597

Opinion delivered November 12, 1934.

N. A. McDaniel and *Cockrill, Armistead & Rector,* for appellants.

Anderson Burks and *John L. McClellan,* for appellee.

BUTLER, J. Appellee recovered a verdict in the sum of $10,000 for injuries suffered while employed by the appellants, a partnership, as a common laborer in the construction of a concrete tank at the State Hospital near Benton. Appellee is a married man, was a manual laborer, strong and in good health and had been employed on this job since it was started two months before his injury, at which time he was twenty-one years old. Before that he had farmed and worked for a while on State highway construction.

The appeal in this case involves only the question of the employers' negligence. It is appellants' contention that there is no legal evidence sufficient to support the verdict. No evidence was offered by the appellants. The case was submitted on the testimony adduced by the appellee in which there is no conflict. The difference of opinion arises as to what are the just inferences reasonably deducible from the evidence.

The tank on which appellee was working when he sustained his injury is a rectangular pit. It was excavated with a steam shovel to the depth of twelve feet. On the bottom and sides wooden forms were installed into which concrete was poured thus making the walls around the pit and a partition wall. The wooden forms had been removed, leaving the walls, which were sixteen inches wide. On the outside of the walls the dirt had been excavated for the purpose of installing drains. At intervals along the walls and near the middle were holes four inches square. The top of the walls had not been smoothed or plastered over, leaving the surface more or less uneven. On the date of the injury to appellee, August 25, 1933, the partition was being used for the storing of lumber and the laborers were engaged in the afternoon of that day in rolling loads of cement and sand in wheelbarrows along and on top of the walls surrounding the pit, under the supervision of their boss or foreman. For just what purpose this material was in-

tended to be used is not disclosed, nor is that fact important. During the afternoon and just before appellee sustained his injury, he had rolled along the wall a couple of loads of sacks of cement in a wheelbarrow. He had also rolled along the wall two wheelbarrow loads of sand. Herman Lott, a fellow workman, had rolled a load of sand up in another wheelbarrow. Appellee's superior directed him to leave the wheelbarrow in which he had brought up the sacks of cement with the last load remaining in it and directed him to take the wheelbarrow Lott had been using and get another load of sand. That wheelbarrow still had some sand in it which appellee unloaded and immediately went to the sand pile, reloaded it, and began pushing this wheelbarrow so loaded along the top of the wall as he had been directed to do. In pushing the wheelbarrow he held the handles which extended on either side of him with his hands. That was the first day he had rolled a wheelbarrow on top of the wall. The holes were uncovered, and it was necessary to guide the wheelbarrow so as to miss them. It was while making this trip that he lost his balance and fell into the hole resulting in serious injury to himself.

In describing the manner in which he pushed the wheelbarrow and how he happened to fall, appellee stated that he had no knowledge of the condition of the wheelbarrow and had had no opportunity to ascertain it. He took the one he had been instructed to take and never got far enough with the load on it to be able to discover its condition. He was uncertain what caused him to fall—he was trying to avoid the holes as he propelled the wheelbarrow, which, as he stated, "just rolled some way on the rocks or hole and got me overbalanced and kicked me in. I can't tell just exactly—I was trying to keep the wheelbarrow under control to keep from falling. I can't say exactly what the wheelbarrow hit."

Appellee was required to repeat several times, both on direct and cross-examination, the manner in which he rolled the wheelbarrow and how his fall was occasioned, but the above quotation contains essentially all that he stated in regard to the incident and his knowl-

edge of its cause. No other person observed appellee as he fell or just before his fall. Three of his fellow employees testified. All that two of them knew was that they heard the fall of the wheelbarrow and the outcry of the appellee and saw his condition when they reached him in the pit into which he had fallen. The third employee did not see the accident but went also at once to his injured fellow and noticed the wheel-barrow and described its condition at that time. His testimony is to the effect that he examined the wheelbarrow a little—but not much; that he looked at it as it was being taken out of the pit sufficiently to observe its condition, which he described as "pretty shackly." In the frame part there were bolts missing and wire had been inserted where they should have been to hold the frame together.

At the conclusion of the testimony the appellants moved for a peremptory instruction which the court refused, and this action on the part of the court is the principal ground of error assigned. The contentions are (1) that there is no evidence to sustain the claim that the accident resulted from youth, inexperience, or failure to warn; (2) that there is no legally sufficient evidence to show that the wheelbarrow was defective before the accident, or that any defect in the wheelbarrow caused the accident; (3) that the risks were obvious and assumed. In disposing of the first contention it is sufficient to say that the allegations of the youth and inexperience of the appellee and failure to warn were abandoned and were not issues in the case. Contentions numbered two and three will be discussed in the order above stated, which is the reverse from the order of discussion in appellant's brief.

It is contended that there is no competent and legal evidence tending to show the condition of the wheelbarrow before the accident. We agree with the appellants that evidence is incompetent where the defects discovered are such that they may reasonably be supposed to have been the result of the accident itself when there are no circumstances in proof from which there may arise a reasonable inference that the defective condition of the instrumentality existed prior to the accident.

In this case, however, it appears that a just inference may be drawn from the evidence relating to the condition of the wheelbarrow that such condition had existed for a considerable time. Its ramshackle condition might reasonably be deemed to have been occasioned by the loss of the bolts from the frame of the barrow and the substitution of wire in their stead. Learned counsel contend that the manner of construction of wheelbarrows is one of common knowledge. We agree that this is true, but differ with counsel in their conclusion that wheelbarrows are not rigidly built; as to the frame or "body" of a wheelbarrow, the reverse is true. It is likewise the case that while wire is often substituted for a lost bolt, it cannot, and does not draw the parts together as firmly as a bolt well tightened. The fact that immediately after the accident the barrow was found to be held together with wire, justified the jury in concluding that this condition had existed for a considerable time and was the cause of the frame of the barrow being "shaky." Common experience in the ordinary affairs of life and the fact that wheelbarrows are ancient vehicles in common use would also justify the jury in the assumption that a wheelbarrow with a loose frame would be easily overturned when loaded, because it would be liable to move from side to side as it is being rolled along, and that the condition of the wheelbarrow in question was the proximate cause of its being overturned while being rolled along the wall which caused the appellee to lose his balance and to fall within the pit.

The next question is, was the danger attendant on the movement of the barrow along the wall so great and so readily discoverable as to constitute a lack of ordinary care under the circumstances on the part of the appellee and create an assumption on his part of the risks involved. It is the general rule that a servant assumes the risks ordinarily attendant upon his work and also those risks created by the negligence of the master which create a situation of danger open and obvious and readily appreciable by a person of ordinary intelligence who continues to work in such situation. There are exceptions, however, to this rule. One of these is that

where the work is being done under the direct command and supervision of the master, the risk will not be assumed by the servant unless it is so grave and apparent that no person of ordinary intelligence, regardful of his own safety, would engage in the work despite the command.

In the recent case of *National Refining Co.* v. *Wreyford, ante* p. 598, the cases bearing on this question were collected and the general rule drawn from them was thus stated: "In cases of this sort" [where the employee is working under the direct supervision of the master and obeying his commands] "the employee is not required to weigh the degree of danger and decide whether it is safe for him to act, and, in a measure, he is relieved of the usual obligation to exercise ordinary caution in the performance of his work. In ordinary cases he may assume that the employer has superior knowledge and may rely thereon. * * * This rule is founded on the psychological truth that habits of obedience are formed by employees to a degree which often overrules independent thought and action and thus deprives them of the exercise of intelligent foresight and prudence, which would otherwise protect them. The rule, however, has application (as will be discovered by a review of the cases cited) where the superior who gives the command is present in person actually directing the performance of the work, or where the command is given with a degree of knowledge equal to that of the employee as to the situation and circumstances surrounding the performance of the act commanded. The question of assumption of risk of the danger arising from an act commanded by a superior, under the rule stated, is always under circumstances from which the jury might find that the command was negligence in that it directed the performance of an act which, from its very nature, or from the attendant situation and circumstances, might be reasonably apprehended as dangerous to the employee."

In the instant case the work was being done under the direct supervision and direction of appellee's superior, the representative of the master, who commanded

him to use a particular wheelbarrow, load it with sand, and to roll it along the top of the wall. Was the risk attendant upon this work so manifestly great and so appreciated by appellee as to justify him in refusing to obey the command and to create on his part by obedience to it an assumption of the dangers involved? We think the evidence was sufficient to submit that question to the jury. It is true that the appellee, as a reasonable man, would know that his movement along the wall would be attended by some danger, but which he had the right to believe could be overcome by the exercise of due care on his part. He knew the condition of the wall and the existence of the pit, but did he know the condition of the wheelbarrow, and had he had a reasonable opportunity of appreciating the danger to be expected from such condition within the time he had taken charge of the barrow under the command of the master until the accident occurred? And was the knowledge of the entire situation and appreciation of the danger sufficient to cast upon him the assumption of the risks involved? These were questions for the jury, which have been resolved in favor of the appellee upon substantial evidence.

We have already discussed the proposition that the jury might have justly concluded that the defective condition of the wheelbarrow was the proximate cause of appellee's fall and his injuries. The next question is, what was the duty of the master with respect to affording the appellee safe tools with which to work and the effect of his command to use the particular tool? Counsel argue that a wheelbarrow is a simple tool, and that there was no duty resting upon the master to inspect the same for defects. While a wheelbarrow is a common tool, it cannot be said to be a simple tool—like a chisel, a woodman's axe, or tools of such nature which are commonly used. The simplicity of the tool, however, is not always the criterion by which the duty of the master with regard to it is to be established, but rather the use to which the tool is to be put, the locality where the work is to be performed, and the attendant circumstances. It must be conceded that where a servant is employed in pushing a wheelbarrow loaded with

material like loose sand along level ground where there is no danger to be reasonably anticipated from a false movement of the barrow, or its being overturned, no duty would rest upon the master to inspect its condition before command to a servant to use it. A different situation, however, presents itself in the case at bar. The master knew the ordinary danger to be expected from any movement along the wall with tools in good condition, and therefore, before directing the servant to use an instrument with which he was not acquainted, it was the duty of the master to acquaint himself with it sufficiently to discover whether or not it was reasonably safe and in condition for the purpose intended. Therefore, it must be assumed that the master knew the condition of the barrow. If, then, the command to use it directed the performance of an act which from its very nature or from the attendant situation and circumstances, might reasonably be apprehended as dangerous to the servant, the jury would be warranted in finding that the master was negligent in giving such command. *National Refining Co.* v. *Wreyford, supra.*

Appellants complain of instruction No. 2, given at the request of the appellee, because it submitted to the jury the question of the negligence of the appellant as alleged in the complaint. The contention is that there were several grounds of negligence alleged in the complaint which were not supported by any evidence, and that the instruction given was therefore erroneous. The jury could not have been misled or the appellant prejudiced on account of the quoted language contained in the instruction. All of these allegations had been abandoned except the one relating to the defective condition of the wheelbarrow and the negligence of the master in that regard, the case being submitted to the jury on that sole issue. This appears to have been the thought of counsel for the appellants at the time the objection was interposed to the instruction during the course of the trial, because, in the specific objection made, there was no complaint about any particular word or phrase in this instruction. The specific objection made was, "because there is no testimony to show any negligence

on the part of the employer." This had the effect of waiving other specific objections to the instruction. *Trumbull* v. *Martin,* 137 Ark. 495, 208 S. W. 803.

Instructions Nos. 3 and 4 submitted the question of the right of the servant to rely upon the command of the master and whether or not, under the circumstances, the servant should be held to have assumed the risks. These instructions, which we deem it unnecessary to set out in full, correctly state the law of the case, which is in effect that as approved in the cases heretofore referred to.

The appellant requested instruction No. 6 which would have told the jury that the master was under no duty to furnish the servant with a safe place to work where the servant is engaged in work of such nature that it changes his place of work from time to time and the situation where the work is performed, and that any hazards arising under those conditions are assumed by the servant. There are several reasons why this instruction should not have been given. In the first place, the appellee was not engaged in work which was constantly changing in character. The pit had already been constructed and the walls were undergoing no change at the time of the accident. The servant was working under the direct supervision of the master and obeying his command, and the duty of making his working place and appliances safe had not been delegated to him.

Instruction No. 7, requested by the appellants, would have told the jury that there could be no recovery for any defective condition of the wheelbarrow. Instruction No. 8, requested by appellants, would have directed no recovery because of post holes in the wall. Instruction No. 10, requested by appellants, was to the effect that it was not the duty of appellants to put railing around the wall or flooring upon its top. Instruction No. 7 was properly refused, and what has previously been said, with no further discussion, is sufficient to dispose of that instruction. Instructions Nos. 8 and 10 were properly refused because the questions presented by these instructions were not issues. For the same reason, instruction No. 13, requested by appellant, was properly

refused. This instruction dealt with the duty of the master with relation to young and inexperienced servants.

Instruction No. 9, requested by appellants and refused by the court, would have told the jury that no recovery could be had if appellee accidentally lost his balance and fell or if he accidentally stepped from the wall. Instruction No. 14, requested by the appellants and refused by the court, related to the assumption of obvious risks by the servant. These instructions were fully covered by instructions previously given, and it was not required of the court to restate propositions of law already given. What we have said of instructions Nos. 10 and 14 disposes of the question of the court's refusal to give instruction No. 11, requested by appellant. This related to an employee knowingly working under an unsafe condition or who should have known of the same, and that a continuing of the work with knowledge of these risks, or those which became known to him during the progress of the work, would create the assumption of such risks by him under such circumstances.

The sufficiency of the evidence to support the amount of the verdict is not questioned. Therefore, since there appears to be substantial evidence fixing liability on the appellant and since the court committed no prejudicial error in its charge to the jury, the verdict is upheld, and the judgment of the court affirmed.

BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 23 *v.* MATHENEY.

4-3508

Opinion delivered October 8, 1934.

Herbert V. Betts and *Graham Moore,* for appellant.

M. P. Matheney, for appellee.

JOHNSON, C. J. Appellant Paving Improvement District No. 23 of El Dorado was organized in 1927, and immediately thereafter appellee Matheney was employed as attorney for the district. The services rendered and to be rendered by the attorney were the usual and ordinary ones consisting of collecting past-due assessments of benefits, bringing suits to enforce payment of such past-due assessments and representing the district generally in its litigation. Appellee's contract of employment with appellant district is evidenced by the minutes of the board of date June 4, 1927, and expressly provides compensation to the amount of 75 per cent. of all penalties collected against defaulting property in the district. On June 25, 1928, appellee's contract was amended, and his compensation increased to all the penalties collected against delinquent property. This contract is evidenced by the minutes of the board meeting of that date. On March 2, 1931, appellee was employed by the district as collector of all assessments of benefits due the district, and his compensation as such was fixed by the board at 3 per cent. of all collections effected. This contract is evidenced by the minutes of the meeting of the board of that date.

Appellants, Board of Commissioners, was reorganized in the early part of 1933, and appellee's services as attorney and collector were dispensed with by the new board, and soon thereafter this suit was instituted for an

accounting. Upon trial the chancellor stated the account as follows:

Balance alleged due under the complaint		$4,006.60
CREDITS		
Item 1—Penalties		$1,451.27
Item 2—3% Collector's commission on $9,392.90		281.78
Item 3—3% on former Collector's shortage of $960.25		28.81
Item 4—3% on T. N. Wilson tax of $1,111.25		33.33
Item 5—3% on State aid vouchers, $1,031.17		30.93
Item 7—Expenses of collection, 1919		15.00
Item 8—Expenses as collector, 1931		24.76
Item 9—Expenses as collector, 1932		26.80
Item 10—Investment of district in properties acquired in 1930-1931		534.25
Item 11—Additional court costs paid on same		23.70
Item 12—Investment in district properties acquired in 1932		698.80
	$4,006.60	$3,149.43
Less Credits	$3,149.43	
Balance	$ 857.17	
IMPROPER CHARGES		
Item 1—Voucher for $107.65		$107.65
Item 3—Charles Carpenter 1927 tax		36.00
Item 4—Mrs. Kate Harris, interest		31.08
Item 5—Expenses paid by district on district property		412.90
	$857.17	$587.63
Less improper charges	$587.63	
Balance due from defendant to plaintiff	$269.54	

And entered a decree accordingly, from which this appeal is prosecuted by appellant district.

Appellant's first contention is that item one allowed to appellee by the court aggregating $1,451.27, same being

penalties collected by appellee from delinquent lands is unlawful, unauthorized and improvident. This allowance is based upon an express contract of the board of improvement with appellee, and was faithfully performed by all parties thereto over a period of approximately six years. The law is well settled in this State that boards of commissioners of improvement districts have full power and authority to make contracts—such as the ones here under consideration—save only that the compensation awarded by such contracts must be reasonable.

In *Bowman Engineering Co.* v. *Missouri Highway District,* 151 Ark. 47, 235 S. W. 399, we stated the rule as follows: "The commissioners have power to make contracts, but they are trustees of the property owners, and can only make reasonable ones. The owners of the property have a right to challenge the validity of such contracts by showing that they are unreasonable. Of course, in testing the validity of such contracts, the court should not substitute its own judgment primarily for that of the commissioners, the authority to make the contract being lodged by the lawmakers in the commissioners, but the inquiry of the court is to determine whether or not the contract is so improvident as to demonstrate its unreasonableness."

Again in *Martin* v. *Street Improvement District No. 349,* 178 Ark. 588, 11 S. W. (2d) 469, we restated the rule as follows: "As the commissioners had the right to contract with appellant in regard to his fee as attorney, their contract is binding unless it be found that the contract was so improvident as to demonstrate its unreasonableness, and unless and until its improvidence be first found as a fact, the question of its reasonableness does not arise. In other words, the contract between the attorney and the commissioners must be enforced unless it be found that it is so improvident as to demonstrate its unreasonableness. When this finding is made, the contract is treated as being void, as it would be in the case of actual fraud, and in such case the recovery would be on a *quantum meruit* basis."

Tested by the rules thus stated, the chancellor was fully warranted in finding that the compensation awarded appellee by appellant for collecting delinquent assessments under his contract of employment as attorney for the district was reasonable.

Next, it is urged that item three allowed by the court to appellee should have been rejected. Appellant admits that item two is a proper charge under the contract of March 2, 1931, but contends that item three does not come within the purview of the contract. This item represents a shortage of a previous collector and according to the evidence was collected only after determined efforts so to do, and we think the court was correct in allowing compensation therefor.

Items numbered 10, 11, 12 as allowed by the court are strenuously objected to by appellant. These charges arose out of foreclosure sales wherein the improvement district became purchaser of the foreclosed properties. As we understand, it is not contended that the services rendered were not reasonably worth the amount claimed by these items, but the contention is that the district should pay only after the property passes into private ownership. When the district became the purchaser of this property at its foreclosure sale, it thereupon became responsible for the expenses incident thereto, and we think the chancellor was correct in so deciding.

Other minor items are urged upon us for review, but we deem them of insufficient importance to here discuss in detail. It suffices to say they fall within the rules heretofore discussed.

No error appearing, the judgment is affirmed.

BENNETT *v.* YOUNES.

4-3562

Opinion delivered October 15, 1934.

Cotton & Murray and *J. Loyd Shouse,* for appellants.

Shinn & Henley, for appellees.

SMITH, J. On June 10, 1929, the tract of land involved in this litigation was sold by the collector of taxes for Boone County for the nonpayment of the taxes due thereon for the year 1928. Pursuant to this sale the clerk of the county court executed and delivered to the tax purchaser his tax deed on July 16, 1931. This suit was brought to cancel that deed. There were allegations of a tender of taxes, etc., supported by a proper and sufficient affidavit.

The sale was attacked upon numerous grounds. We do not consider all the irregularities alleged in the assessment of the land for taxation or the proceedings incident to its sale. Having found that the sale was void for the reason herein stated, it is unnecessary to consider whether it was not also invalid for other reasons alleged.

It appears that § 10,084, Crawford & Moses' Digest, was not complied with. This section reads as follows: "The clerks of the several counties of this State shall cause the list of the delinquent lands in their respective counties, as corrected by them, to be published weekly for two weeks, between the second Monday in May and the second Monday in June in each year. Such list of delinquent lands shall be published in some newspaper of the county, if any be published therein; if not, in some newspaper published nearest to said county having a circulation in such county. He shall also keep posted up in or about his office such delinquent list for one year."

Numerous cases have held that noncompliance with the provisions of this section invalidates the sale, and the testimony of the county clerk discloses the fact that there was a failure to comply therewith. *Byrne* v. *Less,* 92 Ark. 211, 122 S. W. 635; *Walter* v. *Swaim,* 107 Ark. 242, 154 S. W. 511; *Wolf & Bailey* v. *Phillips,* 107 Ark. 374, 155 S. W. 924; *Earl* v. *Harris,* 121 Ark. 621, 182 S. W. 273.

The court should therefore have held the sale invalid, and should have canceled the tax deed as prayed, upon compliance with the tender which the complaint alleges was made.

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

TORRENCE *v.* BENTON.

4-3564

Opinion delivered October 29, 1934.

S. F. Morton, for appellants.

W. R. Benton, pro se.

MEHAFFY, J. On March 30, 1933, W. W. Torrence and Sophronia Torrence presented their claim for $416 against the estate of Elizabeth Jordan, deceased, in due form to W. R. Benton, administrator, for allowance and classification. The claim was disallowed by the administrator, and notice waived, and claim presented to the probate court for allowance and classification. There was a trial by a jury in the probate court, and a verdict and judgment in favor of claimants for the amount of said claim.

On May 4, 1933, the appellee filed with the clerk of the Dallas County Probate Court an affidavit and prayer for appeal. There is no evidence showing that an appeal was ever allowed by the probate court.

On November 21, 1933, there was a trial before a jury in the Dallas County Circuit Court, and judgment rendered for appellee. It is the contention of the appellants that this judgment is void, because the circuit court never acquired jurisdiction of the case. The only question therefore for our determination is whether the circuit court had jurisdiction.

The appellant cites § 2258 of Crawford & Moses' Digest, which provides, among other things, that the probate court shall order an appeal.

Attention is called to the case of *Matthews* v. *Lane,* 65 Ark. 419, 46 S. W. 946. In that case there was a motion filed to dismiss the appeal, and the court held that no appeal had been granted, and the appeal was thereupon dismissed. It appears from the above case that no appeal was granted, and the court correctly held that it should be dismissed.

This court has repeatedly held that, in order to give the circuit court jurisdiction, the probate court must grant the appeal.

In the case of *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 854, the court held that the granting of the appeal by the probate court was a prerequisite to the right of the court to exercise jurisdiction. In that case the claim was for $95.25. This amount was not sufficient to give the circuit court original jurisdiction.

In all matters of contract, the justice of the peace court has jurisdiction exclusive of the circuit court, where the amount in controversy does not exceed $100. In matters of contract where the claim is less than $100, the circuit court has no jurisdiction.

In the case of *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. (2d) 36, the probate court had granted the appeal, but it was contended that it had not been granted within the time allowed by law. Moreover, there was a motion made to dismiss the appeal because not taken in time, and this court said: "The record does not show

whether or not any evidence was introduced on the motion in the circuit court; and, in the absence of such showing from which this court might determine whether or not the circuit court abused its discretion in overruling the motion to dismiss, every presumption that it was correct must be indulged."

The question we have now was not involved in that case, because there the court granted the appeal.

If the case is such that the probate court has exclusive original jurisdiction, and the circuit court does not have original jurisdiction, then, under the decisions of this court, the appeal must be granted by the probate court, or the circuit court will acquire no jurisdiction. On the other hand, if the circuit court has original jurisdiction of the subject-matter, and the parties appeal and do not object to jurisdiction, they will be bound by the judgment rendered by the circuit court.

In this case the claim was for $416, and the circuit court had jurisdiction of the subject-matter. The parties appeared, tried the case, no objection was made to the jurisdiction of the court, and the judgment rendered was binding on the parties.

There is no question but what the circuit court had jurisdiction of the subject-matter. It is true that our statute says that a suit is begun by filing a complaint, and causing a summons to be issued. While a suit is begun in this manner, it does not follow that the case may be tried, because the summons might never be served, and the court might not acquire jurisdiction of the person.

We recently said: "A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of the court for all other purposes. In other words, he must limit his appearance to that particular question, or he will be held to have appeared generally and to have waived his objection. If he takes any step consistent with the hypothesis that the court has jurisdiction of the cause and the person, such special appearance is converted into a general one, whether it is limited in its terms to a special purpose or not." *Fed-*

eral Land Bank of St. Louis v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696.

The court also said in the above case: "But one cannot come into court, assert a claim, ask the court for affirmative relief, and then, when there is an adverse judgment, claim that the court had no jurisdiction over his person. If this could be done, the appellant would have the opportunity and advantage of prosecuting its claim and, in case it recovered judgment, it could collect, and at the same time take no chances of a judgment against itself."

What we have said applies in cases where the circuit court has original jurisdiction of the cause of action. If the circuit court's jurisdiction depended on the jurisdiction of the lower court, then no jurisdiction would be acquired by the circuit court unless the appeal was allowed by the probate court.

The Ohio court said, in a case appealed from the probate court: "It does not appear that any objection was made because of any lack of jurisdiction in the circuit court to hear and determine the issue, nor was there any objection respecting the way in which the controversy reached that court. Indeed, it seems to be conceded that the circuit court is a court of general jurisdiction, thus possessed of power to pass upon its own jurisdiction, having also chancery powers; and such we understand to be the fact. The parties, therefore, were then in a court which, according to the theory of plaintiffs in error, was such a court as should have been resorted to in the first instance. In that court the parties joined issue, and the cause went forward to final judgment. How can the parties who then entered their appearance at the trial and submitted their controversy be heard now to dispute the jurisdiction of that court? We think they cannot. That the cause got into that court by appeal from a court which had not jurisdiction of it (if that be the case), rather than by original pleadings and process, was, after all, but an irregularity, not affecting any substantial right, and one which was waived." In re *Crawford,* 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648.

"Within its limitations respecting subject-matter, a Federal court is a court of general jurisdiction. If organic power to hear the controversy exists, it is immaterial when or how the parties get into court; it is enough if they do come in and waive all preliminaries to the submission of their controversy. And so we deem in point those authorities from State courts which hold that, although the trial court acquired no jurisdiction by the removal of the case on appeal from an inferior court, yet, the trial court having jurisdiction of the subject-matter, the judgment would be sustained because the parties had voluntarily joined in submitting their controversies for decision." *Toledo, St. L. & W. R. Co.* v. *Perenchio,* 205 Fed. 472.

"Where a cause of action is within the general jurisdiction of a court, the voluntary appearance of the parties and submission of the cause on its merits confers jurisdiction to try the issues presented." *Rio Vista Mining Co.* v. *Superior Court of Plumas County,* 187 Colo. 1, 200 Pac. 616.

"It is also a well-established rule that, in cases appealed from an inferior court to a superior court having appellate jurisdiction only, the appellate court acquires such jurisdiction as the inferior court had. * * * In cases of this kind the weight of authority holds that where parties on appeal to a court having original jurisdiction of the subject-matter of the action have, without objection, as in the case at bar, submitted their controversy to the court for trial and adjudication, and the cause proceeds to trial and final judgment, they will be held to have waived their right to object to the jurisdiction of the court to which the appeal is taken." *Burt & Carlquist Co.* v. *Marks,* 53 Utah 77, 177 Pac. 224.

It appears that the weight of authority is to the effect that where the circuit court has original jurisdiction of the subject-matter, and the parties appear and try their cases without objection, it is immaterial how the court acquired jurisdiction. *Purnell* v. *Nichol,* 173 Ark. 496, 292 S. W. 686.

The judgment of the circuit court is affirmed.

BAKER, J., (dissenting). The opinion of the court is not supported by authority. It would seem from an analysis of the opinion that the amount sued for, $416, an amount that is within the jurisdiction of the circuit court, is the controlling factor in a determination of the validity of the judgment, appealed from to this court.

The circuit court would have jurisdiction of the amount when that jurisdiction is properly invoked, either by the filing of a suit in the circuit court, according to the usual or statutory processes provided by law, or that jurisdiction may be invoked by an appeal, in cases of this kind, from an order of the probate court.

Sections 34 and 35, article 7 of the *Constitution of* 1874, are as follows:

§ 34. "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law. The regular terms of the court of probate shall be held at the times that may hereafter be prescribed by law.

§ 35. "Appeals may be taken from judgments and orders of the probate court to the circuit court under such regulations and restrictions as may be prescribed by law." These constitutional provisions and § 2258 of Crawford & Moses' Digest, which is the statute governing appeals from the probate court, provide a method of invoking the jurisdiction of the circuit court upon an appeal from an order and judgment of the probate court. It is exclusive.

Said § 2258 is as follows:

"Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court, and upon the filing of such affidavit the court shall order an appeal at the term at which such judgment or order shall be rendered, or at any term within twelve months thereof.

The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because he verily believes that he is aggrieved, and is not taken for the purpose of vexation or delay. And any heir, devisee, legatee or judgment-creditor of an estate, who feels aggrieved, may at any time within six months after the rendition thereof prosecute an appeal to the circuit court from any final order or judgment of the probate court by filing an affidavit and prayer for appeal with the clerk of the probate court together with a bond to pay the costs of the appeal if the judgment of the probate court is affirmed, and upon the filing of such affidavit and [bond] for the cost to be approved by the clerk, the court shall make an order granting the appeal at the term at which said judgment or final order shall be rendered or at any term within six months thereafter. And any such heir, legatee, devisee or judgment-creditor of an estate may likewise, upon executing bond for costs, prosecute an appeal to the Supreme Court from the circuit court."

The instant case is distinguished in the opinion from the case of *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 854, by reason of the fact that in the Speed case the amount involved was $95.25, which was not sufficient to give the circuit court original jurisdiction. Therefore, it must have reached the circuit court, if at all, by proper appeal.

In the case of *Matthews* v. *Lane,* 65 Ark. 419, 46 S. W. 946, there was a motion filed to dismiss the appeal. But both these cases reached the Supreme Court by appeals from judgments of the circuit court in which the parties in each case took part in the trials.

In the case of *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. (2d) 36, it was contended that the appeal had not been granted within the time allowed by law, and the motion was filed in that case to dismiss the appeal because it was not taken in time. The circuit court overruled that motion, and, the evidence offered upon the motion not having been brought forward in the bill of exceptions, the Supreme Court had to indulge the presumption that the trial court was correct, and it furnishes no authority or basis for the new theory advanced in this case.

In the case of *Matthews* v. *Lane, supra,* the note sued on was for $1,000 and was filed for allowance in the probate court. The claim was disallowed in the probate court, and Matthews attempted to appeal to the circuit court, and there, upon motion of Lane, his appeal from the probate court was dismissed. Matthews did not take proper steps to bring up the record to show his appeal was proper, but he appealed from the order of the circuit court, dismissing his appeal. Lane's motion to dismiss the appeal is not set out in this case, but, if the suit had been filed in the circuit court originally, and Lane had filed a motion to dismiss for want of jurisdiction, it would have been an entry of appearance, and he would have then been required to answer.

In the case of *Tharp* v. *Barnett,* 93 Ark. 263, 124 S. W. 1027, this court construed the section providing for appeals in probate court, using this language: "The law is analogous to that governing the procedure in appeals from justice to circuit courts and from circuit courts to this court under similar statutes." The court held further in that case that the circuit court being without jurisdiction, it was error to render judgment for costs.

Causes rightfully originating in the probate court may reach the circuit court only by appeal. To that proposition we all agree.

In the case of *Walker* v. *Noll,* 92 Ark. 148, 122 S. W. 488, a formal affidavit was tendered by the attorney, who handed to the probate clerk an affidavit, proper in form, signed by himself with the remark: "I will swear to this," and without further formality left the office. The circuit court held this affidavit sufficient and tried the case upon its merits. This court reversed that case, for the reason that the appeal was not perfected under the provisions of the statute governing appeals from the probate court to the circuit court and upon the theory that the affidavit was not properly presented to the court, and that no order granting an appeal was made after the filing of that instrument. The amount in controversy in that case is not shown by the opinion. It seems not to have made any difference. The court said: "The direct

matter involved in the hearing of the appeal from this order was whether the appeal was taken in the manner prescribed by law. It was not therefore a collateral attack of that order." This court reversed that case with directions to dismiss the appeal. Numerous cases of this court have held that the affidavit and prayer for appeal from the judgment of the probate court do not invest the circuit court with jurisdiction unless the appeal be also granted by the probate court. *Neale* v. *Peay,* 21 Ark. 93; *Crow* v. *Hardage,* 24 Ark. 282; *Hanna* v. *Pitman,* 25 Ark. 275; *Love* v. *McAlister,* 42 Ark. 183.

In the case of *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 854, Justice HART said this: "The record shows J. C. Speed filed an affidavit and prayer for appeal in the usual form to the circuit court, but it does not show that the probate court made an order granting the appeal. This was necessary in order to give the circuit court jurisdiction." Citing Kirby's Digest, § 1348; *Matthews* v. *Lane, supra.*

"This court has held that the appellee may waive the want of an affidavit for appeal in the circuit court by failing to move to dismiss. *James* v. *Dyer,* 31 Ark. 489. The reason is that the affidavit and prayer for appeal is a regulation for the sole benefit of the appellee. But the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason cannot be waived. It follows, therefore, that the circuit court should have dismissed the appeal because no order of the probate court granting it was made, and for this error the judgment will be reversed, and the cause remanded with directions to the circuit court to dismiss the appeal for want of jurisdiction." In that case there is no showing that any motion was ever made to dismiss the appeal in the circuit court.

It is true this was an appeal from a case in which the probate court had exclusive jurisdiction, a matter of the guardian's settlement, but the parties entered upon a trial in the circuit court without objection, as in the instant case. A judgment was rendered for $126, and Speed appealed to this court. He was also the ap-

pellant from the probate court. He attempted to invite the jurisdiction of the circuit court, the appellee tried the case there with him, was satisfied with it, did not raise the question of jurisdiction, and this question was apparently raised for the first time in the Supreme Court.

In the case of *Williams* v. *Bowen,* 116 Ark. 266, 170 S. W. 221, in a controversy over a will, in which the probate court, of course, had exclusive original jurisdiction, the executor and other legatees, as stated by Chief Justice McCulloch, attempted to prosecute an appeal to the circuit court. They filed an affidavit with a transcript of the proceedings and lodged them in the circuit court, but the record did not disclose any affidavit or prayer for appeal to the probate court, or any order of that court granting an appeal. No motion was made below to dismiss the appeal, but the cause proceeded to trial before the court sitting as a jury, and it was insisted, for the first time, in the Supreme Court, that the judgment of the circuit court should be reversed for lack of jurisdiction, and it was urged by the appellees that this objection was waived by the parties proceeding to trial without moving to dismiss the appeal. The Chief Justice certainly had in mind that there was but one method of appealing from the probate court when he wrote the opinion. He says: "This question was expressly decided by this court in the case of *Speed* v. *Fry, supra,* where we said that 'the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason cannot be waived.' Other decisions of this court bearing on that question are cited in the opinion." He also cited the case of *Drainage District No. 1* v. *Rolfe,* 110 Ark. 374, 161 S. W. 1034. That case was tried in the circuit court on appeal from the county court and in that case the matter of jurisdiction was raised in the Supreme Court for the first time. It is true that in *Williams* v. *Bowen, supra,* and *Drainage District No. 1* v. *Rolfe, supra,* original exclusive jurisdiction was in the probate court and county court, respectively.

In the case of *Mississippi County* v. *Moore,* 126 Ark. 211, 190 S. W. 110, Justice HART, in reversing the case, in his discussion said in argument: "Section 1348 of Kirby's Digest provides that appeals to the circuit court from the probate court shall be granted by the probate court. In construing this statute in the case of *Speed* v. *Fry, supra,* the court held that the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason cannot be waived. This rule was reaffirmed in the case of *Williams* v. *Bowen, supra.* The court held that it was the duty of the circuit court to dismiss the appeal for want of jurisdiction."

With all deference to the greater experience of my associates, the writer begs leave to offer the following suggestions:

The jurisdiction of courts in this State is fixed by the Constitution and the laws of the State. It is not sufficient to say that the circuit court has jurisdiction of a certain class of cases merely because the amount, as fixed by the Constitution or law, is sufficient. There are always steps to be taken by one who wishes to invoke that jurisdiction. In the circuit court there must first be filed a complaint. The defendant may be brought in by service or process, or he may enter his appearance. On appeals from justice of the peace courts, municipal courts, probate and county courts, certain things must be done to invoke or call into action the jurisdiction of the circuit court. The circuit court can no more act upon these appeals unless proper steps are taken to invoke the exercise of that appellate jurisdiction by the circuit court, than it can in cases in which it has original or exclusive jurisdiction without proper procedure.

The statute prescribes a definite, certain, and complete method of perfecting appeals from the probate court. Unless this method be substantially followed, the circuit court is without power to exercise that jurisdiction. If there be an exception, it would have, in all probability, been suggested at some time.

We are saying now, in this opinion the writer is criticising, that one who desires to take advantage of

the fact that an appeal was not granted by the probate court must carefully prepare his motion, objecting solely to jurisdiction and reserving his rights thereunder, or he will be deemed to have entered his appearance and must go to trial, provided the amount in controversy be in excess of $100. In all of these appeal cases heretofore determined in this court, a motion to dismiss has been treated as the proper pleading, but by this new method of appeal, if it be an appeal, one dare not make a motion to dismiss without specially reserving his rights, for, if he should fail to do so, it will be treated as an entry of appearance. We so held in a *per curiam* opinion rendered in the case of *Crain* v. *St. Francis Levee District, ante* p. 721, and cited as authority therefor *Federal Land Bank* v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696. Such must be the ultimate result of the opinion in this case when it is followed as a guide for future procedure.

It is unnecessary to cite authorities showing that the probate court is a court of superior jurisdiction. In the probate court a judgment was rendered. Under the statute there has been no appeal prayed for or granted, and that judgment is necessarily in force and effect. In the circuit court of Dallas County another judgment has been rendered on the same cause of action. Under the opinion rendered, that judgment is valid, and it must be conceded that it was not rendered on appeal from the probate court, because the decision is based upon the proposition of the original jurisdiction of the circuit court and not upon the matter of appellate jurisdiction from the probate court.

We therefore have the anomalous situation of two judgments relating to the same subject-matter. The first of which is impervious to collateral attack. It has not been attacked by appeal. The time to appeal from the judgment has probably expired. The second judgment, that of the circuit court, has no more vital force than the probate court judgment. The supervising power of the circuit court is exercised by appeal. The circuit court has no more power to reach over into the probate court and settle this controversy than has the probate court to pluck from the files of the circuit court the cause

pending there. Shall we now create a new remedy, judicial in character, to correct this obvious error?

It is of no importance to the public generally as to how this case is settled. It is of the greatest importance to the members of the legal profession and to their clients to understand whether we shall follow the time-honored processes prescribed by statute. The circuit court should have dismissed the purported appeal upon its own motion. A failure to do that did not, and could not, give jurisdiction. We are dealing with a shadow that had no substance to produce it.

Mr. Justice BUTLER concurs.

BALL *v.* BALL.

4-3573

Opinion delivered November 12, 1934.

Oscar E. Williams, for appellant.

Bernal Seamster, for appellee.

SMITH, J. James P. Ball filed suit on October 5, 1933, in the Washington Chancery Court against Lina M. Ball, his wife, for divorce, and alleged her desertion of him as the ground therefor. A decree was rendered as prayed in March, 1934, from which is this appeal.

An answer was filed in which Mrs. Ball denied that she had deserted her husband. She alleged that, on the contrary, her husband had, without cause and against her wishes, deserted her, and that she had been at all times, and was now, willing and desirous to resume the marital relation. She pleaded also, in bar of the suit, the judgment of the circuit court of Jackson County, Missouri, at Kansas City, in which her husband had been denied a divorce. That court was alleged to be a court of competent jurisdiction, having jurisdiction of the subject-matter of the suit and of the parties thereto, and that the final judgment of the court, rendered on the merits of the case after a full hearing on June 23, 1933, denied Mr. Ball's prayer for a divorce. A copy of all the pleadings and proceedings in that case, duly authenticated, was offered and admitted in evidence at the trial from which this appeal comes. *Hall* v. *Roulston,* 70 Ark. 343, 68 S. W. 24.

In the complaint or petition for divorce filed in Missouri it was alleged that the parties were married December 4, 1916, in Norwalk, Connecticut, and lived together as husband and wife until June, 1924, since which time they have lived separate and apart, and that Mrs. Ball had offered such indignities to her husband as to render his condition as her husband intolerable and made it impossible for them to live together, the details of which allegations need not be stated. It was also alleged that the petitioner's business required him to establish his abode at various places throughout the country for long periods of time, and, although he requested his wife to accompany and remain with him, she refused to do so and insisted on remaining at the home of her mother in Norwalk, Connecticut, remaining away from him continuously since June, 1924, notwithstanding the fact that he had discharged all his duties as a husband and had treated his wife with kindness and affection.

In the suit filed in this State a decree was prayed on the sole ground of desertion, a fact which was sufficiently alleged in the complaint, and testimony was offered to support that allegation.

As opposed to the plea of *res judicata*, it is insisted that the second suit for divorce—the one filed in this State—is upon a different cause of action from the one alleged in the Missouri suit, and, as appellee insists, "the causes are contradictory," and, this being true, the former suit bars only the cause of action there relied upon and does not bar a cause of action then existing but not then and there adjudged.

It is insisted that desertion was not relied upon as a cause of divorce in the Missouri suit, for the reason that the complaint did not allege that the absence was without reasonable cause, whereas that allegation and proof thereof is essential, under the laws of Missouri, to obtain a divorce on the ground of desertion. *Freeland* v. *Freeland*, 19 Mo. 354; *Hoffman* v. *Hoffman*, 43 Mo. 547; § 1801, Revised Statutes of Missouri, 1919.

In answer to this insistence, it may be first said that we do not construe the complaint filed in Missouri as being deficient in this respect. By fair intendment the allegations thereof do charge an absence from the husband during a long number of years, and without reasonable cause, and desertion was therefore alleged, although the proof in that case was directed, not to that charge, but to the charge of indignities rendering the condition of the husband as such intolerable. However, there is no allegation or proof in the instant case of any change in the situation or relations of the parties to each other since the rendition of the decree in Missouri. If the husband is entitled to a divorce now on the ground of desertion, he was entitled to it for the same reason when the Missouri decree was rendered.

It is true we held in the case of *McKay* v. *McKay*, 172 Ark. 918, 290 S. W. 951, that, if one spouse leaves another without cause and absents himself or herself from the innocent spouse for a year or more, a complete cause of action for divorce arises, which the offending spouse may not destroy by an offer, even though made in good faith, to resume the marital relation. But no such question is presented here. The husband has those causes of action which existed then, and none other.

It is conceded, of course, that full faith and credit must be given by us to the decree of the Missouri court. It could not be otherwise in view of § 1 of article 4 of the Constitution of the United States, which requires that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

In the famous and leading case of *Haddock* v. *Haddock,* 201 U. S. 562, which involved the validity in one State of a decree for divorce rendered in another, it was held (to quote a headnote) that: "The requirement is not that some, but that full, faith and credit, equal to that to which it is entitled in the State where rendered, shall be given to a judicial decree of another State." See also *Harding* v. *Harding,* 198 U. S. 317.

In the case of *Viertel* v. *Viertel,* 99 Mo. App. 710, a headnote reads as follows: "The husband brought divorce on the ground of adultery with D. His bill was dismissed on the ground of connivance. *Held,* such connivance would not be a complete bar to a subsequent bill for adultery with C committed after the dismissal, or for adultery with P committed prior to the former suit of which the husband had no knowledge at that time, but such judgment of dismissal bars an action for adultery with P, since it might have been raised and litigated in the former action." In the body of the opinion it was there said: "The court found that plaintiff at the time he brought his first suit was unaware of the former infidelity. We have examined the testimony, and it does not appear that any evidence was offered to show such fact. The plaintiff himself failed to state whether or not he was in possession at said time of any knowledge of such prior adultery. It devolved on him to prove that, at the time he brought his said former suit for divorce, he included his whole case, and he will not be permitted to open up the same subject of litigation in respect to matters which might so have been brought forward. 'All the issues that might have been raised and litigated in any case are as completely barred by the final decree therein as if they had been directly adjudicated and included in the verdict.' *Donnell* v. *Wright,* 147 Mo. 639,

49 S. W. 874. Under the rule the plaintiff was not entitled to a decree against his wife for the alleged act of adultery with said Parker, as it was a matter for litigation in said former suit."

It would appear to follow from this holding that the courts of Missouri would not now grant Mr. Ball a divorce for desertion, inasmuch as that cause of action existed and was known to him, if true at all, at the time of the trial in Missouri, and nothing has since occurred to confer a cause of action which did not then exist. See also *Searcy* v. *Searcy*, 196 Mo. App. 311, 193 S. W. 871.

We have many cases holding the judgments of courts of competent jurisdiction of other States to be conclusive as to the merits of the original cause of action. Among others are these: *Glass* v. *Blackwell*, 48 Ark. 50, 2 S. W. 257; *Jordan* v. *Muse*, 88 Ark. 587, 115 S. W. 162; *Taylor* v. *Bacon*, 102 Ark. 97, 142 S. W. 1128; *Albright* v. *Mickey*, 99 Ark. 147, 137 S. W. 568; *Ederheimer* v. *Carson Dry Goods Co.*, 105 Ark. 488, 152 S. W. 142; *Rice* v. *Metropolitan Life Ins. Co.*, 152 Ark. 498, 238 S. W. 772; *Hartford Fire Ins. Co.* v. *Citizens' Bank*, 166 Ark. 551, 266 S. W. 675; *Miller* v. *Brown*, 170 Ark. 949, 281 S. W. 904.

The question here presented is not a novel one. The case of *Averbuch* v. *Averbuch*, 80 Wash. 257, 141 Pac. 701, is reported in Ann. Cas. 1916B, and, with the annotations, extends from page 873 to page 920 of that report, and reference is made to it for the use of any one desiring an exhaustive review of the subject. In the body of that opinion a number of cases are cited in support of the statement there made, that: "It is elementary law that, in divorce actions, as in all others, a judgment is final and conclusive upon all questions which were or might have been litigated," and the annotations cite many other cases to the same effect.

We have many cases in our reports announcing the same principle. A late case citing a number of others is that of *West Twelfth Street Road Imp. Dist.* v. *Kinstley*, *ante* p. 120, 70 S. W. (2d) 555, in which it was said: "The settled rule of this jurisdiction supported by the weight of authority is that a judgment of a court of competent jurisdiction is conclusive of all questions, legal or

equitable, which were raised in the cause or which, being within the scope of the issue, could have been interposed.'' (Citing cases.)

Our cases of *McKay* v. *McKay,* 172 Ark. 918, 290 S. W. 951, and *Butts* v. *Butts,* 152 Ark. 399, 238 S. W. 600, are cited as sustaining the contention that a denial of a divorce upon one ground is not a bar to a suit for divorce upon a different ground, although the latter cause existed and was known when the first suit was determined. But such is not their effect. In the McKay case, *supra,* it was said: ''We think the present suit of appellant is not barred by the decree in the first suit, for the reason that she alleges a different cause for divorce, one which could not have existed when she filed her first suit—that of desertion—as the parties had not been separated a year when the first suit was commenced. 1 Nelson on Divorce and Separation, § 555. In other words, a denial of a decree upon a particular ground is no bar to a suit for divorce upon a cause of action which subsequently arose. But, as has already been said, no new cause of action, not existing at the time of the rendition of the decree in Missouri, was alleged or proved.

In the Butts case an appeal from a decree of divorce was dismissed for the reason that the appellant had remarried after the divorce had been granted, and it was held, for that reason, that the appellant had forfeited her right to appeal to this court to correct the alleged error of granting the divorce. Attention, however, was there called to the fact that the Louisiana court which had granted a divorce *a mensa et thoro,* pleaded in bar of the suit for divorce in this State, was without jurisdiction to render a decree for an absolute divorce, for the reason that, under the practice in Louisiana, an absolute divorce cannot be rendered on constructive service of process, as had been there prayed. But, as has been said, there is no question about the jurisdiction of the Missouri court to have granted an absolute divorce for either the indignities or the desertion.

Inasmuch as the decree of the Missouri court bars the present suit, it becomes unnecessary to review the case on its merits. We may say, however, that, in our

opinion, the testimony does not establish the fact of desertion on the part of Mrs. Ball. On the contrary, in our opinion, he is the offending spouse in this respect.

Having held that Mr. Ball is not entitled to a divorce, and that the decree granting the divorce should be reversed, we are now asked to make an order allowing Mrs. Ball an attorney's fee and the costs of the suit, and also a provision for her support and maintenance. We heretofore allowed a hundred dollars as expense money, reserving the questions of attorney's fee and costs until the final disposition of the cause. It is now shown that, since the trial of the case in the court below, Mr. Ball's income has been very greatly increased through the death of his father; but the facts in relation thereto were not developed at the trial, and we are therefore of the opinion that this feature of the case should be heard and fully developed in the court below, where appropriate orders may be made for Mrs. Ball's support.

The litigation appears to have been protracted and expensive, and it is now ordered that all the costs thereof, including the costs on the appeal, be assessed against Mr. Ball, and he is further ordered to pay her attorney the sum of $250 as his fee in this case to this date.

The decree of the court below will therefore be reversed, and the cause remanded with directions to set aside the decree from which this appeal came, and for further proceedings in accordance with this opinion.

MORGAN *v.* STATE.

Crim. 3906

Opinion delivered November 12, 1934.

Jeff Bratton, for appellant.

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

MEHAFFY, J. The appellant, Anthony Morgan, was indicted, tried and convicted of the crime of assault with intent to rape, and his punishment fixed at three years in the penitentiary. To reverse the judgment of conviction, he prosecutes this appeal.

His first contention is that the court erred in not granting him a postponement of the trial. He was indicted on the 15th day of May, 1934, and his trial was had on May 22, 1934.

The crime was alleged to have been committed on the 23d day of January, 1934, approximately four months before the trial. Appellant was immediately arrested, and waived a preliminary hearing. He had all that time to employ counsel, and he need not have waited until the indictment was returned before employing counsel. This court said: "We must repeat the settled rule that motions for continuance are addressed to

the sound discretion of the trial judge, and a refusal to grant such a motion is not ground for a new trial unless it clearly appears to have been an abuse of such discretion and manifestly operated as a denial of justice." *Hamilton* v. *State*, 62 Ark. 543, 36 S. W. 1054. Moreover, the motion to continue did not comply with the statute, and we think the court did not abuse its discretion in refusing a continuance.

It is next contended that the evidence is insufficient to justify the conviction. In testing the legal sufficiency of the evidence to support the verdict, we must view the evidence for the State in the light most favorable to it, and if that evidence is legally sufficient to support the verdict it cannot be disturbed on appeal. This court, in commenting on this rule, stated: "The reason is that the jury are the judges of the credibility of the witnesses, and have decided that question in favor of the State by returning a verdict of guilty. Hence we need only to refer to the evidence adduced in favor of the State." *Begley* v. *State*, 180 Ark. 267, 21 S. W. (2d) 172.

The prosecuting witness, Lurleen Burks, a fourteen year old girl, and her twin sister, attended a party on the night of January 23, 1934, at the home of Boon McDonald, in Greene County, Arkansas. Kathleen Burks, the twin sister of the prosecuting witness, met Galen Hatcher at the party, and made a date with him to take her to her sister's home after the party. When the party broke up, Kathleen Burks got in Hatcher's car, and her sister got in the car with them. Kathleen Burks was seated next to Hatcher, and Lurleen was sitting on her right. As they started to drive off the appellant appeared and requested Hatcher to let him ride. Hatcher replied that it was all right with him if it was with the girls, whereupon Lurleen Burks objected to his going. The appellant said he was going to the corner and climbed into the car. The prosecuting witness testified that she then sat on her sister's lap, and that the appellant afterwards pulled her over into his lap. They then started toward the home of Lurleen's married sister, but turned off that road. When they got a half-mile or three-quarters be-

yond the home, he stopped and asked Lurleen to have intercourse with him, and she told him she would not. He said: "Yes, you will, too" and she again said she would not. About this time the prosecuting witness looked back and saw Vernon Drafton in the rumble seat, and he got out, came around and asked the appellant for his overcoat. Appellant gave Drafton his overcoat, and Drafton then got back into the rumble seat. Lurleen testified that the appellant had his clothes down, and got one of her bloomer legs off, and exposed his private parts, pulled her dress up, and had her down in the seat holding her, and that he really tried to have intercourse with her then. At this time the sister of the prosecuting witness got out and ran to Mr. Hopkins' house. Lurleen then got out of the car, and she and her sister walked to the home of her married sister about a half-a-mile, and did not see the boys any more that night. The testimony on the part of the State showed that appellant was wrestling with Lurleen, trying to push her down on the seat underneath him, and all the time Lurleen was trying to get him to quit and tried to push him off of her, but she could not. It appears from the evidence that he did not desist until the twin sister had gotten out of the car and gone to Mr. Hopkins' house, and then Lurleen was permitted to get out of the car and go, and her clothing was torn, and after the girls got out the boys drove away. The Hatcher boy was attempting the same thing with Kathleen that the appellant was with Lurleen.

The evidence on the part of the defendant goes to show that he did not use any force; but it also shows that, while he was trying to get her to have intercourse with him, he did not desist until the sister had gotten out of the car and gone to the Hopkins' house, and then they drove away. The appellant testified and said that it was not his car, but was Hatcher's car, and he got in with them to ride, and asked one of the girls to sit in his lap, admitted that he talked with her about having intercourse, admitted that Hatcher and the other girl left the car, and when Hatcher came back with the other girl she jerked loose from him and ran to the house, and Hatcher then told appellant to let Lurleen out of the

car, and they let her out and then turned the car and left.

Hatcher was put on the stand, but declined to answer questions because it would incriminate himself. It appears from the record that he is a co-defendant, that is, he was called a co-defendant, and is probably indicted in a separate indictment.

The evidence is not entirely satisfactory, but the jury may have concluded that he intended to have intercourse with her against her will, and desisted only because the twin sister escaped and appellant thought that other parties would be notified. At any rate, these were questions for the jury, and not for this court. This court has said: "The evidence is far from satisfying, but we cannot say that it is not legally sufficient to sustain the verdict. * * *." The jury has passed upon her evidence, and we cannot say it is not legally sufficient to support the verdict." *Gray* v. *State,* 125 Ark. 272, 188 S. W. 820. This court said in a very recent case: "It is well settled that an assault with intent to rape is an effort to obtain sexual intercourse by force and against the will of the person assaulted, and the intent is to be ascertained from the commission of some act or acts at the time or during the progress of the assault. The force actually used need be of no specific degree or character, but comes within the meaning of the law if it is reasonably calculated to subdue and overcome; nor need it be persisted in until the assailant's design is accomplished; if the assault is actually begun and the intent can be inferred from the acts committed, the offense is complete, notwithstanding the fact that the assailant may, for some reason, relent and forbear from the consummation of his purpose." *Boyett* v. *State,* 186 Ark. 815, 56 S. W. (2d) 182.

It is finally contended that the court erred in refusing to give instruction No. 1 requested by appellant. That instruction reads as follows: "You are instructed that force is the essence of the crime of rape, and that persuasion and solicitation coupled with caressing and attempting to force the will of the female to consent to the act of sexual intercourse is not sufficient to justify a verdict of guilty."

The court did not err in refusing to give this instruction. It not only singles out certain testimony, but it also tells the jury that persuasion and solicitation coupled with caressing and attempting to force the will of the female is not sufficient to justify a verdict of guilty. If he were attempting to force her will, it could not be said as a matter of law that this was not sufficient to justify the jury in finding that he intended to have intercourse with her against her will. Besides, the court gave instruction No. 4, which fully states the law to the jury. They are told in that instruction that they must find from the evidence beyond a reasonable doubt that the appellant feloniously, wilfully and with malice aforethought did assault Lurleen Burks, with the intent to carnally know her, forcibly and against her will.

It appears that the jury were fully instructed as to the law and as to the sufficiency of the evidence, of which the jury, and not this court, is the judge.

We find no error, and the judgment is affirmed.

COCA-COLA BOTTLING COMPANY OF BLYTHEVILLE *v.* DOUD.

4-3578

Opinion delivered November 12, 1934.

Bruce Ivy and *Cecil Shane,* for appellants.

Luther H. Graves and *Harrison, Smith & Taylor,* for appellees.

BUTLER, J. The scene of the occurrence out of which this litigation grows is a village called Joiner, populated by three hundred and six persons, which straggles on either side of Highway No. 61 and a railway. Running at an angle across this highway is a gravel road, and at the intersection there is a large triangular space approximately 100 feet at its widest point. The highway runs through the village from northeast to southwest.

At about 3:30 o'clock on the afternoon of April 28, 1933, an automobile, driven by Miss Ruth Albrecht in which Mrs. Helena A. Doud was riding as a guest, in passing a truck operated by an employee of the Coca-Cola Bottling Company, was overturned. Both ladies were very seriously injured. To recover damages for these injuries, each brought suit against the company

on the theory that the negligent operation of the truck by its driver, Hendrix, was the proximate cause of the accident and the resulting injuries. William P. Doud and O. F. Albrecht also brought separate suits against the company, the first named to recover for doctor's bills and other expenses incurred by him in the treatment of Mrs. Doud, his wife, and the other for expenses incurred in the treatment of Miss Albrecht, his daughter.

The suits were defended on the theory that the accident occurred at the intersection of streets in the business district of the town which Hendrix, driving the truck of the company, was in, having entered the same in a prudent manner giving the proper signals and driving with due caution with regard to the traffic and use of the way; that the accident was the result of the negligence of the driver of the automobile; that it was being driven recklessly in the business district at an excessive rate of speed, rendering the driver unable to keep the car under control. The further defense was interposed that, if the driver of the truck was negligent, the driver of the automobile was also negligent by reason of her rapid and careless driving, and that her guest, Mrs. Doud, by acquiescing in the manner of such driving, was also guilty of negligence; that the negligence of the driver of the automobile and her guest directly contributed to the happening of their injuries.

The cases were consolidated for the purposes of trial, which trial resulted in a verdict and judgment in favor of each of the plaintiffs. On appeal no exceptions are taken as to the amount of the judgments.

It is first contended that the trial court erred in refusing to direct a verdict on the motion of the defendants, the contention being that the evidence failed to establish the negligence of the driver of the truck, and that, under the facts and circumstances proved, the casualty to the automobile was occasioned solely by the reckless driving of the same and the inattention of its occupants.

There is some conflict in the evidence relative to the movement of the truck immediately preceding the accident and a sharp and decided conflict in the evidence rela-

tive to the speed at which the automobile was being driven and the attention of its driver to the conditions of the road ahead.

On the west side of the highway north of the intersection where the gravel road crosses at an angle is a store occupied by Squire Holt. It was in front of this store slightly to the south on the east side of the highway that the automobile overturned. Just before the automobile appeared, being driven from the northeast to the southwest, the truck of the appellant company was parked parallel with the highway in a space between the west curb of the highway and the front of Holt's store, approximately in front of the middle door of the store. It appears that the truck was headed toward the south when parked. Hendrix testified that, when he started to leave Mr. Holt's place of business, he passed around the south end and in front of the truck, speaking to some persons as he did so; that he entered the truck from the side next to the highway; that he looked in each direction and saw no one approaching; that as he put his truck in movement he signaled with his left arm his intention to turn into the highway; that about the time he got the truck moving he heard a horn and stopped instantly; that he then observed Miss Albrecht's car about thirty or forty feet to the north going off the pavement so fast as to apparently be from under control. Witness stated that where the movement of his truck was being made was a very dangerous place, with which he was familiar; that the front of his truck at the time the Albrecht car was overturned was at about the center of the highway and that the automobile missed him about fifteen feet.

Hendrix's testimony was corroborated by that of some witnesses regarding the rate of speed at which Miss Albrecht's car was being driven, the estimated speed being from forty-five to fifty miles per hour.

The testimony of witnesses for the appellees tended to show that Miss Albrecht and Mrs. Doud were traveling at a moderate rate of speed entering the village from the north. Miss Albrecht stated that, before reaching the village, she was traveling at about forty miles an hour,

but slowed down on reaching it. She was corroborated by witnesses who stated that she was traveling at from thirty to thirty-five miles an hour after entering the village and that she slowed down as she approached Holt's store. The testimony further tends to show that, as Miss Albrecht was proceeding in this manner, the driver of the truck without warning made a sudden left turn directly into the highway and directly in front of the approaching automobile, which was sounding its horn.

In describing the situation thus presented, Miss Albrecht said: "As I approached the truck, I gave him a signal that I was going to pass. He turned out the least bit, and as I got closer to him he started to shoot out straight across the highway. At that point I realized that I was too close to apply my brakes. I have done a great deal of driving, and I saw the only chance I had was to turn in front of him, which I did, and he came right straight through and hit us. The collision made me lose control. We started to roll, and that is all I remember."

There was testimony corroborating Miss Albrecht's statement to the effect that right after the occurrence Hendrix, the driver of the truck, stated that he guessed he was at fault because he pulled out on the highway in front of them, and also testimony tending to show he was engaged in conversation with his friends as he entered the car, "gabbing" as one expressed. On this testimony the trial court submitted to the jury the question of the negligence of the truck driver in the manner of the movement of his vehicle and also the question of the contributory negligence of Miss Albrecht and her guest, Mrs. Doud. We think the testimony abundantly justifies the submission of those questions to the jury. The court properly refused to instruct a verdict in favor of the defendants.

Exceptions were saved to the giving of instructions Nos. 1 and 2 for the plaintiff. These are identical instructions with the exception that No. 1 submits to the jury the question, in Mrs. Doud's case, as to whether or not Hendrix drove the truck in question upon the highway in front of the oncoming car, and, if so, whether or

not it was negligence, and, if so, whether this caused or contributed to Mrs. Doud's injury. Instruction No. 2 presented the same question as it related to the case of Miss Albrecht. One of the objections urged was that if the jury should find the facts in the affirmative, that such were negligence and the proximate cause of the injuries, "then your verdict will be for the plaintiffs." The contention is that the expression, "then your verdict will be for the plaintiffs," offends against the rule stated in *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676, and other cases cited, which is that an instruction ending with the stereotyped "find for the plaintiff" is incomplete in that it ignores and leaves out the question of the defense of contributory negligence. These instructions, however, do not so conclude, but end with the phrase, "unless you should find for the defendants under other instructions given you." This, with the further instruction given by the court: "You are not to take any one instruction given you as the whole law of the case, but take them all together as such," differentiates these instructions from those criticized in the cases cited by the appellants.

It also appears that the appellants made a specific objection to these instructions "for the reason the jury might be misled into thinking that if he drove out there under any condition with a car coming from the north he would be guilty of negligence." This specific objection waived other specific grounds of objection. *St. L., I. M. & S. R. Co.* v. *Williams,* 105 Ark. 331, 151 S. W. 243; *Ark. & La. Ry. Co.* v. *Graves,* 96 Ark. 638, 132 S. W. 992; *Mo. Pac. Ry. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942.

Instruction No. 3 submitted the question of ordinary care of one suddenly confronted with an emergency created through the negligence of another, and instructed the jury that, if such person so situated makes a choice of a course of conduct to avoid the danger such as one of ordinary prudence, under similar conditions, might reasonably make, then there would be no negligence, even though it might subsequently appear that it would have been wiser to have chosen some other course of conduct.

It is urged that the giving of this instruction was error, because of the expression "although it may now appear that it would have been wiser for her to have chosen some other course," and other expressions of like character. We are of the opinion that the instruction correctly states the law. The general rule is stated in 42 C. J., page 890, as follows:

"Where the operator of a motor vehicle is by a sudden emergency placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and is not liable for injuries caused by his machine or precluded from recovering for injuries to himself or his machine if an accident occurs, even though a course of action other than that which he pursues might be more judicious, provided he exercises ordinary care in the stress of circumstances to avoid an accident." This is also, in effect, the rule announced in our own cases, one of the more recent being *Ark. Gen. Utilities Co.* v. *Oglesby,* 188 Ark. 564-6, 67 S. W. (2d) 180.

There were a number of instructions requested by the defendants which the court refused, which action of the court, it is argued, was error. We do not set out these instructions because to do so would unduly extend this opinion. It is sufficient to say that they were all based on the theory that at the time of the accident the driver of the truck was in, or entering, the intersection of Highway No. 61 with the gravel road which crossed it at an angle; that therefore he had the right of way and was not guilty of negligence in the movement of his truck. This theory is not supported by the evidence in the case. The plats of the locality and the measurements made by appellants' own witnesses show that the points on the highway entered by the truck on leaving Holt's store was not in, or at, the intersection of the highway with the gravel road, but was approximately one hundred feet to the north. Consequently, Miss Albrecht's car, at the time the truck turned on to the highway, was a still further distance to the north. The truck, instead

of turning into the intersection turned directly across Highway No. 61 north of the intersection and across that part of the highway along which Miss Albrecht's car was properly proceeding.

Instruction No. 8, requested by the defendants, told the jury that if, at the time the truck movement was made, its driver made the proper signal of the intended movement, which the driver of the automobile saw or which she could have seen had she been in the exercise of ordinary care in time to slow down or stop the automobile and thus avoid the injuries, she was bound to take notice of the signal and bring her car under control accordingly.

Instruction No. 9, requested by the defendants, instructed the jury as to the duty of a person operating an automobile upon a public highway, and that this duty required that the automobile be driven with due care at a prudent speed not greater than reasonable and proper, having due regard to the traffic and safety of others, and that the driver had no right to travel at a speed or in a manner as would endanger other persons or their property lawfully upon the highway.

The court gave these instructions except the concluding sentence of each. The sentence excluded from instruction No. 8 is: "And you are further instructed that it was her duty at the time to be driving the car at such reasonable speed and with such reasonable care that she could bring it under control." This sentence does not correctly state the true rule as to the control of a car by its driver, even though the driver was in, or entering, a highway intersection. The true rule is that the driver must have his car under such reasonable control as would enable him to avoid accidents which might be foreseen by the exercise of ordinary care.

Another objection which justified the court in striking these sentences from the two instructions is that they were grounded on the erroneous assumption that the injuries occurred at the intersection of highways which the truck driver was entering in a careful manner before the automobile had arrived at this intersection. Appellant calls attention to a number of our cases in which

the language is identical with the last sentence of instruction No. 9 excluded by the court in this case. This is true. In *Smith-Arkansas Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. (2d) 1052, the identical language was in fact, approved by the court and reference was made to the approval of the same statement by the court in *Madding* v. *State,* 118 Ark. 506, 177 S. W. 410. The statement of law was correct as applied to the facts in those cases, both of which involved a question of liability for injury caused by the movement of automobiles approaching street crossings in cities. The reason for the rule was thus stated in the Smith case, *supra:* "Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he can not be regarded or treated as exercising ordinary care."

In support of appellants' contention, a number of other cases of our court are cited, approving declarations similar to the one stricken from instruction No. 9, but all of these relate to the liability resulting from the movement of automobiles at street crossings in cities and the duty of the driver at such places, or when turning a corner; whereas, in the case at bar, as we have seen, the movement of the truck was not at a street crossing. It is apparent that ordinary care in one situation would be the grossest negligence in another and different situation. *Railway Co.* v. *Lewis,* 60 Ark. 409-13, 30 S. W. 765, 1135; *Railway Co.* v. *Triplett,* 54 Ark. 300, 15 S. W. 881, 16 S. W. 266. In a small village at a point on a highway one hundred or more feet distant from the intersection of that highway with another, the degree of care to be exercised and the rate of speed permissible is quite different from the care required and the proper rate of speed to be maintained in crowded cities at street crossings. It is not to be supposed that a driver of an automobile is required to drive at a rate of speed at all times as would enable him to stop immediately at any given time. If such were the rule, it would nullify that part of our statute making it lawful to travel at thirty-five miles an hour except in business districts at the

intersection of highways when the driver's view is obstructed and in turning corners; and also the further rule that a vehicle on a highway shall be driven at "a careful and prudent speed, not greater than is reasonable and proper having regard to the traffic, surface and width of the highway, and of any other conditions then existing."

Instruction No. 11 contained a part of our statutes relating to the manner in which automotive vehicles may be driven. The first subdivision of the statute given stated the rule quoted, *supra*. The remainder stated the different rates of speed, *prima facie* lawful, when approaching and traversing intersection of highways when the driver's view is obstructed, prescribes the circumstances under which the driver's view shall be deemed to be obstructed, prescribes certain rates of speed in a business district, the rate of speed permissible under all other conditions, and, in the concluding portion defines "business districts." Following the language of the statute, an application was sought to be made of its several provisions to the evidence in the case. The court refused to make the application requested, and correctly so. Much of the statute which the court gave at the request of the defendants has no application to the facts of the case at bar. As we have seen, the case did not involve an approach within fifty feet and a traverse of the intersection of the highways when the view of the driver is obstructed. There was no proof offered that the scene of the casualty was a business district within the meaning of the act. The court instructed the jury on the applicable portion of the statute in an instruction as favorable to the appellants as they were entitled to. That instruction is as follows: "If you find that the driver of the automobile was violating any of the rules with reference to the use of the road as set out above, then you are told that such violation would be evidence of negligence, and you will determine from all the facts and circumstances introduced in evidence in this case whether in doing so she was guilty of negligence that caused, or contributed to, the injury, and if you find that

she was guilty of such negligence, then she and her father cannot recover.

"It shall be *prima facie* unlawful for any person to exceed any of the foregoing speed limitations."

Instruction No. 10 requested by the defendants and modified and given by the court as modified, was an instruction on the duty of Mrs. Doud, the invited guest of Miss Albrecht, to exercise ordinary care to protect herself from injury and gave to the jury a guide for the determination of whether her conduct just prior to the injury she sustained contributed to it. The modification consisted in striking from this instruction a provision that it was the duty of the guest in the exercise of ordinary care "to caution the driver of any danger, to keep a lookout for her own safety, to protest against any reckless, unlawful or dangerous driving." The court, at defendant's request, gave instruction No. 12 covering the paragraph stricken from instruction No. 10. In that instruction, after telling the jury that, if it should find that the driver of the car was guilty of contributory negligence which proximately contributed to the injury, it was further told if it should find that Mrs. Doud failed to exercise ordinary care for her own safety "by acquiescing in the negligent manner of driving or failing to protest against same, provided she had time to do so acting as a reasonably prudent person, and that such acquiescence or failure to protest contributed to her injury, then she cannot recover." We do not intend to be understood as approving the language of instruction No. 12, but quote it only for the purpose of showing that instruction No. 10 was covered by it and the modification complained of was not prejudicial.

On the whole case it appears to us that the issues were presented to the jury under instructions about which the appellants have no cause to complain, and that the testimony warranted the verdict of the jury. The judgment is therefore affirmed.

SMITH *v.* SMITH.

4-3730

Opinion delivered November 12, 1934.

Miller & Yingling and *Culbert L. Pearce,* for appellant.

Gordon Armitage, Gregory & Taylor, Ross Mathis and *W. J. Dungan,* for appellee.

BAKER, J. This is an election contest case. The only question to be determined is the sufficiency of the complaint on demurrer. The complaint alleges in effect that at the Democratic primary election, on August 14, 1934, the plaintiff, appellant here, the defendant, appellee, and Grafton Thomas, qualified electors and residents of White County, qualified and entered the race as rival candidates for the nomination to the office of county and probate clerk. The names of the plaintiff, the defendant and Grafton Thomas were properly placed upon the official ballots used in the various precincts of the county, to be considered and voted upon for said nomination; that, after said primary election was held on Aug-

ust 14, returns were duly made under the law and the rules of the party showing the ballots cast in the various precincts of the county.

The Democratic County Central Committee at its meeting tabulated, totaled and declared and published the returns.

On the face of said returns, said committee found and declared that the defendant received 2,503 votes and the plaintiff received 1,642 votes and the said Grafton Thomas received 1,470 votes. The committee certified that the defendant had received the highest number of votes and plaintiff had received the second highest number cast for the nomination for said office and were therefore eligible and entitled to enter the race in a second primary election to be held on August 28, 1934, under the provisions of act 38 of the General Assembly of 1933, known as the "Run-Off Primary Act," to ascertain which of them might receive a majority of all votes cast in said second primary and thereby become entitled to final certification as the nominee for said office as aforesaid.

The names of the plaintiff and defendant were so certified by the chairman and secretary of the said committee and placed upon the official ballots used in said second primary election, to be considered and voted upon as rival candidates for said nomination, as in the first primary.

On August 28, 1934, said second primary was held under the rules of the party and the law, and in due time the judges and clerks of said election in the various precincts made returns of the ballots cast in their respective precincts, as required by the rules of the party and the law.

On August 31, 1934, the county central committee met at the court house in the city of Searcy and tabulated, totaled, declared and published the returns as sent in by the various precincts. On the face of said returns, it found and declared that the defendant received 2,190 votes and the plaintiff received 2,114 votes. Said committee then certified that the defendant was the nominee of the party for said office, to be voted upon at the general election.

Plaintiff alleged that, as a result of fraud and errors, the defendant was declared the party nominee when the plaintiff should have been so declared. The contestant further alleged that there were 475 persons having no poll tax receipts issued to them for the year 1933, who, by reason thereof, were totally disqualified to vote in said primary election, but were permitted to vote and did vote in said election, and cast their ballots for the defendant; that all such votes should be declared illegal and void and should be deducted from the number of votes certified in favor of the defendant. Then followed a list of those voting in the separate townships, which list showed the number of the ballot and the name of each alleged disqualified voter.

The second allegation was to the effect that there were 161 persons voting in the election who, if their names were correctly entered on the poll books, do not have poll tax receipts issued to them for the year 1933, although receipts were issued to persons of similar names. That the contestant was not advised as to whether that matter is the result of an error in entering these names on the poll books or in recording their names in the poll tax records, and alleges that they do not have poll tax receipts for the year 1933 legally issued to them prior to June 15, 1934, and that they were not entitled to vote in said primary election; that all of said persons cast their ballots for the defendant; that their votes, being illegal and void, should be deducted from the number of votes certified in favor of the defendant by the Central Committee. The names of the persons were listed.

The plaintiff further alleged that more than 750 persons in the county held illegal poll tax receipts, issued to them for the year 1933 by the collector of White County; that said receipts are illegal because of being predicated upon false and fraudulent assessment lists and because of having been, in most instances, issued after June 15, 1934.

There was a further allegation that through concerted action and collusion of the defendant, who was tax assessor of White County, and the county tax collector, one of his partisan supporters, and other persons

associated with them, some eight or nine hundred poll tax assessment lists were made up and entered upon the assessment records of White County; that said assessments were so made without authority from persons whose names were used, and later poll tax receipts were issued upon said illegal assessments and delivered to such of said persons as the defendant and his associates, after investigation, considered friendly to them and likely to cast ballots for the defendant and other candidates for whom said persons, so collusively acting, were interested; that the poll tax receipts were paid for by the defendant and his associates who, like him, were candidates for nomination in said election; that most of said receipts were issued after June 15, 1934, and were wrongfully certified by the collector as having been issued prior to June 15, 1934, and, by reason of said false and fraudulent certification, the names of the persons to whom said poll tax receipts were issued appeared in the printed list of qualified electors as among those who were entitled to vote in all legal elections held between July 1, 1934, and July 1, 1935.

Plaintiff further alleged that the defendant agreed to pay, and did pay, $300 into a fund to be used in paying for and distributing said illegal poll tax receipts. The recipients of said illegal poll tax receipts have not paid the defendant and his associates for said poll tax receipts and did not agree to do so.

No list was made of the several hundred alleged holders of illegal poll tax receipts. Contestant alleged that more than 500 of these persons were permitted to vote, did vote in said election, and cast their ballots for the defendant.

He alleged further that in Dogwood township, by error and wrongful certifications, sixteen more votes were certified for defendant and sixteen less votes for plaintiff, than were actually cast for them respectively.

Then followed a prayer wherein the plaintiff prayed the court to find and declare that he received a majority of all legal votes cast for the nomination for county and probate clerk of White County, and that an order be issued, directed to the chairman and secretary of the

White County Democratic Central Committee requiring them to certify said nomination as should be done. He prayed an order impounding the ballot boxes, ballots, tally sheets, poll books and all other papers and records used in holding said primary election and that the same be placed in the custody of some suitable, disinterested person whom the court might select, to be held subject to its orders; that all assessment lists and records pertaining to poll taxes issued for the year 1933, payable in 1934, in the custody of the defendant as assessor of White County, Arkansas, be likewise impounded and placed in the custody of some suitable, disinterested person whom the court might select, to be held subject to its orders; that all records, papers and memorandums in the collector's office pertaining to the issuance of 1933 poll tax receipts be likewise impounded and put in the custody of some suitable, disinterested person, subject to the orders of the court and for all other proper relief.

The complaint was verified by the contestant and by 22 reputable citizens. It is unnecessary to set forth the oath made by the plaintiff and the supporting affiants, as this is not called into question.

On September 12, an amendment to the complaint was filed setting forth the names of some of the persons voting, the townships in which they voted and the number of ballots, with the challenge as to the validity thereof. This statement is sufficient to show the issues.

On September 22 the defendant filed a general demurrer to the effect that the complaint does not state a cause of action under the laws of the State of Arkansas regarding election contests. The court sustained the demurrer and dismissed the complaint.

We think the court was in error in sustaining this demurrer. Contestant alleged that he received 2,114 votes and that the contestee had received 2,190 votes. There was a difference between the number of votes they received, as certified, of only 76 votes. The contestant did not say that the votes he had received were "legal votes." Upon this failure to plead that fact, the demurrer is based. An analysis of this complaint will demonstrate that was unnecessary. He was not impeaching the votes

he received in any particular, except in the fourth division of the complaint he alleged that he was entitled to sixteen more votes, received in Dogwood township, than had been certified for him, and otherwise he was treating the number of votes he received, and which were certified to him by the county democratic central committee, as being the total number of votes to which he was entitled. The other portions of the complaint differ somewhat from the usual complaint filed in election contests. He alleged that his opponent received a considerable number of votes that were illegal, specifically pointing out all such illegal votes in every instance except one, but he did not claim that these illegal votes should be credited to him, or be counted for him, but only that they should be deducted from the number of votes received by the contestee. For instance, he alleged that there were 475 persons, whose names were listed by township and ballot number, who were not qualified to vote and asserted that they did vote for the contestee. If this statement, as alleged, is correct and can be proved, then the number of 475 votes should be deducted from the number of votes certified to the contestee. The fraud charged was alleged to have taken place at the voting precincts as distinguished from a charge of error or bad faith of the election officers.

The contestant did plead the number of votes received. He alleged affirmatively that there should have been certified to him sixteen more votes. For consideration upon the demurrer, it must be conceded he did receive 2,130 votes and that they were legal.

In *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631, the court said: "We do not agree with contestant in this contention. The official returns of the election are *quasi* records, and are *prima facie* correct. The burden is upon the contestant to show by affirmative proof that they do not speak the truth."

In the case of *Morrow* v. *Strait,* 186 Ark. 384, 53 S. W. (2d) 857, the court said: "The official returns of the election are *prima facie* correct, and the burden of showing that they are not correct rests upon the person who alleges that fact."

Under the authority of these two cases, we have no hesitancy in holding that there is an affirmative allegation that the votes received by the contestant were legal votes, though the word "legal" is not used; but his pleading is susceptible of no other interpretation.

There is also the allegation that this number of votes contestant received, as certified, is substantially in excess of the number of "legal" votes received by the contestee, so it must be seen that the contestant alleged, at least, a *prima facie* case. Contestant had the right, after the issues were made up, and could have been required by proper motion to file a list of names of voters whose names had been omitted as among those whose votes were challenged. We held this in the case of *Winton* v. *Irby, ante* p. 906.

We but recently said in effect that the statute providing for contesting elections should be liberally construed; that the purpose of the contest is to determine what candidate received the greatest number of legal votes, and if there are sufficient facts stated to give the other party reasonable information as to the grounds of the contest, then the case should be tried on its merits. *LaFargue* v. *Waggoner, ante* p. 757. We also said in the same case that the rule relating to pleadings must not be so strict as to afford protection to fraud, by which the will of the people is set at naught.

The court said in the same case: "The statute does not require supporting affidavits of the citizens to these permissible amendments. These amendments may be made without the supporting affidavits and after the expiration of the original ten days, when unreasonable delay in the trial of the cause will not result therefrom."

In *Winton* v. *Irby, supra,* we said: "The real issue is, which candidate received a majority of the legal votes cast? If his competitor was ineligible, this would not entitle the contestant to receive the certificate of nomination, unless the contestant received a majority of the legal votes.

The instant case is peculiar in one respect, and that is that the candidate relies on the certificate of the Democratic County Central Committee as to the number of

votes received by him, but impeaches, by his complaint, the count in favor of his opponent and alleges that his opponent, the contestee, did not receive the number of legal votes as certified by the committee.

While we do not think that it is absolutely essential to the trial of the cause that the amendment offered by the contestant after the demurrer was sustained should be filed, but, since it adds no new cause of action, and only states the result or effect of the matters already pleaded, it was not improper. It was helpful, however, to file it, as it did aid, by way of explanation or amendment, the pleadings already filed, and upon which the issue, by demurrer, was raised.

We held in the case of *Winton* v. *Irby, supra,* that it was proper to permit the contestant to amend his complaint after the ten-day limit, by filing the list of names of the voters whose ballots were challenged. Such amendment did not set up any new cause of contest. The amendment was only explanatory of matters already, perhaps, somewhat imperfectly pleaded.

It follows that the judgment should be reversed. It is therefore ordered that the judgment be reversed with directions to overrule the demurrer, and permit the cause to proceed to trial upon its merits.

WESTERN CLAY NATIONAL FARM LOAN ASSOCIATION
v. LILLY.

4-3596

Opinion delivered November 19, 1934.

Guy V. Head, C. S. Hale, A. T. Welborn and *A. P. Patton,* for appellant.

Oliver & Oliver, for appellee.

JOHNSON, C. J. In 1926 J. B. Lilly, now deceased, applied for and was granted a loan in the sum of $2,500 by the Federal Land Bank of St. Louis, Missouri. As a condition precedent to the granting of this loan, the borrower was required to purchase and pay for twenty-five shares of stock of the par value of $5 per share in appellant Western Clay National Farm Loan Association, and the association in turn was required to purchase a like amount of stock from the land bank. Subsequent to the granting of this loan, J. B. Lilly died, and thereafter on June 1, 1931, Mrs. J. B. Lilly, appellee here, and wife of the said J. B. Lilly, paid the loan in full to the Federal Land Bank of St. Louis. Upon payment of the loan the land bank canceled its stock issued upon this loan and gave the association credit on its contingent liabilities for the full value thereof. Thereafter, due demand was made upon the local association for the retirement of the shares of stock held by appellee which was refused by appellant, and this suit was instituted to compel retirement. Upon trial a judgment was rendered in favor of appellee and against appellant, and the cause is here on appeal.

Appellant is a corporation organized under the Federal Farm Loan Act, same being 12 USCA, c. 7, § 641, approved July 17, 1916. The Federal Land Bank of St. Louis is a corporation organized under said act, and is domiciled at the city of St. Louis in the State of Missouri, and as such serves the territory embraced in Arkansas, Illinois and Missouri making farm loans.

By § 7 of the act referred to, appellant is a separate and distinct corporation from the Federal Land Bank of St. Louis. Under the provisions of said act, appellant association is required to indorse all paper handled by the borrowers of such association and therefore has a contingent liability upon such indorsed paper. Section 4 of said act creates twelve Federal Land Bank districts and creates therein a Federal Land Bank for the purpose of making loans on farm lands situated in such districts. The act further provides that the original capital stock of each Federal Land Bank shall be divided into shares of the par value of $5 each.

The theory of the act is co-operative in purpose, spirit and effect. Upon approval of a loan by the local association, it issues stock to the borrower in the amount of 5 per cent. of the loan applied for, and the local association is thereupon required to purchase from the Federal Land Bank in the district capital stock therein to the amount of 5 per cent. of the loan granted by it. The borrower by the terms of the act is liable to the local association for an assessment against this stock to the extent of 100 per cent. thereof upon insolvency. In each instance the issued stock is held as collateral security to the loan.

No contention is made that the Federal Land Bank of St. Louis is liable to appellee for stock held by her in the local association; therefore this question and the cases bearing thereon have no application to the facts of this case.

Appellee does contend, however, that the local association which issued her stock is liable upon the retirement thereof for its par value, regardless of the solvency or insolvency of the local association.

The question here under consideration was determined by the Supreme Court of North Dakota in *Byrne v. Federal Land Bank, etc.,* 61 N. D. 265, 237 N. W. 797, and the logic and reasoning of the opinion are such as to warrant the following quotation therefrom:

"It is true the act says upon payment of his loan 'the national farm loan association shall pay off at par and retire the corresponding shares of its stock which

were issued when such land bank stock was issued.' The plaintiff, however, is a stockholder in a corporation. The corporation cannot pay off at par the stock held by the plaintiff if it be insolvent, or if it has no money. The pleadings and the stipulated facts admit the practical insolvency of the Farm Loan Association. The shareholders are 'individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.' Section 9 of the act. Consequently it is possible for the plaintiff to be held for double liability.

"Plaintiff contends that the pleadings do not show the insolvency of the loan association at the time of the repayment of the loan; that is, at the time the land bank bid in the property for the full amount. It may be the answers are somewhat indefinite on this point; but it is shown the land bank applied the value of the stock held by the loan association on its debts to the bank, because of the inability of the association to pay them. Then, also, if the association was insolvent at the time of the commencement of the action and is still insolvent, it cannot be compelled to pay plaintiff the value of his stock when it is not yet known whether he may lose, not only the $500 which he has already paid, but in addition be required to pay an assessment of $500 or part thereof. While the statute requires the retiring of the shares at par, it contemplates a solvent institution. The plaintiff, by merely paying his loan, cannot escape the responsibility which he assumes as a stockholder. The relationship which he bears to the other shareholders and to the whole system is such that he cannot evade responsibility. When he applies for and receives a loan under the provisions of the act, he takes the loan according to the tenor of the law. The act makes provision for earnings and for dividends on his stock, and it provides also that in case the dividends are sufficient the directors of the loan association 'with approval of the Federal Farm Loan Board' (12 USCA, § 721) may in their discretion pay off at par, and retire the stock, even if the loan be not paid. The

payment of the loan does not relieve the borrower from his liability as a stockholder. The only assets which a Farm Loan Association has or can have are the shares which it takes in the Federal Land Bank to counterbalance the shares of stock in the association taken by the borrower, such dividends as the shares of stock in the land bank taken by the association may earn, and such 'reasonable initial charges to be made against applicants for loans and to borrowers in order to meet the necessary expenses of the association' as specified in subdivision 3 of § 11 of the act; but such charges can 'in no case exceed 1 per centum of the amount of the loan applied for.' It is true the association may acquire and dispose of property, real and personal, that may be necessary or convenient for the transaction of its business, and it may invest its earnings so as to have increased income; but this is the extent of its capital and assets. The statute contemplates that when the loan is paid the stock shall be canceled, and the necessary corollary of this is that the par value of the stock be returned; but it is evident from the statute that Congress had in mind the possibility that such Farm Loan Association may become insolvent.

"Section 29 of the act makes provision for the dissolution of a Farm Loan Association upon insolvency, and the appointment of a receiver. The power to declare an association insolvent and to appoint a receiver therefor is vested in the Federal Farm Loan Board. But 'no national farm loan association shall be declared insolvent by said board until the total amount of defaults of current interest and amortization installments on loans indorsed by national farm loan associations shall amount to at least $150,000 in the Federal Land Bank district, unless such association shall have been in default for a period of two years.' 12 USCA, § 961.

"It is true the pleadings do not allege that the Federal Farm Loan Board declared this association to be insolvent; but the facts alleged in the pleadings show that the status described by the act obtains, and it is therefore insolvent. Manifestly the association cannot be compelled to pay the plaintiff the value of his stock

when it has no assets out of which the stock can be paid. This association has no property, received no dividends, has no earnings, and there is no fund which the association can be compelled to distribute to its stockholders. The only source from which it could pay is this stock in the Federal Land Bank. The pleadings show this had been pledged and was held by the land bank as collateral. The plaintiff proceeds on the theory that, as soon as the loan is repaid, the Farm Loan Association must 'pay off at par and retire' the shares of stock in the association issued to him. The last paragraph of § 7 of the act (12 USCA, § 721) describes the procedure for subscription of stock in the Federal Land Bank and requires the association to subscribe for capital stock when it applies for a loan to a borrower. After making provision for this capital stock to be held as collateral to the loan, it says: 'Such stock (that is the stock in the land bank taken by the loan association) may, in the discretion of the directors (that is the directors of the land bank), and with the approval of the Federal Farm Loan Board, be paid off at par and retired, and it shall be so paid off and retired upon full payment of the mortgage loan. In such case the national farm loan association shall pay off at par and retire the corresponding shares of its stock which were issued when said land bank stock was issued.' But this is only a portion of the act. When we consider the act as a whole, it is apparent Congress did not intend the Farm Loan Association to pay off the stock at par when it had nothing with which to pay the stock.

"The plaintiff is a stockholder in a corporation. He has rights therein, but he has also corresponding duties and liabilities. As shown heretofore, he is individually responsible equally and ratably for the debts of the corporation in which he is a stockholder. Section 9 of the act. This provision for double liability is similar to the one regarding liability of stockholders in banking corporations, both State and National. His responsibility to his corporation is the same.

"As we have already pointed out, the principle involved in the act is co-operative in nature. It is only through the co-operation of his neighbors, with their

assistance, upon their recommendation and the pledge of their liabilities he can secure his loan. They pledge their faith and credit to aid him, and he pledges his faith and credit to aid them. Having secured their co-operation and assistance and finding his loan paid, he now wants to avoid his responsibilities to those who made it possible for him to get his loan. His rights are not superior to the rights of any stockholder in the corporation."

Appellee tacitly admits that the opinion just quoted reached the correct conclusion of no liability against the local association under the facts and law there discussed and decided, but contends that the opinion overlooked or ignored the amendatory act of 1923 as follows:

"Upon liquidation of any national farm loan association, the stock in the Federal Land Bank held by such association shall be canceled and the Federal Land Bank shall thereupon issue to the borrowers through such association an amount of stock in the Federal Land Bank equal to the amount of stock held by such borrowers in the liquidated association, such stock to be held by the bank as collateral to the loans of such borrowers and to be paid off and retired at par in the same manner as stock held by borrowers in farm loan associations, and the Federal Land Bank shall pay to the borrowers holding such stock the same dividends as are paid to national farm loan associations by such bank. The personal liability of the stockholders in such liquidated association to the association shall survive such liquidation and shall be vested in the bank in that district, which may enforce the same as fully as the association could if in existence." Section 966, USCA, chapter 7. Section 29 of the original act so amended provides:

"If any national farm loan association shall be declared insolvent and a receiver shall be appointed therefor by the Farm Credit Administration, the stock held by it in the Federal Land Bank of its district shall be canceled without impairment of its liability, and all payments on such stock, with accrued dividends, if any, since the date of the last dividend shall be first applied

to all debts of the insolvent farm loan association to the Federal Land Bank, and the balance, if any, shall be paid to the receiver of said farm loan association: *Provided*, that in estimating said debts contingent liabilities incurred by national farm loan associations under the provisions of this chapter on account of default of principal or interest of indorsed mortgages shall be estimated and included as a debt, and said contingent liabilities shall be determined by agreement between the receiver and the Federal Land Bank of the district, subject to the approval of the Farm Credit Administration, and if said receiver and said land bank can not agree, then by the decision of the Farm Bank Commissioner, and the amount thus ascertained shall be deducted in accordance with the provisions of this section from the amount otherwise due said national farm loan association for said canceled stock. Whenever the capital stock of a Federal Land Bank shall be reduced, the board of directors shall cause to be executed a certificate to the Farm Credit Administration, showing such reduction of capital stock, and, if said reduction shall be due to the insolvency of a national farm loan association, the amount repaid to such association." 12 USCA, c. 7, § 964.

The amendatory act just quoted amends § 29 of the original act of 1916 in the particular that, upon liquidation of a local association, it is the duty of a land bank in that district to cancel out all stock in the possession of the local association and re-issue same to the individual borrowers of such local associations and subsequent thereto all dealings in reference to such stock shall be had and done between the Federal Land Bank and the borrower. No contention is made that the association stock here in controversy was ever reissued by the Federal Land Bank of St. Louis as is provided for in the amendment, but it is contended that the amendment of 1933 demonstrates the legislative policy of such institutions with and towards the borrowers therein, and that the amendment evinces a clear legislative intent that the borrower's stock, whether it be issued by the local association or by the Federal Land Bank of such district, shall be retired upon payment of the loan of

such borrower, regardless of the solvency or insolvency of the local association. We can not agree with this contention. We are convinced that the amendment of 1923 has application to solvent local associations only which are in process of voluntary liquidation. Any other construction of the amendment nullifies and destroys the clear intent and purposes of the original act, and would nullify and destroy the whole theory of co-operation by the borrowers which is significantly demonstrated by all provisions of the original act. If a borrower be permitted to pay off his loan and withdraw his capital stock at par value in an insolvent association, there is no co-operation left.

Manifestly co-operation is the groundwork of the original act. Ten borrowers are required to co-operate in the formation of a local association, and each borrower is required to purchase capital stock in the local association to the approximate amount of 5 per cent. of his loan. This stock is never surrendered to the borrower, but is held by the local association as collateral security to the borrower's loan. In other words, each borrower in a local association, to the extent of his stock plus an individual liability upon insolvency of a 100 per cent. assessment on such stock, is surety for the loans of all other members and borrowers in such local association, and this liability continues until the loan is paid off and retired during the solvency of such local association.

The co-operative feature of the original act also extends and applies to the Federal Land Banks, but it is not deemed necessary to go into this phase of the situation. It suffices to say that the destruction of the co-operative features of the original act would nullify and destroy the clear and unmistakable intent of the Congress as exemplified in the act, and we are unwilling to give the 1923 amendment such construction and interpretation.

The conclusion thus reached leaves only the question of whether or not the local association was solvent on June 1, 1931, when appellee retired her loan. On August 23, 1930, appellant and the Federal Land Bank of St. Louis, its principal creditor, made and entered into

a written contract or agreement, to the effect "that, whereas defaults have accrued, etc. * * * and whereas the association desires to reimburse the bank for the actual loss, etc." This contract defines the respective rights and liabilities of the local association and the Federal Land Bank which are dealt with in minute detail, but we deem it sufficient to say that the parties to this contract definitely determined the insolvency of the local association on the date of its execution and arranged the date for final reckoning of the aggregate of the liability by the local association to the Federal Land Bank on January 1, 1935. Moreover, the agreed statement of facts upon which this cause was submitted and decided provides:

"That, at the time said loan was paid off, on June 1, 1931, the total outstanding capital stock of the Western Clay National Farm Loan Association was two thousand fifty-seven shares (2,057) of a par value of $10,285, including the twenty-five (25) shares of said capital stock issued to John B. Lilly.

That from time to time, prior to June 1, 1931, defaults had occurred under the terms and conditions of the aforesaid indorsed first mortgages taken by the Federal Land Bank of St. Louis from the members of said association and pursuant to the terms and provisions of § 25 of said Federal Farm Loan Act, said association had been notified of said defaults and had been called upon by said bank to make good each of said defaults either by the payment of the amount unpaid thereon in cash or by the substitution of an equal amount of Federal farm loan bonds with all unmatured coupons attached. Notwithstanding its liability as indorser as aforesaid, said association has failed, and still fails, to make good such defaults and was indebted on June 1, 1931, and still is so indebted by reason thereof; and that said association had been in default in the payment of its said obligations for more than two years prior to June 1, 1931, and still so in default."

Section 921, USCA, c. 7, provides in reference to defaults:

"If there shall be default under the terms of any indorsed first mortgage held by a Federal Land Bank under the provisions of this chapter, the National Farm Loan Association through which said mortgage was received by said Federal Land Bank shall be notified of said default. Said association may thereupon be required, within thirty days after such notice, to make good such default, either by the payment of the amount unpaid thereon in cash or by the substitution of an equal amount of Federal farm loan bonds, with all unmatured coupons attached."

Clearly, it appears that on June 1, 1931, when appellee retired her loan in the Federal Land Bank of St. Louis, the Western Clay National Farm Loan Association had defaulted in its obligations to the Federal Land Bank and had been in such default for more than two years prior thereto. This was a state of insolvency on the part of the local association, and the mere fact that no receivership was procured thereon in no wise alters the situation under consideration. We know of no rule of law, and have been cited none by counsel, which permits a stockholder in an insolvent corporation to withdraw his capital investment at par. True, if the amendment of 1923 had the purpose and effect contended for by appellee this would be the result, but, as has been shown, the amendment produced no such result.

Since we have concluded that the Western Clay National Farm Loan Association was insolvent in 1930 and was insolvent on June 1, 1931, when the loan was retired, appellee has no lawful right to maintain this suit as a stockholder against the local association.

The conclusion reached renders it unnecessary to consider or decide other questions argued orally and in briefs.

For the reasons stated, the judgment is reversed, and the cause of action dismissed.

ARKANSAS POWER & LIGHT COMPANY *v.* HUGHES.

4-3588

Opinion delivered November 19, 1934.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

George W. Emerson, Hargraves & Johnson, Fred A. Isgrig and *Harry Robinson,* for appellee.

HUMPHREYS, J. Appellee brought suit in the circuit court of St. Francis County against appellant for damages resulting from a fall which was caused by negligently operating a street car which had a worn, slick

steel plate across the platform near the door for passengers to step upon as they entered the car.

Appellant denied that the plate inset in the platform for passengers to step upon as they entered the doorway of the car was worn or slick or that the condition of the plate rendered the entrance of the car unsafe. As an additional affirmative defense, appellant pleaded contributory negligence on the part of appellee in failing to exercise proper care for her own safety and in failing to keep a proper lookout while boarding the car.

The cause was submitted to a jury upon the issues joined, the evidence adduced, and the instructions of the court, which resulted in a verdict and consequent judgment against appellant for $10,000, from which is this appeal.

The first contention for a reversal of the judgment is that the evidence is insufficient to support the verdict.

A statement, in substance, of the evidence in its most favorable light to appellee is as follows:

On April 22, 1932, appellee attempted to board a street car at 5th and Main streets in Little Rock. She got on the step and put one foot on the platform, and, in attempting to lift the other foot to go in, she slipped and fell on her back and would have fallen on the pavement if she had not been caught by her brother-in-law, Mr. Cain, who was behind her. A number of witnesses saw her fall and attributed the cause to the worn and slick condition of the steel plate upon which she stepped with one foot as she attempted to board the car. Her own witnesses were not in perfect accord as to the exact manner in which she fell, but all agreed that she slipped and fell as she was attempting to get on the platform from the step and that the steel plate upon which she was compelled to step was worn and slick.

Appellant contends that, on account of contradictions in the testimony of each of the witnesses and the conflicts between their several testimonies, they are all discredited to such an extent that their testimony should have been disregarded by the court and that he should have peremptorily instructed a verdict for it. In reading the testimony of each witness, we do not find con-

tradictions therein which render the testimony of each wholly and entirely unbelievable, nor do we find such a contradiction between the several witnesses upon material matters that we can say as a matter of law that there is no truth in what any of them said concerning the unsafe condition of the steel plate and that she slipped and fell because of its worn and slick condition. Most of the contradictions relate to the way or manner in which she fell or whether there was a center rod in the doorway or one on each side thereof and as to what was said or done by her immediately after the fall and after she was seated in the car. The jury was the sole judge of the credibility of the witnesses and the weight to be attached to the evidence of each. There was sufficient substantial evidence introduced on behalf of appellee to submit the issues joined to the jury. The court did not err in refusing to instruct a verdict for appellant.

Appellant objected to the court's instruction No. 1 on the alleged specific ground that it made it the insurer of the safety of appellee as she entered the car as a passenger and that on account of this inherently erroneous instruction, the judgment should be reversed. The instruction is as follows:

"The jury is instructed that it is the duty of a common carrier of passengers by street car to exercise such degree of care which may reasonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the danger naturally to be apprehended, to see that every appliance connected with its car is kept in repair and in a safe condition for the protection of passengers."

Our interpretation of the instruction is that it told the jury that it was appellant's duty to exercise that degree of care which may reasonably be expected of intelligent people to see that its car was kept in repair and in a safe condition consistent with the practical operation thereof. This instruction, as thus construed, was more favorable than appellant was entitled to, for the law imposes the highest degree of skill and care upon common carriers, consistent with the practical operation of their cars, to furnish their passengers a safe place to

get on and off. *Prescott & Northwestern Railroad Company* v. *Thomas,* 114 Ark. 56, 167 S. W. 486; *Beech* v. *Eureka Traction Company,* 135 Ark. 542, 203 S. W. 834, and cases therein cited.

The same specific objection was made to instruction No. 4 given by the court, but we find nothing in the instruction which told the jury directly or by reasonable inference that the appellant was the insurer of the safety of appellee as she entered the car.

Appellant also specifically objected to instruction No. 4 because it submitted the issue of assumed risk on the part of appellee to the jury as an abstract proposition of law to be determined by them. No prejudice resulted to appellant on this account, for it was not entitled to the defense of assumed risk. No contractual relation existed between appellant and appellee. This is a suit based on tort and not growing out of contract.

Appellant also specifically objected to the court's instruction No. 6 on the measure of damages because it permitted a recovery for the loss of earnings after the injury and up to the trial of the cause, the diminution of appellee's earning capacity in the future, and for medical, hospital, and doctor bills. It is argued that no evidence was introduced in support of these items of damage. We cannot agree with learned counsel for appellant in this contention. The record contains ample evidence in support of these alleged items of damage.

Lastly, appellant contends that the verdict is excessive. It is true, as argued by learned counsel for appellant, that appellee had little or no earning capacity in dollars. She was a housekeeper and earned her living in that way. She was able before her injury to work and earn small amounts, as she was strong and healthy. On account of her injury, she was incapacitated to do hard work or to work long at a time. She was 47 years of age when injured, and had an expectancy of 23.08 years. She received a very serious and painful injury. Her left sacroiliac was sprained and fractured and a contusion formed in same. Her left knee was sprained and fractured. She was placed in a cast and kept there eight weeks with a weight upon her foot, and a tumor

formed on her back, necessitating a surgical operation. Her suffering was intense and after two years she still suffers much pain. The result is she is crippled so that she is compelled to walk with a cane. Her deformity will remain with her. Dr. Carruthers' bill alone was $250. He testified that she still has a spasm and rigidity of the left knee and in the left sacroiliac region and advises that she have a bone graft at her sacroiliac joint. Her hospital bill was $50 and her medicine bill $15. Considering the loss of her small earning capacity, the extent of her injury, her very intense suffering during the early months after her injury and the suffering she still endures and will likely continue to endure, the amount she has already expended for medical, hospital, and doctor bills, and the operation yet to be had and the probable expense thereof, we think the amount of the recovery was not excessive.

No error appearing, the judgment is affirmed.

UNION TRUST COMPANY *v.* POCAHONTAS SPECIAL SCHOOL DISTRICT.

4-3598

Opinion delivered November 19, 1934.

Moore, Gray, Burrow & Chowning and *S. S. Jefferies,* for appellants.

George M. Booth, Frauenthal & Johnson and *Walter L. Pope,* for appellees.

MEHAFFY, J. The Randolph State Bank of Pocahontas, on October 10, 1930, borrowed $20,000 from the Bankers' Trust Company of Little Rock, and executed its promissory note for said amount, and pledged as collateral security for the payment of said note or other indebtedness, notes and warrants aggregating $37,723.37. The Randolph State Bank was also indebted to the Union Trust Company of Little Rock in the sum of approximately $27,000. The payment of this note was also secured by collateral. In November, 1930, the Randolph State Bank became insolvent, and thereafter the Bankers' Trust Company, the Union Trust Company and the State Bank Commissioner concluded that the collateral held by the Union Trust Company as security for the debt due it was insufficient, and that the collateral held by the Bankers' Trust Company was more than sufficient to pay the debt due it. They therefore concluded that the Union Trust Company should purchase, and it did purchase, the note held by the Bankers' Trust Company, which at that time amounted to $7,484.59, and they applied the collections from the collateral held by the Bankers' Trust Company to the entire indebtedness,

treating the debt to the Union Trust Company and to the Bankers' Trust as one item. Among the collaterals held by the Bankers' Trust Company were school warrants of the Pocahontas Special School District, amounting to $6,238.23.

In November, 1932, the appellants filed suit in the Randolph Chancery Court against the Pocahontas Special School District and others. They prayed judgment for $3,103.98, the amount of the warrants held at that time by the Union Trust Company against the Pocahontas Special School District and H. L. Haynes, treasurer of Randolph County, and the sureties on his bond, and against the State Board of Education for any part of the money now in its hands. Appellants also asked that a mandamus be granted commanding the treasurer to pay the appellants the amount sued for, together with interest, and that a writ of mandamus be granted directing the State Board of Education, its members and C. M. Hirst, Commissioner of Education, to refund and pay to appellants the sums of money sued for, and they also prayed that said money be impounded by order of the court. Appellants also asked for a restraining order and injunction.

The appellees filed answer denying the sale and delivery of the warrants to the Randolph State Bank; denied the execution of the note to the Bankers' Trust Company, and denied the transfer of the note to the Union Trust Company, together with the warrants as collateral security; denied that appellants had any right to judgment or injunction or restraining order; and alleged that the appellee, Pocahontas Special School District, had on deposit in the Randolph State Bank, on November 4, 1930, $7,400, and that the treasurer had no opportunity to pay the warrants mentioned in the complaint, and that the loss of the deposit was caused by the negligence and indifference of appellants.

A reply was filed by appellants denying all affirmative allegations in the answer.

A. Brizzolara, Jr., vice president of the Union Trust Company, testified in substance that he had a conversation on August 21, 1931, with Mr. Haynes, who represent-

ed the Pocahontas Special School District, and that Mr. Haynes offered to pay $3,100 in full settlement for the school warrants. Witness referred the matter to Mr. Jernigan, vice president of the Union Trust Company in charge of out-of-town banking matters, and the matter of settlement was left in the hands of Mr. Tom Bigger, and that said settlement was rejected. Mr. Bigger declined to recommend the settlement because the value of the remaining pledged assets was doubtful. The school warrants taken over from the Bankers' Trust Company amounted to approximately $6,000. The note of the Bankers' Trust Company and collateral was purchased by the Union Trust Company at the request of the State Banking Department, and also to strengthen the collateral held by the Union Trust Company. The note held by the Bankers' Trust Company was for $7,484.59. After the Union Trust Company purchased the note, it treated the amount due from the Randolph State Bank as one item, and credits were made upon collections of collateral without reference to the former indebtedness due the Union Trust Company as distinguished from the indebtedness bought from the Bankers' Trust Company. The authority for consolidating the collateral was obtained from the State Banking Department. Witness does not know whether the collections on the collateral obtained from the Bankers' Trust Company exceeds the sum of $7,484.59. The Randolph State Bank still owes the Union Trust Company approximately $12,000 exclusive of the Bankers' Trust Company note. The purpose of purchasing the note of the Bankers' Trust Company was for the benefit of the Banking Department, the benefit of the depositors in Randolph State Bank, and for the benefit of the Union Trust Company, and the transaction did result in material benefits. The Union Trust Company took over $37,723.37 in face value collateral from the Bankers' Trust Company. The amount realized on this collateral has been applied on the entire indebtedness of the Randolph State Bank to the Union Trust Company at the time of the purchase from the Bankers' Trust Company.

We do not deem it necessary to set out the evidence in full, nor any further evidence except the evidence relating to the settlement.

The county treasurer testified in substance that the school district had on deposit in the Randolph State Bank on November 4, 1930, the day the bank became insolvent, approximately $7,400; warrants aggregating approximately $3,160 held by the Union Trust Company had been paid. Witness testified to a conversation with Mr. Brizzolara, offering to pay $3,100. The amount of warrants held by the Union Trust Company at that time was something over $6,000; that Brizzolara told him that the proposition sounded interesting, and that he would write Mr. Bigger, and that, if Mr. Bigger thought it would be satisfactory, he would accept the proposition. Witness took the matter up with Mr. Bigger, who had received a letter from Mr. Jernigan, about the compromise. When asked to state his understanding about the compromise, witness said: "Well, I just paid him according to the agreement, and the agreement was that he was to pay half to them, and we would talk about the matter of the offset." The reason all the warrants were not demanded was that witness understood there would have to be an order of the chancery court authorizing the offset.

G. S. Jernigan testified that they were holding the warrants and other collateral which they received from the Bankers' Trust Company as security for the total indebtedness due from the Randolph State Bank. As to the settlement, this witness testified in substance that he did not favor the settlement unless he was absolutely assured that the remaining collateral would be sufficient to pay the full indebtedness. Bigger was given authority to settle if he thought the remaining collateral would be sufficient. He had never heard from Mr. Bigger. Witness did not know how much had been collected out of the collateral attached to the Bankers' Trust Company note, but would furnish a list showing collections. The purpose of purchasing the note from the Bankers' Trust Company was to strengthen the position of the Union Trust Company, and assist the Randolph State Bank in

protecting collateral. Mr. Bigger had no authority to make any compromise except by consent of Union Trust Company.

Mr. Bigger also testified that the note of the Bankers' Trust Company and collateral were taken over by the Union Trust Company with the consent of the State Banking Department; that the collateral and other unpledged assets of the Randolph State Bank would be security to the Union Trust Company for the total indebtedness of the Union Trust Company. This witness also testified about receiving a letter from the Union Trust Company authorizing him to accept 50 per cent. compromise if he thought that the remaining collateral would be sufficient to make the Union Trust Company absolutely safe. Mr. Haynes, the treasurer, paid to witness $3,100, and told witness he would get a letter from Little Rock authorizing him to release all the warrants.

Contract between Union Trust Company and Bankers' Trust Company, with the approval of the Bank Commissioner, was introduced in evidence; letter from Jernigan to Bigger, and letter from Bigger to Jernigan; a list of school warrants and other collateral was introduced.

The court found for the defendants, and the case is here on appeal.

It is contended by the appellants that the Union Trust Company had a right to apply the proceeds of the collateral which it received from the Bankers' Trust Company to the payment of the pre-existing indebtedness of the Union Trust Company, as holder of the note. The word "holder" used in the note from the Randolph State Bank to the Bankers' Trust Company had reference only to negotiable instruments. The statute defines the word "holder" as follows:

"Holder means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Section 7761, Crawford & Moses' Digest.

The first case to which attention is called by the appellants is the case of *Oleon* v. *Rosenbloom,* 247 Pa. 250, 93 Atl. 473, Ann. Cas. 1916B, 233, and the same case in L. R. A., 1915F, 968. This case was discussing a nego-

tiable note as collateral, and the court said: "The term 'holder,' as applied to negotiable paper, has always had the well-recognized legal meaning of the payee or indorsee of it, entitled to receive the sum for which it calls." The court further said in the same case: "These notes were in every respect negotiable, and these plaintiffs had given them that character. * * * With knowledge which the law presumes the appellants had that their notes, negotiable in form, might, and probably would, pass from the payee into the hands of another holder, no other meaning is to be given to their agreement as to the right of a subsequent holder to use the collateral than that given to it by the superior court."

Appellant calls attention to the case of *Richardson* v. *Winnissimmet National Bank,* 189 Mass. 25, 75 N. E. 97, and to the case of *Mulert* v. *National Bank of Tarentum,* 210 Fed. 857. These cases both are to the effect that the word "holder" means either the payee or his indorsee; and since the note gives power to sell, this power may be exercised by the indorsee.

In the case of Richardson, *supra,* the note is not set out, but the court said: "This note plainly shows the intention of the parties that the right to enforce the payment of it should pass to the order of the payee, and that the party thus designated would be the holder."

The court however called attention to *Gillet* v. *Bank of North America,* 160 N. Y. 549, 55 N. E. 292, and the court in that case said: "The note was a printed one prepared by the defendant, which, in addition to the promise of payment, contained provisions as to the collateral security furnished and its application by the bank. * * * The undersigned further agree that upon transfer of this note, the Bank of America may deliver said collaterals or any part thereof to the transferee, who shall thereupon become vested with all the powers and rights above given to said bank in respect thereto. * * * The respondent's contention is that this agreement on the note authorized the defendant to hold the property pledged, not only as security for the sum loaned, and such other liabilities as were contracted or existed between them as bank and customer, but also for any and all claims

against the plaintiff's assignors which it might purchase, regardless of their character, so long as they were liabilities of the assignors and owned by the defendant. It further claims that under the contract it could have transferred the note and collaterals, and that thereupon the transferee would be entitled to retain and sell the property pledged or in its possession for safe-keeping or otherwise, not only for the payment of the liabilities of the assignors to the defendant, but also for the payment of all and any claims or liabilities of theirs held by the transferee."

The court further said: "If there is any uncertainty or ambiguity as to the meaning of agreement, it should be resolved in favor of the plaintiff, as it was the defendant who prepared this contract. * * * If the language can, without violence, be interpreted to include only such liabilities to the defendant as resulted from transactions between the plaintiff's assignors as customers and the defendant as a bank, or their liabilities which came into its hands in the ordinary course of its banking business, it should be adopted."

The court then held that the collaterals could be resorted to only for the payment of the debts due the bank, to which the note was made.

In the other case relied on, *Mulert* v. *National Bank of Tarentum, supra,* the note involved there expressly provided for the payment of this or any other liability or liabilities of the undersigned to the holder thereof.

But the note given by the Randolph State Bank pledges the collateral security for the payment of this note or any other indebtedness or any other liability of the said undersigned to the Bankers' Trust Company. It does not say, "or the holder." Therefore there is no authority in this note to give the assignee, as holder, a right to apply the collections from this collateral to any other indebtedness. It is true that the clause giving a right to sell the collateral uses the word "holder," but there is no authority in the note for the payment to any holder except the Bankers' Trust Company.

This transfer or sale by the Bankers' Trust Company to the Union Trust Company would not, in any

event, deprive the debtor of any defense that he might have had against the original assignor previous to the assignment. Section 477, Crawford & Moses' Digest. The question then is, what defense would the debtor have as against the Bankers' Trust Company?

Evidently when it paid the debt due the Bankers' Trust Company, it would be entitled to a return of its collateral. The Bankers' Trust Company could not hold it to pay the debt of another. Moreover, the Randolph State Bank, being insolvent, the title to all of its assets was vested in the State Bank Commissioner. The Bankers' Trust Company had the right to resort to its collateral for payment of its debt, and nothing more.

The Randolph State Bank became insolvent on November 4, 1930, and the Union Trust Company purchased the note from the Bankers' Trust Company on March 19, 1931. The sale and transfer was made without any order of the chancery court, and without any authority of law. After the Randolph State Bank failed, no one had authority to make a contract by which the collateral held by the Bankers' Trust Company could be used to pay the debt of the Union Trust Company, and, even if the sale and transfer were valid, and the securities liable for the payment of the Bankers' Trust Company note, the collateral could not have been used to pay anything except the indebtedness due the Bankers' Trust Company. The sale, as we have said, could not have been lawfully made without permission of the chancery court. Section 720, Crawford & Moses' Digest; Act 496 of 1921.

"Where the principal debt is sold and the collateral is transferred with it, the purchaser takes the debt and collateral on the same footing on which it was taken by the original creditor, being charged with the same duties respecting it, and entitled to the same benefits therein. He stands, so to speak, in the shoes of the seller. Thus the assignee holds the collateral subject to the right of redemption by the pledgor on payment of the debt." 21 R. C. L., 673.

The Bankers' Trust Company held this collateral subject to the payment of its debt. The pledgor had a right to pay that debt and redeem the collateral. No

contract by any of the parties could deprive him of this right.

When the Randolph State Bank failed, the rights of its creditors became fixed, and it would be a fraud on its creditors to permit anybody to make a contract whereby any portion of its assets should be applied to the payment of a debt other than the debt which they were given to secure.

Appellants also contend that there was no compromise made, and they call attention to several authorities discussing the law of accord and satisfaction. This principle of law is not involved. In the first place, it is not claimed that the debt was reduced in any way, or satisfied by paying a sum less than the debt. The Union Trust Company held no obligation of the school district, except certain school warrants. The school district did not owe the Union Trust Company any debt, and there was therefore no compromise of a debt. The undisputed evidence shows that the school district had refused to pay the warrants held by the Union Trust Company, but that the school district agreed to pay approximately $3,100 if the Union Trust Company would deliver to them all the warrants, amounting to something more than $6,000.

Mr. Bigger was given authority to make the settlement. He however testifies that he did not approve it because there was not enough collateral remaining to pay the entire debt. He evidently meant the debt due the Union Trust Company, and the debt due the Bankers' Trust Company, because all the evidence shows that they treated the two debts as one item and applied the collections from the collateral attached to the Bankers' Trust Company note to the payment of both notes. This they had no right to do. But Mr. Bigger knew that they had at all times refused to pay the warrants; he knew that the $3,100 which he received was paid with the understanding that all the warrants would be delivered. It cannot be claimed that the payment was made except on this condition, because all of the evidence shows that the school district had refused to pay. Mr. Bigger was told by the treasurer, who acted for the school district,

that he would receive a letter from the Union Trust Company with reference to the compromise, and he did afterwards receive this letter. Mr. Haynes, the treasurer, after his conversation at the bank with Mr. Brizzolara, went back to Pocahontas and gave Mr. Bigger a check for $3,134.25, which Mr. Bigger accepted and kept for several days, and then sent to the Union Trust Company.

We think there was substantial evidence to show that this compromise was made. If it was not the intention to carry out the agreement, the check should not have been kept.

There is some evidence about an offset, and Mr. Haynes said that they could attend to that later. The offset that he had in mind evidently was to use its deposits in the Randolph State Bank as an offset against the warrants, and to do this, the treasurer understood that they would have to have authority from the chancery court.

As to whether the compromise was made was purely a question of fact, and we cannot say that the finding of the chancellor was against the preponderance of the evidence. The decree is therefore affirmed.

FARMERVILLE STATE BANK *v.* HARMON.

4-3576

Opinion delivered November 19, 1934.

Neil C. Marsh, Neil C. Marsh, Jr., Tom Marlin and *C. W. McKay,* for appellant.

J. V. Spencer, McNalley & Sellers and *H. S. Yocum,* for appellees.

McHaney, J. In the year 1926, appellee, T. L. Grubbs, was engaged in the construction of highways in Louisiana near Farmerville, and owned considerable tools, machinery, mules and horses, which he used in his road construction business. He became indebted to appellant in that year, and executed to appellant a note secured by a mortgage on said property which is now in controversy. On April 17, 1928, Grubbs was so indebted to appellant in the sum of $4,500, evidenced by his note for said amount due and payable August 20, 1928, which was secured by mortgage on said property. The property was then located in Louisiana, but was afterwards without appellant's consent brought into Union County, Arkansas. Grubbs failed to pay his indebtedness to appellant when due, and on October 2, 1929, he executed and delivered to appellant a bill of sale of the property in controversy, which was then located near Huttig, in Union County, Arkansas, and was in the possession of the appellee, J. W. Valliant, who was employed by Grubbs and was using said property in hauling logs for the Union Sawmill Company. A short time after the execution and delivery of the bill of sale, appellee Valliant went to Farmerville, Louisiana, for the purpose of obtaining appellant's consent for him to keep possession of the property for a while and until they could pay the indebtedness that Grubbs was due his employees. According to Valliant, Mr. Selig, appellant's vice president, refused permission to keep such possession for this purpose. According to Mr. Selig, he agreed to let Valliant keep possession of the mules and other property involved in this suit for the purpose of finishing some hauling. A

short time thereafter Valliant brought an attachment suit in the Union Circuit Court against Grubbs on an alleged indebtedness of $834.95 which he claimed Grubbs owed him for services rendered, and levied an attachment on the property in controversy. Thereafter Grubbs entered his appearance and consented that judgment go against him, and on the 20th day of November, 1929, judgment for said sum was rendered, the attachment sustained, and the property was ordered sold to satisfy said judgment. Before the sale, appellant learning of this proceeding, brought a replevin suit against John W. Harmon, sheriff of Union County, Arkansas, as also Valliant and Grubbs, to recover possession of the property. Issue was joined, and on Valliant's motion the court required appellant to elect whether it claimed title and right to possession of this property under its mortgages above mentioned or its bill of sale dated October 2, 1929. Under the order of the court appellant elected to stand on the bill of sale. It was tried to a jury, and judgment rendered against appellant in the sum of $1,762, the property having been delivered to appellant under its replevin bond.

The bill of sale is the ordinary form of a bill of sale covering personal property. It provided that, in consideration of the sum of one dollar and other valuable considerations to him (Grubbs) cash in hand paid by appellant, receipt of which is acknowledged, "have bargained, sold and delivered, and do by these presents bargain, sell and deliver," unto the appellant the personal property therein described, which is the property in controversy. It further contained this clause: "It is agreed that any money received by the seller under this bill of sale for any of the livestock, tools, or equipment herein mentioned, shall and will be credited on and against my indebtedness to them, memorandum of such sale shall be made to me at my address at Maud, Texas, said credits to be applied as, where and if the money is received, less all expenses of sale." It concluded with a warranty clause, but no defeasance clause. At the same time Grubbs executed a note to appellant covering all of his indebtedness to it up to that time, and also executed

a mortgage on other property that he had in Cass County, Texas.

The court instructed the jury that the instrument above mentioned, called a bill of sale, is a bill of sale. The only question submitted to the jury was whether there was a constructive or symbolical delivery made of the personal property therein described by Grubbs to appellant. The jury found that there had been no such delivery, and under the instructions of the court returned a verdict against appellant for the value of the property.

We are of the opinion that the court erred in submitting that question to the jury, and in refusing to direct a verdict for appellant at its request. The undisputed evidence shows that the sale by Grubbs to appellant was complete, and the execution and delivery of the instrument to it constituted a constructive or symbolical delivery of the property to the appellant. The instrument was executed in Texarkana, Texas. The property was located in Union County, Arkansas, and was not subject to manual delivery at that time. We agree with the trial court that the instrument is in fact a bill of sale and not a mortgage. There is no question of fraud involved in the case as between appellant and Grubbs. Appellee is merely an attaching creditor, and, if the execution and delivery of the bill of sale was a sufficient delivery of the property, either actual or constructive, to pass the title to it, a judgment should have been directed in the appellant's favor. It was said by this court in *Cate-LaNieve Co.* v. *Plant,* 172 Ark. 82, 287 S. W. 750: "It has always been the rule of this court that constructive delivery on the sale of a chattel is sufficient to pass the title, and that the intention of the parties, when manifested by any overt act, is controlling" (citing a number of cases).

Now in this case both appellant and Grubbs testified positively that the execution and delivery of the instrument was intended by both parties to be a complete sale, and to pass the title to the property therein described at that time. Appellee, Valliant, also recognized this to be the fact and recognized appellant's title to the property by his trip to Farmerville, and by his request of

permission to retain the property for a short time for said purposes. Valliant's possession of the property was Grubbs' possession prior to the execution and delivery of the bill of sale, as he was Grubbs' agent. After the execution and delivery of the bill of sale, he held possession for appellant. Appellees contend that the clause above quoted renders the instrument a mortgage and not a bill of sale. Assuming that it might be so held in equity, we think it can make no difference to Valliant for in either case his lien acquired by attachment was subsequent to the title or lien conveyed by the instrument.

Under our view of the case, the court should have directed a verdict in appellant's favor. Not having done so, the judgment will be reversed, and judgment will be rendered here for the possession of the property in appellant's favor.

COMMONWEALTH BUILDING & LOAN ASSOCIATION *v.* WINGO.

4-3595

Opinion delivered November 19, 1934.

Lake, Lake & Carlton, for appellant.

E. K. Edwards and *Will Steel,* for appellee.

McHANEY, J. On August 25, 1926, the late Congressman, Otis Wingo, and his wife, the appellee, convey-

ed by warranty deed a certain eleven-acre tract of land adjacent to DeQueen, in Sevier County, Arkansas, to Robert A. Brown for a consideration of $5,500, of which $500 was paid in cash, and for the remainder notes were executed and a vendor's lien was retained in the deed to secure the payment of the unpaid purchase money, represented by said notes. Said deed contained the following clause: "It is further agreed that, upon full compliance with all of the conditions herein set out, the grantor will release the lien herein retained upon any lot or parcel of said land, and upon the payment to the legal holder of the notes of 3½ cents per square foot, embraced in the said lot, provided that interest due at the subsequent semi-annual interest payment periods is paid, which said payments shall be applied upon the indebtedness."

This clause was placed in the deed to enable Brown, who was constructing a number of residences in DeQueen and vicinity at that time, to construct houses on certain lots in said eleven-acre tract, clear the title thereto by procuring a release of the vendor's lien to such lots without paying the whole of the balance of the purchase money due on the whole tract. This enabled him to borrow money to construct the houses by showing a clear title to any particular lot or tract on which he decided to build a house. The tract in controversy is a lot 100 by 110 feet. Brown began the construction of a residence and garage thereon in the fall of 1926. He applied to appellant for a loan of $2,000 thereon for the purpose of completing the construction of said building, and, in order to clear the title, he procured a release deed from Mr. Wingo to said lot, which was placed of record. Thereafter appellant approved Brown's application for a loan, advanced to him the sum of $2,000 on January 14, 1927, taking a mortgage on said plot of ground which described the plot the same as in the release deed from Wingo to Brown which was executed on the 3d day of December, 1926. Brown completed the residence and garage, and he built two other residences on the eleven-acre tract in the same way. Brown failed to pay for certain materials and labor entering into the construction of said buildings, and mechanics' liens were filed against them.

Suits were brought to enforce said liens in which Wingo was made a party, and he filed an answer and cross-complaint, alleging default of Brown in the payment of his notes, and prayed a foreclosure of the lien retained in his deed to Brown. It was granted as to the entire tract less three small lots upon which buildings had been erected and which had been released from his vendor's lien. Appellant's mortgage on the lot in controversy was held to be second and subsequent to the materialmen's liens which were adjudged against it. The property was sold under the decree of foreclosure, and Mr. Wingo became the purchaser of all the land not released, and appellant became the purchaser of the lot in controversy, said sales being duly approved and deeds thereto acknowledged and approved. In all these proceedings the lot in controversy was described as in the release deed from Wingo to Brown above mentioned. Later, appellant sold the lot in controversy to one McCown, taking a mortgage from him and wife for the purchase price. In December, 1930, appellant foreclosed the McCown mortgage and reacquired the property at the foreclosure sale, and in all these proceedings said lot was described as in Wingo's release deed to Brown. Mr. Wingo died testate in 1930, and, under the terms of his will, appellee became the owner of his real estate, subject to all of the rights and liabilities attaching to it at the time of his death. In October, 1932, appellee wrote appellant a letter stating that in running the lines on her property known as Wingo Hill, she found that the house owned by appellant, being the tract in controversy, was on a part of her property; that one-half of the garage, two door steps, the southwest corner of the house and all of the front yard were on her land. She demanded $500 rent for the use of it, and offered to sell sixteen feet of it on the east side, forty feet on the south side, and fifty feet on the west side, in order to enable appellant to handle its property. Mr. Byington, agent for appellant at DeQueen, and a surveyor, assisted the appellee in making the survey in which it was discovered that the house on the appellant's tract of land extended over the lines, and onto appellee's property as heretofore stated. There-

after appellant instituted this action to reform the release deed from Wingo to Brown and all subsequent transactions affecting the title to said lot so as to describe a tract of ground 100 by 110 feet on which the improvements would be situated without extending over to appellee's property. The court denied reformation, and this appeal is from that decree.

We think the court erred in refusing to reform the release deed in question, and all other instruments thereafter affecting the title to said lot based on said description. It is clear from the language used in the deed from Wingo to Brown that it was the intention of Mr. Wingo to release any particular plot or tract of ground which Mr. Brown desired to have released, upon the payment to him or to the holder of the notes of 3½ cents per square foot. It was manifestly the intention of Brown and of Wingo in the execution of the release deed to the plot in controversy to release from the vendor's lien the ground on which Brown was then building the improvements mortgaged to appellant. His failure to do so was the result of a mutual mistake. While Brown did not testify and Wingo is now dead, we think all the facts and circumstances clearly indicate that Brown did not intend to build a house or any improvements on land belonging to Wingo, and that Wingo did not intend that he should do so. The error was due to Brown's failure to properly describe the tract he wished released. Brown intended to get released the land on which he was then building a house, the foundation of which had already been laid, and it was Wingo's intention that this should be done. Brown's error in describing the tract was also Wingo's error in releasing it. This makes a clear case of mutual mistake. This court has many times held that courts of equity are vested with jurisdiction to reform instruments, including deeds and mortgages, in order to give effect to the intention of the parties. *Clark* v. *Roots,* 50 Ark. 179, 6 S. W. 728, 8 S. W. 569; *Smith* v. *Kaufman,* 145 Ark. 548, 224 S. W. 978; *Glover* v. *Bullard,* 170 Ark. 58, 278 S. W. 645; *Foster* v. *Dierks Lumber & Coal Co.,* 175 Ark. 73, 298 S. W. 495. The general rule is that equity has jurisdiction to cancel or reform written in-

struments, either where there is mutual mistake or where there has been mistake of one party, accompanied by fraud or other inequitable conduct of the other. We held in *Sherwin-Williams Co.* v. *Leslie,* 168 Ark. 1049, 272 S. W. 641, that, where the uncontroverted proof showed that it was the intention of the parties to a deed that certain lands should have been included, and that it was omitted through the oversight of the scrivener who prepared the deed, as between such parties, the deed will be reformed. Many other cases might be cited. This court has also held in *Blackburn* v. *Randolph,* 33 Ark. 119, that: "Where a mistake in description of land occurs in a series of conveyances, under such circumstances as would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitled the last vendee to a reformation against the original vendor," to quote the second syllabus. This same rule was reaffirmed in the case of *Modica* v. *Combs,* 158 Ark. 149, 249 S. W. 567.

Nor do we agree with appellee that the decision in the mechanics' lien case herein referred to constituted *res judicata* of appellant's rights. All these proceedings were based upon the erroneous assumption that the description in Mr. Wingo's release deed was correct. This holding will work no injury to appellee, but the contrary holding would work a great loss to appellant.

The decree will be reversed, and the cause remanded with directions to reform the release deed of Mr. Wingo, and also all subsequent instruments incorrectly describing the tract of land, in accordance with the prayer of appellant's complaint.

GREAT ATLANTIC & PACIFIC TEA COMPANY *v.* GWILLIAMS.

4-3579 and 4-3580

Opinion delivered November 19, 1934.

King, Mahaffey, Wheeler & Bryson, for appellant.

Carrigan & Monroe, for appellees.

BAKER, J. These two cases were consolidated for the purpose of trial, resulting in judgments for the plaintiff, Norma Jean Gwilliams, a minor, by Eva Gwilliams, her next friend, and the plaintiff, Bobby Joyce Gwilliams, a minor, by R. L. Gwilliams, her next friend, and from these judgments in favor of plaintiffs, defendant, the Great Atlantic & Pacific Tea Company has appealed. A very short statement of the pleadings will suffice in these cases, as the facts will be set forth somewhat at length. The reason for so doing is that the sole question to be determined in each case is whether the facts, as proved, are such as to justify the judgments rendered.

The complaint in each case alleges that the servants and employees in charge of the retail grocery store at Hope sold to R. T. Gwilliams, the grandfather of the two children, some cheese; that at the time of the purchase, Gwilliams asked for a pound of cheese that would be fresh, wholesome and nutritious, when in fact such cheese was, at the time of the sale, spoiled, contaminated and poison, and wholly unfit for human consumption, and that the servants and employees knew at the time of the sale of the cheese, or should have known, in the exercise of ordinary care that said cheese was spoiled, contaminated and unfit for human consumption; that it was not fresh, wholesome and nutritious as represented; that the appellant failed to exercise ordinary care in properly keeping and preserving the cheese.

That the two appellees, who ate some of the cheese, suffered from ptomaine poisoning for weeks, and that the health of each of them was permanently impaired, etc.

The evidence offered was to the effect that R. T. Gwilliams, his wife, his daughter, Eva Gwilliams, and her daughter, Norma Jean Gwilliams, about sixteen months old, drove from their home, about five miles, to Hope, at which place just before leaving for their home, R. T. Gwilliams purchased from the appellant a pound of cheese; that Mr. Gwilliams asked Mr. Daniels, who sold him the cheese, if he had some good cheese, and that the latter replied, "Yes, I have some good cheese"; that he then told Mr. Daniels to cut off a pound, which was wrapped by Daniels in paper; that Daniels cut the cheese with a butcher knife; that the purchase was made about 12 o'clock on Monday. Gwilliams and his family ate some of the cheese on the road to their home. Norma Jean Gwilliams, about sixteen months old, was given some of the cheese. After reaching the home Bobby Joyce Gwilliams, another grandchild, about three years old, who lived a short distance away, came to the house of the grandfather about 3 o'clock in the afternoon, and the two children ate what was then left of the cheese; that about 6 o'clock in the afternoon Bobby Joyce Gwilliams was taken ill; was picked up by the grandmother, and was apparently very sick. Her father came for her and took her home fifteen or twenty minutes later. The other child, Norma Jean Gwilliams, was taken ill, and just as they were about to eat supper she commenced to vomit, as had the older child, Bobby Joyce. An examination of the vomit disclosed undigested portions or small particles of the cheese. Dr. Hilton was sent for and came about two hours later and treated the children. They soon recovered from the violence of the attack. The wife and daughter ate some of the cheese and complained that it made their throats sore. The children have not been well since they ate the cheese, have not grown, although it has been a year since the cheese was eaten by them. Prior to that time they were healthy and strong. The health of both has been impaired. Gwilliams further testified on cross-examination that he lived about five and

one-half miles from Hope; that he got to Hope about 10 o'clock and went in a wagon; that they had breakfast that morning before they left home; doesn't remember what the baby, Norma Jean, had for breakfast; was in Hope about two hours before the purchase of the cheese. His wife had bought some crackers, only ate them when he bought the cheese. He saw the cheese and paid little attention to it. It looked all right. Didn't know about it being fresh because they didn't examine it. The piece of cheese was cut from a larger piece weighing five or six pounds. At the time the cheese was given to the baby, he didn't suppose he paid any attention to it, he was driving and didn't look around. His wife ate a little bit, and he ate a little bit himself as they were going home; that he ate some crackers; that when he got home he had dinner, didn't recollect what they had; didn't think the baby ate that day; that it was still nursing and ate very little at any time; that Bobby Joyce had eaten dinner at home before she came there; it was about 3 o'clock when the children ate the cheese at witness' home. They were on the back gallery or in the kitchen. Perhaps they went out in the yard before they ate it. They were given what they wanted of it; didn't know how much Norma Jean ate, but saw her eat it, but she had a very little bit on the way home from Hope; wasn't certain whether or not she ate dinner.

Mrs. Etta Gwilliams testified that she was the grandmother of the children, and also testified substantially to the same facts that her husband had related, stating, however, somewhat more definitely the fact that the small child, Norma Jean, ate a very small portion of the cheese on the way home, and that they arrived there about 2:30 or 3 o'clock; that the cheese was eaten because of the fact that they knew they would get hungry before they got home; that Bobby Joyce and Norma Jean both ate of the cheese after they reached home. The witness cut a piece or two and divided it for the children, and they ate it. There was not a great deal left when they got home. She further testified that they did not have crackers, but she had bought two packages of light bread rolls or biscuits; that Norma Jean ate a little of this

bread before they reached home; that she unwrapped the cheese, and didn't see anything wrong with it. If she had, she would not have eaten it. It looked nice and tasted all right, though she said she paid but little attention to it; that at the time she divided the cheese for the children, she unwrapped it, and there was not a great deal of it left; that she split a big piece of cheese in two and gave a piece to each child. The piece given to the little baby was not very large. Bobby Joyce did not eat dinner at their house, because she had eaten her dinner at home. The witness testified that she herself had eaten somewhat more of the cheese than the others, and at about 3 o'clock her mouth felt like it was scalded, and that she got sick at her stomach.

Eva Gwilliams testified that she was the mother of Norma Jean, and that they left Hope between 11 and 12 o'clock, or about noon; that her father had bought the cheese, and they all ate of the cheese as they were going home; that they made the trip in a wagon. She said they began tasting the cheese right after they got out of town; that she fed her baby, but didn't feed it very much, just a little piece. It didn't eat very much. She also said that they did not eat when they got home, or until they fixed supper, but that the children ate some of the cheese. She testified further that she was made sick; that her throat got sore, and that she ate only a small piece of the cheese. On the trip home they didn't have any knife to cut the cheese with, but broke it off with their fingers and ate it; that the cheese looked all right and tasted like other cheese; that she never ate anything but nice fresh cheese, and that this cheese looked nice and fresh; that she wouldn't have given it to the baby if it hadn't looked that way; that they gave to the babies three crackers apiece, and they ate the crackers with the cheese; that she and her mother got sick about the same time.

Dr. Hilton, the physician who was called to treat the children, testified that he found the children to be nauseated and vomiting and suffering from dizziness, that they had turned purple and looked and acted like they had symptoms of the cramps; that after the little girl had

vomited she would drop off in a comatose or sleepy condition; that her heart was irregular; that he didn't make a chemical examination of the substances seen by him which the children had vomited; that all he saw was film or phlegm with little pieces of cheese; that the children's mouths and throats were corroded; that this condition was attributable to poison; that it was his opinion that the cause of this corroded condition was ptomaine poison caused from the cheese, if that was all that was eaten.

Dr. Martindale also testified that he treated the children; that they had been taken sick, and some days later they were brought to his office; that he examined them and found that they had sore mouths and tongues; that their throats were irritated and tender, gums swollen and throat very sore; stomachs bloated. It was his opinion that ptomaine poison caused the condition. He also said that cheese was not the best food for very young people, but, if good, cheese was not apt to set up irritation of the stomach, such as these children suffered.

Dr. Joe Ellis Tyson, on behalf of the appellant, testified that young people are unable to assimilate cheese; that the digestive secretions are not able to break it down; that this fact brings on the vomiting and symptoms similar to those from which the children suffered, except that he does not say that this would cause the corroded condition of the mouth and gums, as testified by Dr. Hilton. He testified further that he would not necessarily attribute a condition of that kind to anything being wrong with the cheese. He did testify that ptomaine poison is due to the intake of decomposed food protein. If some of it should get on cheese, it would poison.

Mr. Daniels testified that he was with the Atlantic & Pacific Company, and that he remembered the occasion of selling Mr. Gwilliams cheese, about the 17th of April. His attention was first called to it four or five days later when Mr. Gwilliams made complaint to him about it. This cheese was cut from a hoop of the Wisconsin Daisy Cheese. He had been selling this cheese ever since he had been with the company, about three years. They sold about three times as much of that as they did the

other varieties of cheese; that the amount, however, would vary with the season of the year. Ordinarily about the spring of the year they would handle about four hoops a week. This was sent to their place from Dallas by commercial truck. The cheese came in a wooden hoop or box; that the cake of cheese had a covering on it. There was a very thin piece of wood which was on the top and bottom inside the box, then there was cheese cloth. The cake of cheese was entirely inclosed with the cloth; that the particular hoop from which Mr. Gwilliams bought his cheese came to the store Thursday before the sale, which occurred on Monday following. When cheese was received, it first went into the big cooler, and then to the serving counter or display case; that the display case had several doors to it, with packing around the doors to hold the refrigeration; that the temperature maintained in it, and in the big box was from 34 to 36, or 37 degrees. They kept meat in the display case. Some of it was cut up ready to serve. It was kept both ways. They kept beef, pork and cured meat and cold meat, and on week-ends they kept fish in it; that he got this hoop of cheese out of the big box and commenced to sell off of it on Monday. It had been kept in the other box until Monday. He took the cheese out of the hoop and cut it half in two, and then quartered it, and usually put three pieces back in the big cooler, or the big box, and a quarter in the display counter. He had had experience with cheese, and this was all right, as far as he could tell. It appeared to be in proper condition. He thought he sold to Mr. Gwilliams from the first quarter placed in the counter. He looked at the piece he cut off. It looked and appeared to be all right, did not see anything wrong with it. It looked like the cheese he sold every day. All of it looks very much alike. He kept the knives and display case, and other places clean. On Monday the big box, the large cooler box, was washed, hooks inside of the box were washed each Monday. The rest of the market was washed from day to day through the week. The big box was washed one day a week. The display counter was washed on Saturday night after closing business, and at such times through the week as was found neces-

sary; thought he had always had the reputation of keeping the place clean. They considered it the best part of the business, and had comments on the cleanliness of the market; tried at all times to keep the market clean; that they did not keep any putrefied or spoiled meat in the display case, or any other place. As to knives, they were washed, towels were kept in the market to keep the knives clean; that he cut this piece of cheese for Mr. Gwilliams with a knife, and, going by their habit in things like that, they usually wipe the knife whenever they get ready to use it; that he had not been cutting any spoiled meat with that knife, or cutting anything that was putrid in any way; tried to keep their hands and persons perfectly clean, and when he handled this cheese his hands were clean. He continued to sell that whole block of cheese; sold the whole hoop to his regular customers, and he had quite a few customers there in the city of Hope and surrounding country. He had no complaint about the cheese, except what Mr. Gwilliams was alleged to have made.

On cross-examination, he repeated much he had already stated, and in addition some other facts. He had cut some meat with that knife. He put the cheese on the meat block, and cut the cheese on the meat block, and put it in the case; kept a light on the inside of the case; that he kept steak in there, and fish on the week-end; they kept practically everything in there, except ground meat. Perhaps would not have remembered the particular sale if Mr. Gwilliams had not come back and called his attention to it. The cheese had been shipped to Hope by commercial truck covered by tarpaulin with no refrigeration.

The completeness of this statement as to all detail is made necessary for the reason that these two suits were prosecuted upon the theory that the appellant had been guilty of negligence, by reason of which the injuries or illness of the children followed.

The appellant earnestly contended that the appellees in these cases have failed to discharge the burden placed upon them to prove negligence resulting in the alleged injuries. No question is raised as to the com-

petency of any evidence or as to any error in the instructions, except that appellant contends that the court should have directed the verdict for the appellant.

For the purpose of this opinion we treat the facts as being sufficient to show that the children suffered from ptomaine poison, occasioned by active putrefactive agencies. The condition of the children was serious. According to the evidence, a very small bit of this poison may become very violent and active, quickly impairing the health, if not endangering the life, of the unfortunate victim who happens to eat food contaminated by it.

The briefs have been carefully studied, other investigation has been made of authorities. We agree with counsel for appellees as to the correct rule announced in the case of *Heinemann* v. *Barfield,* 136 Ark. 456, 207 S. W. 58, as follows: "The duty which a retail seller of food for immediate consumption owes to his customers is succinctly and correctly stated in Ruling Case Law, as follows: 'Persons who engage in the business of furnishing food for consumption by man are bound to exercise care and prudence respecting the fitness of the article furnished, and they may be held liable in damages if, by reason of any negligence on their part, corrupt or unwholesome provisions are sold and persons are made ill thereby.' 11 R. C. L. 1118, and cases cited in note. Actionable negligence in such cases is the failure to exercise such care as a man of ordinary prudence would exercise under the same circumstances to prevent injury and damage to his customers by the sale of articles which he knows are bought by them for immediate use as food."

The theory now is that, in the handling or sale of standard packaged goods, inspection is not required, expected, or anticipated of the dealer. Such inspections could not be made, in most instances without destroying or damaging package protective coverings.

In the case of *Coca-Cola Bottling Co.* v. *Swilling,* 186 Ark. 1149, 1153, 57 S. W. (2d) 1029, this court said: " 'The retailer owes to the consumer the duty to supply goods packed by reliable manufacturers, and such as are without imperfections that may be discovered by an exercise of the care, skill and experience of dealers in such prod-

ucts generally. This is the measure of the retailer's duty, and, if he has discharged it, he should not be mulcted in damages because injuries may be produced by unwholesomeness of the goods. As to hidden imperfections, the consumer must be deemed to have relied on the care of the packer or manufacturer or the warranty which is held to be implied by the latter.' The annotated cases cited in the notes to the text quoted appear to sustain the text.''

The retail dealer is not a guarantor, and this case is not founded upon that theory, but he is charged with the exercise of ordinary care to sell sound and wholesome products, meaning that degree of care necessary for the protection of customers against impurities or contamination that might ordinarily be discoverable by any usual or ordinary tests. This cannot mean, however, that the retail dealer must make or apply such tests as would in every case operate to insure absolute safety. Hidden or concealed imperfections or contaminations might require microscopical tests or chemical analysis for their discovery. Under present conditions, such requirement would prove so burdensome that many articles in ordinary use could not be handled by the ordinary dealer, and consumers would be denied the right to buy such products. In other words, such a test, if applied under the ordinary conditions, would be equal to requiring the dealer to become an insurer of the absolute perfection of the commodity sold. The test should not be higher than that commonly or usually practiced by careful dealers under the same conditions and circumstances, which is at least as high as the consumer expects, or has the right to expect of his groceryman or food dealer.

The essential facts in this case are not in dispute. Daniels remembers that Mr. Gwilliams called upon him a few days after the cheese had been sold to him, and made complaint of its unsoundness or unwholesomeness, and this called to his mind the incident of the purchase, and he is practically sure that this was the first piece cut by him from the quarter that he had put in the display counter. He says that he examined it at the time he cut it; that there was nothing wrong with it that was ap-

parent. No doubt he would not have hesitated to send this particular cut of cheese to his own home for consumption by his own family.

It is urged, however, that he cut it upon the meat block where meats were cut, and where fish was probably sometimes cut, and that he used a knife which was sometimes used, or which may have at all times been used, to cut meat; that the contamination might have come from the contact of the cheese with the block, or its contact with the knife. That could be true, but this is within the realm of speculation and conjecture. This contamination might also have come from the paper with which it was wrapped. It is also just as probable that it may have come from contact with the hands of those who later carried it, opened it while upon the road home. Mrs. Gwilliams and her daughter both handled the cheese. They could observe its quality, its purity, its apparent freedom from contamination, and the matter need not be argued that, if it had had any appearance of being contaminated or unwholesome, these good people would not have given this food to the children who suffered from it. They had gone to town in a wagon, had no doubt used their hands in climbing in and out of the wagon. Childrens hands are frequently not clean when not at home under the attentive care of those charged with the duty of their protection, and still, as a matter of speculation or conjecture, it may be that the children's hands were not wholly free from contaminating conditions. All of these matters are set forth, not as being true conditions, which prevailed, but as tending to show the danger of speculation in order to determine, without evidence, the means whereby the cheese had become unsound or unwholesome for human food.

It is argued in the brief of appellees that the cheese had been shipped by commercial truck from Texarkana to Hope, that it may have thus become contaminated. If so, and this fact of such contamination was not discoverable by the exercise of ordinary care, then the negligence was that of another party and not of the appellant here. To hold otherwise would be to hold the appellant as an insurer of the wholesome condition of the

food. It will be remembered that the appellant was a dealer and not a manufacturer; that it had handled the same brand of cheese for a long period, and that the cheese had always been found to be wholesome and sound, and that no other part of this same hoop of cheese had been found to be unsound, and the fact that a small particle thereof may have been unwholesome, when that condition was not discoverable in the exercise of ordinary care, would be insufficient to justify a determination by us that plaintiffs need not prove negligence either directly or inferentially by circumstances. Daniel's statement was not inconsistent or in conflict with other testimony; it was not unbelievable or unreasonable.

Daniel says that the market was kept clean. The knives were clean, and they kept no putrid meats. They kept their hands and persons clean. Should he have been believed? *Fleming* v. *L. R. Chamber of Commerce,* 137 Ark. 615, 206 S. W. 895; *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397; *Toll* v. *Lewis,* 136 Ark. 318, 206 S. W. 442.

Authorities in cases involving negligence of vendors, as distinguished from the implied warranty, are not lacking. This court seems to have followed in all decided cases the weight of these authorities. There must be proof tending to show the negligence alleged before there is a recovery. Negligence, like fraud, is not presumed, but it must be proved, or, at least, facts must be shown from which it may be inferred.

The case of *National Cotton Oil Co.* v. *Young,* 74 Ark. 144, 85 S. W. 92, is in point. The facts showed that Young bought a load of cottonseed hulls and a sack of cottonseed meal from the oil company, and he himself loaded the hulls in the wagon with a large fork, direct from the factory. He mixed the meal with the hulls, and fed the mixture to his cows. The cows died shortly afterward. An examination of one of them disclosed nails, pieces of wire and other foreign substances in the throat and stomach. The meal and hulls were examined and similar metallic substances were found in both. Young sued the oil company, relying both upon the implied warranty of the feedstuff, and upon negligence.

The question of implied warranty was eliminated by a prior decision of this court, so the case went to the jury upon the question of negligence.

The jury returned a verdict as follows: "We, the jury, find for the plaintiff, J. E. Young, the sum of one hundred dollars, and believe the foreign matter got into the feed by accident." This finding was upon evidence adduced by the oil company tending to show that it was impossible for such foreign substances, as found in the feed, to have gotten into it in the process of manufacture, and necessarily that such substance got into the meal and hulls after they were manufactured. The court held that negligence was not established, though some proof was offered from which the jury might have inferred that the foreign matter got into the feedstuff through negligence of the employees of the oil company. The point is that the unfit condition of the feedstuff for consumption by the cattle did not establish negligence.

In a much more recent case, that of *Colyar* v. *Little Rock Bottling Works,* 114 Ark. 140, 146, 169 S. W. 810, this court distinguished the case under consideration from the case of *O'Neill* v. *James,* 138 Mich. 567, though both cases are based upon the fact that a bottle of soda water or coca-cola exploded by reason of an overcharge of gas, doing injury to the one handling the bottle.

In the case of *O'Neill* v. *James,* the proof offered did not show knowledge on the part of the defendant that the bottle which exploded had been improperly charged with gas, while in the case under consideration, proof was offered that the producer or manufacturer had information of the fact that bottles frequently exploded when handled, and he knew, or should have known, of the unsafe condition of the overcharged bottle. In the case of *O'Neill* v. *James,* the proof of negligence was the explosion of the bottle. The judgment for plaintiff was reversed. In the Colyar case it was held that with the evidence, in addition to the fact of the explosion, the case should have gone to the jury. It is argued in appellees' brief, but not found in the abstract of evidence, that the meat block was contaminated with soured and putrid particles of meat, etc. If this were evidentiary,

and not merely conjectural, a different case would be presented.

In the case of *Heinemann* v. *Barfield,* 136 Ark. 456, 207 S. W. 58, it was found that flour sold to the plaintiff contained arsenic, and it is also shown that an employee of the appellant had a short time before this sale bought "rough on rats" from a neighboring druggist which, according to the druggist's statement, contained fifteen or twenty per cent. arsenic, and this had been put out near or around the flour bin, and that the appellant had burned some flour, saying that "the chances are some one else might get poisoned from this same flour."

In the case of *Drury* v. *Armour & Company,* 140 Ark. 371, 216 S. W. 40, and the same case reported again in 146 Ark. 310, 226 S. W. 133, there was proof in regard to the sausage sold that there was a green, slimy piece, as big as one's thumb, which was wet and soggy, and gave out a bad odor, and that it smelled like it was rotten. This was a condition that should have been discovered in the exercise of ordinary care.

In the case of *Safeway Stores, Inc.,* v. *Ingram,* 185 Ark. 1175, 51 S. W. (2d) 985, Ingram was made sick by eating a piece of cheese loaf, purchased from appellant. The proof was that this loaf had a tainted taste; that one could tell from the looks of it that it was poison. It was also proved that it had mold upon it, and had the odor of spoiled meat.

In the research we have made we have not been able to find a case, nor have appellees cited one, decided by this court, wherein the injuries suffered were held to be sufficient proof of negligence to justify a recovery. Such a holding would seem to be against the weight of authority.

It follows therefore that both cases should be reversed, and remanded.

It is so ordered.

SMITH *v.* LEEPER.

4-3599

Opinion delivered November 19, 1934.

Oscar T. Jones, for appellant.

Dene H. Coleman and *Chas. F. Cole,* for appellee.

BAKER, J. The appellee in this case, about thirteen years ago, purchased an eighty-acre tract of land in Independence County from Mack T. Smith, the appellant, and agreed to pay the sum of $2,000 therefor, executing eighty-five notes of $20 each. He paid $300 about January 1, 1921, and at that time, or soon thereafter, took a deed and executed a mortgage to secure the deferred payments.

At the time of this purchase both of the parties lived in Chicago, and the appellee says that he had never seen the land; that it was represented to him by the appellant, as an inducement to cause him to purchase the land, as being located upon a good road, when in fact it was not upon any road; that one had to pass through the lands of three different landowners to reach a road or mail route; that he represented the character and quality of the land as being excellent, free from rocks and suited to truck farming, when in fact it was rocky and not well adapted to truck farming, very poor soil; that he further represented that there was certain merchantable timber on the land, sufficient to pay for it, when in fact there was no merchantable timber whatever.

Appellee also charges that Smith represented that all of said land was capable of being placed in cultivation, when in fact there was only a small portion thereof suitable for cultivation; that he represented there was a good house and barn on the property, and that the land was fenced, when in fact there was no barn and no fence and that the house was in a very bad state of repair, and it was necessary to go to a great expense to make it habitable.

A contract was entered into in October, 1920; that the deed and notes were executed in January, 1921. It was some considerable time after that, perhaps a year, before the appellee saw the land, and he at once attempted to rescind the contract, but was persuaded by Smith not to do so, and Smith promised that he would grant him a reduction and make adjustment with him before final settlement would be required in payment for the land.

At the time the suit was filed there was due $400 of the principal sum under the contract, which, together with interest, amounted to about $600. This amount Leeper refused to pay. Smith proceeded to make sale of the land under the power granted in the mortgage and procured Oscar T. Jones to sell the land, at which sale Smith became the purchaser. Leeper brought suit to cancel this sale made under the mortgage, and for dam-

ages, and Smith, by way of cross-complaint, asked for the foreclosure of the mortgage, or deed of trust.

Leeper, in his testimony, said that he saw Smith's advertisement in *The Chicago Daily News;* that he wanted to buy a place for a home; that he saw Smith and took notes in a memorandum book as to Smith's statements or representations. Among other things set out in the notes, which Leeper says he took down, is the fact that Smith recited that all of the land could be cultivated, except a small portion, and that there was timber enough on the place to pay for it; could raise vegetables of all kinds, beets and tomatoes one and a half to two pounds; land not rough but gently rolling; spring water, sufficient to irrigate the place; good soil; grow anything you plant; about thirty acres in cultivation; near churches; road and mail route near place; good road out; place fenced; good barn; house the best on south side of the river; other buildings, spring house; had six acres of fine orchard bearing peaches; tenant on the place named Cazort.

Leeper, without investigating but relying upon all of the representations so made, contracted for the land. In this suit he said there was no merchantable timber upon the land; no barn upon it; no fence; no orchard; that the house was in a very bad condition; the soil very poor and not productive; that the property was not worth exceeding $1,000 at a high price.

Other witnesses testified the property to be worth from $400 to $600. Cazort, who lived upon the place was also a witness. He states that he received a letter from Smith, who advised him he had found a buyer for the place at $2,000 and asked him to make the place as attractive as possible; to meet the purchaser at the depot and take him to the farm late in the afternoon, just in time to get the train out the same day; that he thought the deal would go through and that he would pay Cazort for his trouble, and also that he didn't want Leeper to get in touch with any real estate men for fear they would try to switch him to some other place; to keep the information given him in the letter to himself and to do his

best to help make the deal go through and not to say anything to anybody until afterward.

Cazort said that he lived on the place four or five years, one year before Leeper came and four years after he came. He said that the timber on the place was fit for fire wood only; that the barn had been torn down for kindling the year before.

Smith testified that Leeper's attitude was a shock to him and offered a letter written by Leeper and his wife stating that they had paid the taxes, no advertising fee, that all the favors and help extended to them seemed like mountains of blessing and were received with real appreciation. Trusted that they might not always be up against it, that instead something may come their way which would make it possible for them to meet their full obligations and duty. Smith admitted he wrote the letter to Cazort concerning the purchaser who would come to look at the place.

The chancellor, upon the trial of this cause, found that this was a suit in recoupment for the deceit alleged to have been practiced by Smith upon Leeper. He set aside the sale, wherein the land was sold by Smith and bought by Smith, under the power contained in the mortgage or deed of trust. No question is raised about the correctness of this part of the decree. He found also that Leeper had paid full value for the land and canceled the other or outstanding notes and mortgage and quieted the title in Leeper against Smith; dismissed Smith's cross-complaint, wherein Smith was seeking to foreclose the mortgage for the balance due upon the remaining portion of the contract or purchase price.

It is urged upon this appeal that much of the evidence, or, at least, part of it offered by Leeper contradicts the contract. This is not correct, and this contention can arise only upon a misconception of the nature of the suit. The contract does not say, of course, that there was a barn upon the place, but Smith had lived upon the place at one time, and there was one at that time. It is not in contradiction of the contract for Leeper to testify that there was no barn upon the place, nor is he prevented from testifying that Smith told him

there was a barn there merely because of the fact that no barn is mentioned in the written contract. The fraud or false representations, or deceit, is the gist of Leeper's contention, and, if he were not permitted to show that the statements made as an inducement to him to enter into the contract were untrue, because of the fact that Smith did, or did not, write these statements into the contract, then the anomalous situation of preventing a recovery in the case would arise, for the reason that Smith had not only deceived him, but had contracted with him so as to perpetuate and make workable this deceit without relief. Leeper ratified the contract but sought relief in recoupment.

This court has said in several cases that one of the remedies of the victim in the case of deceit is to await the effort to collect the money and then assert his remedy by way of recoupment for damages. Leeper, the appellee, has done this.

It is urged also that Leeper's claim is stale; that he has not been diligent, but Leeper's explanation is entirely tenable, at least not unbelievable, that is, to the effect that Smith had insisted that he keep the property, promising that he would adjust the price with him on the last payments. To argue that he should not have waited thereafter would be tantamount to arguing Smith's lack of honor and good faith. Perhaps he should not have relied upon this promise of Smith's, but should have proceeded at once with the suit, either to rescind or to recover his damages, but under the circumstances Smith may not properly urge that defense. Smith was making an effort to collect this money, alleged to be due him, by sale of the land under the power contained in the mortgage. Leeper filed his suit to cancel this sale and deed made under it and asked for damages.

Chief Justice HART, speaking for the court, in the case of *Held* v. *Mansur,* 181 Ark. 876, 881, 28 S. W. (2d) 704, said: "In the third place, to avoid a circuity of actions and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped against the sum he has paid for the land. *Matlock* v. *Reppy*, 47 Ark. 148, 14

S. W. 546; and *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57. In the same case Chief Justice HART said further: "Where the vendor knows that the purchaser is wholly ignorant of the value of the property, and knows that he is relying upon his representations, the representations do not take the form of a mere expression of opinion, but are in the nature of a statement of fact. The reason is that the vendor knows that the statements he has made are untrue or are made in reckless disregard of the truth, and it cannot be doubted that he knows and believes that such statements will have a material influence upon the purchaser. *Carwell* v. *Dennis,* 101 Ark. 603, 143 S. W. 135; *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458; *Bell* v. *Fritts,* 161 Ark. 371, 256 S. W. 53; *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S. W. 432; *Laney-Payne Farm Loan Co.* v. *Greenhaw,* 177 Ark. 589, 9 S. W. (2d) 19."

Smith's letter to Cazort, attempting to arrange with Cazort to so manage Leeper upon his trip to visit the farm so as to not permit any one to meet or talk with him about the property, indicated pretty clearly his intention to deceive, and he did, in fact, deceive Leeper. *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856.

The court held that the remaining notes should be canceled. The brief of appellee suggests that further relief ought to be given Leeper, under the proof in the case, to the effect that the property was worth only five or six hundred dollars. We think, however, that, inasmuch as Leeper had paid of the principal amount $1,600 before he quit paying in order to enforce his remedy, the most he could consistently ask is what the court gave him, that is, relief from the payment of the balance of $400 and interest.

The chancellor's ruling is supported by the authorities, and seems not to be against a preponderance of the evidence, but is well supported by it.

It follows therefore that the case should be affirmed, and it is so ordered.

PARSONS *v.* BARNETT.

4-3708

Opinion delivered November 19, 1934.

W. K. Ruddell and *S. S. Jefferies,* for appellant.

Dene H. Coleman and *Wallace Townsend,* for appellee.

McHaney, J. Appellant, a qualified elector and taxpayer in Batesville School District No. 1 of Independence County, brought this action against appellees as the board of directors of said district to enjoin them from issuing refunding bonds in the sum of $110,500 to take up a like sum of outstanding bonds of the district. The complaint filed for this purpose alleged a number of grounds of invalidity of the proceedings taken, to which a demurrer was interposed and sustained. The complaint was dismissed as being without equity, and this appeal followed.

At the annual school election held May 19, 1934, the ballot used gave the electors the choice of voting "for school tax" and "against school tax," and also for and against "18 mills school tax, including 6 mills for building fund." It then provided: "The building fund is for a proposed refunding bond issue of $112,500, and will run for twenty years and whatever number of mills is voted for the building fund will be a continuing levy of that amount on the real and personal property now embraced in this district until said bonds and interest are paid." The names of four persons as candidates for school directors were also placed on the ballot with instructions to vote for two, and the name of one candidate for State Board of Education. The county judge canvassed and certified the result of said election, showing, among other things, that a tax of 18 mills had been voted—12 for school purposes and 6 for building fund. Thereupon, appellees, the directors of said district, had bonds printed of the face value of $110,500, executed them, as also a deed of trust and pledge securing said bonds by a mortgage on all the property of the district and pledge of the

annual revenues derived from a six mill building fund tax for twenty years, or until all the bonds and interest of the refunding issue of $110,500 are paid. They thereupon gave notice of the sale of said refunding bonds by publication, sale to be to the highest bidder for cash or for exchange for outstanding bonds, reciting certain conditions and the date of sale, August 30, 1934. One bid was received as follows: For $3,000 of 6 per cent. bonds, a surrender would be made of a like sum of bonds issued April 1, 1915; for $40,000 of 5 per cent. bonds a surrender would be made of a like sum of bonds issued January 1, 1923; for $43,000 of 5½ per cent. bonds, a surrender would be made of a like sum of bonds issued August 1, 1926; and for the remainder, $24,500 of 5 per cent. bonds, a surrender would be made of a like sum of bonds issued March 2, 1931. One of several conditions of this bid is as follows: "This offer is upon the condition that the district will set aside into a building fund the entire proceeds of the annual building fund tax of six mills which this district voted on May 19, 1934, for the retirement of this bond issue. The said building fund is to be kept solely for the following purposes"; setting them out.

For a reversal of the judgment, appellant first contends that § 1, act No. 28 of the Special Session of 1933, approved September 2, 1933, which amended § 65 of act No. 169, 1931, page 476, is unintelligible because of the following language used in the act: "Hereafter on the proposed issue of bonds by any school district, either for the purpose of borrowing money or to refund any outstanding bonds of said district, the directors shall submit to the electors of the district either at the annual school election or at a special election called for that purpose * * * at which the electors shall vote on the question of the number of mills to be set aside in the building fund to pay the bonds and interest on the proposed issue." The criticism is that the language employed requires the directors to "submit" something without stating what is submitted. It must be admitted that the sentence is awkwardly drawn, but the whole act leaves no doubt about what they were to submit to the

electors. The question to be submitted was the voting of a building fund in the manner and form prescribed in said act 28. Section 65 of act 169, 1931, provided for the voting of a continuing levy for a building fund, but it did not provide that such facts should be printed on the ballot to be used at the election at which the continuing levy was voted. The object of the amendatory act No. 28 was to advise the electors of the fact that a continuing levy for the building fund was to be voted for and the number of years the levy should run. The purpose of the act is therefore clear, and it is not subject to the criticism made of it by appellant.

It is next said that the notice given of the annual school elections in this and other districts in the county was not a proper notice because not signed by the directors. The notice was signed by the county judge and the county examiner. It correctly stated the nature of the election, the date and hours as fixed by law and that: "Electors will vote on local district tax, for local school directors and any other question that may be submitted by the local directors." We do not here decide whether the notice should have been signed by the directors or by the county judge, as such failure, if it be a failure, did not invalidate the election as it is a mere irregularity. *Wallace* v. *K. C. Sou. Ry. Co.,* 169 Ark. 905, 279 S. W. 1. In that case we quoted from *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, which is a quotation from *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229, as follows: "All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election or unless it is expressly declared by the statute that the particular act is essential to the validity of an election or that its omission shall render it void." Therefore the failure to give a proper notice, or a notice signed by the proper officials could not have the effect of voiding the election.

The next argument made for the reversal of the judgment is that the ballot used in the annual election held May 19, 1934, did not comply with the provisions of said act 28. The act provides, with reference to the ballot, the following: "The ballots shall state plainly in the same size type and immediately following the words, 'for ..... mills for building fund,' that the proposed bonds will run for the number of years agreed upon between the directors and the bond broker, and that whatever number of mills is voted for the building fund will be a continuing levy of that amount on the real and personal property then embraced in said district until said bonds and interest are paid, and that shall be the effect of said election." The ballots had printed on them the matters herein above stated. Instead of printing the information required by the act as above quoted, immediately following the words "for 18 mills school tax, including 6 mills for building fund," such information was printed below the words "Against 18 mills school tax including 6 mills for building fund." We think this is a substantial compliance with the requirements of the act. Said act 28 further provides: "They shall show on the ballot the proposed levy for school purposes and the part thereof to be voted for and placed in the building fund. The ballots shall show the number of mills to be voted for the building fund." It is conceded by appellant that the act was literally complied with in the printing of the ballots except that the information regarding the building fund as to its being a continuing levy and the number of years it was to run did not immediately follow the words, "for 18 mills school tax including 6 mills for building fund." The very purpose of the act was to advise the voter what the effect of his ballot would be. Prior acts made no such requirement regarding the printing of such information on the ballot. Each elector had his choice of voting first, "for or against" the school tax and second, for or against "18 mills school tax, including 6 mills for building fund."

Another contention made by appellant is that the county judge and the county examiner canvassed and certified the result of the election instead of the county

court. It is true that under § 30, act 169, 1931, the duty of certification devolved upon the county board of education, and that by act 247, of 1933, the duties exercised by the county board of education were transferred to the county courts of the respective counties of the State. There is no contention that the county judge and the county examiner did not correctly canvass and certify the result, and no contest thereof was had. We think the mere fact that the county judge instead of the county court certified the result is an irregularity, and that it should not be permitted to invalidate the election. It is also contended that the form of the certificate as to what tax was voted is insufficient to constitute a levy of any tax,—that it is unintelligible. We cannot agree with this contention. It shows that in district No. 1, which is appellee district, two persons were elected directors to serve for a five and four year term respectively, and that a 12 mill and a 6 mill tax were voted. Based upon this certificate a 12 mill tax for school purposes was levied and a 6 mill tax for building purposes was levied. We think this is sufficiently intelligible to justify the levy made.

It is next contended that the offer to purchase the refunding bonds was merely one for the exchange of the bonds outstanding for new or refunding bonds and not for cash, as it is contended the statute requires. Section 65 of act 169, 1931, and act 28 of the special session of 1933 authorize the refunding of outstanding bonds by school districts. It would be a useless procedure to require the holders of the outstanding bonds to pay cash for the refunding bonds and then take the cash back on the surrender of the outstanding bonds, and we do not understand the statute so requires. It is further contended that the electors voted for a bond issue for $112,500, whereas the board finds it necessary to issue only $110,500 in refunding bonds. Since the amount to be issued is less than the amount authorized, certainly this is to the advantage of the district and does not prejudice its interests in any way.

The concluding sentence of said act 28 tends to cloud the act with some uncertainty. It is as follows: "In

no other case shall the voting of any building fund have the effect to make the same a continuing levy, and it is hereby declared to be the legislative intent that no voting of a building fund by any school district in this State since the passage of act 169 of the Acts of the General Assembly of 1931, shall have the effect to be a continuing levy except where money was actually advanced to a school district since the passage of said act and in reliance thereon, but in no other case." What the Legislature evidently intended was to annul or make void the voting of a building fund which would be a continuing levy since the passage of act 169 of 1931, and prior to the passage of said act 28. No doubt the reason for such action was that the electors in some cases had, during such a period, voted for a building fund, which had the effect of being a continuing levy, without knowing such to be the fact. Said act 28 provides for such information to be printed on the ballot, and it then said that: "In no other case shall the voting of any building fund have the effect to make the same a continuing levy, etc." We therefore hold that said act 28 authorizes the voting of a continuing levy for a building fund, when the act is complied with, and this matter of voting a continuing levy in school districts for building funds has twice been held by this court to be constitutional. *Woodruff* v. *Rural Special School Dist.*, 170 Ark. 383, 279 S. W. 1037; *Ruff* v. *Womack*, 174 Ark. 971, 298 S. W. 222.

We find no error, and the judgment is affirmed.

WELBORN *v.* WELBORN.

4-3603

Opinion delivered November 26, 1934.

J. Loyd Shouse and *W. M. Thompson,* for appellant.

W. K. Ruddell, for appellee.

JOHNSON, C. J. This is an action for divorce instituted by appellee against appellant in the Independence Chancery Court, the complaint alleging "indignities" in accordance with the mandate of § 3500, Crawford & Moses' Digest. Appellant answered the complaint by general denial, and by way of cross-complaint prayed a decree in her behalf for separate maintenance, suit money, attorney's fees and costs.

To sustain the allegations of the complaint, the following testimony was adduced. Murill Welborn testified that she is a daughter of appellee and is thirteen years of age; that she had met appellant upon the streets, and appellant did not speak to her. This occurred before appellant and appellee began living together as husband and wife.

Luther Welborn, a brother of appellee, testified that he assisted appellee in his restaurant business, and that appellant would come in the place of business and raise "cain" with appellee because witness was working there.

Appellee testified in his behalf: That he is thirty-nine years of age and was married to appellant January 11, 1932; that they did not live together as husband and wife until about May 10, 1932, because appellant did not desire to take care of his children; that they lived to-

gether on this occasion only two weeks when appellant moved away because, as she said, she could not get along with the children. Thereafter in June, 1932, appellant brought suit against appellee for maintenance, but this suit was settled and dismissed, and appellant then returned to his home; that appellant objected to his going to see his children and giving them money, and "fussed every time I came home," and when he sent money to the children appellant would "blow up"; that appellant would "fuss" because appellee would not take her to shows "She told me that she couldn't come into the shop without some of my 'darned outfit' was there; that just before I left there or the morning appellant left she had been fussing ever since Saturday night about me not going out with her and this continued until Wednesday morning when appellant left."

Ada Welborn, appellee's sister, testified that she never saw appellant but one time and never had "any fusses" with her.

In rebuttal Fon Wagner testified that appellant came to his place of business and asked about appellee and stated that "she would have been glad to let him go" if he had settled up with her.

Mrs. Wagner corroborated the testimony of witness, Fon Wagner, and this was all the testimony adduced in appellee's behalf.

Without stating in detail the testimony on behalf of appellant, it may be said as to all material facts it flatly contradicts that produced for appellee, and in addition recounts a shocking set of facts and circumstances in reference to the conduct of appellee in regard to his marital obligations.

Appellee was awarded a decree of divorce, and this appeal is prosecuted therefrom. Were it conceded, which we do not for the reasons hereinafter expressed, that appellee's testimony was sufficient to establish cause for divorce, this would fall far short of complying with the prevailing rule in this State that a divorce will not be granted upon the uncorroborated testimony or admissions of either spouse. *Rie* v. *Rie*, 34 Ark. 40; *Kurtz* v. *Kurtz*, 38 Ark. 119; *Scarborough* v. *Scarborough*, 54 Ark.

20, 14 S. W. 1098; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486.

The testimony of appellee's witnesses heretofore set out demonstrates its lack of corroborative facts and circumstances, and we have no hesitancy in holding its insufficiency.

Moreover, appellee's testimony, giving it its most charitable view, relates no facts or circumstances establishing indignities under our statute. True, he testified to certain "fussing," "blow ups," etc., and other conclusions but he does not undertake to detail the facts which superinduced these conclusions. Not only this, but appellee's testimony falls far short of the rule announced by us many, many times, to the effect, that to entitle a complaining spouse to a divorce for indignities, the conduct of the offending spouse must be of such nature as to connote settled hate and a plain manifestation of alienation and estrangement, and must have been followed habitually and continually through such period of time as to show settled hate and malevolence. *Rose* v. *Rose,* 9 Ark. 507; *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. (2d) 1013.

Manifestly, therefore, the court erred in granting appellee a divorce on the testimony adduced. The trial court also erred in refusing to award appellant separate maintenance and a reasonable attorney's fee. The testimony in reference to appellee's ability to provide separate maintenance is to the effect that appellee owned a restaurant business in the city of Harrison which he gave to his brother for the asking; he gave a farm worth several hundred dollars to his sister because she had assisted him; he collected more than two thousand dollars from a fire insurance company which accrued to him because of a fire, and no satisfactory explanation has been made of its disposition. From this we conclude that appellee should be compelled to contribute $25 per month for appellant's separate maintenance which allowance is made effective as of date of the trial court's decree. Appellant's counsel is awarded an attorney's fee of $50 for his services in this court.

The cause is therefore reversed, and remanded with directions to enter a decree not inconsistent with this opinion.

ÆTNA LIFE INSURANCE COMPANY *v.* LANGSTON.

4-3609

Opinion delivered November 26, 1934.

Owens & Ehrman, for appellant.
Surrey E. Gilliam, for appellee.

JOHNSON, C. J. This action was filed by appellee against appellant on March 8, 1933, seeking a recovery upon a certain insurance policy issued by appellant in favor of appellee on August 2, 1921, the pertinent provisions thereof being: "If the insured becomes wholly, continuously and permanently disabled and will for life be unable to perform any work or conduct any business for compensation or profit, or has met with the irrecoverable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands or of both feet, or of such loss of one hand and one foot, and satisfactory evidence of such disability is received at the home office of the company, the company will, upon the acceptance of such proof, if all premiums previously due have been paid, waive the payment of all premiums falling due thereafter during such disability, and if such disability existed before the insured attained the age of sixty years, the company will immediately pay to the life beneficiary the sum of ten dollars for each thousand dollars of the sum insured and will pay the same sum on the same day of every month thereafter during the lifetime and during such disability of the insured.

"Any premium waived or monthly payment made by the company on account of this provision will not be deducted from any settlement under this policy, and the sum insured and loan and cash surrender value will be for the same amount as if the premiums waived had been paid in cash.

"The foregoing benefits for disability are conditioned upon the representatives of the company being permitted to examine the insured before the acceptance of proof and during twelve months thereafter."

Appellee alleged that prior to his sixtieth birthday and while the policy was in full force and effect he became permanently and totally disabled within the purview of said policy.

Appellant filed an answer to the complaint which denied all the material allegations thereof and affirmatively pleaded the five year statutes of limitation in bar of the action; also that no notice had been given by the

insured to the insurer of the alleged injury until 1932. Upon the issues thus joined a trial to a jury was had on January 16, 1934, which resulted in a verdict and judgment in favor of appellee for the sum of $1,750.

The testimony was amply sufficient to support the jury's finding that appellee was totally and permanently injured prior to his sixtieth birthday and at a time when the policy was in full force and effect, but, since this point is not now urged upon us for consideration, we do not detail the testimony in reference thereto.

Appellant urges that appellee's alleged cause of action is barred by §§ 6955 and 6960, Crawford & Moses' Digest, because as it is argued the suit was not filed within five years after appellee attained his sixtieth birthday, and that the suit was not brought within five years after receipt of his total and permanent disability.

We have never held that suits upon insurance policies similar to the one under consideration must be brought within five years after receipt of total and permanent disability; neither have we ever held that such suits must be brought within five years after the insured attained the birthday designated in the policy as limiting liability thereunder.

In *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2) 912, we stated the applicable rule as follows: "If, therefore, the disability exists and commenced when the contract was in force, it is immaterial how or when proof is made, if within the statutory period, and recovery may be had for the damage sustained, excluding that occurring beyond six months from the time proof is made. As stated in the case of *Hope Spoke Co.* v. *Maryland Cas. Co., supra,* the proof of disability is intended to give the insurer an opportunity to investigate the facts affecting the question of its liability and the extent thereof. This end is served when the complaint is filed, and no prejudice can result if, as in the instant case, no claim is made for benefits accruing before the filing of the complaint or the statute (Crawford & Moses' Digest, § 6155) prescribing a penalty or attorney's fee is not invoked."

Again in *Missouri State Life Ins. Co.* v. *Foster,* 69 S. W. (2d) 869, we reiterated the rule as follows: "We are definitely committed to the rule 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."

And again in the more recent case of *Equitable Life Ins. Society* v. *Felton, ante* p. 318, 72 S. W. (2d) 225, we stated the rule in the following language:

"We have repeatedly held in cases arising under contracts of insurance not dissimilar to the one here involved that liability against the insurer and in favor of the insured attaches and comes into being upon the happening of total and permanent disability. * * * The requirement for proof of loss or notice under this contract being a condition subsequent, suit might be maintained for the liability at any time until barred by the statute of limitations."

The effect of the rule thus quoted is that, in policies of insurance similar to the one under consideration and which provides a monthly indemnity to the insured for life in the event of total and permanent disability incurred during the effectiveness of the policy, suits may be instituted, prosecuted and maintained by the beneficiary at any time after receipt of such injury, but the aggregate recovery is limited to a five year period immediately prior to the filing of such suit. When the rule is thus interpreted, it appears that the trial court was correct in determining and submitting this issue. The doctrine thus stated is in full accord with the previous decisions of this court and is certainly not in conflict with our holdings in *Smith* v. *Mutual Life Ins. Co.,* 188 Ark. 1111, 69 S. W. (2d) 874; *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533.

It is next insisted that no notice was given by appellee to appellant of receipt of the injury complained of. On this point it suffices to say that the policy under consideration does not provide for notice. Moreover, were the following provisions of the policy, "The foregoing benefits for disability are conditioned upon the

representatives of the company being permitted to examine the insured before the acceptance of proof and during twelve months thereafter," construed as one for notice, it would fall clearly within the rule of a condition subsequent and not a condition precedent to recovery, as announced by us in many cases. *Hope Spoke Works Co.* v. *Maryland Cas. Co.*, 102 Ark. 1, 143 S. W. 85; *Home Indemnity Co.* v. *Banfield Brothers Packing Co.*, 188 Ark. 683, 67 S. W. (2d) 203, and cases therein cited. Moreover, appellant was apprised of appellee's disability in July or August, 1932, and had full opportunity to make such examination and investigation thereof as it deemed proper and expedient, as this suit was not begun for several months thereafter; therefore appellant was afforded timely opportunity to examine appellee which was the only right reserved in the clause of the policy just quoted.

Neither can we agree that prejudicial error is made to appear in admitting testimony in reference to the mental condition of deceased subsequent to his injury or the argument of counsel relative thereto. The insured's mental condition was a circumstance tending to show his total and permanent disability; therefore such inquiry was relevant and proper.

Finally, it is urged that prejudicial error was committed by the trial court in refusing to grant a new trial because of newly-discovered evidence. This contention is grounded upon certain testimony of the War Department of the U. S. A. which tended to show that the insured was several years older than he had represented his age to be in the application which superinduced the issuance of the policy of insurance. No error is made to appear in this regard. First, no diligence was shown in procuring this testimony. Appellant's witness, R. D. Leas, testified that he, the investigator and adjuster for appellant, made an investigation of this claim when filed (August, 1932) and appellee then advised witness that he enlisted in the United States Army at Memphis, Tennessee, but could not give the name of his general or colonel, but thought he had served under General Cook. Witness further testified that he pursued the inquiry no

further at that time. This testimony demonstrates a total lack of diligence upon appellant's part. If the law compelled a new trial under the facts and circumstances here presented, litigation would never end.

This suit had been pending more than ten months when finally tried, and seven additional months had been consumed by appellant in investigation prior thereto; therefore this length of time certainly afforded ample opportunity to make all necessary inquiries. *Fowler* v. *State,* 130 Ark. 365, 197 S. W. 568; *Lisk* v. *Uhren,* 130 Ark. 111, 196 S. W. 816; *Hinkle* v. *Lassiter,* 142 Ark. 223, 218 S. W. 825. Moreover, the testimony offered is merely cumulative to the testimony produced by appellant, and such testimony is never considered sufficient to compel a new trial. *Winn* v. *Jackson,* 158 Ark. 644, 245 S. W. 812, and cases there cited. Not only this, but it has ever been the established doctrine in this court not to reverse a judgment because of newly-discovered evidence except in such cases as it clearly appears that the trial court abused its discretion. *Arkansas Mutual Fire Ins. Co.* v. *Stuckey,* 85 Ark. 33, 106 S. W. 203; *McDonald* v. *Daniel,* 103 Ark. 589, 148 Ark. 271; *Banks* v. *State,* 133 Ark. 169, 202 S. W. 43.

We have always held, first, that the granting of a new trial for newly-discovered evidence is within the trial court's discretion; secondly, a new trial will not be granted for newly-discovered evidence, unless the applicant has shown due diligence; third, to warrant a new trial for newly-discovered evidence, it must appear that the evidence will probably change the result, was discovered after the trial, could not have been discovered before the trial by due diligence, and is material, and not merely cumulative or impeaching. *Arkansas Power & Light Co.* v. *Mart,* 188 Ark. 202, 65 S. W. (2d) 39. It appears that the newly-discovered evidence here adduced, if admitted in evidence, would tend only to impeach the testimony of the insured. It will be remembered the insured testified to his age as it appears in his application which superinduced the issuance of the policy, and the purpose and effect of the offered testimony would be to tend to impeach his testimony. Not

only this, but, were the testimony admitted, the result probably would not be changed because appellee testified in an affidavit in response to the motion for a new trial that he erroneously gave his age to the war department. Certainly, if this were true, and the trial court so found, it would not change the result of the trial.

No error appearing, the judgment is affirmed.

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

4-3600

Opinion delivered November 26, 1934.

Moreau P. Estes and *Streett & Streett,* for appellant.

L. B. Smead and *Lawrence E. Wilson,* for appellees.

SMITH, J. This suit was brought to recover on a policy of life insurance, and was heard in the court below on an agreed statement of facts reading as follows:

"1. It is agreed that the life insurance policy numbered 63572, in the sum of $1,000 was issued and delivered by the Life & Casualty Insurance Company of Tennessee to Harmon Goodwin on June 21, 1926; that semi-annual premiums were due thereon on June 15 and December 15 of each year; that all premiums were paid up to and including the 15th day of December, 1932; that on said date the policy lapsed for the nonpayment of the premium then due; that at the time of the lapse of the policy there was a loan outstanding against the same

in the sum of $82, and it had a reserve or loan value of $90, leaving a net reserve of $8 and an unearned interest credit thereon of $2.46, making an aggregate reserve value under the policy at the time of its lapse, December 15, 1932, and on the date of the death of the insured, August 28, 1933, of $10.46; that all premium notices were sent out and received by plaintiff in due time;

"1½. That upon the lapse for failure to pay said premiums the policy was then immediately commuted to a paid-up policy as provided under its terms.

"2. It is agreed that the insured received notice from the defendant company by letter of March 27, 1933, that his policy had lapsed, and that under the terms thereof he was entitled to paid-up insurance, in the sum of $32.43, but said letter did not notify insured the reserve value of his policy; that the insured died on August 28, 1933; that prior to his death he could read and write, and had the policy in his possession at all times after its delivery, and that he never exercised or made any effort to exercise any of the options provided under the 'non-forfeiture provisions' thereof.

"3. It is further stipulated and agreed that the amount of paid-up insurance the policy reserve would purchase at the time of forfeiture and death was and is the sum of $32.43, and that this sum has heretofore, by the defendant, been tendered to the plaintiff and the tender refused, and the amount paid in lawful currency into the registrar of the court.

"4. It is further agreed that, provided the 'non-forfeiture provisions' or 'automatic provisions' of the policy should be held of no effect, that the amount of the reserve was sufficient to extend the benefits provided in the policy under the extended insurance clause thereof beyond the date of the death of the insured.

"5. It is contended by the plaintiff that the amount of extended insurance is the face of the policy less any indebtedness outstanding, which is admitted to have been the sum of $82; it is contended by the defendant that the amount of extended insurance is reduced under the terms of this policy in the same *pro rata* as the outstanding indebtedness bears to the reserve value. It is admitted

that, if the provisions of the policy, including the last two paragraphs under the heading 'non-forfeiture provisions' are held to sustain the contention of the defendant, then the amount of extended insurance which the reserve of the policy would have purchased, provided the automatic provisions for commuting the insurance to a non-forfeitable paid-up policy should be held of no effect, would be the sum of $116.

"6. It is further agreed and stipulated that the reserve value of the policy was not sufficient, even if so applied, to have paid the premiums necessary to keep in force the policy, with all benefits therein provided, up to the date of the death of the insured.

"7. All questions of fact are herein agreed upon, and there are two issues presented to the court:

"First: Was this policy irrevocably commuted upon lapse for failure to pay premium, and upon the passing of the ninety days provided therein, to a paid-up non-forfeitable policy in the admitted sum of $32.43.

"Second: If the 'automatic non-forfeitable provisions' contained in said policy should be, by the court, held of no effect, then is the amount of the 'extended' insurance reduced in the same ratio as the admitted indebtedness of $82 bears to the reserve of $90, or is the full face of the policy extended less any indebtedness thereon."

The policy sued on contained the following provisions relating to the nonpayment of premiums and the effect thereof after as many as three annual premiums had been paid (as had been done by the insured in this case), to-wit:

"Non-forfeiture provisions. After three full annual premiums shall have been paid, if default be made of any payment of any subsequent premium, this policy shall automatically at time of lapse be unconditionally commuted to non-forfeitable paid-up insurance as provided below, payable at the same time, and on the same terms, save as to amount, as this policy.

"Within ninety days after said commutation, the insured, in lieu of this automatic unconditional non-forfeitable paid-up insurance, may upon written demand ad-

dressed to the home office of the company, receive either of the following options:

"(1) Receive the cash surrender value of this policy, less any indebtedness to the company hereon. The cash surrender value shall be the reserve on this policy at the date of default, less a surrender charge, which in no case shall be more than two and one-half per cent. of the sum insured; or

"(2) Receive extended insurance from date of default for an amount equal to the face of this policy, for such term in years and months from the date of default as is provided below, but without the right to loans and cash surrender values.

"The amount of the paid-up insurance or the term for which the insurance will be extended shall be such as the cash surrender value will purchase as a net single premium at the attained age of the insured at the date of default according to the New York Standard Intermediate Table of Mortality, with interest at the rate of three and one-half per cent. per annum.

"Any indebtedness to the company under this policy will be deducted from the cash surrender value; and such indebtedness will also reduce the amount of paid-up insurance, or the amount which is continued as extended insurance, in such ratio as the indebtedness bears to the cash surrender value at due date of premium in default."

The trial court rendered judgment for $1,000, the face of the policy, less $82, the amount of the policy loan, together with the statutory penalty and an attorney's fee. In rendering this judgment the court made the following declaration of law:

"Under these facts, the court declares the law to be, that it was the duty of the insurer, instead of exercising the option itself, after the nonpayment of the premiums on the 15th day of December, 1932, and commuting assured's policy to a non-forfeitable paid-up policy in the sum of $32.43, to have notified the insured that the $10.46 would buy that kind of commuted insurance, or, if he desired, he could take the option of extended insurance, and to have notified the insured how many months that sum would extend his policy of insurance. Without giv-

ing the assured that information, he wasn't bound to take the option selected by the insurer, or either of the others, until that information had been given him by the insurer; and in the meantime it was the duty of the insurer not to allow the policy to lapse, and to have used the funds towards keeping the policy in force. Having thus failed to notify the assured, he wasn't bound to take the option selected by the insurer, and the court finds, as a matter of law, that the reserve of $10.46, had it been applied towards the payment of premiums, it would have extended this policy, and the same would have been in force and effect, for a longer period than the date of the death of the assured, in August, 1933, and therefore at the time of assured's death in August, 1933, the policy was in full force and effect as extended insurance, and the plaintiffs, as beneficiaries, are entitled to recover the sum of $1,000; and that the judgment of the court will be in favor of the plaintiffs for the sum of $1,000, together with twelve per cent. penalty, as provided by statute, and a reasonable attorneys' fee."

The case of *Metropolitan Life Insurance Co.* v. *Stewart,* 188 Ark. 903, 68 S. W. (2d) 1017, is cited in support of this declaration of law and the judgment rendered pursuant thereto.

The policy there sued on was a participating contract, which required the company, on the 31st day of December of each year, to ascertain and apportion any divisible surplus accruing thereon. It was there said: "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 non-participating, 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."

The policy here sued on was a non-participating policy, having exact values and options not dependent upon the company's earnings. A table printed upon the policy contained three columns, showing, at the end of each year for a period of twenty years, when the policy became paid-up, the following options: In the first column the cash or loan values; in the second column the amount of paid-up insurance then available, and in the third column the extended insurance from that date.

Cases are cited to the effect that forfeitures are not favored, and that the insurer may not allow a policy to lapse for non-payment of premiums when it had sufficient funds in its hands to pay the premiums necessary to keep the policy in force. We reaffirm these holdings, but they do not control this case. There is no question of lapse or forfeiture in this case. The policy did not lapse, and there has been no forfeiture. The question is, what are the contractual rights and liabilities of the parties under the contract of insurance under the facts stipulated? Now, it is stipulated that the insured did not pay the semi-annual premium due December 15, 1932, and that the insured died on August 28, 1933, without having paid it.

The non-forfeiture provisions were intended to cover, and do cover, the exact state of facts set out in the agreed statement. They provide that, after three full annual premiums have been paid (and here six such payments have been made), if default be made in payment of any premium subsequent to the third (as is the case here), the policy shall automatically at the time of lapse be converted to non-forfeitable paid-up insurance, as shown in column 2 of the table above referred to.

Now, if the policy contained nothing else as to non-forfeitable provisions after three annual premiums had been paid, no question would or could be raised, but there is a further provision. It is this. After this commutation, which is automatic, requiring no action on the part of

either the insured or the insurer, the insured has ninety days after commutation aforesaid within which time, upon written demand upon the insurer, to take either of the other two options which the policy gives him.

Otherwise stated, the policy provides that, upon default in paying premiums after three annual premiums have been paid, the policy is automatically converted into one for paid-up insurance unless within ninety days after default in paying premiums the insured, upon written demand addressed to the home office of the insurer, shall elect to take either the cash surrender value of the policy or the extended insurance. After default in paying premiums, it is the insured's move, and, if he does not exercise this right, and within the ninety days limited for that purpose, he is bound by the automatic conversion of the policy into paid-up insurance as is provided by the contract. The contract so expressly provides, and we have no authority to change it, nor have we the right to refuse to enforce it.

The fact—and in this case it is a fact—that the insured had borrowed the full loan value of the policy at the time the loan was made does not alter the provisions of the policy above described, although the loan does affect the value of those options.

Here, the insurer tendered, along with its answer, the full amount of the paid-up insurance to which the insured became entitled upon his failure to accept the other options, as he might have done but did not do. The insured, not only had the notice which the policy in his possession gave as to his duty to elect within the ninety days allowed for that purpose, but it is stipulated that he received actual notice in the form of a letter from the company as to the action which it had taken.

In Couch's Cyclopedia of Insurance Law, vol. 3, § 641a, page 2082, it is said: "But where the policy gives an option, and provides for paid-up insurance for a reduced amount if an election has not been made within a specified time, the policy automatically becomes such a paid-up one at the expiration of the period, no prior election having been made, and the insured can claim no alternative right."

The exact question here presented was considered and decided by the Supreme Court of South Carolina in the case of *Ginyard* v. *Lincoln Ins. Co.,* 135 S. C. 48, 133 S. E. 227. The policy there sued on contained the provision that "If the insured shall not, within 30 days after default, surrender this policy to the company at the home office for its cash surrender value, as provided in option (a), or term insurance, as provided in option (b), the cash value, less any indebtedness, will be applied to the purchase of paid-up insurance, as provided in option (c). The insured did not surrender the policy and accept options (a) and (b), and the company, under the third privilege of the option, converted the policy into paid-up insurance, amounting to $114, and, as has been hereinbefore stated, this sum was paid to the respondent as administratrix, and was afterwards tendered back to the company, and the company declined to receive it."

It was there contended, as is contended here, "that all the clauses of the policy must be construed together, that the provisions of the policy must be construed most strongly against the insurer and in favor of the insured, and, if the policy of insurance can be lawfully saved, this will be done," but it was pointed out that, inasmuch as the insured did not apply to have his extended insurance, under option (b) above referred to, as he could have done, the beneficiary might not later claim the benefit of that option. In so holding the court said: "The insured had the policy in his possession, and was acquainted with its terms. He had a right to accept either one of the three options which he deemed most beneficial to himself, and declined to make his election; whereupon the respondent (insurance company) exercised the right expressly given it under the terms of the policy, and converted the cash value into paid-up insurance, amounting to $114."

The court further said: "The company had no right to exercise this option so long as the option remained to the insured to exercise a different option if he saw fit," but that, failing to exercise this right within the time limited for that purpose, the contract must be enforced according to its terms.

So, here, the insured having made no election as to the option he would accept, the rights of his beneficiary must be determined by the provisions of the contract applicable to a case where no election was made. In this connection, it may be said that, had the insured lived for a longer period of time than the reserve of $10.46 would have continued the policy in force, his beneficiary would have been entitled to collect the paid-up insurance, a small amount, it is true, but made small by the fact that the insured had himself borrowed from the insurer the full amount of the loan value.

It follows, from what we have said, that the tender made covered the full liability, and judgment should have been rendered for that amount only, and the judgment for the face of the policy, less the amount of the policy loan, will therefore be reversed, and judgment will be entered here for $32.43, the sum tendered.

CLARK *v.* MATLOCK.

4-3612

Opinion delivered November 26, 1934.

McMillan & McMillan, for appellants.

J. H. Lookadoo, for appellee.

MEHAFFY, J. The appellee brought suit against the appellants and alleged that Grady Russell, appellee's intestate, before his death rented land from the appellants, and alleged that the fence inclosing the land rented was bad, and that the crop was destroyed by cattle.

Before the suit was brought, Grady Russell died, and W. T. Matlock was appointed administrator of the

estate. The suit was for $100 damages. There was a jury trial and verdict and judgment for $70. To reverse this judgment, this appeal is prosecuted.

There is no dispute about appellee's intestate having rented the land, and no dispute about the crop having been destroyed. Appellee was permitted to prove that it was the custom in that locality for the landlord to keep up the fence around a farm when it was rented. There is, however, no evidence tending to show an agreement on the part of the appellants to make repairs.

This case is ruled by the case of *Rundell* v. *Rogers,* 144 Ark. 293, 222 S. W. 19. This court said in that case: " 'Unless a landlord agrees with his tenant to repair leased premises, he can not, in the absence of a statute, be compelled to do so,' is a rule of law well established in this State and elsewhere. * * * A local custom can not be shown in order to render the landlord liable for failure to make repairs in contravention of the above well-established rule."

The evidence as to the local custom was therefore incompetent, and the court erred in permitting it. If the evidence showed that the landlord agreed to keep the fence in repair, or if the evidence showed that the contract was made between the parties that the landlord should keep up the repairs, or that they should be governed by the local custom, then evidence of the custom would be admissible.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

WESTERN UNION TELEGRAPH COMPANY *v.* PHILBRICK.

4-3605

Opinion delivered November 26, 1934.

Francis R. Stark, Elmer L. Lincoln and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

M. V. Moody and *W. S. Atkins,* for appellee.

McHaney, J. Appellee brought this action against appellants to recover damages for personal injuries sustained by her when struck by Daniel McGrew, the other appellant's messenger boy, on a bicycle, as she attempted to cross East Markham Street between the intersection in the 500 block in the city of Little Rock, on April 21, 1933. In the midst of the trial after a number of witnesses had been examined, the following occurred:

"The court: At this point in the trial, the court is advised that there is a message to one of the jurors, Mr. Allen Johnson, to the effect that his sister is at the point of death. Whereupon the court excuses Mr. Johnson from the jury, and announces its intention of proceeding with the trial with eleven jurors. The defendant moves the court to declare a mistrial, which the court declines to do." "Mr. Lincoln: The defendant excepts."

The case proceeded over appellants' objections before the eleven jurors, and a verdict was returned against appellants signed by all eleven jurors, upon which judgment was entered and from which comes this appeal.

For a reversal of the judgment against them appellants first insist that the court erred in continuing the trial with only eleven jurors over their protest. This assignment of error must be sustained. Section 7 of the Declaration of Rights, which is § 7 of article 2 of our Constitution, reads as follows: "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

In construing this section, this court in *Minnequa Cooperage Co.* v. *Hendricks,* 130 Ark. 264, 197 S. W. 280, held that it referred unquestionably to the jury trial as known and recognized by the common law, and further

held that the word "jury" at common law means twelve men, and that the Legislature could not abridge the number. The earlier decisions of the court in construing similar provisions of an earlier Constitution were there reviewed. Section 7, article 2, of our Constitution was amended by amendment No. 16, so as to read as follows: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in jury trials in civil cases, where as many as nine jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury; provided, however, that where a verdict is returned by less than twelve jurors, all the jurors consenting to such verdict shall sign the same." This amendment to the Constitution clearly recognizes that a jury must consist of twelve jurors. Of course, the parties could have consented to a continuation of the trial with eleven jurors; but appellants did not consent. On the contrary, they moved for a mistrial because the juror was excused, and excepted to the refusal of the court to order a mistrial.

But appellee says that appellants waived the legal number of jurors by proceeding with the trial and their acquiescence therein, by the questioning of witnesses and moving the court for a peremptory instruction, all of which, it is insisted, amounted to a waiver of a jury of twelve persons. We cannot agree with this argument. Cases cited by counsel for appellee are not in point. Appellants had the constitutional right to a trial by a jury of twelve persons, and cannot be held to have waived this right by proceeding to defend this action before a jury of eleven. They were compelled to do so by order of the court or else abandon further participation in the case. Nor does the fact that all eleven of the jurors signed the verdict help the situation, as appellants were entitled to have twelve jurors present, and it cannot be said that the result would have been the same had the twelfth man been present. This, however, could make no difference as to whether the result might

or might not have been the same, as appellants' constitutional rights were invaded.

Other questions are argued by counsel for appellants for a reversal of the judgment, but, inasmuch as they may not occur again in a subsequent trial, we refrain from a discussion of them.

For the error indicated, the judgment will be reversed, and the caused remanded for a new trial.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* BALESH.

4-3569

Opinion delivered November 12, 1934.

H. L. Ponder, W. R. Donham and *Edward B. Downie,* for appellants.

Pace & Davis, for appellee.

HUMPHREYS, J. Appellee, administratrix of the estate of her deceased husband, brought suit against the appellants for the estate and for the benefit of herself and minor children, to recover damages on account of the alleged negligent killing of deceased resulting from a collision of his car with a Ford truck belonging to appellant, Southwestern Bell Telephone Company, which was driven by Herman Avery, the other appellant.

Appellant filed an answer denying the material allegations of the complaint, and pleading that the injuries and death of deceased resulted from his own negligence.

The cause was submitted to a jury upon the issues joined, the evidence adduced, and the instructions of the court, which resulted in a verdict and consequent judgment against appellants in favor of appellee for the benefit of herself and minor children for the sum of $50,000, from which is this appeal.

Appellants contend for a reversal of the judgment on the ground that the evidence is insufficient to support the verdict. In determining this question on appeal, the testimony in the case must be viewed in the most favorable light to appellee, and if, thus viewing it, there is any substantial evidence supporting the verdict, it cannot be disturbed by this court.

According to the evidence introduced by appellee, her now deceased husband was en route to Little Rock on the Hot Springs highway the morning of June 24, 1933, in his Cadillac sedan, which he was driving at the rate of thirty-five or forty miles an hour; that, just before entering the village of Douglasville, he overtook appellant's truck, which was being driven at a speed of fifteen or twenty miles an hour; that, as he approached the truck, he blew his horn when forty feet behind it, and again when he was ten feet behind it, as a signal that he would pass around it to the left; that when his front wheels were opposite the hind wheels of the truck, the driver of the truck, without checking his speed and without putting out his hand or giving any signal, suddenly turned to the left almost at right angles across the highway, and that before he could get out of the way of the truck by speeding up and turning to the left as far as possible, the collision occurred; that the collision caused his car to lose its balance and swerve or zig-zag at a high rate of speed along the highway for a considerable distance until it turned over and fatally injured him; that he was unable to regain control of his car after the collision.

The evidence thus detailed is substantial and sufficient to sustain the verdict. Although appellant introduced evidence tending to show that deceased was to blame for the collision, and that he had or could have regained control of his car after the collision, in the exercise of reasonable care, it must be remembered that the jury and not the court are the sole judges of the credibility of the witnesses and the weight to be attached to the evidence. The trial court must be sustained in his refusal to instruct a verdict for appellants on the ground of the alleged insufficiency of the evidence to establish liability.

Learned counsel for appellants strenuously insist upon a reversal of the judgment on account of a number of instructions given by the trial court over their general and specific objections and the refusal of the court to give a number of instructions requested by them, to which refusal they objected and excepted. We have carefully read and considered the instructions given and refused and have concluded that the trial court correctly instructed the jury upon the issues involved responsive to the evidence in the case. We regard the exceptions to the giving and refusal of some of the instructions of sufficient importance to more specifically state our reasons for disposing of them.

Appellants specifically objected to the giving of the court's oral instruction No. 2 because they allege he ignored their defense of contributory negligence on the part of deceased. The last sentence in the instruction is as follows:

"But if it (the evidence) preponderates in her (appellee's) favor on all the material allegations, she would be entitled to recover a verdict."

Appellants argue that this part of the instruction necessarily means that, if the jury should find that the evidence preponderates in favor of appellee on all the material allegations in her complaint, she would be entitled to recover. The instruction does not say so in words, and we do not think it susceptible of such a construction. It means all the allegations arising in the case, whether contained in the complaint or other pleadings. The language used does not ignore the defense of contributory negligence, and it should not be interpreted to do so by reading the word "complaint" into it. We are quite sure the jury did not so understand it in view of the fact that they were told in other instructions that, if the deceased met his death on account of his own negligence, appellee could not recover.

Appellants objected generally to the giving of the court's oral instruction No. 3 and now contend that it was inherently erroneous because it opened or began with the following sentence: "This accident, gentlemen,

was due to an automobile collision on the public highway."

They argue that the court told the jury in this sentence that the injuries and death of the deceased were due to the collision. The court did not so state, but said the accident was due to a collision on the highway, which was nothing more than a general statement of the kind and character of case before them for consideration. It was not tantamount to telling them that the injuries and death of deceased were due directly to the collision or that the collision was the proximate cause of the injuries and death of the deceased. No specific objection was made on the ground that the sentence was susceptible of the construction they now give it. The court did not err in giving the instruction.

Appellants objected specifically to the giving of instruction No. 6 on the ground that the effect thereof was to make them insurers of the safety of deceased. That part of the instruction objected to is the exact language of a part of our traffic statute, and is as follows: "I instruct you, gentlemen, that 'the driver of any vehicle upon a highway, before starting, stopping, or turning from a direct line, shall first see that such movement can be made in safety, and, whenever the operation of another vehicle may be affected by such movement, shall give a signal, plainly visible to the driver of such other vehicle, of the intention to make such movement'."

The effect of giving this instruction was to tell the jury that, if the driver of the truck turned to the left without first seeing whether he could make the turn in safety or without giving a signal plainly visible to others that he was going to make the turn, he would be guilty of negligence, which was quite different from saying to them that they were insurers of the safety of deceased, for the instruction left it to the jury to find from the evidence whether or not he was guilty of such acts in turning the truck to the left and also left it to the jury to find from the evidence whether deceased himself caused his injuries and death by his own negligence. The fact that the instruction given by the court was in the exact language of a traffic statute does not keep it from

being a correct declaration of law applicable to the situation and facts in the case. If the court had told the jury that appellants violated the traffic laws of the State in turning to the left and for that reason they became insurers of the safety of deceased, then the instruction would have been erroneous and subject to criticism made by appellants.

Appellants objected to the giving of instruction No. 14 and now argue that it constituted reversible error to give it because it acquitted deceased of all negligence except driving at a greater rate of speed than an ordinarily prudent man would have done. In other words, that the instruction had the effect of limiting contributory negligence on the part of deceased to speeding or fast driving. It is argued that the last sentence in the instruction had this effect, which sentence is as follows:

"But if you further find that at the time he approached the truck and was passing the same he was driving his car at such a rate of speed as an ordinarily prudent man would have driven under the circumstances, then he was not guilty of negligence."

The jury could not have concluded from the sentence that the court intended to cover the entire issue of contributory negligence, especially when read in connection with other instructions given on the subject of contributory negligence. The meaning of the sentence is that if deceased was driving at the speed that an ordinary person would have driven under the circumstances, he was not guilty of negligence in regard to speed. Although the phraseology of the sentence was poor, its meaning was clear, and, as thus construed, did not mislead the jury.

Appellants objected generally to the court's modification of their requested instruction No. 16 on the ground that there was no evidence to support or justify the modification. The instruction, as requested, reads as follows: "You are instructed that it is the duty of the deceased to exercise ordinary care even after the collision, and if you find from a preponderance of the evidence that after the collision he ran his car at an excessive or unreasonable rate of speed and in so doing he failed under all the circumstances to exercise ordinary care;

and if you further find that such failure on his part contributed to his injuries and death, then the plaintiff cannot recover, and your verdict will be for defendants."

The court gave the instruction as requested after adding the following words: "Unless you further believe or find that the deceased had lost control of his car by reason of his car being negligently struck by the truck." There is much evidence in the record to the effect that deceased lost control of his car when the collision occurred, and that he was unable to regain control thereof, so the modification was responsive to the evidence.

Appellants also objected specifically to the giving of the instruction as modified on the alleged ground that the modification assumed that the car of deceased was negligently struck by the truck of appellants. We are unable to discover such an assumption in the modification. It unmistakably submitted the issues of whether deceased lost control of his car, and whether he lost control thereof by reason of his car being negligently struck by the truck. The instruction, as modified, was a correct declaration of law responsive to the evidence in the case.

In our examination of the instructions, we find that quite a number of those requested by appellants and refused by the court were fully covered by other instructions given by the court. Courts are not required in instructing juries to indulge in repetitions and duplications.

As stated above, we have carefully examined each and every instruction given and refused and have concluded that the trial court correctly declared the law applicable to the issues and evidence in the case.

Appellants contend that the verdict is excessive. The jury was correctly instructed as to the measure of damages. A verdict of $50,000 was awarded the widow and children for their pecuniary loss, including damages to the children for the loss of parental care and moral guidance and development. No award was made to the estate of deceased.

The question for our determination is whether this compensatory award is supported by the evidence. The deceased had been a very prosperous merchant in New York City and Hot Springs for many years. He was an

importer of Oriental rugs, fine laces and linens and sold his goods at auction in a business house in Hot Springs. In addition to supporting his family in a luxurious manner, he accumulated sufficient out of his business to buy a home which cost $20,000 and a business house which cost $105,000 and to accumulate a stock of goods valued at about $60,000 with an outstanding commercial indebtedness of about $5,000. In 1929, just before the depression, he bought an adjoining business house on a credit for $95,000. Although he continued to make money in his business until he went into voluntary bankruptcy a few months before his death, the net returns therefrom were insufficient to keep up the principal and interest payments and taxes on his real estate, after paying his living expenses; so a few months before his death, he went into voluntary bankruptcy and closed his store. He then compromised with his creditors on the basis that they accept all his real estate in full settlement of his indebtedness, leaving his stock of goods clear. He was on his way to Little Rock in connection with his bankruptcy proceedings when he was killed. Until he took the benefit of the bankruptcy act, he had contributed about $7,000 a year to his wife and children for their support and education. In addition to educating his children, he was giving them music and dramatic lessons. He was an attentive and dutiful husband and father, making a happy home for his wife and four children, ranging in age from 7 to 16 years. Physically he was a strong man, able to carry on the auction business during the day and until late at night, which he did. He was 51 years of age at the time of his death and had an expectancy of 20 years. His financial troubles resulted from his real estate investments and not from any substantial shrinkage in his business. It is reasonably deducible from the evidence that, had he lived, in view of his composition with his creditors, he would have been able to continue his business successfully and to have contributed about as much in the future to his family as he had in the past. He was familiar with his line of business, having spent his entire life in it. He was an exceptional auctioneer and business man, and knew well how to earn a dollar. Based

upon his earning capacity and expectancy under the accepted rule for ascertaining the present value of the total amount he would have contributed to his family, $50,000 in cash is much less than the present value the total contribution would figure. This being true, it would not be permissible for this court to invade the province of the jury to scale down the amount or reverse the judgment.

No error appearing, the judgment is affirmed.

In the opinion of Justices SMITH and MCHANEY the judgment is excessive and should be reduced.

GOODE *v.* KING.

4-3528

Opinion delivered November 19, 1934.

W. A. Jackson and *Beloate & Beloate,* for appellants.

D. L. King, R. C. Waldron and *J. H. Townsend,* for appellee.

SMITH, J. Richard M. Moore owned at the time of his death a farm known as the old Marshall farm, situated on the right bank of Spring River in Lawrence County. He was survived by his widow, Mrs. M. C. Moore, and three sons, whose initials were N. R., J. C. and B. M. Moore, respectively. After the death of his father, N. R. Moore borrowed $1,500 from J. S. Pruitt, and gave Pruitt a note for that amount, which was signed by N. R. Moore and Pearl Moore, his wife. This note created a lien upon the maker's interest in his father's farm. Pruitt, the payee named in the note, died, and Wells, his administrator, brought suit to enforce the lien there granted in payment of the note. The Bank of Ravenden and J. C. and B. M. Moore, the two brothers of the maker of the note, filed an intervention in this suit, and also a demurrer to the original complaint, which was sustained, but upon an appeal to this court it was held that the demurrer should have been overruled, and the decree of the lower court was reversed, and the cause was remanded with directions to overrule the demurrer.

See *Wells* v. *Moore,* 163 Ark. 542, 260 S. W. 411. No directions were given upon the reversal and remand of the cause except to overrule the demurrer, and the present appeal arose out of subsequent proceedings.

In this intervention filed by the bank and J. C. and B. M. Moore, it was alleged that N. R. Moore, while acting as cashier of the bank, had been found short in his accounts with the bank to the admitted extent of $3,750, and to make the shortage good N. R. Moore had conveyed his interest in the lands which he had inherited from his father to his brothers, J. C. and B. M. Moore, who assumed the payment of the shortage, and, by way of security therefor, mortgaged to the bank the interests which they had inherited and also the interest which they had acquired in the deed from their brother, N. R. Moore. It was not then certain that the full amount of N. R. Moore's shortage had been determined, and the mortgage was drawn to cover any other shortage which might later be discovered, and it was subsequently determined that the total shortage approximated $7,000.

J. C. Moore died and was survived by four minor children and by his widow, Mary Ellen Moore, who subsequently married Charles Goode, and she is referred to throughout the record and in the briefs as Mrs. Goode. The widow of Richard M. Moore, who had joined in the execution of the mortgage to the bank to secure the payment of the shortage of her son, N. R. Moore, was made a party defendant to the cross-complaint which the bank filed along with its intervention to foreclose the mortgage against her and against her surviving sons, N. R. and B. M. Moore, and against the widow and minor heirs of J. C. Moore. These cross-defendants were all properly served with process upon the filing of the cross-complaint, and D. L. King was employed as an attorney to represent the cross-defendants.

Without tracing the progress of that litigation, it may be said that it eventuated in a decree ascertaining and adjudging the amount of N. R. Moore's shortage to the bank, and directing the foreclosure of the mortgage given to secure its payment.

Much of the testimony contained in the record now before us was devoted to an attempt to show that King had been unfaithful to his clients and had conspired with the bank and its representatives to improperly present certain defenses which could and should have been offered in the foreclosure suit. These were, first, that the execution of the mortgage had been secured through coercion by threats to send N. R. Moore to the penitentiary if it were not executed, and that the mortgage was finally executed for the purpose of compounding a felony, and that, through and in consideration of the execution of the mortgage, a felony was compounded, and N. R. Moore was not prosecuted for his crime as he would otherwise have been. The second defense which it is insisted King should have made—but did not make—is that there were certain credits to which N. R. Moore was entitled and which would have been allowed, had they been properly asserted.

We will not review the testimony on these issues of fact, but are content to say that the testimony utterly fails to establish either contention.

After the rendition of the decree, and subsequent to the sale thereunder, an attempt was made, which appears to have been in the utmost good faith, to borrow the money to pay the judgment rendered in the decree of foreclosure. It may be said that a settlement had been made of the original suit brought by Wells, administrator, to foreclose the lien created by the note from N. R. Moore to Pruitt. The terms and details of that settlement are not disclosed, but we regard this as unimportant. The fact remains that an apparently valid decree has been rendered, in which all interested persons had been made parties, upon proper and sufficient service, including the four minor children of J. C. Moore. This decree determined the sums secured by the mortgage and ordered its foreclosure. It was rendered June 24, 1925, and pursuant to its provisions the land described in the mortgage was ordered sold, and it was advertised to be sold on October 24, 1925. In the meantime futile efforts were being made to borrow the money to pay the judgment. These failing, King personally agreed to pay

the judgment, and he took an assignment thereof to himself as security for the loan which he proposed to make. The fact is established beyond the possibility of doubt that King advanced from his personal funds the money for this purpose, six thousand dollars of which were derived from the sale of Government bonds which he then owned. The debt secured by the mortgage bore interest at the rate of ten per cent., as did also the judgment. King actually advanced $8,986.25 in cash, which he paid to the bank, and at the time of payment took an assignment from the bank of its judgment for the debt and of the decree declaring the lien and ordering its foreclosure. It is equally certain that at that time King had no intention of acquiring the title to the land, and made the advance for the benefit of his clients and at their request.

The sale as advertised was not held, but was indefinitely postponed, and the sale which was later had under the decree of foreclosure did not occur until December 18, 1926. During this interval the attempts to finance the proposition were continued, but it was found that an inaccurate description of the land in the mortgage, which had been carried forward into the decree, was an objection which rendered this more difficult. It was shown that in the preparation of the mortgage the land described had been copied from a tax receipt, which was supposed to embrace all the lands comprising the Moore farm, and which included also forty acres, a part of the farm, which Mrs. M. C. Moore, the mother of N. R. Moore, and the widow of Richard M. Moore, owned individually, and which was therefore not conveyed by the deed from N. R. Moore to his brothers, J. C. and B. M. Moore. Much testimony was offered to the effect that this forty-acre tract, although a part of the Moore farm, had been fraudulently included in the mortgage to the bank in the execution of which Mrs. M. C. Moore had joined. There are two answers to this contention. The first is that the testimony does not show any fraud or deception or mistake in the inclusion of Mrs. M. C. Moore's own individual forty acres in the mortgage. The second is that the question is concluded by the decree

of foreclosure to which she had properly been made a party.

It was thought advisable and necessary, and to the interest of all parties to correct the description of the land as it appeared in the decree, and a petition was filed in the court which rendered it for that purpose. This petition appears to have been supported by the affidavits of N. R. Moore and B. M. Moore and Mrs. M. C. Moore, their mother, which were made on March 30, 1926, which was three weeks prior to the rendition of the decree of correction made pursuant to the prayer of their petition. This petition recites that when, on January 30, 1922, the Moores executed the mortgage to the bank, "they agreed with the said Bank of Ravenden to execute said mortgage covering all the lands owned or in which any of the parties grantor of said mortgage had an interest lying in sections 6 and 7, township 18 north, range 2 west, known as the Moore lands, should be according to said agreement and ought to have been embraced and covered in said mortgage.

The decree correcting the description contains the following recital as to the appearance of the parties:

"Now on this day, this cause being reached on regular call of the docket, comes the petitioner, David L. King, in person, and also come N. R. Moore, P. G. Moore, his wife, M. C. Moore, Ellen Moore, widow of J. C. Moore, deceased, in person, and also Ellen Moore as guardian and curator of James Franklin Moore, Mary Catherine Moore, Johnnie Ellen Moore and Louise Moore, minors and heirs at law of J. C. Moore, deceased, regularly appointed by the probate court of the Western District of Lawrence County and acting as such guardian and curator.

"And the court further finds that at this time all parties in any way interested in the subject-matter of this action are all before the court in person, and being duly represented by attorney and guardians as required by law."

Concerning the error in the description the decree contains the following recital:

"It is shown to the court here at this time from the oral testimony of Ellen Moore and L. B. Poindexter, taken in open court, and the depositions of Mahala C. Moore, B. M. Moore and N. R. Moore, that there is a defect and misdescription of the lands in the original mortgage executed to the Bank of Ravenden."

The testimony in the record before us makes clear the fact that there was an erroneous description, and that the decree as corrected now accurately describes the land which the mortgage was intended to cover. The increase in acreage under the corrected decree was less than an acre more than that described in the original decree, and this increase resulted from the fact that some of the tracts of land there described did not contain an even and exact number of acres but some contained the fractional part of an acre.

It is very earnestly insisted that this correction decree is void for the reason that it appears, from the face thereof, that it was rendered at a term of court subsequent to the rendition of the original decree of foreclosure, and was done without service of process upon the minor defendants, and without the appointment of a guardian *ad litem* to represent them for the purpose of requiring the showing to be made that the amendment was not to their detriment but was to their advantage. It is stated also that the petitions and affidavits of the Moores were a forgery of their names by N. R. Moore, but this contention does not appear to have been made until long after the death of N. R. Moore, and was not sustained by the evidence.

It does appear that this decree was rendered without service of notice of the filing of the petition; but it will also be noted that this petition was not filed against the minors, but was filed for them along with the other Moore heirs in the case in which they were all parties, made so by proper service of process, and the recitals of the decree indicate that the court made inquiry into and a finding upon the petition of their guardian and others that the correction of the description was a proper order to make, and not prejudicial to the minors to make under the circumstances. The power of the court to correct

such an error in a proper case has been adjudged in many cases.

The lands were first advertised to be sold on October 24, 1925, but, pending the efforts to refinance the loan and to correct the description as a means to that end, the sale did not actually occur until December 18, 1926, at which time a sale of all the lands was made to W. A. Bowman, who was Mrs. Goode's uncle. At that time neither N. R. Moore nor Mrs. M. C. Moore had any interest in the lands, as they had conveyed their interests to J. C. and B. M. Moore, who had executed the mortgage to the bank which had been ordered foreclosed under the decree of the chancery court. Bowman was unable to pay the purchase-money note which he gave to the commissioner making the sale, and to avoid another sale it was agreed that Bowman should convey the land to Dr. E. N. F. Sullivan, who should convey to King, who would accept the conveyance in satisfaction of the decree. It does not appear why Sullivan should have intervened, but it does appear that the arrangement was known and assented to by B. M. Moore and Mrs. Goode, who actively participated in that transaction by signing receipts to the commissioner and by taking from King an option to buy the lands on terms which were equivalent to a redemption.

It is insisted that the conveyance to King was void for the reason that he was without power to purchase because of his relation as an attorney in the case. Nothing is better settled than that the relation between an attorney and client is one of trust and confidence, requiring a high degree of fidelity and good faith; but it is not the law that they may not make valid contracts with each other with reference to the subject-matter of litigation in connection with which the attorney was employed. The rule is stated in 6 C. J., title, Attorney and Client, § 211, page 687, as follows: "There is no necessary incapacity for dealing between client and attorney, and, although transactions between them will be closely scrutinized, yet those which are obviously fair and just will be upheld. To entitle the client to relief from a contract or agreement entered into with his attor-

ney, it must be shown that the client has suffered some injury through an abuse of confidence on the part of his attorney." See also *Lytle* v. *State,* 17 Ark. 608; *Drennen* v. *Walker,* 21 Ark. 539; *Thweatt* v. *Freeman,* 73 Ark. 575, 84 S. W. 720; *McMillan* v. *Brookfield,* 150 Ark. 518, 234 S. W. 621; *Swaim* v. *Martin,* 158 Ark. 469, 251 S. W. 26.

We think King's relation to and his contract with his clients passes this test. It appears that he has represented them for a number of years in a lawsuit against which his clients had no valid defense, and that he has never been paid a dollar either as a fee or for his expenses.

As we have said, King did not intend to acquire the title to this property when he advanced the money to save it from sale, and his subsequent conduct indicates great forbearance, and it is our opinion that the deed to him above-mentioned conveyed the title and did not constitute a mortgage or create a trust. However, pursuant to his agreement so to do, when he thus acquired the title, King executed a contract, which the court below construed to be a lease with an option to purchase, wherein B. M. Moore and Mrs. Goode were given three years to repurchase this land. This contract reads as follows:

"This agreement and contract, made and entered into on this 29th day of December, 1927, by and between D. L. King, party of the first part, and Mary Ellen Moore and Benoni Moore, parties of the second part. Whereas the party of the first part has this day purchased from Dr. E. N. F. Sullivan, for a consideration of $8,986.25, the same amount paid by the said Sullivan to W. A. Bowman, for a certain tract of land of about 386 acres, lying in sections six and seven, in township 18 north, range 2 west, known as the Moore farm and lands in the Western District of Lawrence County, which lands were sold by R. B. Warner, as commissioner in chancery, by decree of the chancery court to satisfy a certain judgment in favor of the Bank of Ravenden, assigned to D. L. King, which sum with interest to date amounts to said sum of $8,986.25.

"The said Sullivan has this day by his warranty deed sold and conveyed said lands and premises to the said D. L. King for said sum.

"Now the said parties of the second part being desirous to purchase said farm, land and premises, the said D. L. King hereby gives and grants to said parties of the second part the privilege to repurchase said lands at any time within three years from this date by paying to the said party of the first part or his assigns the said sum of $8,986.25, with interest thereon at the rate of eight per cent. per annum. The parties of the second part to remain in possession of said lands and premises during said time or until some deal shall be made in regard thereto. And to pay the taxes on said lands and keep up the repairs on the farm.

"The parties of the second part in consideration of the premises above stipulated and agree to comply therewith.

"It is further stipulated and agreed that rents from said farm shall be used from year to year to pay the interest on said sum agreed upon by the parties hereto.

"It is further agreed by the parties that in the event the said parties of the second part should negotiate a deal to sell or transfer said lands and premises, the said D. L. King agrees that, upon the full payment of said sum of money paid out by him with 8 per cent. interest per annum, that he will make warranty deed thereto to any person whomsoever the parties of the second part may designate."

Payments amounting only to $375 were made to King under this contract, and this payment was made in 1928. No payments were made in 1929, and King attached a portion of the crop for the rent of that year, claiming as rent a sum equal to the interest on the purchase money. The attached crop was sold under the orders of the court, and it was ordered that the proceeds of the sale be applied to the payment of the rent. The complaint filed in that cause prayed also the cancellation of the contract of sale upon the ground that the parties had refused to perform it and had renounced it as a binding contract.

An answer and cross-complaint was filed by Moore and Mrs. Goode, which raised the issues we have recited, along with a number of others a statement of all of which would protract this opinion to an interminable length. This cross-complaint charged King with infidelity and corruption, and also that through a betrayal of his trust he had apparently acquired the title to the land, and it was prayed that all the proceedings under which he had apparently done so be canceled and set aside. In the alternative it was prayed that judgment be rendered against King for $12,000, the present value of the land, as damages for his betrayal of his trust as an attorney.

There was a general finding in favor of King on all the allegations of the cross-complaint filed against him. The chancellor construed the contract set out above between King and B. M. Moore and Mrs. Goode as creating an option to purchase, which, until the option had been exercised, was a lease for an annual rental equal to the annual interest on the purchase money, the repairs and the taxes on the lands, and upon this finding sustained the attachment for the rent and rendered judgment accordingly. It was further decreed that, inasmuch as B. M. Moore and Mrs. Goode had refused to perform the option contract, and had denied its binding effect and their liability thereunder, the same should be canceled and held for naught, and the present appeal is from that decree.

We think the court correctly construed the contract between King and B. M. Moore and Mrs. Goode. Such contracts are not unusual, and have been frequently upheld and enforced. The third headnote in the case of *Thomas* v. *Johnston,* 78 Ark. 574, 95 S. W. 468, reads as follows: "A landowner may agree with another that the relation of landlord and tenant shall subsist between them until it shall be changed into the relation of vendor and vendee by payment in full of certain amounts named." See also *Ish* v. *Morgan,* 48 Ark. 413, 3 S. W. 440; *Quertermous* v. *Hatfield,* 54 Ark. 16, 14 S. W. 1096; *Carpenter* v. *Thornburn,* 76 Ark. 578, 89 S. W. 1047;

Levy v. *McDonnell,* 92 Ark. 324, 122 S. W. 1002; *Smith* v. *Berkau,* 123 Ark. 90, 184 S. W. 429.

We are also of the opinion that the cross-complaint against King was properly dismissed for the want of equity. The undisputed facts are that the lands were about to be sold, and they would, no doubt, have been permanently lost to the Moores, had they been sold. Four days before the date set for the sale King advanced his own money to pay the judgment under which the sale had been ordered. This was done October 24, 1925, and the second sale was not had until December 18, 1926, at which time Bowman bid in the lands for $9,000, and executed a note therefor. He paid no part of the note, yet by consent of all parties the commissioner made Bowman a deed on February 12, 1927, which was approved by the court. Further indulgence was extended by King until December 28, 1927, at which time Bowman conveyed to Sullivan, who, in turn, conveyed to King, and on December 29, 1927, the contract between King and B. M. Moore and Mrs. Goode was executed, with a reduction in the rate of interest provided for in the foreclosure decree.

The conduct of King appears *uberrimae fidei,* and the decree in his favor is therefore in all things affirmed.

PACE *v.* STATE USE SALINE COUNTY.

4-3593

Opinion delivered November 19, 1934.

Danaher & Danaher, for appellants.

J. S. Utley, Ernest Briner, W. A. Utley, D. M. Halbert, J. B. Milham and *Tom W. Campbell,* for appellees.

BUTLER, J. The facts in this case, which are undisputed, are that the treasurer of Saline County had been depositing the funds of the county, prior to December 4, 1930, in the "Benton Bank & Trust Company." At that time the treasurer was George Fish, who served as such until his death on June 20, 1931. The Benton Bank & Trust Company became insolvent, and on said 4th day of December, 1930, the Benton Trust Company was organized and took over the assets of Benton Bank & Trust Company. An agreement was signed by the depositors of the insolvent bank, including the county judge and county treasurer, to the effect that the county deposits in the old bank should be frozen in the new bank to be paid in installments, beginning December 20, 1930, when ten per cent. of the deposits should be paid, the remainder to be paid in four installments—ten per cent. on March 1, 1931, ten per cent. on June 1, 1931, ten per cent. on September 1, 1931, and sixty per cent. on January 1, 1932. When the old bank closed its doors and the new bank took over its assets and assumed its liabilities, the county had on deposit the sum of $28,647, all in one account, which included the funds belonging to the county as such and to its various school and road districts. When George Fish, the county treasurer, died, the appellant, S. H. Pace was appointed as county treasurer on July 7, 1931, and entered into the discharge of the duties of his office on that date. On July 14 he executed his official bond in the sum of $30,000 with the appellant company as surety thereon. On the same day the county court of Saline County designated the Benton Trust Company as one of the depositories, conditioned that it would execute a depository bond as provided by law. On the same day, pursuant to the order of the court, said trust company filed with the county clerk its bond signed by Robert F. Lambeth, H. W. Thompson, L. B. White, W. J. Cox, H. W. Finkbeiner, A. V. Martin, J. A. Cunningham, and B. A. Fletcher. This bond was examined

by the county judge and the treasurer and approved by an indorsement in writing on the bond signed by them.

On July 22, 1931, the administratrix of Mr. Fish paid to S. H. Pace, county treasurer, the sum of $14,591.07, which constituted all the county funds in the possession of Fish as treasurer at the time of his death. This payment was made by check drawn by the administratrix in favor of S. H. Pace, county treasurer, on the Benton Trust Company. Pace issued his receipt for said sum, presented the check to the drawee bank which accepted the same and credited Pace with said sum as county treasurer. Thereafter Pace made deposits in the Benton Trust Company in his official capacity, drawing checks against the account until December 29, 1931, when that bank became insolvent and closed its doors. On this date the balance due Pace as county treasurer was the sum of $10,750.79. He filed his claim for the sum stated with the liquidating agent of the bank, no part of which has yet been paid.

Suit was brought by the State for the use and benefit of Saline County to recover said sum from S. H. Pace, county treasurer, and the surety on his official bond, and the signers of the depository bond executed as aforesaid. The court found in favor of the plaintiff against Pace and his surety and dismissed the case against the sureties on the depository bond. Both the State of Arkansas and Pace and his surety have appealed.

The first question for our consideration is, was the bond executed by the appellees a sufficient compliance with the statute to exonerate the treasurer and his surety from loss of the funds in the depository bank which became insolvent? The first legislation on the subject of county depositories which we need notice is act No. 163 of the Acts of 1927, which the appellants contend was the law governing the subject at the time of the execution of the depository bond involved, and that the bond executed complied with the requirements of that statute. Section 1 of that act provided that any bank or trust company desiring to become a depository should make a proposition to the county court, which court should, twenty days before the commencement of the

term of court at which the proposition should be received and acted upon, give notice by publication in a newspaper published in the county of its intention to receive bids from the banks desiring to become the depository of the county funds; that the bank or banks proposing to become depositories should file with the clerk of the court a sealed bid stating the rate of interest to be paid for the county funds, and that the bid should be accompanied by a certified check of not less than $250, etc. Section 4 of the act provided for the execution of a bond by the successful bidder, payable to the county "with not less than five solvent qualified sureties, who shall own in this State real estate unencumbered and of value as great as the amount of said bond, * * * which may be approved by the county court."

It is contended by the appellants that later legislation on the subject of depository banks did not serve to alter the existing law. Act No. 151 of the Acts of 1929 was entitled, "An Act to Repeal Act No. 42 of the Acts of 1927 of the Statutes of Arkansas, to Provide for the Approval of County Depository Bonds by the County Treasurer, and for Other Purposes." It is argued that as act No. 42 of the Acts of 1927 does not refer to the subject of county depository bonds, but provides merely that the Governor should have authority to relieve any public officer and his bondsmen from the payment of any public funds which said officer might have had on deposit in any bank in this State that has been designated as State or county depository and which has become insolvent, therefore, act No. 151 of 1929, not having mentioned act No. 163, could not be deemed to be an amendment of said act. Section 1 of act No. 151 expressly repealed act No. 42. Section 2 of that act dealt with a different, subject, namely, that mentioned in the title, "To Provide for the Approval of County Depository Bonds by the County Treasurer, and for Other Purposes." This, by implication, amended that part of act No. 163 providing that depository bonds should be approved by the county court, and substituted "a surety bond" for the personal bond of act 163. It is contended that this violates § 23 of art. 5 of the Constitution, which

provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be reenacted and published at length. This section has no application to implied amendments by later legislation to existing laws, and § 2 of act No. 151 does not offend against it. *Perkins* v. *Du Val,* 31 Ark. 236; *Little Rock* v. *Quindley,* 61 Ark. 622, 33 S. W. 1053; *Boyer* v. *State,* 141 Ark. 84, 216 S. W. 17.

Appellants also insist that act No. 139 of the Acts of 1931, purporting to be an amendment of act No. 151 of 1929, does not affect act No. 163; first, because no mention is made in act No. 139 of act No. 163 of the Acts of 1927. The title of that act is: "An Act to Amend § 2 of Act No. 151, Approved March 20, 1929." The pertinent part of that act is as follows:

"No award by any county court or judge thereof, to any bank or banks of custody of any county funds shall be effective until each such bank receiving such award shall file with the county clerk a bond conditioned for the faithful and safe holding and keeping of all county funds placed with it and the due payment of the same according to law; nor until such bond shall have been approved by the county court or the judge thereof and the county treasurer.

"Such bond may be executed by a corporate surety company authorized to do business in this State, or may be signed by not less than ten solvent, qualified sureties, who shall own in this State unincumbered real estate of the value of the amount of the bond over and above the debts and exemptions of the sureties. Each surety shall make an affidavit giving the description of the real estate owned by him and its value over and above his debts and exemptions. Any citizen of the county may appeal to the circuit court from any approval of the bond in the same manner and to the same effect as now provided by law in the approval of official bonds."

It is true no reference is made to act No. 163 of the Acts of 1927, but it deals with the same subject as § 4 of that act and provides for a different number of

sureties, prescribing how their qualifications as such may be shown. While being entitled "An Act to Amend § 2 of Act No. 151," it in reality impliedly amended § 4 of act No. 163; and this may be done, although no mention of the former act is made in the act which impliedly amends it. *Porter* v. *Waterman*, 77 Ark. 383, 91 S. W. 754.

It is further argued by counsel for the appellants that act No. 139 was repealed by act No. 222 of the Acts of 1931. That act contains two sections. Section 1 is as follows: "That act 151 approved March 20, 1929, of the acts of the General Assembly of the State of Arkansas and published on page 766 of vol. 1 of the Acts of the General Assembly of the State of Arkansas at the session of 1929 and entitled: 'An Act to Repeal Act 42 of the Acts of 1927 of the Statutes of Arkansas to Provide for the Approval of County Depository Bonds by the County Treasurer and for Other Purposes,' be and the same is hereby repealed." Section 2 is the emergency clause, giving the reasons for the passage of the act and stating the conditions which made its immediate effect important. In effect, it states the inability of a county to secure surety bonds and the resulting danger of the loss of county funds because of this. By § 2 of act No. 151, it was surety bonds only which could be accepted to guarantee the deposits of county funds.

We are of the opinion that it was not the intention of the Legislature to repeal act No. 139 of the Acts of 1931 by the passage of act No. 222 only a few weeks later. In dealing with repealing acts the same rules govern as to the construction of statutes generally. The cardinal rule for the construction of statutes is that the legislative intent should be ascertained, which may be done by construing every part of the statute together with reference to all laws which relate to the same subject as a single system, so as to give effect to the legislative intent and to carry into effect the general purpose of the system.

The subject of county depositories is an important one, and the Legislature, from time to time, has attempted to safeguard public funds by requiring depository

bonds to be executed. It is clear that the Legislature deemed the qualification and number of sureties named in act No. 163 of the Acts of 1927 insufficient to effect that purpose. By § 2 of act No. 151, *supra*, individuals as sureties were discarded, and surety companies only were deemed sufficiently solvent to execute any good bond. Because of the collapse of values and the uncertainty of all our business affairs, it was thought wise to provide (by act No. 139, *supra*) that bonds might be executed by surety companies as provided in § 2 of act No. 151, and also by individuals—ten in number—who should make a showing of their solvency by sworn statement. Certainly, it was not the intent of the Legislature by the enactment of act No. 222, *supra,* to restore the provisions of act No. 163, *supra,* relative to the execution of depository bonds which experience had proved insufficient, but only to make certain the provisions of § 2 of act No. 139, passed at the same session as act No. 222. This intention is more readily discoverable from an examination of § 1 of act No. 222, quoted *supra,* which discloses the specific purpose of that act, *i.e.,* to repeal a definite and certain law as it appears on a certain page and volume of the Acts of the General Assembly of 1929. If it had been the intention of the Legislature to include in this repeal act No. 139, *supra,* it would have so indicated by adding after the number of the act the words "and all acts amendatory thereto," or words of similar import.

Where a statute expressly repeals specific acts there is a presumption that it was not intended to repeal others not specified. In such cases there is an implied approval of the statutes not specified, as well as of an intention to leave them undisturbed. 59 C. J. 909, § 512. In the case of *State* v. *Young,* 30 S. C. 399, vol. 9, S. E. 355, it was insisted that the repeal of an act necessarily carries with it all amendments made to said act. In overruling that contention, the court said: "We know of no inexorable rule of law which peremptorily requires that every act which is entitled as 'an amendment' to a former act must therefore be carried back, and 'ingrafted' upon that act, so as to become part and parcel of it,

for all purposes. It is well settled that the title is no part of the act. 'There is nothing in a name.' * * * The question must always be one of intention, to be reached by considering the character and objects of the acts.'' The doctrine of that case is in line with our own decisions. *Arkansas Tax Com.* v. *Crittenden County,* 183 Ark. 738, 38 S. W. (2d) 318.

It was the duty of the county treasurer to require that the number of the securities be ten in number, and that they give evidence of their qualification in the manner pointed out in the statute, § 1, act No. 139, Acts of 1931. Failing in this duty, he remains guarantor for the payment of the county's funds deposited by him.

The contention that the funds belonging to the county are to be classed as a preferred claim is based on the theory that the bond executed by the Benton Trust Company and the sureties created an express trust by the use of the following language: ''* * * and promptly pay, upon presentation of all checks drawn upon said depository by the county treasurer so long as said funds shall be in said depository to the credit of the treasurer of said county and keep all funds of said county faithfully in the hands of said bank and account for, according to law, all monies deposited by said county treasurer.'' As authority for this contention, we are referred to the cases of *Grossman* v. *Taylor,* 185 Ark. 64, 46 S. W. (2d) 13; *Albright* v. *Taylor,* 185 Ark. 401, 47 S. W. (2d) 579; *Royal Arch Ben. Ass'n* v. *Taylor,* 187 Ark. 531, 60 S. W. (2d) 915. We do not review these cases, for they clearly do not support the contention of appellants. The instruments involved in those cases which were held to create an express trust were clearly indicative of that intention. The bond in this case is an ordinary depository bond, the sole purpose of which was to guarantee the payment of all money deposited to the account of the county treasurer, and the court correctly found that it should be classed as a common claim.

We agree with the appellees that act No. 163 of the Acts of 1927 is not the controlling statute, but that act No. 139 of the Acts of 1931 is the law prescribing the execution of depository bonds. This, however, does not

exonerate the sureties, for, by the execution of the bond and the delivery to the proper officials, they have estopped themselves to question its binding effect. *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330; *School Dist.* v. *Massie,* 170 Ark. 222, 279 S. W. 993. The bond was made for the benefit of Benton Trust Company in which appellees were stockholders and directors. "A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains. While this is not strictly a contract *inter partes,* it is the same in legal effect, and the same principle applies hereto." *Wasson* v. *State, use Lonoke County,* 187 Ark. 680, 61 S. W. (2d) 679.

The contention of the appellees that the bond has no validity because it was not signed by all of the directors of the bank as it had been agreed would be done is without merit. The evidence goes no further than to show an agreement among the appellees themselves, and there is no proof that this agreement was communicated to the county judge or treasurer, nor were they advised that the bond was not to become effective until signed by all eleven directors. As a matter of fact, it was delivered as a fully executed instrument, and it was upon the faith of this bond, according to the undisputed evidence of the treasurer, that the deposits were made.

There is likewise no merit in the appellees' contention that there was no breach of the conditions of the bond. The evidence is certain that from and after the 20th day of February, 1931, all the funds deposited by the treasurer were new money, for on that date it is admitted that Mr. Fish, who was then the treasurer, was overdrawn in a small sum. Therefore, none of the funds from that date on could have been frozen deposits, as claimed by appellees, because all of these the bank had permitted to be withdrawn. Another reason why this contention is untenable is that when Mr. Pace took over the office of treasurer, the administratrix of Mr. Fish delivered to him a check on the bank for the amount of funds in the hands of Mr. Fish as treasurer when he

died. The bank accepted this check and passed the amount thereof to the credit of Pace without informing him that any of the funds of the county were frozen or that the check was to replace that character of funds which had been withdrawn.

It is mentioned by appellees in their statement of the case, but not contended in their brief, that, because the bond uses the words "funds of the county," their liability extends no further than for repayment of the amount due the county arising from the general revenues and did not include liability for school and road district funds which were included in the account of the county treasurer. The answer to this is that the words by which their liability is sought to be limited are substantially the same as contained in the statute. In providing for the award to banks of the custody and the execution by them of bonds, the words "county funds" are used, which is, of course, equivalent to "funds of the county." These words were used in the act so as to include not only the funds belonging strictly to the county, but all such as it collected and preserved as the agent of school and road districts within the county. Any other interpretation would wholly nullify the purpose of the act. Similar language in the bond as is in the statute must be construed as we construe the language of the statute in order to carry out its purpose. *Huffstuttler* v. *State,* 183 Ark. 993, 39 S. W. (2d) 721.

It follows from the views expressed that the execution of the depository bond, not being in conformity to the statute, did not relieve the treasurer as guarantor for the safety of the county deposits and that he and the surety on his official bond are primarily liable to the State for the use of Saline County; and that appellees are secondarily liable to S. H. Pace and the appellant company for the amounts they pay out on the judgment.

The decree of the trial court is therefore affirmed as to Pace and his surety and reversed as to appellees, with directions to enter a decree in accordance with this opinion.

MEHAFFY, J. I agree to that part of the decree affirming the decree of the lower court, but dissent to that

part reversing a portion of lower court's decree. In other words, I think the decree should be affirmed.

GUS BLASS COMPANY *v.* MAY.

4-3613

Opinion delivered November 26, 1934.

John Sherrill and *Osro Cobb,* for appellant.

Fred A. Isgrig and *Harry Robinson,* for appellee.

MCHANEY, J. Appellee, for himself and as administrator of the estate of Babbette May, deceased, who was his wife, brought this action against appellant to recover damages for personal injuries received by her on January 22, 1932, when she fell on the steps or while descending the steps leading from one part of the basement of appellant's store in Little Rock to another part of the basement thereof. Mrs. May received severe and permanent injuries to her right leg, there being an oblique fracture of the right femur. She died on April 6, 1932, from this and other contributing causes.

A trial of the cause resulted in a verdict and judgment against appellant.

Several errors are assigned for a reversal of the judgment against it by appellant, but we consider it necessary to discuss only one of them which of itself calls for a reversal of the judgment. The condition of the nosing board at the head of the steps, whether in good or bad condition, was sharply at issue. During the course of the trial, appellant's counsel requested the court to order the jury to go to the scene of the accident and view

the condition of the stairway. This was not done. At the conclusion of all of the evidence, appellant's counsel renewed his request to have the jury go look at the steps. The court inquired of the jury, whether it wanted to look at the steps. Whereupon juror W. C. Edwards said: "I went down and looked at them at noon."

"Mr. Cobb (counsel for appellant): Note our objections."

As the court reporter wrote it up, the court overruled the objection, and Mr. Cobb saved his exceptions, but the court struck from the bill of exceptions as prepared by the stenographer, the fact that the objection was overruled, and exceptions saved. Thereupon other members of the jury spoke up and said: "We will take his word for it," referring to juror Edwards. "Mr. Cobb: Defendant requests that the entire jury go look at the steps, one member of the jury having already done so." The court announced that he would not require the jury to go. Whereupon Mr. Cobb objected, his objection was overruled, and he saved his exceptions.

We are of the opinion that this constituted error. Under Crawford & Moses' Digest, § 1293, it is provided: "Whenever, in the opinion of the court, it is proper for the jury to have a view * * * of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial."

Under this statute it would have been proper for the court to have ordered the jury to view the scene of the accident, if he thought it advisable, but only in accordance with the terms of the statute, that is, to be conducted in a body, under the charge of an officer and to be shown the place where the accident occurred and the alleged defective steps by some person appointed by the court, but it was highly improper for one juror to do so, unless by the consent of both parties. The reason is, as happened in this case, that such juror, when the jury

has retired to consider of its verdict, may become a witness in the case for one of the parties and give his testimony to the jury as to what he found, without being sworn as a witness and without being subject to cross-examination. For obvious reasons, this would not be proper. But appellee says that, even though this was error, no proper exceptions were saved to the action of the court. We cannot agree with appellee in this regard. The above statement from the record shows that counsel for appellant did object when juror Edwards announced that he had been down at noon and looked at the steps. According to the corrected bill of exceptions, the court did not rule upon the objection and the exceptions were not saved. But we are of the opinion that, when counsel for appellant made the request that the entire jury be ordered to go to look at the steps, since one member of the jury had already done so, which the court declined to do over appellant's objection and exceptions, this amounted to an exception to one member of the jury viewing the steps in the absence of the others.

The other errors urged for our consideration may not arise on a retrial of the case, and we therefore refrain from a discussion of them.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

TROTTER *v.* STATE.

Crim. 3902

Opinion delivered November 26, 1934.

W. T. Pate, Jr., Robt. J. Brown, Jr., and *U. C. May,* for appellant.

Walter L. Pope, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

BUTLER, J. The appellant, Rogers Trotter, was indicted, tried and convicted for the crime of accessory before the fact of murder in the first degree, and his punishment fixed at life imprisonment in the State penitentiary. The indictment in effect alleged that on the 10th day of June, 1933, he entered into a conspiracy with Ed Kleier and Bill Bailey to rob one J. D. Fowler who was then living in Booneville in the Southern District of Logan County, Arkansas; that, while acting in furtherance of this conspiracy and attempting to execute its purpose, Ed Kleier and Bill Bailey murdered Fowler by shooting him; that the said Rogers Trotter was not present when Fowler was murdered, but had advised, encouraged, abetted and assisted the said Kleier and Bailey in the commission of the murder.

In apt time the appellant filed a motion for change of venue in the manner and form prescribed by statute, the ground set up being "that the minds of the people of both the judicial districts of Logan County are so prejudiced against him that he cannot receive a fair and impartial trial in either district of said county." There were three affiants to the supporting affidavit who were examined in open court touching their credibility. I. W. Young, one of them, testified that he was familiar with the sentiment of the people in regard to the charge against Trotter, and that he did not believe that Trotter could receive a fair trial in the county; that there are twenty-four townships in the county, the most of which he had journeyed through on a mule buying trip and had heard the case discussed; that in the course of his business of buying and selling mules he dealt with people from all over the county, and based his opinion upon the discussions he had heard among these people. Another affiant, Jack Corley, was foreman of C. W. A. work and, as such, employed men from all over the

northern district of the county, and had talked with numbers of persons from the southern district. He testified that he worked a crew of 74 men at a time which was frequently changed and consisted of men from different parts of the county; that he heard these crews talking about the case and others also, and, from their conversations relative to it, he based his opinion that Trotter would not be able to secure a fair and impartial trial in the county because of the prejudice against him.

U. C. May was called in support of the motion and testified that he was one of the attorneys for the defendant, and as such had ascertained the condition of the minds of the people of Logan County with reference to Rogers Trotter; that he had inquired from each township except one and the minds of the inhabitants were made up one way or the other as to the guilt or innocence of Trotter.

The court overruled the motion, to which ruling timely objections and exceptions were saved.

Previous to the trial of the appellant, Kleier had been tried and convicted of the murder of Fowler which occurred shortly after dark on the evening of June 10, 1933. Fowler was a man eighty-five years of age, and no one lived with him except his housekeeper. On the evening he was killed he was sitting on his back porch which was screened with wire mesh. A man broke through this screen and commanded Fowler to put up his hands. As Fowler arose from his chair, the intruder fired two shots—one inflicting the fatal wound and the other going into the roof of the porch. The housekeeper, who was present, stated that another person besides the actual assailant stood on the outside.

There is no question raised as to the sufficiency of the evidence tending to show that Kleier was the actual murderer, and no contention is made on this appeal that Kleier did not commit the crime. The two grounds most strongly urged for reversal are: (1) error of the court in overruling the motion for change of venue, and (2) lack of sufficient evidence to support the jury's verdict.

We are of the opinion that the trial court should have granted the defendant a change of venue. The tes-

timony of the supporting witnesses to the motion discloses that they had unusual opportunity for discovering the sentiment of the people throughout the county with regard to the prejudice existing; that they had heard discussions of the case by people from practically every portion of the county, and on this they based their conclusion that defendant could not secure a fair and impartial trial in Logan County.

Many cases relating to this subject are cited in the recent case of *Adams* v. *State,* 179 Ark. 1047, 20 S. W. (2d) 130, cited by counsel for the appellee. In that case the settled rule is declared that this court will not overrule the judgment of a trial court in denying an application for change of venue unless it appears that the ruling of the lower court is such as to constitute the denial of a substantial right. That case refers to the examination of the supporting affiants and the purpose for the same—namely, to ascertain the means by which the condition of the minds of the inhabitants became known to the affiants, and the extent of the information so obtained. If it should appear that the opportunity for knowing, and the knowledge of the condition of the minds of the inhabitants was such as not to warrant the statements made in the affidavit, then the affiants would be deemed not to be credible persons within the meaning of the statute. In the instant case counsel urge that the examination shows the information of the affiants to be limited and obtained through limited sources. We do not so view their testimony, but, on the contrary, it appears as stated that the sources of information were wide, and that the conclusion of the affiants was accurate seems to us to be shown from the evidence upon which the verdict was based.

The evidence adduced by the State most strongly tending to support the verdict is collected in appellee's brief, the testimony of each witness being summarized. One witness, Jimmy O'Neal, who, the evidence conclusively proves, was mentally deficient, testified that he had been living in Trotter's home in Scott County for several days prior to the killing; that Trotter told him "about a job about eighteen miles from where he lived;" that

Kleier had also been living at Trotter's home for several days, and that on the morning after the killing witness saw Kleier in the barn changing his clothes and cleaning a gun in the garage, then going into the house where he shaved his mustache and trimmed his eyebrows; that besides the gun Kleier had a blackjack, flashlight, pair of gloves, a piece of rubber hose and two tire tools.

Frank Nichols and Mrs. James testified that on May 29 they saw Trotter in company with Kleier and Herman Mitchell (also charged with the crime of this murder) at Nichols' place of business in Scott County. Another witness, Barney Quinn, stated that about a week or ten days before Fowler was killed Trotter and Kleier came to field about a mile and a half from Fowler's home where Herman Mitchell was working. Harold Jones, another witness, stated that he saw a man he thought was Trotter in company with a man answering Kleier's description in the vicinity of Booneville on the day of the killing, but that he had not seen Trotter in two years and so was not positive. Another witness stated that he had seen Kleier in company with Trotter or Jimmy Walton, Trotter's son-in-law, several times, and that the day Fowler was killed Trotter drove into his filling station from the direction of Waldron in Scott County.

Allan Hart testified that he saw a car resembling the Chevrolet coupe owned by Trotter pass his place of business in the afternoon before the killing going in the direction of Booneville, and there appeared to be three persons in the car.

Dr. Ed Wineman, who lived in Booneville, a half mile from the Fowler home, testified that he heard one shot in the early part of the night and noticed a car passing; that after he went to bed—or about the time he was in the act of doing so—a car passed going at a terrific rate of speed west on West Thomas Street; that in going to Fowler's home one travels on West Thomas Street, turns south, then west; that the first time a car passed his house was before the shooting. It was after dark, but he observed that it had a bright radiator, the side lights were bright, and it had a rumble seat; that he was shown the car which had been taken in custody by

the officers, and it resembled the one he saw passing his house at a high rate of speed. Witness stated that a car passed his house afterwards four or five times.

In addition to this testimony there are these circumstances; it is in evidence that about two weeks before Fowler was killed Kleier and his wife, apparent strangers in that community, came to Trotter's home and remained until Kleier was arrested on the morning after Fowler was killed. From statements made by Jimmy O'Neal the officers suspected Kleier and early on the morning after the killing went to Trotter's home and asked Trotter to call Kleier to come outside. Kleier appeared in response to Trotter's call, was arrested and taken to jail. Among Kleier's belongings a pistol was discovered which he was supposed to have used in committing the murder. Shortly after Kleier's arrest, Trotter learned that he was suspected of some complicity in the guilt of Kleier and left the country, going from place to place for several months, but finally returned and surrendered to the officers. His friends in the meanwhile had made arrangement for his bond.

The inference justly deducible from the testimony quoted and the attendant circumstances proved, when given their greatest weight, falls short in probative value of that degree of evidence necessary to connect Trotter with the commission of the crime. O'Neal did not attempt to explain the nature of the job which Trotter wanted him to undertake, and the association of Trotter with Kleier and his movements during the days immediately preceding the killing and on that day do not reasonably establish more than a suspicion of Trotter's connivance with Kleier in his felonious purpose.

The judgment of the trial court is reversed, and the cause remanded with directions to grant the motion for change of venue, and for such further proceedings as may be deemed advisable.

GOODE *v.* UNION COUNTY.

4-3608

Opinion delivered November 26, 1934.

Herbert V. Betts, for appellant.

Alvin D. Stevens, for appellee.

BAKER, J. H. R. F. Goode, clerk of the chancery court of Union County, filed this suit in the circuit court of Union County challenging, first, the legality of Union County Salary Act, and, second, praying for fees, emoluments and commissions alleged to have been earned by him as clerk of the two chancery courts of Union County, which fees he claims accrued during the year of 1933. The case was presented to the court upon an agreed statement of facts, and upon the testimony of the appellant.

The agreed statement of facts set out that Goode was the duly elected, qualified and acting circuit clerk and ex-officio recorder of the two divisions of the circuit court of Union County, Arkansas, and had been since January 1, 1931. Also that he was the duly elected, qualified and acting chancery clerk of Union County, and had been since January 1, 1931; that the claim involved in this action represents fees and commissions earned and received by the clerk of the two divisions of the chancery courts of Union County, Arkansas, from January 1, 1933, to December 1, 1933, inclusive; that the sums were paid by the appellant to the treasurer of Union County monthly, under protest, and that the amount of such fees and commissions so paid was $2,591.

It is further agreed that the claim involves the construction and interpretation of what is known as act

No. 1 of Union County, Arkansas, which act was filed and made a part of the record, and it was stipulated that in a former cause testing the validity of said Initiative Act No. 1, styled *Dozier* v. *Ragsdale,* in which the opinion of the Supreme Court was delivered on December 5, 1932, as reported in 186 Ark. 654, 55 S. W. (2d) 779, in which said initiative act was held valid, that the question as to whether the said act affected the fees, commissions and emoluments of the clerk of the chancery court was not raised in the court below nor in the Supreme Court, and the purpose of this suit is to determine whether said Initiative Act No. 1 applies to the clerk of the chancery court of Union County.

The parties agreed to waive the right of trial by jury, and also that other evidence might be offered in addition to the stipulation.

Goode testified that he is the chancery clerk; that during the year of 1933 he had collected $1,036.45 as such clerk of the second division of the Union Chancery Court, and $755.55 from the first division of that court; that he had received as commissioner in chancery during the year 1933 the sum of $640; that he earned fees for making transcripts of records, in cases on appeal, the sum of $162; that this money was paid into the treasury of Union County. There were, perhaps, some other fees not necessary to include here. He was paid the salary of $2,700 according to Initiative Act No. 1, the salary act of Union County.

The trial court held that the duties of the chancery clerk, first and second divisions of Union County, devolved upon the appellant by reason of the fact that he was the duly elected circuit clerk of that county; that the law imposed upon the circuit clerk of the county the duties of the chancery clerk, and that the salary fixed in the Union County Initiative Act No. 1 of $2,700 a year was full compensation that he had a right to receive for all of the duties he performed as circuit and chancery clerk.

We think this decision was a correct announcement of the law.

Section 15 of article 7 of the Constitution of 1874, provides: "Until the General Assembly shall deem ex-

pedient, the circuit court shall have jurisdiction in matters of equity, subject to an appeal to the Supreme Court in such manner as shall be prescribed by law." The clerk of the circuit court, of course, performed all of the duties of what was then generally spoken of and called "the chancery side of the docket."

Section 10 of act 166 of the Acts of 1903, provides: "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 the said counties * * *." This was not an imposition of new or additional duties imposed upon circuit clerks, for they had prior to that time, as circuit clerks, performed all of the duties devolving upon them in all equity cases that arose, and were tried in chancery by the circuit judges.

Upon the establishment however of the separate chancery courts, the clerks continued, as under § 10 of said act, to perform the same duties, and render the same services they had prior to that date rendered in the circuit court. There has been no change in that general law of the State since that date, as to the rendition of the duties by the circuit clerk for the separate chancery courts, and clerks of the chancery courts are such by reason of the fact that they are regularly elected as circuit clerks. Upon election they become ex-officio clerks of the chancery courts. So long as the fee system prevailed, they received the fees, emoluments and commissions accruing to them by reason of their services in the chancery court in the same manner that they did those in the circuit court.

Whatever may be said about the separate or distinct duties as clerk of the circuit court or as clerk of the chancery court, those duties are performed by one officer, though that officer may act, in the performance of his several duties, as clerk of the circuit court in the one instance, as recorder in another, or as clerk of the chancery court.

In the case of *Durden* v. *Sebastian County*, 73 Ark. 305, 83 S. W. 1048, this court said: "It is clear that the Legislature intended to provide in this act for the compensation of all the officers of Sebastian County, and

not simply for some of them. The Legislature fixed the salary of the 'judge of the county court.' Nothing was said about an extra salary or additional compensation for the judge of the probate court. Why? Because the judge of the county court is ex-officio judge of the probate court, and in providing the salary of the 'judge of the county court' the Legislature intended to include compensation to him for whatever services he might perform as judge of the probate court. So, likewise, the 'clerk of the county court' for his services as 'clerk of the probate court,' and the 'treasurer' for his services as treasurer of the common school fund. And the 'clerk of the circuit court' for his services as recorder. It is clear that the Legislature intended, for the purpose of fixing salaries, at least, that these various officers (except the sheriff) having ex-officio duties should receive but one salary for all the duties performed. The Legislature intended that there should be but the one salary or compensation in the cases mentioned, even if it could be said that there were in each case named two offices and two officers in one."

In the case of *State ex rel. Poinsett County* v. *Landers,* 183 Ark. 1138, 40 S. W. (2d) 432, this court said: "While it is true that the sheriff, under the Constitution (art. 7, § 46) holds two separate and distinct offices (Ex parte *McCabe,* 33 Ark. 396; *Falconer* v. *Shores,* 37 Ark. 393), and must give a separate bond for each office, it does not follow that he becomes two officers. We think that he is necessarily only one officer, but holding two separate and distinct offices, until such time as the Legisture sees fit to separate them."

In the Landers case, from which the above quotation is taken, Landers was claiming that he was entitled to retain for his own use the compensation of $5,000 for each office, sheriff and tax collector. The court held, however (p. 1142), "The collection of such taxes being a duty imposed by law, it is difficult to perceive on what theory he would be entitled to retain the compensation therefor in excess of $5,000 net compensation for these and all other duties performed." Citing the case of *Durden* v. *Sebastian County,* above.

It must follow that, since the appellant in this case is the circuit clerk and ex-officio clerk of the chancery court, his compensation as clerk, as fixed by the salary act of Union County is the full compensation he is entitled to receive. It has been repeatedly held by this court that the imposition of extra duties on an officer entitled him to no additional compensation unless such compensation is expressly provided for such services.

The question is also raised here, for the first time, as to the sufficiency of the ballot title of the Union County Salary Act. It is unnecessary to argue this proposition. This question was settled, adversely to appellant's contention here, in the case of *Coleman* v. *Sherrill, ante* p. 843, and also in the case of *Blocker* v. *Sewell, ante* p. 924.

It follows therefore that this case should be affirmed.

Affirmed.

DANIELS *v.* BATESVILLE.

4-3615

Opinion delivered December 3, 1934.

L. B. Poindexter and *Chas. F. Cole,* for appellant.

W. M. Thompson, for appellee.

JOHNSON, C. J. By complaint and amendment thereto filed by appellant in the Independence County Circuit

Court in September, 1933, against the city of Batesville, Arkansas, it was alleged, in effect: That during the year 1929 the city of Batesville, a city of the second class, caused to be paved, drained and guttered certain streets adjacent to appellant's real property upon which his home is situated in said city; that, because of the gathering of water from a large territory in said city and throwing it into one drainage, thereby diverting and accelerating the flow thereof into insufficient openings, appellant's property was caused to overflow, etc. The complaint continuing alleges:

"That on or about the 12th day of June, 1933, and at other times, and from time to time, and during heavy rains, the surface drainage from a large territory adjacent to Central Avenue, being most of West Batesville east of Central Avenue and a part of the territory west of Central Avenue, has been concentrated at a point adjacent to plaintiff's property by means of the sewers, gutters, and drains aforesaid, and then discharged in a body onto and across plaintiff's property, thereby flooding plaintiff's sidewalks and causing them to collapse; undermining the foundations of his buildings and the retaining walls constructed on his property causing them to collapse; has damaged his buildings by flooding them from time to time; and has washed and eroded his property by the casting of the surface water onto his property as aforesaid in a volume in excess of the capacity of the drain passing through his property.

"Plaintiff states that, because of the continuing and recurring injuries and damages to his property, the value of said property as a business location is lowered; that the rental value of his property is lowered; that his property is rendered much less desirable and valuable as a residence, or for any other use for which said property is reasonably suited. That, because of the injuries aforesaid, the plaintiff verily believes that he has suffered a damage of twelve hundred and fifty dollars ($1,250), for which said defendant city of Batesville is justly liable.

"Plaintiff further states that the injury complained of is not the construction of the pavement gutters, drains, and sewers along Central Avenue, but is the recurring

damage to said property by the discharge of surface drainage in a mass upon plaintiff's property in a volume in excess of the capacity of the drain passing through his property, thereby causing the damage aforesaid."

The trial court sustained a demurrer to the complaint thus filed, and appellant declined to plead further, whereupon the complaint was dismissed and this appeal follows.

The complaint and amendment thereto were dismissed because they show upon their face that the alleged cause of action was barred by the three year statute of limitations. Crawford & Moses' Dig., § 6950. Was this error? Our leading case on the question under consideration is *St. Louis Iron Mountain & Southern Ry. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331, where the rule is thus stated: "Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be, at once fully compensated. In such case the statute begins to run upon the construction of the nuisance. * * * But when such structure is permanent in its character, and its construction and continuance are *not necessarily injurious,* but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

The case just referred to fell within the latter clause of the rule. In the subsequent case of *St. L. I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, 35 S. W. 791, we had under consideration a similar question, but the facts were that the railroad was built across a natural drain and a trestle was constructed to permit the passage of the water thereunder, but subsequently this trestle was removed and a solid earthen dump was constructed across the drainway. Upon this statement of facts we held that it fell within the first clause of the rule announced in the Biggs case, and that the cause of action was barred by the three year statute of limitations.

In the subsequent case of *Chicago, R. I. & P. Ry. Co.* v. *McCutchen,* 80 Ark. 235, 96 S. W. 1054, we had under consideration the same question, and all the authorities on the subject were there reviewed, and in concluding the opinion we announced the distinction between the Biggs case, *supra,* and the Anderson case, *supra,* in the following language:

"The distinction between the Anderson case and those last cited [*Ry. Co.* v. *Cook,* 57 Ark. 387, 21 S. W. 1066, and *St. Louis Iron Mt. & Southern Ry. Co.* v. *Stephens,* 72 Ark. 127, 78 S. W. 766; *St. L. I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331], is that in the former there was a complete obstruction of the drainway, thus creating a permanent obstruction which necessarily caused a permanent injury, whilst in the latter there was only a partial obstruction which rendered the drainway insufficient at times, and made the future injury dependent upon the seasons and the quantity of rainfall."

In the subsequent cases of *Board of Directors of St. Francis Levee Dist.* v. *Barton,* 92 Ark. 406, 123 S. W. 382; *Turner* v. *Overton,* 86 Ark. 406, 111 S. W. 270, *St. L. I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46, 123 S. W. 786; and *Chicago, R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, the rule as theretofore announced was consistently adhered to and followed. On the one hand, where the improvement or obstruction was permanent in nature and the resulting injury or damage, if any, necessarily flowed from the construction, we have consistently held that the cause of action must be instituted within three years after the construction of the obstruction. On the other hand, we have consistently held that where the structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries, and in all such cases the statute of limitations begins to run from the happening of the injury complained of. In other words, the rule is if the structure is a complete obstruction of the drainway, thus creating a permanent obstruction which nec-

essarily causes a permanent injury to the realty, the suit must be instituted within three years from the date the obstruction is made; on the other hand, if the obstruction is partial and renders the drainway insufficient at times only, and makes the future injury dependent upon the seasons and the quantity of rainfall, successive actions may be instituted to compensate the injuries as they occur.

The complaint and amendment thereto under consideration alleged, in effect, that appellant's property was overflowed and damaged because of insufficient openings in the drainage system to carry away the excessive flow of water which falls at certain seasons of the year. It appears therefore that the suit is not grounded upon the theory that the structure was permanent and therefore the damage original, but upon the theory of a partial obstruction which rendered the drainage insufficient at times only, and this dependent upon the seasons and the quantity of rainfall.

We conclude therefore that the trial court erred in sustaining the demurrer to the complaint and amendment thereto, and in dismissing same.

For the error indicated, the case is reversed, and the cause remanded for further proceedings.

HOPPER *v.* SULLIVAN.

4-3618

Opinion delivered December 3, 1934.

B. F. Madole and *Majors, Robinson & Boyers,* for appellant.

Strait, Caviness & George, for appellee.

HUMPHREYS, J. This is an appeal from a decree rendered by a special chancellor subsequent to the term

at which he was elected. The special chancellor was elected by the bar at the November term to try this case which had been continued and set down for trial on the 4th day of the succeeding March term of court, upon announcement by the regular chancellor that he was disqualified to try the case.

The special chancellor appeared on the 9th day of March which was the 4th day of the March term, and was sworn in and tried the case without objection and took it under advisement, and at a subsequent day of the March term rendered the decree. Under § 21 of article 7 of the Constitution of Arkansas, the special chancellor's authority expired with the adjournment of the November term at which he had been elected. This court said in the case of *Goodbar Shoe Company* v. *Stewart*, 70 Ark. 407, 68 S. W. 250, that "The powers of the special chancellor ended with the term at which he was elected, and, as the record does not show that he was elected during the term at which the decree was rendered, the appeal must be dismissed. Constitution 1874, art. 7, § 21; *Dansby* v. *Beard*, 39 Ark. 254."

Following these authorities, the appeal in the instant case is dismissed.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* CORDELL.

4-3619

Opinion delivered December 3, 1934.

Jones & Wharton and *S. Hubert Mayes,* for appellant.

Hugh U. Williamson and *Fred M. Pickens,* for appellee.

MEHAFFY, J. This action was begun by the appellee in the Jackson Circuit Court. The complaint stated that on April 18, 1931, the appellee purchased from the Cash Service Station, Newport, Arkansas, a bottle of Coca-Cola which had been manufactured and delivered to said Cash Service Station by the appellant. It was alleged that, instead of being wholesome and fit for human consumption, said bottle of Coca-Cola so purchased had been negligently bottled by the appellant, and was unwholesome, poisonous, and wholly unfit for use, in that it contained a decomposed foreign substance, poisonous and deleterious, which had been negligently permitted to enter and remain in said bottle by the appellant. Appellee then alleged that he drank a portion of the contents of the bottle, and he became sick, and was permanently injured.

The appellant filed a motion to require the appellee to make his complaint more definite and certain, and this motion was sustained by the court.

Thereafter, the appellee filed an amendment in which it was stated: "that said bottle of Coca-Cola contained some kind of poisonous matter, foreign matter, and unwholesome matter, which has changed the color and appearance of same, giving it the appearance of being murky and cloudy with heavy dark dregs and settlings in same, the chemical analysis of which is unknown to the plaintiff."

The appellant then filed a supplemental motion to require appellee to make his complaint more definite and

certain. This supplemental motion was overruled by the court, and appellant filed answer denying all the material allegations of the complaint and alleging contributory negligence.

There was a verdict and judgment for $3,000, and the case is here on appeal.

The appellant contends for a reversal on two grounds only, first, that the court erred in refusing to compel the appellee to conform to the motion to make more definite and certain, and in overruling appellant's supplemental motion; second, that the verdict is excessive.

The original complaint was sufficient without any amendment. The court probably sustained the first motion to make more definite and certain under the belief that appellee could state what substance was in the bottle. When the amendment was filed, it contained the statement that the chemical analysis was unknown to the appellee.

Section 1183 of Crawford & Moses' Digest provides: "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Section 1187 of Crawford & Moses' Digest, in stating what the complaint shall contain, among other things, said: "A statement in ordinary and concise language, without repetition of the facts constituting the plaintiff's cause of action."

We think the original complaint is a compliance with the provisions of the statute. It is a statement, in ordinary and concise language, of the facts constituting the plaintiff's cause of action.

The appellant relies on the case of *Rapp* v. *Parker,* 128 Ark. 236, 193 S. W. 535. That was a suit for slander, and the court said among other things: "The sole question in the case is whether, in charging slander, it is necessary to set out the defamatory words." The defamatory words were not set out, the court sustained a motion to make more definite and certain, and the plaintiff refused to amend and the complaint was dismissed. The court also said in that case: "Unless the words used

were set out, it would be impossible for judge or jury to properly construe them."

In the instant case the appellee amended his complaint in compliance with the order of the court.

In the case of *Dorr, Gray and Johnston* v. *Fike,* 177 Ark. 907, 9 S. W. (2d) 318, the court said: "It is well settled in this State (and no citation of authorities is necessary to support the position) that all a pleader is required to state is the facts upon which he relied for a recovery, where general damages are claimed."

Many complaints of this kind have been before this court and other courts, and it has never been required to set out the facts with more certainty than they are set out in the complaint in this case.

It is next contended that the verdict is excessive. Section 1305 of Crawford & Moses' Digest is as follows: "When by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." Section 1311 provides that a new trial may be granted for excessive damages appearing to have been given under the influence of passion or prejudice.

"While the discretion of the jury is very wide, it is not an arbitrary or unlimited discretion, but it must be exercised reasonably, intelligently, and in harmony with the testimony before them. The amount of damages to be awarded for breach of contract, or in actions for tort, is ordinarily a question for the jury; and this is particularly true in actions for personal injuries and other personal torts, especially where a recovery is sought for mental suffering." 8 R. C. L. 657, § 199; *Olson* v. *St. Paul & D. R. Co.,* 48 N. W. 445; *Colgate Co.* v. *Bross,* 107 Pac. 425; *Christy* v. *Elliot,* 74 N. E. 1035.

This court said: "The principal error assigned is in the amount of the recovery. Verdicts are set aside for this cause only when they are not supported by proof, or when they are so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case." *Texas & St. L. Ry. Co.* v. *Eddy,* 42 Ark. 527; *Kelly* v. *McDonald,* 39 Ark. 387.

"The amount of recovery in a case of this sort should be such, as nearly as can be, to compensate the injured party for his injury. The suit is for compensation, and compensation means that which constituted or is regarded as an equivalent or recompense; that which compensates for loss or privation, remuneration." *M. P. Ry. Co.* v. *Remel,* 185 Ark. 598, 48 S. W. (2d) 548.

The evidence shows that the appellee was forty years old, that he became violently sick, vomited, and suffered pain, and was unable to eat the things he had formerly eaten, and was under the care of a physician for a long while. Appellee's physician testified that his injury was permanent; that he would suffer as long as he lived.

The extent of the injury and the amount of recovery were questions of fact for the jury, and there is nothing in this case to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case. This court, as was said in *Texas & St. L. Ry. Co.* v. *Eddy, supra,* cannot set aside a verdict if it is supported by proof, and when there is nothing to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case.

The jury were correctly instructed; they saw the witnesses; heard them testify; were able to observe their demeanor on the witness stand, and also had an opportunity to see the appellee himself, and they are therefore better judges of the extent of the injury and amount necessary to compensate appellee than this court is, and for that reason the jury is the judge of the credibility of the witnesses and the weight to be given to their testimony.

The judgment is affirmed.

BORDER QUEEN KITCHEN CABINET COMPANY *v.* GRAY.

4-3621

Opinion delivered December 3, 1934.

Daily & Woods, C. W. Knott and *J. S. Dailey,* for appellant.

Roy Gean, for appellee.

BUTLER, J. Claude Gray, the appellee, brought this action to recover damages for an injury which he sustained, alleged to have been occasioned by the negligence of a fellow-servant. The answer specifically denied the allegation of negligence, and, as affirmative defenses, pleaded assumption of risk and contributory negligence. At the conclusion of the testimony, the appellant, defendant in the court below, moved for a directed verdict, which motion was overruled. The case was submitted to the jury on instructions declaring the law as to negligence, assumption of risk and contributory negligence which are conceded to be correct.

The sole ground urged for reversal is based on the contention that there was no substantial testimony tending to establish the negligence of the fellow-servant, but, on the contrary, that the injury to appellee was the result of one of the ordinary risks of employment which he had assumed.

The argument is made that the testimony of appellee himself fails to show any negligence on the part of his fellow workman and affirmatively discloses the fact that the injury complained of happened because of the inherent dangers to be expected and those ordinarily incident to the character of work being done. To sustain this argument, certain parts of the appellee's testimony are quoted which do tend to support the contention. During his examination it is apparent that he became con-

fused, causing him to make some contradictory statements, but these serve only to affect his credibility, and the jury resolved that question in his favor.

There were only two witnesses to the incident out of which the injury grew, Gray, the appellee, and Bob Dean, his fellow-servant. Their testimony is in conflict as to the vital question in the case, that of Dean tending to show that, if any accident happened to the appellee, it was one which could not have been foreseen or avoided, and that Dean, himself, was at all times acting with due prudence and caution.

It appears that appellee and Dean were working in the finishing department of appellant's manufactory, each operating a machine used in spraying varnish on the finished products. They worked in a large room containing the equipment used in that particular department in which steel drums containing liquid varnish were stored to be used in that room as needed. These drums were about three or four feet long, made so a spigot could be inserted in one end through which the liquid could be drawn as required. When in use, they were placed on racks about eighteen inches above the floor, high enough to set a five gallon can under the spigot. The drum used by Dean became empty. He asked the appellee to help him move another to, and upon, the rack. A drum filled with varnish was lying about fifteen feet from this place.

When appellee's testimony is considered as a whole and fairly interpreted, it tends to establish these facts: Appellee took hold of the drum at the spigot end and Dean at the opposite end. They lifted it about twelve or fourteen inches from the floor and moved toward the rack, Dean going backward. It was intended that the end where the spigot was to be inserted would rest on the rack, and this made it necessary for them to turn. This movement began when they were about three feet from the rack and, when completed, would place appellee and his end next to the rack so that it could first rest thereon. As they were making this turn, or immediately after it was made, Dean unexpectedly and suddenly elevated his end of the drum throwing the entire weight

upon the appellee, who (as he expressed it) had to hold up the weight of the drum because he had no opportunity to get out of the way. When this occurred, he felt pain in the region of the small of his back, and when they had placed the drum on the rack he told Dean that he had hurt or wrenched his back in some way. At that time he did not appreciate the extent of his injury, and made no complaint to Dean relative to the manner in which the latter had handled his end of the drum. After placing the drum, appellee resumed his ordinary work, which required no great physical exertion, and continued to work for about three days. On the morning of the fourth day he was unable to rise. A doctor was called, and appellee has been unable to perform any labor since that time, that is to say, from the 24th day of October, 1933, down to the date of trial, March 7, 1934.

Dean denied that there was any change in the manner in which they were carrying the drum, but stated that they carried it straight from where it was lying to the rack, and placed it upon it—that there was no sudden uplift by him of the end of the drum he was carrying.

This testimony raised an issue of fact which the jury resolved in favor of the appellee.

The appellee testified that he had helped carry drums many times and helped set them on the racks; that at this time they were proceeding to perform that work in the usual and customary manner. He also stated that it was unnecessary for one carrying an end of the drum to warn the other at the time they were about to lift it and place it on the rack, and that one of ordinary common sense would know that it was time to lift and that both would then lift upward to place the drum in position. These statements, and other similar statements made by appellee, are the basis for the contention that the risk was assumed by him. This overlooks, however, the sudden and unexpected lifting of the drum so that the greater part of its weight would suddenly and unexpectedly be shifted upon the appellee, as testified by him, and was sufficient to submit to the jury the question as to whether or not Dean, at the time, was acting with due care for his fellow-servant. The jury

might doubtless have found that, in carrying a drum of the shape and weight of the one in question, those carrying it would be in a strained and unnatural position, and thus be liable to injury from unexpected and sudden movements, and that due care required that no such movements be made.

It is our conclusion that this evidence warranted the conclusion reached by the jury, and, as the amount of the verdict is not questioned, the judgment of the trial court is affirmed.

BALDWIN *v.* CLARK.

4-3575

Opinion delivered November 12, 1934.

Thos. B. Pryor, H. L. Ponder and *Harry Ponder, Jr.*, for appellants.

Tom W. Campbell, for appellee.

MEHAFFY, J. On April 17, 1933, appellee's intestate, Heber Clark, was struck and killed by a train of the Missouri Pacific Railroad Company at the town of Higginson, White County, Arkansas. The appellee, administratrix of the estate of Heber Clark, deceased, brought suit

in the White Circuit Court for damages for the death of said Heber Clark, alleging that he was struck and killed by the negligence of the appellants and their employees.

Some time before eleven o'clock on the morning of April 17, 1933, Heber Clark drove his automobile to a point on the highway near the crossing. The highway at that place ran parallel with the railroad track. There were four tracks, all running in the general direction of north and south. After parking his car on the highway, which was on the west side of the tracks, Clark crossed over the tracks and went over to a side track to inspect a car of crushed rock which was standing on the side track, this track being the farthest east of the four tracks. The track farthest west was the main line. A Mr. Crawford had parked his car just before Clark arrived, and had gone over to inspect the car of crushed rock. Clark parked his car just behind Crawford's car, and walked across the tracks to where the car of crushed rock was standing on the side track. Clark and Mr. Crawford had some conversation, Clark inspected the car and then started back across the tracks to his automobile. The car of crushed stone was some distance north of the depot, and some distance north of where Clark's car was parked, and a short distance north of the car of crushed stone was a berry shed on the east side of the tracks, and just north of the berry shed was a crossing. Clark, in walking back from the car of stone to his automobile, walked diagonally across the tracks facing south or southwest, and a fast freight train came from the north and struck and killed Clark. The track was straight for more than three miles, and there were no obstructions. There was a conflict in the testimony as to whether any warning was given by sounding the whistle or ringing the bell at the crossing.

Appellee's evidence tended to show that Clark was walking diagonally across the tracks, apparently oblivious to the approach of the train; that the train was running approximately 45 miles an hour and struck Clark, as one witness said, "on the back part of his right shoulder."

The evidence tended to show that Clark was earning from $3,000 to $4,000 a year. He was 36 years old, and left surviving him his widow and two sons, aged 16 and 12 years.

The evidence offered by appellants tended to show that the track was straight for 3½ miles; that the train was going 35 or 40 miles per hour; that it was a fast through freight. One of appellants' witnesses, a section hand, testified that he saw the man walking toward the train with his head down and said: "The man is going to walk into the train." He said it looked to him like Clark did not see the train and did not know there was one coming; that the brakes had not been applied before the train struck Clark, but they made a good deal of noise after that, and the train stopped pretty quickly.

The engineer operating the train testified in substance that north of the depot at Higginson the Rock Island track crosses the Missouri Pacific tracks, and some distance north of this crossing there is a road crossing the Missouri Pacific tracks. This road crossing is 500 or 600 feet north of the Rock Island crossing. He testified that he sounded the usual alarm for the crossing and started whistling and turned on the air bell, and continued this until the fireman came over and shook him and told him they had hit a man. He testified that there must have been five or ten seconds between the time he finished whistling for the crossing north of town, and the time when he started whistling for the crossing south of the depot; that at the speed they were going it would take approximately 1,000 feet to bring the train to a stop; that he was keeping a proper lookout down the track, and that, if a man had been coming toward the track on his side of the train and had been the same distance from the track that the berry shed was, he could not have stopped the train so as to avoid hitting him. He also testified that by the use of the emergency stop you could stop a train in about 700 feet. He did not see Clark before he was struck, and he testified that it was difficult to tell whether there is any one on the track much more than a half mile ahead. He did not see the man and did not sound any alarm blasts. There was an interval of some

5 or 10 seconds when no whistle was sounded. A train running 40 miles an hour will run about 40 feet in a second.

The fireman testified substantially the same as the engineer as to the signals, and that he was on the left-hand side of the engine, and keeping a lookout down the track. He noticed some cars on the siding but did not see anybody walking on the track. He then got down to look into the firebox, and said he was down there three or four seconds. As he raised up, he noticed two men on the car, and about that time he saw that they had struck some object, but could not tell what it was. He also testified that, if they had discovered Clark on the track as they went over the crossing north of the berry shed, it would not have been possible to stop the train before the point where they struck him at the speed they were going. He saw the object they hit about the time they struck it.

It is earnestly contended by the appellant that the evidence is not sufficient to sustain the verdict. This suit was brought under § 8568 of Crawford & Moses' Digest, which reads as follows:

"It shall be the duty of all persons running trains in this State upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

The above statute was enacted in 1911, and one of the early cases construing the statute was the case of

St. L. I. M. & S. Ry. Co. v. *Gibson,* 107 Ark. 431, 155 S. W. 510, decided by this court first in 1913, and the same case was here again in 1914, and this court said in the case on the last appeal:

"The effect of our holding in the former opinion is that where proof has been introduced by the plaintiff of an injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railway company to show that such lookout was kept." *St. L. I. M. & S. Ry. Co.* v. *Gibson,* 113 Ark. 417, 168 S. W. 1129.

The undisputed evidence in this case shows that the track was straight for more than three miles, and level, and there was nothing to obstruct the view, nothing to prevent the engineer and fireman from seeing Clark on the track, if they had kept a lookout. The undisputed evidence also shows that they could see a person on the track for one-half mile if they were keeping an efficient lookout. It is true that the engineer swears that he was keeping a constant lookout, and that he did not see any one going toward the track. He was on the right side of the engine, and of course it would not be possible for him to see any one on the other side of the track, after the engine had gotten close enough to the person to obstruct the view. But certainly, when he was a half mile away and there was nothing to obstruct his view, he could have seen a person on, or approaching, the track. However, the fireman was on the left side of the engine, and he testified he was keeping a lookout, and also testified that he could have seen a person a half mile down the track; and yet each of these witnesses testifies that he did not see Clark. The fireman testified that he saw the object as they hit it, but did not know then that it was a man. The evidence of the engineer and fireman conclusively shows that the track was straight for more than three miles, and that there was nothing within that three miles that would obstruct the view, and it appears certain, if they had been keeping a proper lookout, they could and would have seen Clark before striking him.

The undisputed proof also shows that by using the emergency brake the train could have been stopped in 700 feet. If they had seen Clark on the track, they would have known from his conduct that he was not aware of the approach of the train, and could have exercised care and stopped the train if necessary. However, if they had seen him as far ahead as the evidence shows they could have seen him, it would probably not have been necessary to stop the train; they could have checked its speed, and could have sounded the alarm blasts to attract his attention. But they did nothing to avoid the injury. They did nothing because they say they did not see him.

The evidence was sufficient to warrant the jury in finding that the engineer and fireman should have discovered the peril of Clark in time, by the exercise of ordinary care, to have avoided the injury. If they had discovered him, they would necessarily have discovered that he was going diagonally across the tracks with his back to the train, with no indication that he knew it was approaching.

Appellant calls attention to the case of *St. L.-S. F. Ry. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. (2d) 992, and calls attention to the fact that the court held in that case under § 8562, when injury was caused by the operation of a train, that it made a *prima facie* case of negligence. There is no contention here that there was a *prima facie* case of negligence, or that § 8562 is involved at all. Under that section, railroad companies are made responsible for all damages done or caused by the operation of a train, and this court has held many times that under that section, when the evidence shows that injury was caused by the operation of a train, a *prima facie* case is made. But we also said in the Cole case, *supra:* "The duty of the railroad to take precautions begins when it discovers, or should have discovered, the peril of the traveler. So here the railroad company should have kept the lookout, and is chargeable with such knowledge as it would have had, had the lookout been kept; but, if the lookout had in fact been kept and appellee's presence near the track discovered, this would have imposed no duty on the railroad to stop the engine or to take other

precautions until the peril of the traveler was discovered."

Under § 8562 we have said: "When the evidence shows that the injury was caused by the operation of a train, the presumption is that the company operating the train was guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence." *St. L. S. W. Ry. Co.* v. *Vaughan,* 180 Ark. 559, 21 S. W. (2d) 971.

In discussing the lookout statute we have recently said: "But now the company is liable if, by proper care and watchfulness, it could have discovered and avoided the danger. * * * It was the evident purpose of this act to provide a different rule of liability against a railroad company causing an injury by the operation of its trains, in case of failure to keep a lookout for persons on its track, than was prescribed by the old act, which required the same lookout to be kept, and place the burden of proof upon the railroad company in case of an injury, to establish the fact that the duty to keep a lookout had been performed. It was not intended, however, that, upon proof of the killing of a trespasser by the operation of a train, the presumption should arise that the killing was negligent and the plaintiff entitled to recover damages without showing anything further, and casting the burden of proof upon the company to show that it was not guilty of any negligence, causing the death, as declared in said instruction numbered 1." *Kelly* v. *DeQueen & Eastern Rd. Co.,* 174 Ark. 1000, 298 S. W. 347.

It will therefore be seen that we have distinguished § 8562 from § 8568, and that under § 8562, when injury is shown to have been caused by the operation of a train, the railroad company is presumed to be guilty of negligence. Under § 8568, where a trespasser is killed on the track, there is no presumption of negligence on the part of the railroad company, but the plaintiff must show a failure to keep a lookout, and show that if a proper lookout had been kept, the railroad company could, by the exercise of reasonable care, have avoided the injury.

Appellant argues that the uncontradicted proof shows that a lookout was being kept. The uncontradict-

ed proof also shows that, if such lookout was being kept, the engineer and fireman could have seen Clark for more than a quarter of a mile.

It is next contended that the appellee was not entitled to recover under the doctrine of discovered peril. The engineer and fireman testify very positively that they did not discover Clark's peril, and the question of discovered peril is not involved. The question is whether, by keeping an efficient lookout, they could have discovered Clark's peril in time to have avoided the injury, and there is sufficient evidence on this question to warrant the jury in finding for appellee.

We have carefully examined the instructions, and have reached the conclusion that there was no error in instructing the jury.

It is next contended that the verdict is excessive. There was a verdict for $30,000. The evidence shows that Clark was 36 years of age when killed, and had a life expectancy of 31 years. His wife was 35 years old. He had two sons, aged 16 and 12 years. The evidence shows that he was strong, healthy, active, able-bodied and industrious, and had been earning an average of $350 per month. We think there is sufficient evidence to justify the verdict, and the case is therefore affirmed.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* BAXTER.

4-3606

Opinion delivered November 26, 1934.

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

Partain & Agee, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $2,000 obtained by appellee against appellant in the circuit court of Crawford County for an injury to his wrist caused by the alleged negligence of fellow servants while engaged in loading the front truck of a bus, consisting of an axle and spindles, onto a wrecker.

Appellant filed an answer to the complaint denying the allegations of negligence and interposing the affirmative defenses of contributory negligence and that appellee was a volunteer and not an employee of appellant at the time he received his alleged injury.

Appellant contends for a reversal of the judgment on account of a lack of sufficient evidence to support the verdict. The evidence, when viewed in its most favorable light to appellee, is, in substance, as follows:

Appellant, a corporation, was engaged in transporting passengers in buses from Little Rock to Fort Smith. On the ..... day of March, 1933, about two o'clock p. m., one of its passenger buses was wrecked in the east part of Van Buren in Crawford County on Highway 64. The passengers were transported in a car belonging to appellee to Fort Smith, and he was employed to remain

with the wrecked bus over-night, and was engaged the following morning to assist other employees of appellant in loading the bus onto a wrecker, which came from Little Rock. The wrecker was in charge of a foreman, who directed the employees engaged in the work how to lift and load the injured bus onto the wrecker. The lifting was done by means of two hand booms fastened to the wrecker, which could be lifted up and down and to which cables were attached long enough to take hold of the object to be lifted and drawn onto the wrecker. The body of the injured bus had been placed on the wrecker, leaving enough room thereon for the front truck of the bus. Appellee was directed to stand near the wrecker with a pick bar in his hands to guide the front truck of the bus into the space left for it after being lifted up to a sufficient height to swing into the vacant place. Fellow servants were directed to take hold of the truck, which weighed about 400 pounds or more, for the purpose of letting it swing slowly into place, but some or all of them let loose their hold on same without notice to appellee and allowed it to swing in so rapidly and with such force that, in his effort to guide it into place, appellee's hand was caught between the truck and wrecker, and his wrist was fractured before he could get his hand out of the way.

The testimony was in conflict as to whether the fellow servants of appellee or some of them released their hold on the truck without notice to him so as to let it swing toward the wrecker with such force as to catch his hand between them and fracture his wrist, and also in conflict as to whether appellee was an employee or volunteer; but, notwithstanding the conflict, there is ample evidence in the record to support the finding of the jury that appellee was an employee of appellant when injured, and that his injury resulted from the negligence of his fellow servants.

Appellant also contends for a reversal of the judgment on the ground that appellee was guilty of contributory negligence resulting in his injury, and on that account could not recover any amount from appellant, even though appellant was guilty of negligence. It requested

instructions to that effect, which the court refused to give. We find no evidence in the record tending to show contributory negligence on the part of appellee, but, even if there is, such negligence would not be a complete defense to the alleged cause of action against a corporation not engaged in interstate commerce at the time of the injury. It is provided by §§ 7144 and 7145 of Crawford & Moses' Digest that in actions for personal injuries by employees against such corporations, contributory negligence shall not bar a recovery but will have the effect of diminishing the damages in proportion to the amount of negligence of the respective parties. Under the provisions of these statutes, this contention of appellant cannot be sustained, and the requested instructions were properly refused.

Appellant also contends for a reversal of the judgment on the ground that under the law it cannot be held liable in damages to any one injured by a fellow-servant. In support of this contention, it cites the case of *Walsh* v. *Eubanks,* 183 Ark. 34, 34 S. W. (2d) 762. In that case the fellow-servant doctrine applied because a recovery was sought against a partnership. In the instant case it does not apply because appellant is a corporation. It is provided by § 7137 of Crawford & Moses' Digest that corporations of every kind and character shall be liable to respond in damages for injuries or death sustained by an employee resulting from the omission of duty or negligence of any other servant or employee of the employer. Instructions requested by appellant and refused by the court in support of its theory in this respect were properly refused.

It is also suggested by appellant that the judgment should be reversed because the appellee assumed the hazards incident to his employment. Appellee could not have known in advance that his fellow servants would release their hold on the truck and allow it to come down on him, so he did not assume the risk of their negligence in this respect as one of the hazards incident to his employment.

The court refused to give certain instructions requested by appellant relative to whether appellee was

an employee or a volunteer, and whether he assumed the risk. These instructions were properly refused as the court had covered the issues in other instructions. The court was not required to duplicate instructions.

Appellant also contends that the verdict was excessive and urges the excessiveness thereof as a reason for reversing the judgment. As a result of the injury, appellee's arm was placed in a plaster cast for 31 days, but the ends of the bones never healed, and he has never been able to use his hand. If he takes hold of anything, it drops. He is a mechanic, and his work requires the use of both hands, so he is compelled to hire a mechanic to do the work he formerly did in conducting his business at an expense of from $1.50 to $7 a day. He suffered intense pain, so that he was unable to sleep for three or four weeks immediately after the injury and during the time his hand and arm were in the cast. His doctor's bill was $75. We do not think $2,000 an excessive judgment, considering the nature and extent of the injury, and the pain and suffering he endured.

No error appearing, the judgment is affirmed.

BERRYMAN *v.* CUDAHY PACKING COMPANY.

4-3604

Opinion delivered November 26, 1934.

Robert Bailey, for appellants.

Hays & Smallwood, for appellee.

MEHAFFY, J. The appellants began this action in the Pope Circuit Court against the Cudahy Packing

Company, a corporation, the Cudahy Packing Company of Louisiana, Ltd., and Claude Westerfield. The complaint alleged the injury and death of Robert Ross Berryman, by the negligence of the appellee through its agent and employee, Claude Westerfield. When the complaint was filed and summons issued against the Cudahy Packing Company, the summons was served on Claude Westerfield, agent. There was a second summons issued and served upon the Secretary of State, and the third summons was served upon the Auditor of State.

The Cudahy Packing Company of Louisiana, Ltd., filed an answer, and the suit was dismissed as to it. The Cudahy Packing Company, without entering its appearance for any other purpose, filed a motion to quash service of each summons.

It is the contention of the appellees that the order of January 11, 1934, is not a final order, and that therefore the question of whether service on Westerfield was valid is not before the court. They cite *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579. It is true the court said in that case that, where the motion to quash the summons was denied, that was not a final order from which an appeal could be prosecuted, but the court also said: "On the other hand, if the trial court quashes the writ, the plaintiff may take an alias summons, and thereby waive objection to the judgment of the court; or he may rest upon the quashal of the writ and appeal from the judgment of the court quashing the summons and permitting defendant to go hence without day, or, what amounts to the same thing, dismissing the plaintiff's action."

The court also said in the same case: "The circuit court sustained the motion, and it was adjudged that the writ be quashed and that the defendant recover costs. The judgment was held to be final and appealable. On the question of practice the court said in effect that on the quashing of the writ the plaintiff may take an alias writ or he may rest and appeal."

In the instant case when the court made the order quashing the writ served on Westerfield, the appellants appealed. Of course the complaint could not be dismissed because two other summonses had been issued and

served, and there was a motion to quash the service of each of these, and, until those motions were passed on, the court could not dismiss the complaint. The order of the court was final and appealable. Of course, if appellants had procured an alias summons, this would have been a waiver of their objection to the court's order, but they did not do this. The other summonses had already been issued, and there was nothing appellants could do except to pray an appeal; but, if this order had not been final, it became final when the complaint was dismissed.

Appellees next call attention to the case of *Harlow* v. *Mason,* 117 Ark. 360, 174 S. W. 1163. The court in that case said: "There is a conflict in the authorities as to whether an order of a court quashing a summons is such a final order as that an appeal will lie, and there is some apparent conflict in the early decisions of this court upon that question."

The court in this case also said, in discussing other cases: "In both these cases however, as well as in that of the *State, use, etc.* v. *Adams,* [9 Ark. 33] it was decided that the legal effect of the judgment quashing the writ was a dismissal of the case. This being the effect of the judgment, the parties are necessarily dismissed from the court, and, unless the decision of the circuit court is reversed or set aside, there is no remedy afforded them."

When the court made its order quashing the writ served on Westerfield, appellants objected and prayed an appeal to the Supreme Court. The order made by the court in quashing this summons was all that could be made at that time, and the complaint was in fact thereafter dismissed. But the order quashing the summons put the appellants out of court so far as this summons was concerned.

It is next contended that the service on Claude Westerfield was not sufficient because Westerfield was a mere salesman for appellees. To support this contention they cite *W. T. Adams Machine Co.* v. *Castleberry,* 84 Ark. 573, 106 S. W. 940. In that case the court said: "There is no allegation in the complaint as to whether the appellant is a partnership, a foreign or domestic

corporation. * * * The summons was served as shown by the return, upon T. W. Barnes, agent. Barnes was only a traveling salesman. He had no control over the business of the corporation, and service upon him was not sufficient."

Appellees next call attention to the case of *Arkansas Construction Co.* v. *Mullins*, 69 Ark. 429, 64 S. W. 225, and the case of *Lesser Cotton Co.* v. *Yates*, 69 Ark. 396, 63 S. W. 997. In the first case referred to, the court said: "The character of the agent nowhere appears in the record, and the simple fact that he was agent (it may be without any representative character from which authority might and ought to be implied on his part to receive service) is not sufficient." In the Lesser Cotton Company case the contention was made that, unless the foreign corporation appointed an agent, no service could be had except by publication, and the court said: "It is incredible that the Legislature should have intended to limit its own citizens to such an insufficient remedy, when the corporation is actually doing business in the territory, and is represented there by a manager or local agent."

The next case referred to is that of *L. D. Powell Company* v. *Rountree,* 157 Ark. 121, 247 S. W. 389. In that case, which involved the sale of books, the court said: "The recovery of the books under the McNeill contract amounted to a collection growing out of an interstate transaction. The collection was made in books instead of money, and we think the resale of them, in order to convert them into money, was a continuation of the interstate transaction."

Appellees then call attention to the case of *Sellin* v. *Hessig-Ellis Drug Co.,* 181 Ark. 386, 26 S. W. (2d) 122. The court in that case, among other things, said: "In the first place, it may be said that no effort was made to show that the traveling salesman had any special authority from his principal, and his authority was limited to receiving and transmitting orders."

Section 1152 of Crawford & Moses' Digest reads as follows: "Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State

a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and such service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations, and shall be sufficient to give jurisdiction to any of the courts of this State, held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations."

The evidence shows that Claude Westerfield, upon whom the summons was served, lives in Russellville, and has been traveling for the Cudahy Packing Company for about eight years; he owns his own car; makes all the principal towns in a number of counties; sells to different merchants; he goes to the place of business of the merchants; takes their order, and he sometimes takes orders over the telephone. If a new man or concern buys merchandise, Westerfield recommends the party to the credit department, and they usually carry out his recommendations. The merchandise is shipped to the merchants and is delivered generally in a truck, but the truck does not belong to the company. After he has sold merchandise, he then makes another trip over the route and collects for what he sold the previous week, and makes additional sales. If a merchant orders merchandise and refuses it when it arrives, Westerfield sells it to some other merchant; he collects and remits to the company. The company pays him a salary of $3,240, and they take out 60 cents a week for insurance. They also pay Westerfield 4 cents per mile for the use of his car, which he would not operate over the route if he were not working for the company. Westerfield's headquarters have been at Russellville for the eight years that he has been at work for the company. Westerfield goes wherever the business requires him to go, where he can sell merchandise or make collections. He sells on an average of 80 orders a week, and this runs from $2,000 to $3,000 a week. He recommends the products of the com-

pany, and assists in the business all over the territory during the whole year. If he gets a new customer he looks over the stock of goods, talks to him, and estimates the merchant's ability to pay, and then recommends to the company to sell him so much per week. If some one should order 100 pounds of lard and it should come by truck and the customer would not take it, Westerfield picks it up and resells it. He will take the merchandise in his own car and resell it. He has been doing this all the time. This happens about six or ten times a year. Westerfield also said that he would stop a shipment, keep the merchant from getting it if he thought he would not pay, and the company knew about this. He has an office in Russellville. The orders are made out at his office. About 10 of the customers out of the 80 remit direct to the company and the others pay him. The company has advised him not to carry any passengers in his car while he is selling their products. He said he is a salesman and a peddler; that he sells and collects. A sale is not complete until he collects for it. He is both a salesman and agent.

We think this evidence is sufficient to show that the appellee is doing business in the State of Arkansas and that the service on Westerfield was valid. He has an office where he takes orders over the telephone; any merchandise that is refused by the person to whom it was sold is taken by him and sold to others, or, as he says, "peddled to others."

Appellees contend that they were engaged in interstate commerce, and that Westerfield was merely a salesman. This would be true if Westerfield did nothing but receive orders and transmit them to the company in Kansas City, but, as we have said, he did more than this. Besides keeping an office where he received orders, in all cases where a purchaser declined to take the merchandise shipped to him, Westerfield repossessed the merchandise, and sold it just as any merchant in Arkansas would sell merchandise.

Doing business is defined in C. J. as follows: "Any transaction with persons or any transaction concerning

any property situated in the State, through any agency whatever acting for it within the State." 19 C. J. 384.

Since we hold that the Cudahy Packing Company is doing business in Arkansas, it is unnecessary to discuss or decide the questions as to the service of the other summonses.

The judgment is reversed, and the cause remanded with directions to overrule the motion to quash service.

MARLIN *v.* MARSH & MARSH.

4-3607

Opinion delivered November 26, 1934.

Graham Moore, for appellant.

McNalley & Sellers, for appellees.

BUTLER, J. Appeal from allowance by the chancery court of attorney's fees in the sum of $5,000, to be taxed as costs in case of *El Dorado Building & Loan Ass'n* v.

Union Savings Building & Loan Ass'n, ante p. 858, and payable out of funds in the hands of the receiver.

Reference is made to our opinion in the above case, filed October 29, 1934, for an understanding of the issues there involved.

The appellees, Marsh & Marsh, were employed by Mrs. Lilla McGraw and later by several other persons, all of whom were investment stockholders in the El Dorado Association, to bring the action resulting in the decree which was affirmed by this court in the case *supra*. The suit was brought for the benefit of all the investment stockholders. The motion for the allowance of the attorney's fee was resisted by certain of the investment stockholders, and testimony was taken relative to the character and extent of the services performed by the attorneys and the reasonableness of the fee suggested by them, which was $10,000. The testimony as to the amount of fee properly to be charged varied from fifteen hundred to ten thousand dollars.

It is the contention of the protesting stockholders that they were represented by their own counsel; that no necessity existed for the institution of a lawsuit, and no benefit to the investment stockholders resulted therefrom. In developing the first contention, there was testimony tending to establish the fact that certain of the investment stockholders had employed attorneys to represent them, and there is some testimony to the effect that one attorney took some part in the preparation of the case for submission. The other attorney employed admitted that he took no part in the proceedings, and that in his judgment there was no necessity for bringing the suit. There is a conflict in the testimony as to just what action, if any, was taken by attorneys other than the appellees. There is testimony to the effect that appellees were not advised of the employment of other attorneys, and that there were no steps taken by any one except the appellees in the preparation and conduct of the action.

No one is more intimately acquainted with the proceedings, the character of services performed, and the attorneys who took part in the litigation, than the chan-

cellor who tried the case, and during the course of the investigation relating to the propriety of the allowance of an attorneys' fee he had occasion to, and did, express his opinion regarding the conduct of the attorneys said to have been employed by the protesting stockholders. He said this: "The attorneys have stood idly by in the courtroom, and have not joined in the fight. They accept the fruits of his labors (referring to appellees) knowing the law as to implied contracts." Again he said: "During all this time, at any time during the prosecution of this case you could have taken it away from Judge Marsh, and could have asked the court to fix the fee up to that time. If you, who are representing a majority of the stockholders, have found no fault with what Judge Marsh has done in the case, we will pay him for what he has done, and you can go forward from here on with your own clients. The court would have so held at all times during this case."

We, ourselves, are acquainted with the record in the case out of which the instant proceeding arises, and it is our conclusion that, taken as a whole, it corroborates the testimony of witnesses for the appellees to the effect that they, and they alone, were the attorneys appearing and engaged in the conduct of the cause, and that the protesting stockholders acquiesced in this. We conclude that the finding of the chancellor in this regard is supported by a preponderance of the testimony.

In support of their contention that no necessity existed for the institution of the suit, the attorneys for appellants argue that the Union Savings Building & Loan Association was ready to concede the invalidity of its contract with the El Dorado Association, and to surrender the assets it had received from said association. Counsel also say that the guaranty stockholders were ready and willing to disgorge the assets they had unjustly received, and that therefore the result of the lawsuit was no more than could have been obtained without it. In answering this contention, it may be said that now, as of old, "actions speak louder than words," and the facts are that the Union Savings Building & Loan Association, and the guaranty stockholders contested

the action through every step until the case was finally decided against them on appeal to this court.

It is suggested in the argument that the suit was not amicable in that it was an adversary proceeding between the plaintiffs, investment stockholders and defendants, guaranty stockholders. This is true, but the class for whom the suit was brought was the investment stockholders, and as to them the suit was amicable.

From a consideration of the conclusions reached by the trial court based on the facts above stated, the appellees are clearly entitled to a fee on the authority of the cases cited by appellants, properly allowable as costs to be paid from funds in the hands of the receiver. The cases relied on are: *Bradshaw & Helm* v. *Bank of Little Rock,* 76 Ark. 501, 89 S. W. 316; *Gardner* v. *McAuley,* 105 Ark. 439, 151 S. W. 997; *Valley Oil Co.* v. *Ready,* 131 Ark. 531, 199 S. W. 915.

In the first named case the general principle governing the question of the allowance of an attorney's fee to be paid out of the fund is thus stated: "When many persons have a common interest in a fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay."

As to the excessiveness of the fee allowed counsel for the appellants question the fact that a fund for the benefit of the investment stockholders was obtained as fruits of the litigation, on the theory that the defendants in the original case were willing to concede all the contentions of the plaintiffs. We have already disposed of that question. They also question the value of the assets recovered. An examination of the opinion filed October 29, 1934, discloses that a substantial benefit has resulted from the litigation. The investment stockholders recovered assets of the face value of $125,000 from the guaranty stockholders, and a judgment for more than $6,000 against an individual, as well as having the contract between the two Building & Loan Associations

avoided, the assets to be administered by a receiver of their own choice.

It is suggested that the fee should be limited to an amount which would be reasonably chargeable against the stockholders who employed the appellees, and that this, under the contract between them, would be a little more than $1,000. For authority for this contention, we are referred to statements made by the court in the above cases and particularly to the case of *Gardner* v. *McAuley, supra.* That case was a suit where lands were partitioned according to the respective interests of the tenants in common as found by the court. This was not an amicable proceeding, but an adversary suit, and for that reason the court found that no attorney's fee should be allowed. In explaining the effect of the decision, the court said: "We are not to be understood as holding that, where one or more tenants in common brings suit against the other tenants in common for partition, and there is no appearance or resistance, the proceedings resulting in an amicable partition of the property, the fees of the plaintiff's solicitors should not be taxed against all the parties. That question does not arise in this case under the facts as before related. But, even in that sort of a case, if the fees are taxable, they can only amount to such sum as the solicitor can appropriately charge his own client, and not the fee he might have charged if employed by all of them. *Bradshaw* v. *Bank of Little Rock,* 76 Ark. 501, 89 S. W. 316. 'The object of the allowance,' said this court in the above cited case, 'is not to give the attorneys a larger fee than they might have recovered from their own clients but to shift the burden of the charge from them, and place it upon the creditors of the bank generally. The inquiry then is, what would have been a reasonable charge against their own clients for the services performed?' "

In *Bradshaw* v. *Bank of Little Rock, supra,* the attorney brought suit for the benefit of his own client, but it was one for the benefit of all creditors of the bank and prosecuted with their acquiescence. For that reason the court held that the attorney was entitled to have his fee paid out of the assets in the hands of the receiver. The

court further found that no fund had been created, recovered, or preserved, and that therefore the amount of the fee should be limited to a sum reasonably to be charged against the attorney's own client for the services performed, remanding the case to the court below to ascertain that amount.

The general rule stated in *Bradshaw* v. *Bank,* the application of which to the facts in that case constrained the court to hold that an attorney's fee was properly allowable to be paid out of the fund, is not operative except where the services rendered have inured to the benefit of all the creditors; nor is it operative where each of the creditors is represented by a different attorney working independently for a common purpose. 14 C. J., § 3151, "Corporations." In the Bradshaw case, in discussing what would be considered in fixing the amount of attorney's fee, the court said: "If their services had resulted in securing or producing a fund for the benefit of the creditors, then the amount of this fund might well be the main element to be considered in fixing the amount of such fee; but no such fund was produced here."

It is to be observed that in the judgment of the chancellor no conditions existed to render the principle inoperative, and that there was a fund recovered and preserved by means of the suit which inured to the benefit of all the parties in the class of plaintiffs. Therefore the limitation of the fee to an amount properly chargeable against the appellees' own clients, as held in the cases cited, is not applicable. The inquiry then is, what would be a proper fee to be chargeable against the fund which had been recovered and preserved? In considering this question, the amount of such fund is important, and it was upon this theory that the witnesses for appellees based their judgment as to a reasonable fee, as did also the court in reaching its conclusion, taking into consideration the ability of counsel for the appellees, the nature and extent of the services rendered and the result obtained.

In questioning the judgment of the trial court, counsel for appellants refer to the amount allowed by this court as a reasonable attorney's fee in the case of

Valley Oil Co. v. *Ready, supra.* In that case no fund was recovered, and the case was amicable only in its initial stages. The fee was allowed for attorney's services only during the period in which the proceedings were amicable, and was fixed at a sum which the court found to be reasonable for such services. In the instant case, however, it will be seen that an entirely different state of facts exist from those in that case, and we are of the opinion that, taking all these facts into consideration, the judgment of the chancellor should not be disturbed.

We therefore affirm the decree.

U-DRIVE-EM CORPORATION *v.* WISEMAN.

4-3638

Opinion delivered November 26, 1934.

Akers & Thurman and *E. R. Parham,* for appellants.

Walter L. Pope, Attorney General, *Pat Mehaffy,* Assistant, *Earl R. Wiseman* and *Louis Tarlowski,* for appellee.

BAKER, J. This is a suit brought by the U-Drive-Em Corporation *et al.,* against Earl R. Wiseman, as Com-

missioner of Revenues, alleging the invalidity of § 31 of act No. 11, approved February 12, 1934.

A rather lengthy complaint was filed in which the plaintiffs alleged that various taxes and licenses have grown heavier and heavier and greater and greater until the passage of act No. 11, including the said § 31, which has imposed a burden upon the plaintiffs, and which, added to the other burdens already carried by taxicab operators, means that they cannot exist or continue to do business; that § 31 discriminates grossly between taxicab operators and in favor of buses using streets of cities and towns, and buses using State highways, and the ordinary automobiles used for business and commercial purposes. It is also urged that the State at one time surrendered its right to impose the collections now insisted upon, and that cities and towns have been permitted, under the laws of the State, to impose taxes or assessments by way of regulatory ordinances, and that, if the present alleged discriminatory taxes are insisted upon, as said § 31 is construed by the defendant Commissioner of Revenues, that part of § 31, imposing taxes so insisted upon, is void as being in contravention of Amendment No. 14 of the Constitution of the United States and § 21 of article No. 2 of the Constitution of the State of Arkansas, and therefore void; that the enforcement of the tax insisted upon by the Commissioner of Revenues would deprive the plaintiffs of equal protection of the laws, contrary to Amendment No. 14 of the said Constitution and § 18 of article 2 of the State Constitution.

It is unnecessary to set out more fully the effect of the complaint, demurrer and answer, as set forth in the pleadings. Proof was taken and exhibits were made to the testimony of witnesses, the effect of which proof is to show that several of the plaintiffs, according to statements filed, were not only not making any money or profits in the operation of their taxicabs, but that they were taking losses as they carried on their several businesses.

This proof will not be set forth except as it becomes pertinent in the discussion of the questions argued as necessary to conclusions reached in this opinion.

This is a class suit affecting all taxicab operators in the State. A history of the legislation affecting the highways in the State is not necessary. It is sufficient to say that at the time of the enactment of act No. 11, approved February 12, 1934, the State had defaulted in its bond payments and the interest thereon, and it became necessary to refund the bond issues, and at the same time to provide a method to meet accruing liabilities. It must be conceded at this time that the bonded indebtedness was excessive as compared with the State's ability to pay, and the necessary effect of such conditions was to impose somewhat onerous burdens upon those subject to taxation to save the State from future and further defaults in its indebtedness. It was necessary that, in addition to the tax on gasoline or motor fuel, there should be a tax on motors or automobiles, trucks, buses, etc.

Section 31 classified motor vehicles and imposed a tax upon these classes to be collected by the Commissioner of Revenues. One of the classifications, that being the one about which appellants are complaining, provided that "automobiles equipped with pnuematic tires used for the transportation of persons for hire shall be charged a fee of 45 cents per horsepower generated or developed by the motor propelling such vehicle, and in addition there shall be charged a fee, based upon the gross weight of the vehicle of $1.50 per hundred pounds or fraction thereof." The tax so imposed is substantially higher than the tax imposed upon the same automobile or same type of motor vehicle when not so used to transport persons for hire.

It is strongly urged by appellants that the classification made by the State is unfair and unequal. For the purposes of argument, that proposition might be conceded, and, even if that were true, it would not be a real reason for declaring § 31, or any part of it invalid. It is a principle very generally recognized by all of the courts that almost any system of taxation results in many inequalities and perhaps unfairness to particular classes,

and very frequently seriously affecting individuals composing a particular class. This arises more often, not out of the law itself, but out of the peculiar conditions under which classes, or individuals, may find themselves in their manner of doing business or location, rather than out of the classification.

This is illustrated in the brief filed for appellants in this case. They argue the fact rather seriously that they confine their operations to the streets of cities and towns, as distinguished from the system of State highways. It should be observed, however, that classification in itself does not confine them to the municipalities. They urge also that they are subject to licenses or taxes in the respective cities and towns in which they operate, and that these taxes or licenses are burdens; that they pay other taxes to the cities, municipalities, schools, etc., and that argument suggests, when considered, the fact that the burdens imposed by said § 31 are seemingly oppressive only by reason of the fact that there are other exactions, no one in itself which, as distinguished from the others, might be considered excessive.

Appellants recognize in their brief that the State has power to tax, but they ask us to construe § 31 aforesaid so as to grant relief from what they urge is an overburdensome rate of taxation.

There is no ambiguity in said § 31. The language used, when given its ordinary meaning, is clear and understandable, and there is nothing to invite construction or interpretation. To attempt to read into this section any meaning, other than that which is clearly set forth upon its face, would be an invasion by the court of the legislative field, a course of action we feel unauthorized and unwilling to pursue. Our province can go no further than try to determine the legislative intent and to give effect to it, but in no instance shall we attempt to defeat the legislative intent so clearly expressed, and when it is not in violation of public policy as defined by the Constitution.

But it is urged that the act as written, if enforced by the Commissioner of Revenues, will be violative of the Fourteenth Amendment of the Constitution of the United

States and of § 21 of article 2 of the Constitution of the State of Arkansas.

Section 31 is not in conflict with either the State or United States Constitution. We call attention to a most recent case, decided by the United States Supreme Court, *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40, 54 S. C. R. 599. The Supreme Court of the United States had under consideration the statute passed and enforced in the State of Washington, which levied an excise tax of fifteen cents per pound on butter substitutes sold in the State. That statute expressly exempted from taxation butter substitutes when sold for exportation to any other State of the nation, and more particularly the doing of any act which would constitute an unlawful burden on the sale or distribution of butter substitutes in violation of the interstate commerce act. The act was such that it did not impose any burden upon interstate commerce. Plaintiff in that case was selling a preparation called "Nucoa," which was a form of Oleomargarine, from the sale of which it derived a large net profit in the State of Washington. The plaintiff urged that the tax was prohibitive; that plaintiff could not, after the passage of that act, except in violation of it, make any intrastate sales; that the imposition of the tax had the effect of depriving the complainant of its property without due process of law, and of denying to it the equal protection of the laws, in violation of the Fourteenth Amendment; that the tax was not levied for a public purpose, but for the sole purpose of burdening or prohibiting the manufacture, importation and sale of Oleomargarine, in aid of the dairy industry. The court held (1) that, in respect of the equal protection clause, the differences between butter and Oleomargarine were sufficient to justify their separate classification for purposes of taxation, and (2) that the tax was for a public purpose, and this was disclosed by the use which was to be made of the revenue derived from the tax, and that there was no ulterior motive or purpose which may have influenced the Legislature in passing the act. That court said in the case: "The point may be conceded that the tax is so excessive that it may or will result in destroying the

intrastate business of the appellant; but that is precisely the point which was made in the attack upon the validity of the 10 per cent. tax imposed upon the notes of State banks involved in *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548, 19 L. ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected.' Again in the McCray case, *supra,* answering a like contention, this court said (page 59 of 195 U. S., 24 S. Ct. 769, 778) that the argument rested upon the proposition 'that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored Oleomargarine, therefore the power to levy the tax did not obtain. This however is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that if a tax be within the lawful power of the Legislature, the exertion of the power may not be restrained because of the results to arise from its exercise."

This court in the case of *Fort Smith* v. *Scruggs,* 70 Ark. 549, 550, 69 S. W. 679, upheld an ordinance of the city of Fort Smith imposing a privilege tax, such as we have under consideration, upon buggies and wagons, making a distinction or classification of the same. The tax for a one-horse buggy or phaeton carrying not more than two persons was $2 per annum and for a one-horse delivery wagon $4 per annum. The power to impose such a tax and making such classifications was upheld, though the case was reversed for other reasons.

This court said, in the case of *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753: "It is not essential to the validity of a tax, either upon property or upon privilege, that it be absolutely free from inequalities or discrimination. The lawmakers have some discretion, even in legislating with reference to the power of taxation

as restricted by the terms of the Constitution, and they may determine the scope and extent of the exercise of the taxing power, and a mere incidental inequality or discrimination does not affect the validity of the statute."

It is unnecessary to pursue this argument further than to call attention to the case of *Fitzgerald* v. *Gates,* 182 Ark. 655, 32 S. W. (2d) 634, in which case practically every question raised by the complaint in the instant case was settled by this court. In effect the last cited case decided the validity of the classifications and the imposition of a privilege tax upon those who operate motor vehicles for hire. This court said in that case: "Whether a license tax is prohibitory is primarily a legislative question. 'All presumptions and intendments are in favor of the validity of the tax; in other words, the mere amount of the tax does not prove its invalidity.' The reasonableness of an occupation tax does not depend on whether or not a hardship results in an isolated case, but instead upon the general operation of the tax in the class to which it applies. The amount of the tax is not to be measured by the profits of the business taxed, and the mere fact that the particular person taxed conducted his business at a loss does not of itself make a tax unreasonable." Cooley, Taxation, (4th ed.) 3433. See also *Wright* v. *Hirsch,* 153 Ga. 229, 116 S. E. 795; *Western Union Tel. Co.* v. *Decatur,* 16 Ala. App. 679, 81 So. 199; *N., C. & St. L.* v. *Attala,* 118 Ala. 364, 24 So. 450; *N., C. & St. L.* v. *Ala. City,* 134 Ala. 414, 32 So. 731; *Veazie Bank* v. *Fenno,* 8 Wall. 553, 19 L. ed. 482; *Merchants' Transfer & Warehouse Co.* v. *Gates, supra.*"

It necessarily follows that the decision of the chancery court is correct. It will therefore be affirmed.

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