SMITH *v.* REFUNDING BOARD OF ARKANSAS.

Opinion delivered May 27, 1935.

Verne McMillen, for appellant.

Carl Bailey, Attorney General, and *Walter L. Pope,* for appellee.

Cockrill, Armistead & Rector, amici curiae.

McHaney, Justice. By this suit appellant seeks to enjoin the refunding board from issuing refunding obligations to those municipal improvement districts of this State entitled thereto under the provisions of act No. 248 of the Acts of 1931 (page 770). As a basis for this action, it is contended that, first, said act No. 248 is void for the reason that, as enrolled and printed, it contains no enacting clause, as is required by § 19 of article 5 of the Constitution, which provides that: "The style of the laws of the State of Arkansas shall be: 'Be it enacted by the General Assembly of the State of Arkansas';" and, second, that, since said act is a nullity, the attempt of the General Assembly to provide for the refunding of certificates of indebtedness authorized by said act No. 248, by the enactment of §§ 11 and 12 of act No. 11, of the Extraordinary Session of 1934 (page 48), approved February 12, 1934, is likewise void, because not within the Governor's call for said Extraordinary Session.

A brief review of the acts of the General Assembly, authorizing the issuance by the Highway Commission of certificates of indebtedness to street improvement districts in municipalities, whose streets form a portion or a continuation of State highways through such municipalities, is deemed appropriate. At the Extraordinary Session of the General Assembly in 1928, act No. 8 (page 31), was passed, approved October 3, 1928, which amended act No. 184 of 1927 (page 645), entitled, "An Act to Provide for the Permanent Improvement of Continuations of State Highways Within the Corporate Limits of Cities of the First and Second Class." Said act No. 8, by § 1 (page 31), directed the State Highway Commission to designate for the purpose of said act "such streets and parts of streets within the corporate limits

of cities of the first and second class and incorporated towns as are continuations of duly designated and established highways passing through or into such cities or incorporated towns." Said act further (§ 4, p. 33) provides that one-half of the cost of the improvement of such streets within the corporate limits of cities and towns should be refunded to the district by the State as provided in the act, in annual installments, not less than ten, proportioned as nearly as practicable to the maturity of the bonds of the district. And it further (§ 5, p. 33) provides that said Commission should issue its certificates of indebtedness for said installments, payable to the district if it had no outstanding bonds, or payable jointly to the district and the trustee for the bondholder if the district had outstanding bonds.

The act also provides in § 6 (page 34) that said Commission may "issue like certificates of indebtedness for the State's portion of similar work done by improvement districts since June 9, 1927, or by districts where the plans were adopted by the commissioners before this act went into effect and after June 9, 1927, the amount in each instance to be determined by said Commission."

The General Assembly of 1931 also passed act No. 85, p. 247, Acts 1931. This act was entitled, "An Act to Aid in Paying Outstanding Bonds of Improvement Districts in Incorporated Towns that Paved Continuations of State Highways Through Said Incorporated Towns."

This act provides that any street improvement district having outstanding bonds where such district paved a thoroughfare that is a continuation of a State highway into or through the corporate limits of an incorporated town or city of the first or second class, and made no improvement on any other thoroughfare except the one that is an extension of a State highway, should receive aid in paying outstanding bonds and interest to the extent of 50 per cent. of the remaining bonds and interest as same become due and payable. In other words, this act authorized the payment of 50 per cent. of the remaining outstanding bonds of municipal improvement districts which had improved streets which were continua-

tions of State highways and no other streets. Section 3 of said act (page 249) reads as follows: "In considering the outstanding bonds and interest on which the State is to undertake to pay off half of same, said bonds shall only be the remaining outstanding bonds representing work done for excavation or borrow, surfacing, concrete curb when constructed as an integral part of the pavement or concrete base, drainage, subways, overhead crossings and reasonable overhead expense; it being the intention of this act to pay for such classes of work as the State is now contributing towards constructing as provided for in § 4 of act No. 8 of the Acts of 1928, whereby the State has been aiding in paving continuations of State highways through incorporated towns where the work was done since June 9, 1927."

Section 4 (page 250) provides that, as soon as the Commission has determined the amount of the remaining outstanding bonds of each district and the amount of aid each district is entitled to, the Commission shall issue certificates of indebtedness for the respective amounts due each city, town, or district in installments, as the remaining outstanding bonds are payable. Such certificates of indebtedness should be made payable to the city or town that issued said bonds if done by the city or town, and if done by an improvement district where bonds are outstanding, the certificates were to be payable jointly to the district and the trustee for the bondholders.

Later in the same session of the General Assembly (1931), act No. 248 (page 770) was passed which purports to amend act No. 184 of 1927 (page 645), and act No. 8 of 1928, Extra Session (page 31). This act (§ 1, p. 771) authorized and directed the State Highway Commission to designate such streets and parts of streets within the corporate limits of cities of the first and second class and incorporated towns as are continuations of State highways passing through such cities and towns. It further provided in § 2 (page 771) that the amount of the bonds unmatured for payment at the time of the passage of this act or interest thereon, issued by any municipality or city and town paving district having a

route and street therein on a State highway, "shall be refunded to the district by the State, as provided in § 4 hereinafter in this act, the * * * refund to be all of the unmatured cost as stated above in this paragraph if the work of construction contemplated by this act shall have been done by improvement districts since June 9, 1927, where the plans were adopted for State aid by the Highway Commission before the passage of this act and after June 9, 1927, the refund to be made in annual, or semi-annual installments, over not less than ten years, proportioned as nearly as practicable to the maturing bonds and interest of the district." The act further (§ 3, p. 772) provides for the issuance of certificates of indebtedness for the respective installments payable jointly to the district and trustee for the bondholders. Section 4 (page 773) of said act reads as follows:

"The State Highway Commission shall issue like certificates of indebtedness for the entire said unmatured cost of similar work done by improvement districts or municipalities since June 9, 1927, where the plans were adopted for State aid, by the Highway Commission before the passage of this act and after June 9, 1927, the amount in each instance to be determined by said Commissioner as indicated in the last preceding section, provided, however, in the disbursement of funds from the 'State Highway Fund,' in the State Treasury, the following items of expense shall have preference.

"Payment of 50 per cent. of the maturing bonds and interest of any district as required by law, where such district has paved a continuation of a State highway into or through an incorporated town or city.

"It being the intention that the annual revenues derived from gas tax, auto license fees, chauffeur's license fees or other taxes from users of the roads, shall first be used to provide necessary funds to care for 50 per cent. aid toward paying extensions of State highways into incorporated towns and cities, then out of remaining funds, same shall be used to pay 100 per cent. of the maturing

bonds and interest of certain street improvement districts as provided for herein."

The Extraordinary Session of 1934 of the General Assembly passed act No. 11 (page 28), Acts 1934, commonly known as the Refunding Act. Sections 11 and 12 of said act (page 48) are material to this inquiry. The reporter will copy these sections as a footnote to this opinion.[1]

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[1] Sections 11 and 12, act No. 11, Acts of 1934 (page 48):

Section 11. In instances where municipalities or street improvement districts have improved streets through cities and towns, which streets are continuations of State highways, and said municipalities or districts were given aid or are entitled to aid by the issuance of certificates of indebtedness under act No. 248 of 1931, it shall be the duty of the State Highway Commission to ascertain and report to the Refunding Board by municipalities or districts the amount of said certificates, together with the interest unpaid thereon to January 1, 1934, and the amount of aid to which any of said municipalities or districts may be entitled in instances where certificates have not been issued to them, which represents the actual cost of improving streets which are now the actual continuation of a State highway. Any municipality or street improvement district entitled to aid under said act 248 for which no certificates have been issued shall apply to the State Highway Commission for aid within sixty days from the effective date of this act or thereafter be forever barred from the benefits hereof.

It is the purpose of this and the next sections of this act to authorize the issuance of refunding certificates of indebtedness to municipalities and street improvement districts, in an amount equal to the actual cost of improving streets which are now continuations of a State highway through cities and towns, irrespective of the validity or invalidity of any previous statutes upon the subject.

Section 12. Refunding certificates of indebtedness are hereby authorized to be issued in exchange for and in an amount not exceeding the aggregate of the outstanding valid certificates of indebtedness issued under act No. 8 of the General Assembly, approved October 3, 1928, and act No. 85 of the General Assembly, approved March 3, 1931, together with the accrued interest thereon to January 1, 1934, and the amount reported to the Refunding Board under Sec. 11 hereof. Said refunding certificates of indebtedness shall be negotiable, direct, general obligations of the State, for the payment of which, principal and interest, the full faith and credit of the State and all its resources are hereby pledged. They shall be dated January 1, 1934, and shall be payable ten (10) years from their date, and shall bear interest at the rate of 3 per cent. per annum. Interest upon said refunding certificates of indebtedness shall be evidenced by interest coupons payable semi-annually upon the interest paying dates of the bonds issued by said municipalities or districts. Said refunding certificates of indebtedness shall be delivered to the municipalities or districts entitled thereto, upon surrender of the original certificate to the Refunding Board for cancellation in instances where certificates have been issued, and to municipalities or districts entitled to aid to which no certificates have been issued. The trustee, paying agent or other person holding original certificates shall surrender the same for cancellation upon the issuance of certificates as herein provided. No refunding certificates shall be issued and delivered to any municipality or district until all original certificates issued to or in aid of said municipality or district are surrendered for cancellation.

It will be noted that the concluding paragraph of § 11 of said act (page 48) provides: "It is the purpose of this and the next sections of this act to authorize the issuance of refunding certificates of indebtedness to municipalities and street improvement districts, in an amount equal to the actual cost of improving streets which are now continuations of a State highway through cities and towns, irrespective of the validity or invalidity of any previous statutes upon the subject."

Under these statutes the chancery court sustained a demurrer to the complaint of appellant seeking to enjoin the refunding board from issuing refunding certificates of indebtedness to such districts. Appellant declined to plead further, and his complaint was dismissed for want of equity.

We think the chancery court correctly sustained the demurrer, and this irrespective of the validity or invalidity of said act No. 248 of 1931. Assuming it to be invalid, as contended by appellant, without so deciding, because the enrolled and printed act omitted the enacting clause which the original and amended bill as introduced in the Senate contained, it does not follow that subsequent acts upon the part of the State through its lawmaking power may not cure the infirmity and render valid that which prior to the curative act was invalid. We are of the opinion that § 11 of the said act No. 11 (page 48) of the Acts of 1934 (Ex. Sess.) cured any invalidity in act No. 248 of the Acts of 1931 (page 770) and that the unauthorized act of the State Highway Commission (assuming it to be so) in issuing certificates of indebtedness under the supposed authority of act No. 248 was ratified, confirmed and approved. That part of § 11 hereinbefore quoted specifically so states. We recently had occasion to construe this same section of said act No. 11 of Acts 1934 (Ex. Sess.) in the case of *Refunding Board* v. *Bailey,* 190 Ark. 558, 80 S. W. (2d) 61, 64. We there said: "We think that from § 11 it appears plain that the Legislature intended to issue refunding certificates in an amount equal to the actual cost of improving the streets, and this irrespective of the validity or invalidity of any previous statutes upon the

subject. That provision, by its very terms, not only applies to § 11, but to the subsequent sections. It is a plain declaration of the Legislature itself as to what it means."

It was the manifest purpose of the Legislature to relieve the owners of real property from taxes on assessed benefits levied for the purpose of constructing streets in cities and towns which form continuations of State highways. It had already relieved rural property of such taxes, and its object was to assume the burden of outstanding obligations in such districts. The obligation assumed was limited to bonds that were outstanding at the date of the passage of said acts.

It is next contended that the refunding board is not authorized to issue refunding certificates of indebtedness to street improvement districts in excess of the certificates authorized to be issued under said act No. 8 (page 31) of the Acts of 1928 (Ex. Sess.) and said act No. 85 of the Acts of 1931 (page 247). In other words, this contention is based on the theory that since act No. 248, Acts 1931 (page 770), is void because it has no enacting clause, the refunding of certificates of indebtedness issued under act No. 248 would be void because not within the Governor's call. It is contended that the Legislature, having been called into special session for the purpose of refunding obligations of the State, could not authorize the refunding of obligations which did not exist; that, since act No. 248 is void, the obligations issued thereunder are likewise void, and that the Legislature had no power, acting within the Governor's call, to assume or agree to pay any obligations which the State did not owe for the reason that the Governor did not call the Legislature into session for the purpose of assuming new obligations. Section 1 of the call of the Governor convening the General Assembly in an extraordinary session in the latter part of 1934 (page iii) reads as follows: "To consider and, if so advised, enact legislation providing for the refunding of the outstanding State highway bonds and notes, State toll bridge bonds, outstanding road district bonds, on which the State has been paying interest, for the refunding or payment of certificates of indebtedness issued

under act No. 8 of the General Assembly, approved October 3, 1928, act No. 85 of the General Assembly, approved March 3, 1931, and act No. 248 of the General Assembly, approved March 31, 1931, and to fund other lawful claims against the State for highway construction or maintenance, and the accrued and unpaid interest upon the aforesaid obligations."

We cannot agree with appellant in this contention. It is, of course, true that the General Assembly, when called into extraordinary session, cannot legislate outside the Governor's call. *Jones* v. *State,* 154 Ark. 288, 242 S. W. 377; *Sims* v. *Weldon,* 165 Ark. 13, 263 S. W. 42. But the same cases hold that the lawmakers, when convened in extraordinary session, "may act freely within the call and legislate upon all or any of the subjects specified, or upon any part of the subject; and every presumption will be made in favor of the regularity of its action." See also *State Note Board* v. *State ex rel. Attorney General,* 186 Ark. 605, 54 S. W. (2d) 696. It is perfectly manifest from the language above quoted in the Governor's call that he intended that the Legislature should do something with reference to certificates of indebtedness issued under the supposed authority of said act No. 248. He specifically mentioned said obligations. The Legislature was therefore, under the doctrine of the cases just cited, authorized to enact said §§ 11 and 12 of act No. 11 of the Acts of 1934 (Ex. Sess., p. 48). We sustained the act as a whole in *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182, and sustained, construed and applied §§ 11 and 12 of said act, the very sections now under consideration, in *Refunding Board* v. *Bailey, supra,* and we now sustain them again as not being open to the attack made.

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

STATE USE CRAWFORDSVILLE SPECIAL SCHOOL DISTRICT *v.* HUXTABLE.

Opinion delivered November 19, 1928.

[redacted]

Charles D. Frierson, for appellant.

S. V. Neely and *Rose, Hemingway, Cantrell & Loughborough, W. B. Scott* and *A. B. Shafer,* for appellee.

HART, C. J., (after stating the facts). In the first place, it is contended by counsel for the Crittenden County Bank and the Bank of Crittenden County that there was no liability on their part. The Bank of Crittenden County was organized for the purpose of purchasing the assets and assuming the liabilities of the Crittenden County Bank, which had become insolvent. The contract for the purchase of the assets and the assumption of the liabilities of the Crittenden County Bank was made on February 5, 1927. It is sought to hold both of these banks liable upon the theory that the Crittenden County Bank had purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company. Of course, if there was no liability on the part of the Crittenden County Bank, there could be none on the part of the Bank of Crittenden County.

Now, it is sought to hold the Crittenden County Bank liable under its contract to purchase the assets and assume the liabilities of the Crittenden County Bank & Trust Company, which was approved by the chancery

court on the 3d day of February, 1926. The Crittenden County Bank & Trust Company was organized as a trust company, and, under subdivision 7 of § 747 of Crawford & Moses' Digest, it had the power to sign the bond of Frank Huxtable as county treasurer of Crittenden County. It did sign his bond as one of his sureties, and, on that account, became liable for the faithful discharge of the duties of his office. On December 17, 1923, the Crittenden County Bank & Trust Company became insolvent, and its affairs were wound up by the State Bank Commissioner under the statute. At this time no liability had accrued against any one on Huxtable's bond. The liability of Frank B. Huxtable and his bondsmen for the $5,306.97, belonging to the Crawfordsville Special School District, did not accrue until nearly a year afterwards. This money was lost because of the failure of the Bank of Commerce of Earle, in which the money was deposited. Prior to the failure of the Bank of Commerce, the Crittenden County Bank was organized for the purpose of purchasing the assets of the Crittenden County Bank & Trust Company and assuming its liabilities. The contract of purchase and sale was approved by the chancery court on February 3, 1926; and it is contended by counsel for the appellants that the liability of Frank B. Huxtable and the sureties on his bond as county treasurer included the amount belonging to the Crawfordsville Special School District, which was lost by the failure of the Bank of Commerce.

We cannot agree with counsel in this contention. It is true that the Crittenden County Bank & Trust Company had the power to sign as surety the bond of Frank B. Huxtable as county treasurer of Crittenden County. Subdivision 7 of § 747, Crawford & Moses' Digest. This power, however, was taken away by the Legislature of 1923. Acts of 1923, p. 515. Section 10 of that act expressly repeals par. 7 of § 747 of the Digest. Besides, corporations organized to do a general banking business never had the power to sign the bond of a public officer as surety. At the time the affairs of the Crittenden County Bank & Trust Company were placed in the hands of the

Bank Commissioner, and sold by him under the order of the chancery court, neither a corporation organized to do business as a trust company nor that organized to do a general banking business had the power to sign the bond of a public officer as surety. Therefore it could not be said that, under the contract in question, the Crittenden County Bank should be held to have taken the place of the Crittenden County Bank & Trust Company as one of the sureties on the bond of Frank B. Huxtable. No liability had accrued on his bond at that time.

The Bank of Commerce did not fail until nearly a year afterwards. The money involved in this suit was lost by its failure. Hence there was no existing liability on the bond of Frank B. Huxtable at the time the Crittenden County Bank purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company.

We are of the opinion that the terms of contract of purchase and sale of the assets of the Crittenden County Bank & Trust Company only included existing liabilities of the latter, and that no attempt was made to include a default on the bond of the treasurer which might accrue in the future.

But it is contended that the liability of the Crittenden County Bank & Trust Company, as surety on the bond of Frank B. Huxtable, was a continuing one, and that it continued throughout his term of office, although the Crittenden County Bank & Trust Company became insolvent, and its affairs were placed in the hands of the State Bank Commissioner, to be wound up by him pursuant to statute. We do not think so. When the affairs of the Crittenden County Bank & Trust Company were wound up and its assets disposed of and distributed pursuant to statute, its existence came to an end, and it could not in any sense be said to continue liable on the bond of the county treasurer. When its affairs had been wound up and its assets had been distributed among its creditors as provided by statute, it no longer had any powers whatever, and could in no sense be said to con-

tinue liable as one of the sureties on the bond of the county treasurer.

The police power of the State extends to the regulation of banking business, and even to its prohibition, except on such conditions as the State may prescribe. *Noble State Bank* v. *Haskell,* 219 U. S. 104, 31 S. Ct. 86, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. The business of banking is of a public nature, and therefore is subject to statutory regulation for the protection of the public. The power to regulate the business necessarily carries with it the power to provide adequate machinery for winding up its affairs when insolvent. If it should be said that the liability of a trust company as a surety on the bond of a public officer must necessarily continue during the life of the bond, regardless of the insolvency of the bank and trust company, then a statute providing for the winding up of the affairs of insolvent banks and trust companies by a State Bank Commissioner or other public agency would be seriously impaired, and of but little advantage to the public or to those dealing with such bank or trust company. The power to wind up and settle its affairs must necessarily conclude its future liabilities and have the effect of putting an end to its existence for all purposes except those held open by the regulating statute itself.

We have already seen that, by the terms of the contract, the Crittenden County Bank only assumed the existing liabilities of the Crittenden County Bank & Trust Company. When the affairs of the Crittenden County Bank & Trust Company were wound up pursuant to statute, its liability as one of the sureties on the bond of the county treasurer ended. Therefore we are of the opinion that there is no liability on the part of the Crittenden County Bank or on the part of the Bank of Crittenden County, which purchased the assets and assumed the liabilities of the former.

The chancellor held that the individual sureties on the bond of the treasurer were not liable because the county court had given the treasurer credit for the amount lost by him on account of the failure of the Bank

of Commerce at Earle, in Crittenden County, and no appeal has been taken. It appears from the record that on June 30, 1925, a day of the April term, 1925, of the county court of Crittenden County, F. B. Huxtable, as treasurer of Crittenden County, filed his report as such county treasurer for the quarter ending December 31, 1924. Among other items for which he asked credit is the following: "Lost in Bank of Commerce, $5,306.97." The county court approved and confirmed his settlement, thereby giving him credit for the sum of $5,306.97, belonging to Crawfordsville Special School District, which had been lost by the failure of the said Bank of Commerce. No appeal was taken from the judgment of the county court in the premises. Hence it is claimed that the matter is *res judicata,* and that, inasmuch as the county court has never adjudged that any liability existed, the present suit cannot be maintained under the authority of *Graham* v. *State,* 100 Ark. 571, 140 S. W. 735. In that case the court held that, before a suit can be brought upon the bond of a county treasurer, there must be a settlement made with him by the county court, and the amount due by him determined, and an order made to pay over the amount found to be due. The court said that the judgment fixing the liability and containing an order to pay over was a condition precedent to the bringing of a suit against the treasurer and the sureties on his bond.

Now, under § 10,165 of Crawford & Moses' Digest, the county court was given the power on its own motion to reconsider and adjust the settlement of any county officer at any time within two years from the date of settlement. In *Sims* v. *Craig,* 171 Ark. 492, in construing this section of the statute, the court said that unintentional errors and mistakes in accounting, resulting in a loss to the county, would be a legal fraud upon the county, and might be corrected by the county court itself within the two years. The court also held that the chancery court has the power to surcharge and correct such settlement for fraud at any time within five years.

Was the action of the county court allowing the treasurer credit for the $5,306.97 belonging to Crawfordsville Special School District, lost by him on account of the failure of the Bank of Commerce of Earle in which it was deposited, a fraud? We think so. The general rule with respect to the liability of public officers and their sureties for the loss of public moneys is that, where the statute, in express terms, imposes the duty to pay over public funds received and held as such, and no condition limiting that obligation is in the statute, the obligation thus imposed upon and assumed by the officer is absolute, and the plea that the money has been lost without his fault does not constitute a defense to an action for its recovery. *United States* v. *Prescott,* 3 How. (U. S.) 578; *Smythe* v. *United States,* 188 U. S. 156, 23 S. W. 279; *Board of Education* v. *Jewell,* 41 Minn. 427, 46 N. W. 914, 20 A. S. R. 586; and 33 R. C. L., par. 136, p. 468.

In *Mecklenburg County* v. *Beales,* 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, the Virginia Supreme Court of Appeals held that a county treasurer is liable for public funds lost through bank failure, although he believes the bank to be sound, and it is generally so regarded, and in depositing the funds he merely follows a long-prevailing custom, and acts with knowledge of the supervisors, where the statutes of the State manifest an intention to guard with the utmost care the public funds from loss, and to hold the county treasurer handling them to a very strict accountability for their safekeeping. Many decisions are cited in the opinion in support of the rule, and many more are cited in a case-note to 36 L. R. A. (N. S.) 285.

In *Cameron* v. *Hicks,* 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926, the West Virginia Court of Appeals said:

"By the great weight of authority the custodian of public money is not a bailee bound only to the exercise of a high degree of care, prudence and diligence for its safety, and excusable for the loss thereof by fire, robbery, theft or bank failure, when such loss is not in any sense due to negligence or misconduct on his part, but a

debtor and insurer to the extent of the amount received, excusable for no losses except those resulting from acts of God or the public enemy."

Numerous decisions from the Supreme Court of the United States and from the courts of last resort of the various states are cited in a case-note to 17 Ann. Cas. at p. 929, to the effect that the reasons on which the proposition rests are to be found in the unqualified terms of the bond and in considerations of public policy. Among the cases cited are the following: *State* v. *Croft,* 24 Ark. 550; *State* v. *Newton,* 33 Ark. 276; and *State* v. *Wood,* 51 Ark. 205, 10 S. W. 624.

In this State the condition of the treasurer's bond is that he will faithfully discharge the duties of his office, and under § 2832 of Crawford & Moses' Digest he and the sureties on his official bond are liable for all funds deposited by him in a bank when such bank, on demand, shall fail to pay to the person entitled to receive the same. Demand was made for the funds in the case at bar, and there was a failure to pay the same to the persons entitled to receive the same. Under the authorities above cited, the county court was wholly without power to allow the county treasurer credit for the funds in question, and the action of the county court in allowing the same constituted a legal fraud which a court of chancery had the authority to set aside in the present suit. *Fuller* v. *State use of Craighead County,* 112 Ark. 91, 164 S. W. 770; and *Sims* v. *Craig, supra,* and cases cited.

This principle was sustained in *State* v. *Croft,* 24 Ark. 550. In that case the court held that the declaration, in a suit upon a county treasurer's bond, averring that a specified sum, as appeared by the books, remained in the treasurer's hands; that he had been summoned by the county court to settle his accounts, but had failed to do so; that the court struck the balance due by him, and that he is justly indebted to the county as treasurer in such sum, which he had neglected and refused to pay, were sufficient to charge the sureties in the bond, without the averment of a formal judgment rendered by the county court.

In the case at bar, the county treasurer admitted that he was indebted to Crawfordsville Special School District in the sum of $5,306.97, which was due, and which he had lost by the failure of a bank in which he had deposited it. This substantially amounts to an averment that the county court had settled and determined the amount due from the treasurer to said school district as a part of its school fund, and that such adjustment and settlement are shown by the records of that court. In short, the settled rule is that public policy requires that every depository of public money should be held to strict accountability. The obligation to keep safely the public money is absolute, without any condition, express or implied. Nothing but the payment of it, when required, can discharge the bond, unless by statutory authority. *Newton County* v. *Green,* 104 Ark. 270, 1409 S. W. 73, Ann. Cas. 1914C, 491; *State* v. *Davis,* 178 Ark. 153, 10 S. W. (2d) 513; *Pearson* v. *State,* 56 Ark. 138, 19 S. W. 499, 35 A. S. R. 91.

Therefore, in view of the situation of the parties as shown by the record, the order of the county court procured by the treasurer giving him credit in his quarterly settlement is a legal fraud against which equity will relieve; and we hold that Crawfordsville Special School District was entitled to recover the sum sued for from the county treasurer and his individual bondsmen.

Relying upon the principles of *Graham* v. *State, supra,* it seems that the chancery court held that there was no liability on the part of the individuals in the present case because there was no order to pay over. The settlement filed by the county treasurer in the county court on December 31, 1924, was made pursuant to the statute requiring him to settle his accounts in the county court. The county court approved his accounts, and thereby found that the Crawfordsville Special School District was entitled to receive from him the sum of $5,306.97, which he had deposited in the Bank of Commerce at Earle, and which had been lost by the failure of that bank. This constituted a finding and adjudication by the county court that the Crawfordsville Special School Dis-

trict was entitled to that amount of money. The county treasurer admitted that he had lost that sum of money belonging to the Crawfordsville Special School District by the failure of the Bank of Commerce. Therefore the Crawfordsville Special School District was entitled to recover that sum from the county treasurer and his bondsmen.

It is earnestly insisted, however, that the present suit could not be maintained until the county court made an order requiring him to pay over. No special order to pay over was necessary under the facts presented in the case at bar. As we have just seen, the county treasurer admitted that he had lost $5,306.97, belonging to the Crawfordsville Special School District, by the failure of the Bank of Commerce in which he had deposited the money. His admission that he had lost the money by the failure of the bank made it no longer necessary that there should be a formal order to pay over. The finding of the court that the money was due and that he no longer had it was equivalent to an order to pay over. If he had merely reported that he had that amount of money on hand belonging to the Crawfordsville Special School District, then, under the authority of the case above cited, it would have been necessary for the county court to have made an order for him to pay the money over to the Crawfordsville Special School District before a suit could be maintained against him and the sureties on his bond. It would have been a vain and useless thing for the county court to make an order requiring him to pay over the money when he had just admitted that he had lost it by the failure of the bank. His admission in this respect made useless a formal order to pay over. Therefore we think that the chancery court erred in dismissing the complaint of the plaintiffs as to the individual sureties on the bond of the county treasurer.

Finally, it is insisted that a court of chancery had no jurisdiction. We cannot agree with counsel in this contention. Courts of equity have always had the power to reform contracts. The plaintiffs elected to make the Crittenden County Bank and the Bank of Crittenden

County, or at least those in charge of the affairs of said banks, defendants in the action. Their answers ask for a reformation of the contract whereby they assumed the liabilities of the Crittenden County Bank & Trust Company after its insolvency. This gave the chancery court jurisdiction in the matter, and it is well settled that when a court of equity assumes jurisdiction of a case for one purpose, it will retain jurisdiction of it until the whole case is settled. Equity frowns upon a multiplicity of suits, and when it takes jurisdiction of a case for a matter cognizable in equity, it retains the cause to administer legal, after the equitable, relief. *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14; *Gosnell Special School District No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; and *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21.

The result of our views is that the chancery court erred in dismissing the complaint for want of equity, and for that error the decree will be reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

SMITH, J., not participating.

STATE EX REL. TRIMBLE *v.* KANTAS.

Opinion delivered May 27, 1935.

J. W. Trimble, Rex Perkins and *Oscar E. Williams,* for appellant.

Bernal Seamster and *Price Dickson,* for appellee.

R. W. Robins, amicus curiae.

BAKER, J. Appellants' statement of this case may be adopted by us as being concise and yet sufficiently full to show the issues involved.

"This appeal involves the validity of Special Acts of the General Assembly prohibiting the sale of intoxicating liquors within three miles of the University of Arkansas, as provided in Special Acts of 1875 (page 206), 1905 (page 692), and 1907 (page 649). In other words, are those acts repealed by acts Nos. 69, 108, and 109 of 1935?

"It was the contention of the plaintiffs that the acts of 1875, 1905, and 1907 have not been repealed or amended, notwithstanding acts Nos. 69, 108, and 109 of 1935, called the Clerget Wine Bill, the Thorn Bill, and the Dillon Bill, respectively. The defendants contend that these special acts were repealed by implication. If the special acts establishing a dry zone around the University of Arkansas are still in effect, then plaintiffs were entitled to the relief sought."

Without quoting further, we add to the above statement that there were other special acts or local bills passed by the General Assembly enlarging the scope or effect of the special measures above mentioned, including act No. 372 (page 1059), approved May 31, 1909, making it unlawful to manufacture or sell, or give away, or be interested in the manufacture, sale, or giving away of any alcoholic, spirituous, ardent, vinous, malt, or fermented, or any intoxicating liquors of any kind or char-

acter in Washington County, Arkansas. This is the last act to which our attention has been called.

These several acts will be deemed legal or illegal according to our opinion, as their legality must be determined by the same rule that governs or controls the ones specifically mentioned and set forth in the complaint.

We pretermit a discussion of the passage of the later special acts as repealing those first enacted. They were all for the general purposes, and, if any one of them is good, the prayer of the complaint might properly have been granted.

It may be said in the beginning that the liquor question has been productive of much general and special legislation in this State.

The law prohibiting the sale of intoxicating liquors was progressive, developing from control in counties by ballot at biennial elections, by order of county courts upon petitions of a majority within three miles of a properly designated central point, also by special or local acts of the General Assembly. Finally, prohibition was made State wide by an act popularly called the "Bone Dry Law" (Acts 1915, p. 98). The liquor control controversy later became national in scope and culminated in the passage of the Eighteenth Amendment to the United States Constitution. The trend up to that time was to favor almost every form of prohibition legislation.

A short time ago, however, there came a revulsion of sentiment, and, in this State, by act No. 151 of the General Assembly (page 467), approved March 24, 1933, a convention was provided for, the effect of which was to determine the policy of the State on the controversional matter, by an election held on the 18th day of July, 1933, by ballot, upon Amendment No. 21 to the United States Constitution, the purpose of which amendment was to repeal the Eighteenth Amendment. At that election the vote stood "for repeal" 68,262, "against repeal" 45,925 votes.

Thereafter, the first successful step to legalize the sale of liquor, in the State of Arkansas, was act No. 7 (page 19), approved August 24, 1933, of the Extraordinary Session commencing on the 14th day of August of

that year. It authorized the sale of light wines and beer. Acts Nos. 69, 108, and 109 were enacted by the General Assembly of 1935. Act No. 69 is known as the "Clerget Wine Bill"; act No. 108 as the "Thorn Bill," which provides that it may be cited as the "Arkansas Alcoholic Control Act"; and act No. 109 was referred to as the "Dillon Bill." These acts authorized the sale of wines, beer, and other alcoholic liquors.

As stated in the complaint filed in this cause, the several bills provide for the repeal of all laws or parts of laws in conflict with their provisions.

(1) We recognize under the rule of construction that the passage of a general act does not always serve to repeal a local or a special act, unless it so expressly provides, but there is another principle not less forceful, when applicable, repeal by implication.

(2-5) Repeals by implication must be recognized when it is ascertained that such was the legislative intent. When the new or later act cannot be harmonized with the terms and necessary effect of the earlier act, judicial construction declares the effect. In such cases the legislative announcement last made must be declared to be in effect, if otherwise valid, and the first must yield, at least, to the extent of conflicting provisions. In cases wherein the last legislative act purports to cover the entire field of the subject of legislation, the first will ordinarily be treated as repealed, unless the new or later act is intended to be cumulative. But it is certain that contradictory, repugnant acts, or provisions thereof, cannot be in full force and effect at the same time.

(6) Many examples of this form of constructive repeal appear in cases wherein by amendment the Legislature substitutes a new section for a corresponding section in some former act. In such instances, the matter of the repeal of the original section is never questioned, although there may be no express declaration of the intention to repeal it. Constructive repeals, or implied repeals, must be given full effect where there is irreconcilable conflict or repugnancy between the first and later act.

We ascribe to the Legislature the ability to know or ascertain the effect of former enactments of that body, and, of course, the knowledge of the effect of a new act upon any matter properly the subject of legislation, and it becomes our duty, without regard to individual or personal viewpoint or policy, to declare that legislative intent as fully and completely as we can ascertain it.

Therefore, it must appear that we cannot conceive that the Legislature attempted to make effective, at the same time, conflicting statutes or parts of statutes that are repugnant one to another, and which on that account would result in a chaotic condition, intolerable by reason of that lack of harmony.

In Lewis' Sutherland Statutory Construction, we find this better announcement of the law: "The repugnancy being ascertained, the later act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it." See section 247, pp. 461, 462. Cited in support of this authority are cases of considerable number from almost every appellate court in America. One of the earliest examples of the cases cited is the case of Ex parte *Osborn,* 24 Ark. 479, in which Chief Justice WALKER, delivering the opinion of the court, after announcing that repeals by implication were not favored, said in regard to an act then under consideration: "Should we, however, assume that it was the intention of the convention to declare the act of 21st January, 1861, in force, and to leave the act of the 18th November, 1861, unrepealed and in force also, the result would be, that there would be two acts in force fixing different times for holding the circuit court in Pulaski County. And when such is the case, the rule is that the latter act repeals the former."

(7) Again in *Coats* v. *Hill,* 41 Ark. 149, quoting from the second headnote, we find, "Repeals by implication are not favored. To produce such result the two acts must be upon the same subject and there must be a plain repugnancy between their provisions; in which case, to the extent of the repugnancy, the latter act repeals the former."

In passing, it is pertinent to say that we still adhere to the principle above announced. *Hazelrigg* v. *Board of Penitentiary Commissioners,* 184 Ark. 154, 40 S. W. (2d) 998; *Ouachita County* v. *Stone,* 173 Ark. 1004, 293 S. W. 1021.

An illuminating discussion will also be found in the case of *Louisiana Oil Ref. Co.* v. *Rainwater,* 183 Ark. 482, 488, 37 S. W. (2d) 96.

There is no gainsaying the determinative force of the following cases: *Massey* v. *State, for Use of Prairie County,* 168 Ark. 174, 269 S. W. 567 (see cases there cited); *King* v. *McDowell,* 107 Ark. 381, 155 S. W. 501; *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *Johnson County* v. *Town of Hartman,* 177 Ark. 1009, 8 S. W. (2d) 469.

Again quoting from Lewis' Sutherland Statutory Construction, page 463: "Subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable and only to the extent of the repugnance."

We do not stop to argue with any who may believe that absolute prohibition of the sale of intoxicating liquors can prevail in the same jurisdiction wherein there is a legal right to sell the same.

The intention of the Legislature is evidenced not only by the facts above stated, but act No. 109, by its title, by which it may be cited, as provided therein, "Arkansas Alcoholic Control Act," is practically conclusive. The acts legalize the manufacture, sale, etc. They are not prohibitory, but regulatory. We think it unnecessary to quote from or analyze the several acts, as no other conclusion can be reached, except that it was the intention of the Legislature to provide for legalized traffic and for regulation thereof.

The argument is made, however, that since repeals by implication are not favored, and since the Legislature did not expressly provide in these three acts, above men-

tioned, for the repeal of the special and local acts, that the local acts are still in effect and that legal sales can be had only in the territory or parts of the State in which there has not been any local or special act prohibiting the traffic. A very large portion of the State has, at one time or another, had whatever benefit might have been derived from special or local acts, and other prohibitory measures of local application. Then it must appear that only in the remaining portion of the State, under such construction, as we are asked to give these acts, could intoxicating liquors be handled legally.

As stated above, we ascribe to the Legislature knowledge of these conditions, and further that the Legislature was not attempting to do a vain thing. If it intended to authorize and make legal the traffic in that portion or part of the State wherein no local or special act or measure had been in force, then it must have intended local and special legislation. To give that construction to the acts would necessarily declare them illegal, as being in violation of Constitutional Amendment 14, adopted in 1926, which provides: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

(8) It follows, therefore, that the above and foregoing acts Nos. 69, 108, and 109 must operate to repeal conflicting and repugnant acts. It would be as reasonable to argue that the commonly designated "Bone Dry Law" is still effective as to argue that other conflicting statutes are in full force and effect.

(9) In addition to the foregoing, the Legislature, taking notice of former acts and the effect thereof, must have recognized the effect of act No. 7 (page 19), approved August 24, 1933, of the Extraordinary Session. That act authorized the sale of light wines and beer, and among other things provided: "All laws, local or special, forbidding the sale of light wines and beer as herein defined are hereby repealed." Section 29.

It is only necessary to say that the laws mentioned in the last-quoted sentence were not merely modified so as to authorize the legal sale of light wines and beer, but local and special laws that forbade the sales of light

wines and beer were repealed. Such local and special laws have not been in effect since the approval of said act No. 7, approved August 24, 1933.

The chancellor denied the prayer of petitioners. By the decree of the chancery court, the local or special acts were held to have been repealed. This holding was correct.

Affirmed.

CITY NATIONAL BANK *v.* JOHNSON. (1)

4-3754

CITY NATIONAL BANK *v.* WOFFORD. (2)

4-3776

Opinion delivered March 4, 1935.

James B. McDonough, for appellant and petitioner.

Daily & Woods and *Watts & Wall,* for appellee and respondent.

SMITH, J. A correct understanding of the issues now presented for our decision requires a brief statement of the issues heretofore decided out of which the present litigation arose.

On July 29, 1927, C. B. Johnson and Jessie M., his wife, executed to the City National Bank, agent, twenty-five notes for a thousand dollars each, due three years after date, and by way of security therefor gave a mortgage on four separate pieces of real property in the city of Fort Smith. The bank sold these notes to the following persons: To J. A. and P. L. Riggs, $7,000; to E. N. King, $2,000; to Mrs. D. B. Taylor, $8,000; and to Mrs. Jessie Bracht, $8,000. With the consent of the bank, but without the knowledge or consent of the noteholders, the mortgagors sold one of the four mortgaged lots, referred to as the garage property, for $12,300, after the bank had, without authority, released the lien of the mortgage against that lot. $4,000 of this money was paid to and credited by Mrs. Bracht upon the notes which she had purchased, and $7,500 was credited by the bank on a debt due it by Johnson.

When the remainder of the notes fell due in July, 1930, the loan was renewed, and a new mortgage was given to secure, not only the $21,000 of the old loan then unpaid, but an additional debt of $4,000, so that the last mortgage secured the same amount as the first, and there was included in this renewal mortgage the homestead of Mrs. Johnson, which was of less value than the garage lot described in the first mortgage which the bank had wrongfully released from the mortgage lien.

In a foreclosure proceeding, the history of which is recited in the opinion on the first appeal in this case (*City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293), it was adjudged that the bank was liable to the noteholders for the value of the security (the purchase price of the garage lot) which the bank had wrongfully released, and the noteholders were adjudged to be entitled to recover their *pro rata* share thereof. It was held that the inclusion of Mrs. Johnson's home in the renewal mortgage had been induced by fraud, and that the lien thereof was invalid, in so far as it purported to secure the debt of the bank, but that the mortgage was valid as to all other indebtedness there described which was owned and held by the original note purchasers. It was held that the $4,000, above referred to, which was

paid Mrs. Bracht out of the proceeds of the sale of the released lot was $76.67 in excess of her proportionate share of the sale price of the garage property.

It is recited in this first opinion that King had resold to the bank the two notes for a thousand dollars each which he had purchased, and that there was no controversy between Mrs. Johnson and the remaining noteholders, and that she conceded that they are protected by the mortgage on her homestead if the remaining property is insufficient to pay their part of the debt. With the rights of the parties thus adjudged, the decree of the chancery court ordering the foreclosure of the mortgage was affirmed.

Subsequent proceedings are recited in the opinion on the second appeal (*City National Bank* v. *Riggs,* 189 Ark. 123, 70 S. W. (2d) 574) as follows: The chancery court gave the bank a judgment against the Johnsons on the two notes which it had repurchased from King, but refused to permit it to participate in the security as to the homestead, thereby overruling the contention of the bank that it should be subrogated to all the rights of King which he had to share *pro rata* with the other noteholders in the purchase price of the garage lot. We affirmed that holding and denied the bank's claim to the right of subrogation.

It was also contended in this second appeal that the bank, having paid the Riggs and Mrs. Taylor their *pro rata* part of the proceeds of the sale of the garage lot, should be subrogated to their right *pro tanto* to share in the proceeds of the sale of the homestead; but we held against that contention. But in this second appeal it was said: "We do not understand that the court refused to give the bank a judgment against the Johnsons for the amount it paid to the Riggses and Mrs. Taylor. The decree did provide that, if the bank paid said judgments to the Riggses 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."

It was thought that this second appeal sufficiently adjudged the rights and liabilities of the various parties, so that the proceeds of the sale under the decree of foreclosure might be distributed.

The commissioner appointed for that purpose under the authority of the decree of foreclosure, which we affirmed on both appeals, proceeded to sell the mortgaged property, and the report of sale was approved after various motions relating thereto had been heard and disposed of. The bank became the purchaser of all the property at this sale. The property referred to as Mrs. Johnson's homestead was sold for $3,100. Now, under the decrees of the chancery court and the opinions of this court affirming them, this $3,100 inured to the benefit of the noteholders, but did not inure to the benefit of the bank, for the reason, so far as the bank was concerned, that the bank had no valid mortgage on the homestead to secure its debt.

Upon consideration of the confirmation of the commissioner's report, Mrs. Johnson filed a motion in which she stated that she "does not object to confirmation of sale (of her homestead), but asks that the sale be confirmed in her name, and the title quieted in her, and that in addition thereto she have and recover judgment of and from the defendants, City National Bank and I. H. Nakdimen, for her damages suffered during the time her property was withheld from her."

It appears that in the original suit for foreclosure a receiver was appointed to take charge of Mrs. Johnson's homestead, and that he did so, and rented the property to a tenant and collected the rents thereon. During his possession the receiver collected $525 in rents, and he disbursed therefrom, for insurance, taxes, maintenance and repairs, the sum of $275.94, leaving in his hands the sum of $249.06, and the court rendered judgment in her favor for this balance. This appears very clearly to have been a proper order. Mrs. Johnson had been wrongfully

deprived of the possession of this property by the appointment of a receiver, and was therefore entitled to the net amount of the rents during the time of this deprivation.

The court confirmed the sale of the homestead in Mrs. Johnson, and not in the bank. It appears to be conceded that at the foreclosure sale the bank became the purchaser of the homestead at a price substantially less than its value. The effect of this order of confirmation was to require the bank to pay to the commissioner the $3,100 for the benefit of the noteholders, and to surrender the homestead to Mrs. Johnson free from the lien of the mortgage. This order is complained of as being inequitable and unjust. The court might have confirmed this sale in the bank, and then ordered the bank to convey to Mrs. Johnson; but that result has been accomplished in a less circuitous manner.

As to the equity and justice of this ruling two answers may be given: First, that the situation arose and was caused by the wrongful acts of the bank (a) in wrongfully releasing the lien of the mortgage on the garage tract, and then (b) in wrongfully including the homestead in the renewal mortgage; and, the second answer is that the order complained of accords with the opinions on the former appeals, which, whether right or not, have become and are now the law of this case.

Pending the disposition of the commissioner's report, the bank and Nakdimen filed a pleading in the nature of a supplemental complaint, in which it was alleged that Johnson and wife, in addition to their original debt to the bank, were further indebted to the bank in a note for $4,765, dated August 8, 1932, which indebtedness would be and was secured by the general indebtedness clause in the renewal mortgage. It was alleged in this pleading that the lot referred to as the homestead had never been the homestead of Mrs. Johnson, and, if so, that she had abandoned her homestead right. It was alleged that the bank was entitled "to an equitable garnishment against the proceeds, which are in the custody of the court, and they are entitled to have said interest of Jessie M. Johnson held in this court until a judgment is

obtained on said note," and the fact be determined whether the alleged homestead was in fact the homestead of Mrs. Johnson, and that, if not, it be sold in satisfaction of the judgment which would be secured on the note, there being no defense against it.

This plea on motion of Mrs. Johnson was struck from the files. Whereupon the bank brought suit at law upon the note last mentioned, and sued Mrs. Johnson as a non-resident, and caused an attachment to be levied upon the alleged homestead. The chancellor issued an order temporarily restraining the prosecution of this suit at law, which was later further heard and made permanent, and application has been made here for a writ prohibiting the chancery court from interfering with the prosecution of this suit at law. This portion of the cause may be disposed of by saying that prohibition will not lie to review an order already made. 50 C. J., page 662, chapter Prohibition, subtitle "When Writ Lies," and authorities there cited. The petition for a writ of prohibition is therefore denied.

The supplemental complaint should not have been struck from the files. The court should have determined whether the bank was entitled to the equitable garnishment prayed. It should also have determined the total indebtedness from the Johnsons to the bank. This would, at least, have prevented another suit, the one at law, the prosecution of which was enjoined. All parties were before the court, and complete and final relief should have been awarded. The reason for the court's order enjoining the prosecution of the suit at law does not appear from the decree; it probably was that the question of Mrs. Johnson's right of homestead had already been decided in the original decree. For the reversal of this decree it is very earnestly insisted that Mrs. Johnson's right of homestead has not yet been decided. It may not have been necessary, in deciding the validity of the mortgage as against the property referred to as the homestead, to determine whether it was in fact a homestead. If—as the court decided—this property had been included in the mortgage through fraudulent representations, that inclusion was void, whether the property was

a homestead or not. But, in the determination of this question of fraud, the court may have been influenced by the fact that the lots wrongfully included were a homestead. But, however that may be, the fact remains that it was expressly decided, in the original decree, which we affirmed on the first appeal, that the property was the homestead of Mrs. Johnson. This reference to the property appears in the decree: "* * * which was her separate property, and which constituted her homestead, and still constitutes her homestead." In the brief on the appeal in that case it was argued by appellants that: "The evidence in this record is insufficient to show that Mrs. Jessie M. Johnson is entitled to an Arkansas home as exempt." The opinions in both appeals, while referring to the property as Mrs. Johnson's homestead, did not discuss this question; but the affirmance of the decrees in their entirety must be treated as an affirmance of the finding of fact above quoted from the original decree.

The chancery court should make, if it has not already made, final disposition of the proceeds of the foreclosure sale in accordance with the directions of this and the former opinions, and should ascertain the total indebtedness due the bank from the Johnsons and render judgment accordingly. Whether, when this has been done, the homestead is subject to execution through its abandonment subsequent to the original decree is a question which may be decided if an execution is levied thereon.

Except as stated, the decree is affirmed, but, for the purpose indicated, the cause will be reversed for further proceedings not inconsistent with this opinion.

City National Bank *v.* Taylor.

4-3911

Opinion delivered June 24, 1935.

James B. McDonough, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

HUMPHREYS, J. This is the fourth appeal in this case. The first appeal is reported under style *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293. The second appeal is reported under style *City National Bank* v. *Riggs,* 189 Ark. 123, 70 S. W. (2d) 574. The third appeal is reported under style *City National Bank* v. *Johnson, ante* p. 29. On the first two appeals, the decrees rendered by the chancery court were affirmed, and on the third appeal the decree rendered by the chancery court was affirmed in part and reversed in part. All these appeals came to this court for settlement of questions which arose in the foreclosure proceeding commenced in the chancery court of the Fort Smith District of Sebastian County on December 2, 1932, and this appeal is from a decree in the same case rendered in favor of appellee against appellant on appellee's motion or petition for damages in the sum of $2,797.83 on the 5th day of October, 1934, alleged to have been sustained by her on account of being induced to exchange notes in the sum of $8,000, and a mortgage securing same on property in Fort Smith for renewal notes in the same amount on the representation by appellant that the renewal notes were secured by a mortgage covering the same property and a lot of additional property. A detailed statement of the facts connected with the foreclosure proceeding may be found in the opinions above referred to, and reference is made to them for a general history of the case rather than to restate them in this opinion. The only additional facts not appearing in those opinions relate to the sale of the four pieces of property described in the renewal mortgage executed by the Johnsons, and the apportionment of the proceeds derived from the sale between those entitled to participate therein, and that the bank paid them *pro rata* the judg-

ment against it for $12,300, the amount received from the sale of lot 9, block 30, city of Fort Smith, which it released from the first mortgage without authority and failed to include in the new mortgage. The four pieces of property actually included in the renewal mortgage brought $8,075 at the foreclosure sale. After apportioning appellee's share in the $12,300 received from the bank, and the $8,075 received from the sale and applying it to her judgment against the Johnsons, it left a balance of $2,797.83 due her from the Johnsons, which deficiency was made the basis in awarding damages to appellee against appellant for the deceit or fraud practiced upon her that induced the exchange of the old notes and mortgage for the new notes and renewal mortgage. The rendition of this judgment was erroneous. She was awarded a judgment in the decree rendered by the trial court on May 17, 1933, for the damages she sustained by reason of the deceit or fraud practiced upon her inducing the exchange of the securities, which judgment was appealed from and affirmed by this court in the case styled *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293. Appellee was entitled to only one judgment on account of the deceit or fraud, which she obtained in that decree, and which has been paid. If the construction given that decree by appellee were adopted, it would necessarily make the bank a guarantor of her investment, which was not the intention, as the securities were assigned to her by the bank without recourse. *Awotin* v. *Atlas Exchange Nat. Bank,* 295 U. S. 209, 55 S. Ct. 674.

The deficiency judgment is therefore reversed as to the bank (appellant), and the cause is remanded with directions to dismiss appellee's motion to obtain additional damages.

CITY NATIONAL BANK *v.* JOHNSON.

4-3931

Opinion delivered July 1, 1935.

James B. McDonough, for appellants.

Daily & Woods and *Watts & Wall,* for appellee.

HUMPHREYS, J. This is the fifth appeal in this case in addition to a petition for a writ of prohibition. The first appeal is reported under style *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293. The second appeal is reported under style *City National Bank* v. *Riggs,* 189 Ark. 123, 70 S. W. (2d) 574. The third appeal is reported under style *City National Bank* v. *Johnson, ante* p. 29. The fourth appeal is reported under style *City National Bank* v. *Taylor, ante* p. 35. All these appeals, as well as a petition for prohibition, involve questions which arose in the foreclosure proceeding commenced in the chancery court of the Fort Smith District of Sebastian County on December 2, 1932, and those cases are referred to for a history and statement of the case except such additional facts as appear in this opinion. This is an appeal from a decree in the same case rendered in favor of appellee against appellant on appellant's motion or petition to enjoin appellant from proceeding by attachment in the circuit court of the Fort Smith District of Sebastian County to fix a lien and enforce same upon the homestead of appellee, which was included in the original mortgage which had been foreclosed, sold, and the title confirmed in appellee.

The ground upon which appellant sought to fix a lien by attachment out of the circuit court on the homestead

was that the property was not her homestead, and that, if ever her homestead, she had abandoned it. Appellant filed a supplemental complaint in the chancery court claiming the homestead property, or the proceeds from the sale thereof, in which it alleged that, under its equitable garnishment, it was entitled, on the ground that said property was never her homestead, or, if so, she had abandoned same, which supplemental complaint was struck out by the chancery court. Appellant excepted to this action of the court, from which it prosecuted an appeal to this court. On the appeal it was decided that, by the affirmance of the decrees in their entirety on former appeals, she was entitled to the property as her homestead. This court said, in the case of *City National Bank* v. *Johnson, ante* p. 29, that:

"The supplemental complaint should not have been struck from the files. The court should have determined whether the bank was entitled to the equitable garnishment prayed. It should also have determined the total indebtedness from the Johnsons to the bank. This would, at least, have prevented another suit, the one at law, the prosecution of which was enjoined. All parties were before the court, and complete and final relief should have been awarded. The reason for the court's order enjoining the prosecution of the suit at law does not appear from the decree; it probably was that the question of Mrs. Johnson's right of homestead had already been decided in the original decree."

During the pendency of the appeal in the case referred to, and, after a supersedeas bond had been filed, appellant brought its suit in attachment in the circuit court upon the identical note, and upon the same ground set forth in its supplemental complaint, and was enjoined from prosecuting the attachment branch of the suit at law by the chancery court. This suit at law was brought to the attention of this court by an application for prohibition against the chancery court, and the petition for prohibition was consolidated and briefed with the case above referred to. Appellant took the position in the case above referred to that the chancery court was without jurisdiction to enjoin it from proceeding with its attach-

ment suit. This court, in denying the petition for prohibition, said:

"This plea on motion of Mrs. Johnson was struck from the files. Whereupon the bank brought suit at law upon the note last mentioned, and sued Mrs. Johnson as a nonresident, and caused an attachment to be levied upon the alleged homestead. The chancellor issued an order temporarily restraining the prosecution of this suit at law, which was later further heard and made permanent, and application has been made here for a writ prohibiting the chancery court from interfering with the prosecution of this suit at law. This portion of the case may be disposed of by saying that prohibition will not lie to review an order already made. 50 C. J., page 662, chapter Prohibition, subtitle 'When Writ Lies,' and authorities there cited. The petition for writ of prohibition is therefore denied."

Appellant contends that the chancery court had no authority to issue the injunction, because the case was pending here on appeal, and that a supersedeas bond had been filed. By reference to the supersedeas bond, it appears that it was conditioned for the payment of a judgment rendered against appellant for $249.06 for net rents collected from the homestead by the receiver during the pendency of the foreclosure suit. The homestead property was in the hands of a receiver appointed by the chancery court when the writ of attachment was levied thereon, and at the time the receiver was under an order of the court to deliver the homestead property to appellee.

The homestead was *in cutodia legis* at the time the attachment was levied upon it, and was not subject to attachment. The supersedeas bond conditioned to pay the rent did not dissolve the receivership or have the effect of releasing the property from the custody of the chancery court.

Again, the same issues and all the parties involved in the attachment proceeding as well as the property itself were involved in the supplemental complaint, and, with full knowledge that a suit in attachment had been filed in the circuit court, and levied upon the homestead,

this court directed the chancery court to ascertain the total amount due appellant by appellee, and to credit same with the proceeds derived from the foreclosure sale, and to try out the issue of whether there had been an abandonment of the homestead after the rendition of the original decrees, and, if so, to subject the homestead property by execution to the indebtedness due by appellee to appellant. This direction was in effect saying to the chancery court that it, and not the circuit court, had jurisdiction to try the only remaining issue in the foreclosure proceeding; that is, to find whether appellee had abandoned her homestead after the original decrees had been rendered, and, if so, to subject same to the payment of the balance the Johnsons owed it. The chancery court acquired jurisdiction of the subject-matter and all the parties, and was in a position to determine all questions which had or might arise in the foreclosure proceeding, and to complete justice between all concerned without aid or assistance from another court.

The decree is therefore affirmed.

TYLER *v.* STATE.

Crim. 3920

Opinion delivered April 1, 1935.

Paul Miller, Ed B. Dillon and *Robert L. Rogers II,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

MEHAFFY, J. The appellant was indicted, tried and convicted of the offense of practicing medicine without a license, in Lincoln County, Arkansas. Appellant filed demurrer to the indictment for the following reasons:

"First: That said indictment shows upon its face no definite time when said alleged offense was committed.

"Second: That said indictment does not show with clarity the offense alleged to have been committed.

"Third: That said indictment does not state sufficient facts to constitute a crime.

"Fourth: That the indictment was not returned within the time prescribed by the statutes of this State."

The demurrer was overruled, and the case was tried on the following agreed statement of facts:

"It is agreed by counsel that Dr. P. A. Tyler was convicted of the crime of perjury in the Pope County Circuit Court on the 19th day of June, 1930. That on the 14th day of November, 1933, his license as a practicing physician was revoked by the State Board of Medical Examiners, and notice thereof was given to the defendant.

"That thereafter the defendant practiced medicine in Lincoln County, as charged in the indictment; and it is agreed by and between counsel for the State and the defendant that the court may pass upon the guilt or innocence of the defendant on the charge laid in the indict-

ment on the agreement of facts as herein set out." This was all the evidence introduced in the case.

The court found the appellant guilty, and fixed his punishment at a fine of $25. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant calls attention to a number of authorities to the effect that the board cannot revoke a physician's license without a hearing. Section 8242 of Crawford & Moses' Digest provides for the revocation of the license of a physician or surgeon for several causes, among others, conviction of the crime involving moral turpitude. This section also provides that the physician must be furnished with a copy of the complaint and given a hearing.

It is agreed that Dr. Tyler was convicted of the crime of perjury in the Pope Circuit Court on June 19, 1930. The punishment for perjury is imprisonment in the State penitentiary for not less than one nor more than fifteen years. It is not disputed that the crime of perjury involved moral turpitude, and therefore the board, under § 8242, would have the right to revoke license.

It is argued, however, that the board did not give the appellant a hearing. Whether it did or not we cannot say. The agreed statement of facts recites "that on the 14th day of November, 1933, his license as a practicing physician was revoked by the State Board of Medical Examiers, and notice thereof was given to him." There is no evidence tending to show that the board revoked his license without a hearing. The presumption is, when there is no evidence to the contrary, that the State Board of Medical Examiners acted lawfully.

Section 8279 of Crawford & Moses' Digest is as follows: "Whenever any physician and surgeon, or person engaged in the practice of medicine or surgery in this State, shall be convicted of any crime and misdemeanor involving moral turpitude, in addition to the other penalty or penalties imposed upon him, shall be added a revocation of his license to practice medicine and surgery."

There is no evidence, however, to show whether the court at the time of appellant's conviction revoked his license to practice medicine. It was the duty of the court to do so.

It is earnestly insisted by the appellant that the board could not, after three and a half years after his conviction, revoke his license. The agreed statement of facts does not show what the board did, whether a hearing was granted, nor does it show that his license was revoked because of his conviction. It is merely recited that appellant was convicted, and that his license was thereafter revoked. In the absence of evidence to the contrary, as we have already said, we must assume that the board acted lawfully when it revoked his license. And it is agreed that thereafter he practiced medicine in Lincoln County, as charged in the indictment.

The appellant argues a number of questions, and in his motion for a new trial states that he has discovered important evidence since the verdict; that he was not given a fair and legal hearing when his license was revoked by the Medical Board. This may be true, but there is no evidence to support this statement contained in the motion for new trial. He also states in his motion that he was not notified of any charges against him by the board, and had no chance to defend himself by appearing in person or by his attorney. If this statement is true, it should have been in the agreed statement of facts, or he should have introduced evidence of this fact. We are bound by the evidence and cannot take the statement in the motion for new trial as evidence. Appellant also states in his motion that his license was revoked by one member of the board without notice to the other members and without notice to him at the first hearing, and the first time license was purported to have been revoked. He further says that he received no notice from the board after the second hearing as to any action taken on his right to practice, although said board agreed to notify him within three days after the hearing as to what disposition was made of his case. None of these things in his motion for new trial appear in the evidence, and, although he says he has discovered this since the

trial, most of it he was bound to know at the time of the trial. For instance, if he had no opportunity to be present and have a hearing, he certainly knew this, and should have incorporated it in the agreed statement of facts. It appears from his motion for new trial that there was a second hearing, and he complains that after this hearing the board failed to give him notice, although it had promised to do so within three days. The fact is that appellant agreed he had been convicted of a crime involving moral turpitude; that his license had been revoked, and that he had thereafter practiced medicine in Lincoln County as charged in the indictment. The indictment charged him with the crime of practicing medicine without license. This, of course, was in violation of law, and he agrees in the statement of facts that he did this.

We find no error, and the judgment is affirmed.

McIlroy *v.* McIlroy.

4-3873

Opinion delivered May 27, 1935.

Duty & Duty and *Karl Greenhaw,* for appellant.

Pearson & Pearson and *Bernal Seamster,* for appellee.

BUTLER, J. In February, 1933, Ethel McIlroy, wife of W. H. McIlroy, brought suit for separate maintenance. W. H. McIlroy filed an answer and cross-complaint for divorce, whereupon plaintiff amended her complaint, praying for divorce, for alimony, and a settlement of property rights. The chancellor found that "the defendant was guilty of such acts and indignities toward the plaintiff herein as to render her condition in life intolerable in that he treated her with abuse and neglect steadily and consistently pursued; that defendant was guilty of constant nagging and quarreling with the plaintiff herein, and that such acts were done through no fault of the plaintiff," whereupon a decree was rendered granting plaintiff absolute divorce, fixing her alimony at the sum of $50 for twenty-four months and allowing her attorneys' fees. The personal property involved appears to have consisted only of furniture and household accessories, a part of which was decreed to be the property of the Industrial Finance Company, a part belonging to plaintiff individually, and a part to defendant. Subsequent to this decree, a supplemental order was made allowing plaintiff $250 for the expense of a contemplated operation, which amount was to be deducted from the payment of the alimony of the last five months of the

twenty-four months' alimony previously granted. In plaintiff's amended complaint she prayed for an interest in the dwelling house which had been occupied by her and the defendant. This prayer was ignored by the decree.

One of the contentions on appeal is that the court should have adjudged plaintiff an interest in the home. Another contention is that the court erred in not giving plaintiff a certain carpet and an interest in the dining room furniture, and it is lastly contended that the decree as to alimony was in effect an allowance of alimony in a gross amount.

Since the rendition of the decree, the defendant, W. H. McIlroy, has paid a substantial sum of money under and by virtue of the divorce decree as alimony to the plaintiff which she has accepted. Plaintiff, however, has not accepted any item of personal property under and by virtue of the decree. This, defendant (appellee) contends, constitutes a waiver of the right to prosecute the appeal. The appellee argues that appellant, having obtained and accepted a decree of divorce and having been paid a part of the alimony allowed thereunder, is estopped to prosecute an appeal as she has accepted a part of the benefits of the decree. To sustain this contention, we are cited to the cases of *Bolen* v. *Cumby,* 53 Ark. 514, 14 S. W. 926; *Dismukes* v. *Halpern,* 47 Ark. 320, 1 S. W. 554; *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6; *Dawson* v. *Mays,* 159 Ark. 331, 252 S. W. 33; *Coston* v. *Lee Wilson Co.,* 109 Ark. 548, 160 S. W. 857, and *Hutton* v. *Pease,* 190 Ark. 809, 81 S. W. (2d) 21. The cases cited do not support the contention made.

In *Dismukes* v. *Halpern, supra,* the point decided was that the acceptance of a deed imposing certain terms binds the grantee to their performance. In the case of *Taylor* v. *Taylor, supra,* it appears that the wife had obtained a decree of divorce in which proceeding no property rights had been sought or adjudicated. Subsequent to the decree and after the lapse of the term at which it had been granted, the divorced wife brought an action praying for one-third of her former husband's property. The court held that the statute under which plaintiff brought her action contemplated a division of the hus-

band's property when the decree of divorce was granted, and that, if the wife failed then to ask for and obtain such relief, the matter became *res judicata.* The decree first rendered was not entered until a later date. The plaintiff contended that she was entitled to the relief prayed in the subsequent suit as she was not present when the divorce decree was entered *nunc pro tunc* by the court on its own motion. In disposing of this contention, the court held that the decree was for plaintiff's benefit, and that she could not consider it valid for one purpose and invalid for another, and that she had no right to complain that she did not obtain the relief which she neither asked nor desired in the first instance.

In the case of *Dawson* v. *Mays, supra,* a wife had obtained a divorce and, after the death of her divorced husband, sought to have the decree set aside in order that she might take dower in his estate. The court held that the wife could not thus change her status after the death of the husband from whom she had secured a decree of divorce.

Bolen v. *Cumby, supra,* was an action of ejectment in which the plaintiff recovered a judgment for the possession of the land in question and the defendant recovered a judgment for the value of the betterments he had placed thereon. The defendant was tendered the amount of his judgment, which he accepted. On appeal it was held: "His acceptance of the amount adjudged to him for ameliorations is inconsistent with his claim of title and of the right to possess the land. The amount adjudged to him is the recompense for the loss of the possession and of his supposed title. He cannot have the title and possession, and also remuneration for their loss. He cannot, therefore, while enjoying the remuneration awarded him, prosecute an appeal from the residue of the judgment." The doctrine of this case was restated in *Coston* v. *Lee Wilson Company, supra,* and there is nothing in the case of *Hutton* v. *Pease, supra,* which in any way impairs it.

In the case at bar there is no cross-appeal challenging the amount of alimony to be paid each month. Therefore, in any event, the appellant is entitled to those sums,

and there is nothing inconsistent in her acceptance of the same and her contention as heretofore stated. *Kelley* v. *Laconia Levee District,* 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

It is the contention of appellant that she should have been awarded some interest in the home as she was led to believe, while it was being erected, that it was to be in fact and in law the home of her husband and herself. Her contention was based on the following circumstances: appellant and W. H. McIlroy were married in 1923. They lived together as husband and wife until early in 1927 when she sued for, and obtained, a divorce. She was awarded $100 per month as alimony for a certain period, at the expiration of which she was to be paid the sum of $5,000 in cash additional. J. H. McIlroy, father of W. H. McIlroy, guaranteed the payment of these sums. Some two or three months after the decree of divorce, W. H. McIlroy effected a reconciliation. The decree of divorce was annulled, and the marital relation resumed and the property settlement set aside. They had previously lived in apartments or boarded, and in effecting the reconciliation appellant was promised among other things that a nice home would be built for her. J. H. McIlroy was the owner of a number of building lots, and he, in company with his son and appellant, selected certain of these lots upon which the home was to be erected. J. H. McIlroy pointed out these lots to them and was present in person frequently during the construction of the dwelling. Mrs. McIlroy was there almost every day. During the period of construction, in order that her husband might be better able to build the house, appellant paid her own personal expenses from her earnings and a material part of their living expenses. The construction of the house began sometime in 1929, and it was completed in the latter part of 1930. Appellant entered upon the occupancy of the house when it was completed in the belief that it was the home of her husband and herself. She had no intimation that it was not such until after the filing of her complaint in this case, when—and in a short time thereafter—a deed was placed upon record from J. H. McIlroy to the Industrial Finance

Company conveying the lots upon which the home stood. The Industrial Finance Company is a corporation, which, according to the testimony of J. H. McIlroy and W. H. McIlroy, was created for the convenience of J. H. McIlroy in the conduct of his business and of which he is the virtual owner. From the time of its incorporation and until the hearing of this case, W. H. McIlroy was the president of this corporation and in active and sole management thereof. He is also vice-president of the McIlroy Bank & Trust Company of which J. H. McIlroy is president; J. H. McIlroy and his sister owning fifty per cent. of the capital stock of this institution. In addition to his official connection with the bank and the Industrial Finance Company, W. H. McIlroy is connected in an official way with other allied industries.

W. H. McIlroy is a man, forty-three years of age, and in the discharge of his business duties in connection with the varied McIlroy interests he makes frequent and extended business journeys. Notwithstanding all this, he testified that since 1929 he had received no remuneration. He also testified that the home was built with money furnished by the Industrial Finance Company and not with his own money. It was paid out of an account carried as "W. H. McIlroy, Special." It appears, however, that in July, 1930, while the house was under construction, W. H. McIlroy acquired from a sale of certain stock the sum of $22,700 in cash which he paid into the treasury of the Finance Company. In explaining the disposition of this sum, he stated that at the time this money was received by him he owed the Finance Company $9,000, which was paid out of the sum he received, leaving $13,700 to his credit in the treasury of the company. When asked what became of this balance, he answered, "then I began to whittle on that—different withdrawals." When again pressed in this particular, he answered, "I spent it." When asked, "What for," he answered, "Thousands of things—living expenses," and when urged to further explain, he said, "I told you I spent it in numerous ways—living."

It is undisputed that appellant in 1928 was earning, from a business of her own, about $200 per month net,

and at the time appellee said that he was using his money for living expenses it is evident that it was not expended on his wife. She was able to, and did, present vouchers for her personal expenses during the year 1929, including drugs, clothing, traveling expenses, etc., amounting in the aggregate to more than $1,000, and for approximately the same sum in the year 1930. She produced also canceled checks for sums expended for household expenses—pay of the servant, groceries, household utensils, laundry, etc., for the year 1929 in the approximate sum of $170; and for the year 1930, in the approximate sum of $129. All of this came from her earnings except an allowance of $75 a month which appellee gave her for an uncertain period of time, but which, it is admitted, he stopped giving her about June, 1930. She continued to pay her personal expenses for a further period of time—at least during the year 1931.

W. H. McIlroy, in explaining why he continued to work without pay, said, "I have a house to live in, and another consideration is, I am representing my own folks' interests." Since their separation he has continued to reside in the home, keeping open house and having a housekeeper to look after the establishment at an expense, he says, of about $130 per month. When it is remembered that appellant was paying her personal expenses and contributing to the actual household expenses, it seems clear that the living expenses about which appellee testified could not have been very great, and, as his traveling expenses were paid by the business interests he represented, there remained no other expense save his own personal expenditures. From this, it follows that his explanation of how the $13,700 was spent is both unsatisfactory and insufficient.

When it is remembered that the construction of the house began in 1929, that the Finance Company paid the bills therefor, and in July, 1930, W. H. McIlroy was indebted to said company in the sum of $9,000, the only reasonable explanation for this is that this debt was contracted for money furnished in building the house. When the $13,700 was paid into the treasury of the Finance Company in July, 1930, while the house was still under

construction, there can be but little doubt, but that it, too, went into the construction of the house, and that J. H. McIlroy knew of this. It is our conclusion that at least $13,700 was used in the construction of the house, and, as the title to the property was in J. H. McIlroy, it should be treated as personal property of W. H. McIlroy. The appellant is therefore entitled to one-third thereof under § 3511, Crawford & Moses' Digest, and should have judgment against W. H. McIlroy for that amount.

As to the division of personal property, the evidence relative to the ownership of the carpet in controversy is in conflict. It is admitted that appellant bought the carpet and paid $150 therefor with her own money. Appellee claims that it was given him by the appellant, and, while she denied this, we cannot say that the finding of the trial court was against the preponderance of the evidence. It must therefore stand. The situation as to the dining room furniture is quite different. It is undisputed that it cost about $700; that appellee paid only $350 of that amount and appellant paid the balance. The court therefore erred in awarding the furniture to the appellee. It should have declared that the appellant have an equal interest therein and ordered the same sold and the proceeds divided between appellee and appellant.

On the question of alimony, we are of the opinion that the decree of the chancellor was in effect the award of a gross sum to be paid in installments which is contrary to the doctrine announced in our cases cited by appellant namely, *Brown* v. *Brown,* 38 Ark. 324; *Wood* v. *Wood,* 59 Ark. 441, 27 S. W. 641, and *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762. The rule in those cases seems to be that a court, in awarding alimony, should not fix a specific sum, but a continuing allowance payable at fixed regular intervals. It is true that future circumstances might arise which would warrant the court in altering the amount of the allowance or in discontinuing it altogether.

The uncontradicted testimony shows that appellant, by reason of physical infirmities, has been obliged to discontinue her work, that this occurred a year or more before the institution of this action, and that, if she is to

be restored to health, it will be necessary for her to have a serious and expensive operation performed. Her disability occurred and persisted during the existence of the marriage contract and was considered by the trial court. In a motion filed since the transcript was lodged in this court, it is suggested that the necessary operation has been performed, and that it cost a sum greatly in excess of the amount awarded by the trial court for that purpose. The appellant, however, in the court below, did not offer any evidence as to the probable expense of the operation, and we cannot say that the amount fixed is unreasonably low. Under the circumstances, we think the trial court erred in deducting this expense from the alimony.

The decree of the trial court as to the divorce is affirmed, and in other respects reversed, and the cause is remanded with directions to award appellant the sum of $50 per month as alimony with no limit now fixed on said number of monthly payments, and, in addition thereto, that she have judgment in the sum of $250 for the operation; that she be awarded a one-half interest in the dining room furniture; that she have judgment against W. H. McIlroy in the further sum of $4,566 ($4,566 1/3 of $13,700 aforesaid) and on remand that J. H. McIlroy and the Industrial Finance Company be made parties to the end that they show cause why a lien should not be declared on the lots conveyed by J. H. McIlroy and the buildings thereon to satisfy $4,566 of the sums ordered to be adjudged against W. H. McIlroy, and for such other proceedings as the parties may be advised in conformity with the principles of equity and not inconsistent with this opinion.

McHaney, J., dissents.

NEW YORK LIFE INSURANCE COMPANY *v.* CAMPBELL.

4-3882

Opinion delivered June 3, 1935.

[redacted]

James B. McDonough, for appellant.

Miles, Armstrong & Young, for appellees.

JOHNSON, C. J. In 1928 appellant caused to be issued its policy of life insurance by the terms of which it insured the continued life of Bruce Campbell, and a corporation in which the insured was financially interested was designated therein as beneficiary. On February 4, 1932, the original policy was reissued and Anna L. Campbell, wife of the insured, was named therein as beneficiary. This policy expressly provided that "this policy takes effect as of the nineteenth day of November, 1928, which day is the anniversary of the policy." On March 19, 1932, the policy lapsed for nonpayment of premium and on March 29, 1932, the insured made written application for reinstatement which was subsequently on March 30, 1932, duly granted and the policy reinstated.

The relevant provisions of the policy necessary to a decision of the contention urged on this appeal are as follows:

"Reinstatement. This policy may be reinstated at any time within five years after default upon written application by the insured and presentation at the home

office of evidence of insurability acceptable to the company, and upon payment of overdue premiums, with six per cent. interest thereon from their due date."

* * *

"Incontestability. This policy shall be incontestable after two years from its date of issue, except for nonpayment of premiums, and except as to provisions and conditions relating to double indemnity."

About September 10, 1933, the insured suffered a stroke of paralysis and advised appellant thereof, and this suit was instituted in equity by appellant against the insured and the designated beneficiary on March 27, 1934, seeking the cancellation of the policy, because, as it is alleged, its reinstatement was superinduced by fraud practiced by the insured upon it. Appellees answered appellant's complaint by general denial, and affirmatively pleaded the issuance of the policy in 1928, and the two years incontestable clause therein contained as a complete defense to the alleged cause of action.

The testimony adduced upon trial was to the effect that the insured stated in his application for reinstatement of his policy of insurance that his health and physical condition were in the same state they were when the original policy was issued in 1928, and that within two years last past he had had no illness, disease or injury, nor had he been treated by or consulted a physician. Dr. Gregg testified that he treated the insured from October 2, 1931, until February 1, 1932, for dizziness or vertigo, and that the insured's kidneys showed some albumen and a toxic condition. That witness pronounced insured's ailments as "chronic nephritis."

Other testimony was heard by the chancellor, but it is not deemed relevant to the decisive issue on appeal, and we therefore omit a synopsis thereof. The chancellor dismissed appellant's complaint for want of equity, and this appeal follows:

The decisive and controlling question presented by this appeal is, do the misrepresentations made by the insured, and upon which the insurer relied in reference to his health in his application for the reinstatement of his policy render such reinstatement void?

The answer to this question is dependent upon a construction of the contract of insurance in reference to reinstatements of lapsed policies. This contract, as appears from the provisions heretofore quoted, gives to the insured the right to be reinstated at any time within five years after default upon his written application—the presentation of evidence of insurability, and the payment of past-due premiums with interest. We have many times decided under contracts of insurance not materially different from the one here under consideration, that the right of reinstatement is not a gratuity on the part of the insurer, but is a contractual right and obligation, and that the insurer has no right or authority to enlarge the terms upon which reinstatement may be effected. *Equitable Life Ins. Co.* v. *King,* 178 Ark. 293, 10 S. W. (2d) 891; *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Illinois Bankers' Life* v. *Hamilton,* 188 Ark. 887, 67 S. W. (2d) 741; *Security Life Ins. Co.* v. *Leeper,* 171 Ark. 77, 284 S. W. 12; and *Life & Casualty Co.* v. *McCray,* 187 Ark. 49, 58 S. W. (2d) 199.

In *Illinois Bankers' Life* v. *Hamilton, supra,* we stated the applicable rule as follows:

"It will be noted that the provision for reinstatement contained in the policy in the case at bar places no burden or restriction upon the right of reinstatement save the furnishing of satisfactory and acceptable evidence of insurability, and the payment of all past-due premiums with compound interest thereon at the rate of six per cent. per annum, the latter provision being ample consideration moving to the company. As is held in the Arkansas cases cited, the company had no right to enlarge the terms upon which reinstatement could be obtained. It had the right to defer its action on the application for reinstatement for a reasonable time in which it might investigate the insurability of the applicant, and there was no requirement in the original contract that the answers to the questions in the application for a reinstatement should be true and a condition precedent to the reinstatement of the policy, and to its validity when so reinstated. * * * In our cases cited, *supra,* the doctrine is laid down that, since the reinstate-

ment is not a gratuity, the insurer had no right to enlarge the terms upon which reinstatement could be obtained."

It necessarily follows from what we have said, and the cases cited in support thereof that the reinstatement of the insured by appellant created no new contract between them, but simply revives and reinstates the original contract and all provisions thereof, and subsequently the rights and obligations of the respective parties thereto must be measured thereby.

Appellant next urges that the incontestable clause of the policy heretofore quoted gives to it two years from the date of reinstatement to contest the insured's right to reinstatement. This construction can be sustained only upon the theory that courts can or should make contracts for parties. We have uniformly held otherwise. See cases cited vol. 2, Crawford's Arkansas Digest, §§ 67, 68, 69 and 70 under title of Contracts. The incontestable clause here under consideration provides in no uncertain language that the policy shall be incontestable after two years from its date of issue except for nonpayment of premiums, etc. This can mean but one thing, when applied to the facts and circumstances of this case; namely, that this suit can not be maintained. The original contract does not give to the insurer the right to contest reinstatements effected through fraud subsequent to two years from the date of the issuance of the policy, and this suffices to answer all contentions advanced in this behalf. See *Life & Casualty Ins. Co.* v. *McCray, supra.*

The contention is urged that such construction of the contract of insurance permits the insured to effect reinstatement by fraud and deceit. Even so the insurer had a fair opportunity to make such investigation in reference to the truthfulness of the answers contained in the application for reinstatement prior to the reinstatement as it saw fit, and when it accepted the insured's statements in reference to his health and physical condition, and the policy was reinstated by the insurer, the door was forever closed to future investigation.

The contention is also made that *Pacific Mutual Life Ins. Co.* v. *Butler,* 190 Ark. ....., 78 S. W. (2d) 813, is au-

thority for the position that fraud which superinduced a reinstatement may be urged at any time to avoid it, and especially it may be invoked within the time provided within the incontestable clause of the contract. This is not the effect of the Butler case. If the policy there under consideration contained an incontestable clause, it is not disclosed by the opinion, and for this reason it is no authority in the instant case.

Many authorities are cited in briefs of counsel from other jurisdictions which support or tend to support the position of the respective parties, but, since our own decisions on the vital questions in the case are decisive of the contentions urged, we deem it unnecessary to discuss these cases.

No error appearing, the judgment is affirmed.

REED *v.* PHILLIPS.

4-3891

Opinion delivered June 3, 1935.

G. E. Garner, for appellant.
Sid J. Reid, for appellee.

McHaney, J. On the 28th day of March, 1934, appellant, O. F. Reed, entered into a written agreement with appellee whereby he leased to appellee during the months of April to December, inclusive, 1934, his ice plant in the town of Rison, consisting of the west twenty-five feet of lot 4 and all of lot 5 in block 9 in said town and all the buildings, machinery and fixtures thereon, for the sum of $2,000 to be paid in monthly installments beginning May 1, and ending September 1, 1934. The contract further provided for an option for the appellee to buy the property for the sum of $5,000, of which the $2,000 paid as rent was to be a credit thereon, and the balance of $3,000 to be paid in two equal installments of $1,500 each on October 1, 1935 and 1936. The option to buy should be made before the 1st day of January, 1935, and the deferred installments of purchase price bore interest at 8 per cent. per annum. The contract further provides:

"As a part of said machinery and fixtures and buildings is now on that part of lot 4, or east 15 feet of said lot, the same is rented to said party of second part, and, in case he decides to buy the balance of said property as aforesaid, then he is to have the said east 15 feet of said lot 4 in block 9 for the sum of $50 to be paid in ice at the price which it is sold to others at that time."

The rent price was paid and accepted by appellant and appellee exercised the option to purchase within the time specified and offered to carry out the contract according to its terms, demanded of appellant that he comply with the contract by executing and delivering to him a deed for the property leased and for the east 15 feet of said lot 4. Appellant refused to do so, and appellee brought suit for specific performance. There was a decree in appellee's favor requiring appellant to convey by warranty deed.

Appellant defended on the ground that his wife did not join in the lease contract and could not be compelled to relinquish her dower interest. The court took this matter into consideration, determined the value of her dower interest and abated the purchase price to the ex-

tent thereof. Appellee had two remedies in the case; he could sue as for breach or specific performance. He elected the latter remedy. He was therefore entitled to have the contract performed to the extent the vendor could perform it and to have an abatement out of the purchase price for any deficiency in title on account of the outstanding dower interest. This court has many times so decided. *Hirschman* v. *Forehand,* 114 Ark. 436, 170 S. W. 98.

It was agreed at the trial that the Bank of Rison held a mortgage on the property in litigation in the amount of $447. In the decree of the court, appellee was given the right to pay said indebtedness and take credit on the deferred payment. This he had a right to do.

As to the east 15 feet of lot 4, it developed that appellant did not own said parcel of land. It is contended by appellant that he should not be compelled to convey property that he did not own. It is insisted by appellee that appellant was the agent of the owner, one W. S. Moody, who by his acquiescence has estopped himself to deny Reed's authority as his agent. The facts show that a part of the buildings is located on the fifteen feet. Appellant has exercised acts of ownership over said lot, leased it to appellee and otherwise dealt with it as his own. It may be that he had no authority to sell said lot. We are unwilling to say that he did have the right to sell and convey title thereto. He has been paid $37.50 of the purchase price and the additional $12.50 has been deposited in the registry of the court. Appellant should be required either to obtain the title to the property from Moody and convey it to appellee, or, if unable to do so, the purchase price should be abated by the value of the property to which the title fails.

The case will be reversed, and the cause remanded for further proceedings in accordance with this opinion at the cost of appellant.

ATKINSON *v.* LYLE.

4-3966

Opinion delivered June 3, 1935.

John A. McLeod, Jr., for appellant.

Bridges, McGaughy & Bridges, for appellees.

HUMPHREYS, J. This suit was brought to enjoin appellees from incumbering by mortgage the real estate in Pine Bluff known as the Merrill Institute, which was conveyed to them in trust in 1889 by Joseph Merrill, and from incumbering and selling certain other income real estate devised to appellees about the same time to aid in the operation of the Merrill Institute. In addition to the real estate conveyed and devised, Joseph Merrill gave appellees $20,000 in cash to build a three-story brick building on the lot conveyed for the use and occupancy of the institute; and it was provided in the deed that the building should be so constructed as to contain on the ground floor two store rooms to be rented for business purposes, the rents and other income from any source to be used in maintaining the institute building, the payment of taxes, procuring public lectures, and payment of incidental expenses. The purposes of the trust were specified in the deed and will so as to include entertainment and educational instruction for the white people of Pine Bluff. Shortly after the execution of the instru-

ments, the trustees constructed a brick building three stories high, fifty feet wide, and one hundred and forty-four feet long on the lot conveyed with a lobby on the first floor instead of two rental stores as provided in the deed. The building has been used since that time by the white people of Pine Bluff for physical, moral and educational development, and the revenue derived from the rentals and operations of the institute have been sufficient until recent years to keep all the property in repair and maintain the trust. Although there is no deficit, the building is old and pretty well worn and needs remodeling and rehabilitation such as a new roof and other substantial and costly repairs, which cannot be made out of the net income. The trustees have decided to mortgage the property for $16,000 with which to make the improvements, so as to include two stores on the first floor for rental purposes, and will do so unless enjoined. The deed and will both provide that the trustees shall have no power to sell and in any manner incumber the property.

The court found that conditions have so changed since the execution of the deed and will that the trustees may sell and mortgage the property to avoid the failure of the trust, and dismissed the complaint of appellant, from which is this appeal.

In thus finding and decreeing, the chancery court overlooked the positive prohibition or inhibition in the deed and will that the trustees should not sell or incumber the property. It was clearly the intention of the donor to prevent any incumbrance being placed upon the property, and to decree otherwise would be thwarting his intention. The trustees took possession of the property subject to all the conditions and restrictions or prohibitions contained in the instruments and cannot be allowed to violate or ignore them. This is a charitable trust, and, concerning such a trust, this court said in the case of *Morrison* v. *Boyd,* 110 Ark. 468, 162 S. W. 69, (quoting syllabi 4 and 5) that:

"The jurisdiction of courts of equity to supervise the execution of a charitable trust created by a will does not include the power to alter the terms of the trust, nor to sanction a diversion of any portion of the trust estate.

"Where a charitable trust is created by a will, it is dependent upon the terms of the will for its existence, and that instrument is the sole measure of the power of those who are called upon to execute the trust, whether the trustees themselves or a court of equity in the exercise of a superintending control, and a court of equity has no authority to exercise any greater powers."

The case of *McCarroll* v. *Grand Lodge I. O. O. F.*, 154 Ark. 376, 243 S. W. 870, relied upon by appellees in support of the decree of the chancery court, is not in point and has no application to the facts in the instant case. The instrument creating the trust in that case contained no restrictions or prohibitions against selling or incumbering the property devised. The *cy pres* doctrine—the doctrine of nearness or approximation—cannot be invoked or applied in the execution of a trust which prohibits in express words the doing of the thing the trustees are attempting to do. In the instant case, the trustees are attempting to incumber a part of the property and sell and incumber the other part, which the donor expressly prohibited them from doing in executing the trust.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to permanently enjoin the trustees from selling or incumbering any or all of said property.

SMITH and MCHANEY, JJ., dissent.

WISEMAN *v.* PHILLIPS.

4-3942

Opinion delivered June 3, 1935.

Louis Tarlowski and *Millard Alford,* for appellant.

Edward B. Dillon, Rowell & Dickey, Buzbee, Harrison, Buzbee & Wright, Oscar Fendler and *Reid, Evrard & Henderson,* for appellees.

Rose, Hemingway, Cantrell & Loughborough, G. R. Smith, Joe C. Barrett, D. A. Bradham and *Owens & Ehrman, amici curiae.*

McHaney, J. The General Assembly of 1935 enacted act 233, the "Arkansas Emergency Retail Sales Tax Law," as it is named in § 1. Its purposes as defined in § 2 are "to provide relief for the free common schools of the State, for the wards of the State who are supported from the Charities Fund, and for other worthy causes." Section 3 consists of definitions of terms as used in the act. Section 4 levies the tax. It reads as follows:

"Beginning May 1, 1935, there is hereby levied upon, and shall be collected from all retail sales, as herein defined, a tax of two (2%) per centum of the gross proceeds derived from said sales.

"The tax imposed by this section shall apply to:

"(a) All sales at retail of tangible personal property.

"(b) All retail sales at or by restaurants, cafes, cafeterias, hotels, dining cars, auctioneers, photostat and blue-print sales, funeral directors, and all other establishments of whatever nature or character selling for a con-

sideration any property, thing, commodity, and/or substance.

"(c) All sales of admission or admittance to athletic contests, theaters, both motion picture and stage performances, circuses, carnivals, dance halls and other places of amusement.

"(d) All retail sales of electric power and light, natural gas, water, telephone use and messages and telegrams.

"(e) Where there are adjoining cities or incorporated towns which are separated by a State line, the taxes and licenses to be paid by dealers in and on sales and services in such adjoining city or incorporated towns on the Arkansas side of the State line shall be at the same rate as provided by law in such adjoining State, if any, not to exceed the rate provided in this act."

Section 9 requires the retailer to collect the tax from the consumer, and account for same to the Commissioner of Revenues, who is required to deposit his collections in the State Treasury, 35 per cent. to the General Revenue Fund and 65 per cent. to the Common School Fund. There are many administrative provisions not deemed necessary or pertinent to a proper discussion of this case. Certain exemptions are set out in § 15, and the following is the concluding paragraph of said section:

"All foods necessary to life, more specifically defined as follows: Flour, meat, lard, sugar, soda, baking powders, salt, meal, butter fats, eggs, and all medicines necessary for the preservation of public health, each of above to be exempt from the provisions of this act."

Certain refunds of taxes paid by governmental agencies, hospitals and sanatoria are authorized by § 16, and § 17 makes it unlawful for any retailer to assume or absorb the tax or to advertise that he will do so. Section 20 provides that a tax on sales of separate articles of merchandise, commodity or personal property, sold in this State for use outside this State, for a price of $200 or more, "shall bear the rate of sales tax of the State where the same is to be taken and used."

Appellee brought this action to enjoin and restrain the appellant as Commissioner of Revenues from taking steps to enforce the act and from collecting the tax. Its constitutionality was attacked by appellee on five grounds, as follows: (1) That it is violative of § 5, article 16, of the Constitution of this State, in that (a) it is a property tax, and that it violates the provision of that section that a property tax shall be equal and uniform, because certain articles are exempt from the tax; and (b) that it is not uniform because in § 4, paragraph (b), the tax is levied on articles sold at certain designated places, and that such listed places does not include all places where retail sales are made of like tangible personal property. (2) That it is further violative of said section and article because the tax imposed is a privilege tax on the privilege of doing business as a merchant, which is a matter of common right not subject to be taxed. (3) That it imposes upon the citizens of the State a tax upon the privilege of using and consuming articles necessary for existence, which is a matter of common right not subject to be taxed. (4) That it is an occupation tax which may not be levied for State purposes. And (5) that it constitutes double taxation.

Appellant filed an answer denying all the allegations of unconstitutionality of the act. Later, two interventions were filed by citizens and taxpayers attacking the act on the same and additional grounds. One by J. B. Hall, a citizen of Little Rock, who alleges that said act is unconstitutional and void for the further reason that it imposes upon him and other citizens a tax upon the right or privilege of purchasing in the State of Arkansas, for their own use and consumption, articles and commodities which, as a common right, he and every other citizen of the State has a right to purchase in the ordinary course of business, free from the imposition of any tax upon the exercise of such right or privilege. Other allegations of unconstitutionality of the act are made, some of which will be hereinafter referred to. An intervention was also filed by Joe Isaacs, a dry goods and clothing merchant, of Blytheville, and William Hundhausen, a retail grocer and meat merchant of West Mem-

phis. They make an attack on said act on numerous grounds, some of which will be hereinafter referred to. A demurrer was filed to this intervention and overruled. A stipulation was filed as to the intervention of Hall, and the case was submitted to the court on the complaint, the answer, the interventions, the stipulation and demurrer. From all of which the court found that the prayer of the complaint and of the Hall intervention should be granted, and, the demurrer to the Isaacs-Hundhausen intervention being overruled, and appellant declining to plead further, the court perpetually enjoined appellant from proceeding further in the enforcement of said act 233 of 1935. The case is here on appeal.

At the invitation of this court, several members of the bar have filed excellent briefs as *amici curiae,* some on one side of the question presented, and some on the other, in addition to the splendid briefs of counsel for the parties, including interveners. We are duly appreciative of this assistance and of the painstaking generosity of time and energy spent in this connection.

In determining whether an act of the General Assembly is constitutional, we must bear in mind that that instrument is not a "grant of enumerated powers of the Legislature, not an enabling, but a restraining act," and that the Legislature has the undoubted power to make the written laws of the State, unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution; that the act is presumed to be valid, and that all doubt of its validity must be resolved in favor of the act. *Bush* v. *Martineau,* 174 Ark. 215, 295 S. W. 9.

In the Isaacs-Hundhausen intervention and brief it is alleged and contended that the act is void because its title is not germane to the body of the act, and that § 2, above quoted, falsely states the purpose of the act in that one of the purposes named is to provide relief "for the wards of the State who are supported from the Charities Fund," and that § 9 thereof apportions all the funds collected to the General Revenue and Common School Funds, and none to the Charities Fund. This objection is not well taken. It is well settled that a statute is not invalid

because the title does not refer to all the matters covered in the body of the act. See *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. (2d) 356, 44 S. W. (2d) 331, for one of the latest cases on the subject. Nor can we hold the act void because no distribution is directly made to one of the enumerated purposes. The deposit of 35 per cent. of the funds to the general revenue fund is certainly germane and comes within the clause "and for other worthy causes," and the Legislature might take it out of the General Fund and put it in the charities fund.

It is next argued in the same brief that onerous and burdensome duties are placed on retail dealers in §§ 9 to 14, inclusive, against their will. But this court answered this contention in *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, when it said on page 125 that: "It is next contended that the due process clause of the Constitution of this State and of the United States is violated by the requirement laid upon the dealers in gasoline to collect and pay the tax. It must be remembered that the tax is not laid on the sale of the gasoline, nor upon the business of the dealer. The dealer is not required to pay the tax, but to collect it, keep and present an account thereof, and pay it over to the county treasurer. The purpose of the statute is twofold, namely, to impose a tax upon the purchaser of gasoline for the use of the car, and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the county treasurer. It is certainly within the power of the Legislature to regulate the business of selling gasoline, and it is not an unreasonable regulation, for it does not involve the payment of any fee, nor the performance of any unreasonable task." Here the purpose of the act is to impose a tax upon the transaction of a purchase at retail for use or consumption of articles not exempt, and to regulate the business of the retailer by requiring him to collect the tax and pay it over to the Commissioner of Revenue. This is not an unreasonable regulation, "for it does not involve the payment of any fee, nor the performance of any unreasonable task."

Complaint is also made of § 20 that it violates the equal protection clause of the Federal Constitution be-

cause of the provision that sales of $200 or more for use outside the State shall bear the rate of sales tax of the State where taken; also of § 4 (e) relating to cities and towns divided by a State line above quoted. In the first place, these interveners do not claim that they are affected by either provision. In the next place, the recent case of *Bollinger* v. *Watson,* 187 Ark. 1044, 63 S. W. (2d) 642, holds to the contrary.

It is next contended that § 5 is bad because of that provision that any person doing a credit business "may make application to the Commissioner for permission to prepare his returns on the basis of cash actually received." And "any person making such application shall be taxable on all moneys collected * * * regardless of the date of sale." The argument made is that this is a tax upon the gross receipts, and not upon sales, or a tax upon gross income; also that it is a discrimination against those who pay for what they buy and those who buy on credit and do not pay at all. We cannot agree. It is a tax upon the transaction whether for cash or on credit. If on credit the collection and accounting therefor may be postponed until the bill is paid. It is certainly to the interest of the seller to collect his credit sales, else a credit merchant would not long stay in business. Permitting the seller to collect and account for the tax when he collects the account is not discriminatory. *Reif* v. *Barrett,* 355 Ill. 104, 188 N. E. 889.

It is next said the act unlawfully delegates legislative power to the Commissioner when in § 6 it provides: "The Commissioner shall, therefore, prepare instructions to dealers by setting out to them suitable brackets of prices for applying the tax." It is said that this provision gives the Commissioner power to fix the tax on small sales. We do not agree with this contention. The power given is to "prepare instructions to dealers by setting out to them suitable brackets of prices for applying the tax," not to fix the tax, for that is fixed in the act at 2 per cent. As to the power of the Legislature to constitute an agency to make such rules and regulations as are necessary to accomplish the legislative intent expressed in the act, see *Snow* v. *Riggs,* 172 Ark. 835, 290

S. W. 591; *State* v. *Davis,* 178 Ark. 153, 10 S. W. (2d) 513; *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182.

Having thus disposed of what appears to us to be the minor arguments against the validity of the act, we come now to a consideration of the question of whether such a tax may be levied at all under our Constitution. What kind of a tax is it? What is it a tax upon? Some of counsel say that it is a property tax, others that it is an occupation tax, and others that it is either a gross income tax or an occupation tax, while another says it has all the earmarks of a property tax. Counsel for appellant and those *amici curiae* supporting that view contend that it is neither a tax on property, an occupation tax, nor a tax on gross income; that it is an excise tax or privilege tax, and the argument is made with some force that it is a tax upon the right to acquire personal property by purchase for use or consumption. It is generally agreed that, unless the tax is prohibited by express language or by necessary implication in the Constitution, it is a valid levy. If it is prohibited, either expressly or impliedly, the prohibition must be found in § 5 of article 16 of the Constitution, which 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, to tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper; provided, further, that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity."

Decisions of courts of other States generally hold that similar provisions of their Constitutions for equality

and uniformity apply only to taxes on property, and not to excises and privileges. In 26 R. C. L., p. 225, it is said: "It is generally held that a constitutional provision requiring taxation to be equal and uniform applies only to taxes on polls and property, and has no reference whatever to excises." To the same effect see 61 C. J., p. 106. Such has been the rule in this State since the decision in *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112, which sustained the inheritance tax as a tax on a privilege. There the court said: "If this were an attempt to tax the property of the estate, there might be some merit in the contention; but it may now be regarded as settled law that inheritance taxes are not laid upon property, but upon the privilege or right of succession to it; or, in other words, it is in the nature of excise tax, and not subject to the same tests with respect to equality and uniformity as taxes levied upon property." Citing cases and continuing: "We recognize this is true, and hold that the tax provided by this act upon the privilege of succeeding to inheritances and estates was well within the power of the Legislature to impose, being included within its expressed power: 'To tax * * * privileges in such manner as may be deemed proper'." A study of our cases on the subject will disclose that the earlier cases such as *Washington* v. *State,* 13 Ark. 752, held that the Legislature could tax only such privileges "that are ascertained and recognized to be such at the common law." This view was expanded in *Baker* v. *State,* 44 Ark. 134, arising subsequent to our present Constitution, to include those subjects that were within the police power of the State to regulate. Since the decision in *State* v. *Handlin, supra,* this court has sustained the gasoline tax as a tax on the privilege of using the public roads. *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753. Also the Severance Tax case, *Floyd* v. *Miller Lumber Co.,* 160 Ark. 17, 254 S. W. 450, and the Gross Income Tax case, *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720. Great trouble was experienced by the court in deciding the two cases last mentioned. In fact, the Severance Tax case was affirmed because a majority could not agree upon a proper construction of the Constitution, so it could not be re-

versed. It was agreed by all that the tax was not one on property. In *Sims* v. *Ahrens, supra,* Mr. Justice Wood wrote the majority opinion on rehearing and stated: "My conclusion of the whole matter is that there are two, and only two, limitations in our Constitution upon the power of the State to raise revenue for State purposes, namely, (1) that taxes on property must be *ad valorem,* equal and uniform, and (2) that the Legislature cannot lay a tax for State revenue on occupations that are of common right." It was there said that an income tax was not a tax on property or occupations of common right. In *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000, a net income tax was sustained on the theory that it was an excise tax not prohibited by the Constitution. In *Hixon* v. *School District of Marion,* 187 Ark. 554, 60 S. W. (2d) 1027, an act taxing State and county warrants was sought to be sustained as an excise tax. The court refused to so decide, and held that it was a tax on property and therefore void. It was there said:

"A tax on warrants has none of the characteristics of an excise tax. There is no exact definition of excises, but ordinarily they are duties laid on the manufacture, sale or consumption of commodities, or upon certain callings or occupations, and are generally referable to the police power of the State." See also *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182.

From these decisions we are bound to conclude that the tax levied by said act 233 is an excise tax or privilege tax that is not prohibited. Whether it is such a tax on the purchase or the sale, or the right to acquire personal property for use or consumption, or whether it is a tax on the transaction, it is unnecessary to determine. Whatever it is and by whatever name it may be called, its character must be determined by its incidents, and its validity must be measured by the Constitution under the rules stated. It is certain that it is not a tax levied upon any one's occupation, therefore not an occupation tax. The merchant is not taxed. He is a tax collector. The tax is required of the purchaser, and the merchant must collect and account for it. The buyer's occupation is not

taxed. It is not a pursuit or occupation to buy at retail for use or consumption.

It is also insisted that under the Constitution, article 2, § 2, providing that all men have the inalienable right of acquiring, possessing and protecting property, etc., is destroyed and taken away by this act. Such is not the case. The Supreme Court of the United States held to the contrary in *Bromley* v. *McCaughn,* 280 U. S. 124, 136, 74 L. ed. 226, 230. There the court had under consideration the constitutionality of the Federal Gift Tax Act. It was there contended that the tax was one upon an essential right inherent in property—the right to give it away—and that it was therefore a tax on the property itself and void as a direct tax. It was there said: "It is said that, since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property (see *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 65 L. ed. 638, 41 Sup. Ct. 272), and hence a direct tax requiring apportionment, that is not the case before us.

"The power to give cannot be said to be a more important incident of property than the power to use, the exercise of which was taxed in *Billings* v. *United States,* and even though differences in degree may be carried to a point where they produce distinctions in kind, the present levy falls so far short of taxing generally the uses of property that it cannot be likened to the taxes on property itself which have been recognized as direct. It falls, rather, into that category of imposts or excises which, since they apply only to a limited exercise of property rights, have been deemed to be indirect and so

valid although not apportioned." See also *State* v. *Boney,* 156 Ark. 169, 245 S. W. 315, sustaining an inheritance tax on dower.

The act under consideration is an emergency measure, specifically declared to be so, which expires July 1, 1937, unless renewed or extended. The recitation in the emergency clause discloses a grave situation with reference to the free public schools. While these considerations cannot determine the validity of the act, they may be viewed to determine the necessities out of which it arose.

Other arguments against the act are made, such as exempting certain articles of food and not others, and other incidental matters, all of which we have considered and find to be without substantial merit.

It will be noticed that § 4 of the act provides that the tax levied shall be collected beginning May 1, 1935. The injunction granted by the chancery court prevented this from being done. Section 21 of the act provides that the violation of any provision of the act shall be a misdemeanor, punishable by a fine not exceeding $1,000 or imprisonment not exceeding one year in the county jail, or both at the discretion of the court, and each day of violation is made a separate offense. The act is therefore highly penal. Section 9731, Crawford & Moses' Digest, provides: "Whenever, by the decision of any circuit court, a construction may be given to any penal or other statute, every act done in good faith in conformity with such construction after the making of such decision, and before the reversal thereof by the Supreme Court, shall be so far valid that the party doing such act shall not be liable to any penalty or forfeiture for any such act that shall have been adjudged lawful by such decision of the circuit court."

Of course the same provision would apply to the decision of any chancery court. The act has therefore been suspended during this period, and will become effective when and if the judgment of this court as here announced becomes final.

Our conclusion on the whole case is that the act is not prohibited by the Constitution, either expressly or

by necessary implication, and that its validity must be sustained.

The decree of the chancery court is therefore reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

JOHNSON, C. J. (concurring). Since a constitutional majority of the court decline to overrule *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112, *Floyd* v. *Miller Lumber Co.,* 160 Ark. 17, 254 S. W. 450, *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720, and *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000, I perceive that we are bound by the doctrines therein announced and for this reason I concur in the court's view that the Sales Tax Act of 1935 is constitutional and valid. This Sales Tax Act cannot be distinguished in principle from the Income Tax Act held constitutional in *Stanley* v. *Gates, supra,* and all efforts in this respect immediately prove illogical. Were I free to follow reason and logic, I should hold that under art. 16, § 5 of the Constitution of 1874 that this sales tax act is inhibited by affirmation which implies a negation. Such was the express holding of this court in the early case of *State* v. *Ashley,* 1 Ark. 513, and adhered to and followed for three quarters of a century. This case was decided under the Constitution of 1836, but a comparison of art. 16, § 5, of the Constitution of 1874 with that of 1936 demonstrates that the former was copied from the latter except in minor details not necessary to here point out.

State v. *Ashley, supra,* was followed and its doctrine re-examined and approved by this court in such cases as *Colby* v. *Lawson,* 5 Ark. 303; *State* v. *Washmood,* 58 Ark. 609, 26 S. W. 11; *Baker* v. *State,* 44 Ark. 314; *Stevens and Woods* v. *State,* 2 Ark. 291; *Washington* v. *State,* 13 Ark. 752 and many other cases, until *Handlin* v. *State, supra.* This case arose under the inheritance tax statute, and the majority held the inheritance tax statute constitutional and valid, thereby, in my opinion, for the first time materially impairing *State* v. *Ashley, supra,* and all subsequent cases which followed its lead. *Floyd* v. *Miller Lumber Co., supra,* arose over an act levying a tax against the severance of natural resources and by a divided court this enactment was sustained, thereby further impairing

the line of cases heretofore cited. *Sims* v. *Ahrens, supra,* arose over an income tax statute and was sustained by a divided court, the result of which presented the anomalous situation of the court holding the act in question invalid but affirmatively deciding in advance that a proper income tax act would be approved by the court if drawn under certain specifications. Subsequently these specifications were complied with by the legislative branch of the State government, and the constitutionality of this planned income tax act was presented in *Stanley* v. *Gates, supra,* and the opinion there approved the form of the act and relied upon its previous *dictum* as to its constitutionality. Such is the history, reasoning, logic and effect of the cases heretofore referred to and cited, and they and each of them should be overruled.

Until *State* v. *Handlin, supra,* we consistently held that § 16, art. 5, of our Constitution authorized a property tax and prescribes the rules to be applied in assessing and collecting taxes on property, with the proviso that the Legislature shall have authority to levy a tax on hawkers, peddlers, ferries, exhibitions and privileges. Under settled principles of constitutional interpretation, these provisions of our Constitution should be treated as a limitation upon the powers of taxation. Since the Constitution prescribes what taxes may be levied, it impliedly prohibits any other kind of taxation not therein provided for. "To specify is to exclude" is a maxim of interpretation. The Constitution specifies what taxes may be imposed. Therefore, no taxes may be levied which are not specified.

Moreover, the line of cases last referred to should be overruled for still another reason. Fundamentally courts should be interested in realities and not nomenclatures. Realities are ignored in each of the cases referred to. An inheritance tax is a tax on property and not a hybrid tax, as decided by the court in *State* v. *Handlin, supra.* Likewise a severance tax is a tax on property, and not a cross breed tax, as decided by this court in *Floyd* v. *Miller Lumber Co., supra.* Demonstrably certain is an income tax one on property and not an excise as decided by a

majority of this court in *Sims* v. *Ahrens* and *Stanley* v. *Gates, supra.* The two last-mentioned cases are *true hybrids,* the offspring of illogic and misnomer.

The sales tax is a property tax beyond question, cavil or doubt, when measured by constitutional law and logic. The Supreme Court of the United States has so decided many, many times. The true rule is a tax on a sale of an article is a tax on the article itself, so says the highest court in the land. *Stewart Dry Goods Co.* v. *Lewis*—U. S. —55 S. Ct. 525; *Brown* v. *Maryland,* 2 Wheat. 419; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Crew Levic Co.* v. *Pennsylvania,* 245 U. S. 292; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, and *Indian Motorcycle Co.* v. *U. S.,* 283 U. S. 570.

If a property tax, concededly, the sales tax does not conform to art. 16, § 5, and therefore is null and void.

Necessity of raising revenue should never be considered so urgent as to warrant courts to either ignore or rewrite the Constitution. For seventy-five years we treated art. 16, § 5, as a limitation upon the Legislature's taxing power, and I perceive no good reason for overturning the wisdom of the ages and not only opening, but destroying the flood-gates of taxation, and I fear the ultimate results.

I was not a member of this court when the novations heretofore discussed were decided, therefore I perceive that I should, in fairness to myself, make my position clear.

Justice BAKER concurs in this opinion.

UNIONAID LIFE INSURANCE COMPANY *v.* BANK OF LINCOLN.

4-3887

Opinion delivered June 3, 1935.

Duty, Duty & Duty, for appellant.

Karl Greenhaw, for appellee.

BAKER, J. Mutual Aid Union issued to Andrew J. Spears a certificate of insurance in May, 1912, payable to his wife, Sarah V. Spears, as beneficiary. This certificate was kept in full force and effect until 1926. The August assessment of that year was not paid, and, on account of the delinquency beyond the period of grace of thirty days, the certificate lapsed. The insured was subject to reinstatement upon furnishing a certificate of good health. This was not a matter of right, but more strictly one of favor and discretion to be exercised by managing officers of the insurance organization.

In October, when the lapse was discovered by the Bank of Lincoln, to which the certificate had been assigned, as security for debt owing by the insured, it made remittance of assessments due. The remittance was returned with letter calling attention to the lapse.

Immediately negotiations began, on the part of the officers of the bank, to reinstate the insurance contract. The officers of the insurer indicated by correspondence a favorable consideration of application for reinstatement "only in the event Mr. Spears is in good health and can certify thereto." With the letter, from which the above-quoted phrase is taken, a health certificate was inclosed. The health certificate, when blanks were filled and signed, was as follows:

"Form 0-227-5M-11-24 RD JTW
10-19-26

"817-63

"Health Certificate
"To Be Signed by the Member
"Rec'd Oct. 22, 1926.

"Secretary, Mutual Aid Union,
"Rogers, Arkansas, Andrew J. Spears

"Dear Sir:

"I am in receipt of your advice that my Certificate No. 885, Circle No. 15, has become delinquent for non-payment of assessment.

"I hereby make application to have this certificate again put in good standing, and for that purpose can truthfully certify that I am in good health.

"I authorize you to attach this certificate to my application for membership, and agree that it shall become a part thereof and a warranty by me as to the statements concerning my physical condition.

"Signed A. J. Spears,
"Member.

"Date 10-20-26."

The certificate of insurance was reinstated upon receipt of the above health certificate. All assessments, or monthly premiums, were thereafter paid till the death of the insured in June, 1932. This was nearly six years after the reinstatement.

During the last part of the year of 1926 the Mutual Aid Union found itself in a failing condition, by reason of inadequate rates and increased mortality among its members. Before a failure or insolvency was declared, it transferred all its property and business to appellant. The Unionaid Life Insurance Company assumed the liability for payment of benefits to "all living contributing members and policyholders of the reinsured association, in good standing in said association on the 1st day of April, 1927," under such limitations and conditions as were set out in the contract. It is not necessary to state more definitely these conditions, except to say that the pertinent condition in this controversy was that the reinsurer "shall further be subrogated to each and every

defense that would have been available to the reinsured association in the conduct of its business."

Long prior to this contract the insured, with the consent of Mutual Aid Union, had made his insurance payable to Bank of Lincoln, as its interest might appear, and any balance to his administrator, for his heirs.

Soon after the Unionaid Life Insurance Company took over the business acquired from Mutual Aid Union, the insured's beneficiary began paying the higher rate of monthly assessments or premiums required to make the policy worth one thousand dollars at death of insured. The total paid by the Bank of Lincoln in premiums is $722.43.

From the proof of death of insured, in June, 1932, facts were disclosed from which the insurer learned for the first time that in August, 1925, A. J. Spears had suffered from a stroke of paralysis. He later died from a similar attack.

In answer to the complaint filed to collect the insurance, the defendant pleaded that the reinstatement of the lapsed policy, in October of 1926, was procured by false and fraudulent statements and representations as to his good health, in application above quoted. Other issues were tendered, not here on this appeal, but on account of which the cause was transferred to the chancery court for trial.

It will be observed from the detailed statement that the sole issue tendered on this appeal arises out of the certificate of good health, the basis for the reinstatement of the lapsed policy.

It is easy to surmise that, if the insurer had learned, prior to the act of reinstatement, that insured had suffered from this stroke of paralysis, about fifteen months prior thereto, the reinstatement would have been refused. No inquiry was then made as to previous condition of health, nor is there anything in the correspondence or certificate that indicated that such information was germane or desirable.

A great deal of testimony was introduced upon the trial of this case tending to show the condition of health of A. J. Spears in October, 1926, when he signed the

application for reinstatement of his policy. While this proof may be said to show conclusively that at that time, and perhaps continuously thereafter till his death, he showed the effect of the paralytic attack from which he suffered in 1925, in that he did not have normal use of his left leg and left arm, and his face was somewhat drawn, we cannot say as a matter of law that the insured was not in fact in good health. Physicians who testified in the case said that the stroke was brought on by reason of a bursted blood vessel causing a clot upon the brain, but it was also testified that this was most probably absorbed, and that Mr. Spears regained the normal condition of his health, though not the normal use of leg and arm. One of the physicians illustrated the condition by saying that, if the insured had suffered from a broken leg, he might have continued to limp thereafter, though entirely well.

It is sufficient, for the purpose of this suit, to say that there was testimony tending to prove the condition of Mr. Spears in 1926 when his policy of insurance was reinstated, and apparently somewhat contradictory, one part with another. Our view of this situation is such that we consider this as a question of fact properly to be determined by the trial court.

On this account it is unnecessary to quote from, or abstract, this great volume of proof considered by the trial court.

Upon consideration of the testimony adduced, even if we construed the application for reinstatement as an absolute warranty, it still remains that there was a question of fact for determination by the chancellor. We are required, however, to give to the testimony its strongest probative value to sustain the decree.

We cannot find, and do not believe, that there were willful misstatements of fact by the insured as to his condition at the time of reinstatement. Under conditions such as these which are presented to us upon this appeal upon this matter of good health, the rule announced by this court in *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 921, 293 S. W. 1045, is controlling. For other authorities see *U. S. F. & G. Co.* v. *Maxwell,* 152 Ark. 64,

237 S. W. 708; *Metropolitan Life Insurance Company* v. *Johnson,* 105 Ark. 101, 150 S. W. 393; *American Life & Accident Association* v. *Walton,* 133 Ark. 348, 202 S. W. 20; *Lincoln Reserve Life Insurance Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; *Old American Insurance Co.* v. *Hartsell,* 176 Ark. 666, 4 S. W. (2d) 25.

It may be well to observe, in conclusion, that at the time of the death of Spears, he was more than 76 years old. Some of the witnesses who had observed his condition indicated that his mental condition at that time and prior thereto had not been as sound as in former years, but this may have been attributable directly to his age.

Appellant relies most strongly upon testimony of experts. Such testimony, however, was for the court's interpretation to the same extent as was that of lay witnesses.

The Western Union Telegraph Co. v. *Turner,* 190 Ark. 97, 77 S. W. (2d) 633.

We are of the opinion the trial court's decree was well supported by the testimony, and should be affirmed.

It is so ordered.

CHILDS *v.* MAGNOLIA PETROLEUM COMPANY.

4-3867

Opinion delivered June 10, 1935.

L. B. Smead and *H. G. Wade,* for appellant.
W. E. Patterson, for appellee.

McHaney, J. This action originated in the circuit court, where appellant sued appellee for $800 for his share of royalty oil taken under contract from an oil lease operated by appellee from April 1, 1932, to the date of trial. Appellee answered and admitted it was indebted to appellant for royalty oil from April 1, 1932, to June 30, 1933, in the sum of $494.86, but that during the period from May 6, 1929, to May 6, 1932, appellant had wrongfully abstracted from its fuel gas lines 43,-800,000 cubic feet of fuel gas of the value of $7,446 by means of a secret and concealed pipe connection. Its answer was made a cross-complaint and prayed judgment for said sum less the set-off. Subsequently, after appellant had filed a response to the cross-complaint, denying said allegations and accusing appellee of stealing his gas, a substituted answer and cross-complaint was filed, seeking a discovery and accounting of, and for the amount of gas so wrongfully taken by appellant from its fuel gas line, alleging that the definite period of time during which it was so taken, and the actual amount so taken were not known to it but were known to appellant, and that he should be required to make disclosure thereof; that it involved a long, tedious accounting, with much testimony on disputed values, gas pressures, measurements, etc., which would require a master in chancery. Prayer was for transfer to equity and for judgment on its cross-complaint. Transfer was ordered,

and appellant on January 8, 1934, appeared and moved without success to remand. At the close of the trial it was stipulated that the amount of royalty accruing to appellant, including October, 1934, amounted to $1,126.29.

After hearing the evidence, the court found that appellee owed appellant the amount stipulated, $1,126.29, but that the latter owed the former $4,106.47 for fuel gas wrongfully taken and appropriated over the period from May 5, 1929, to May 6, 1932, and rendered judgment in appellee's favor for the difference, $2,980.18 and costs. Appellant's claim for stolen gas against appellee was found to be not sustained, and was dismissed as being without equity. The case is here on appeal.

Appellant's first contention for reversal is that because the suit was brought in the first instance by him in the circuit court, and because appellee filed an answer and cross-complaint therein without any motion to transfer, this constituted an election to try the case in the circuit court, and that court had the exclusive jurisdiction thereof. The second contention relates to the same subject-matter, and that is, that equity had no jurisdiction of the issues involved in this case. We think appellant is wrong in both contentions.

Section 1041 of Crawford & Moses' Digest provides: "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket."

Section 1044 provides: "The defendant shall be entitled to have the correction made * * * when the action has been commenced by proceedings at law, the defendant, by motion made at or before the filing of his answer, may have them changed into equitable proceedings when it appears that, by the provisions of § 1034, the plaintiff should have adopted the proceedings in equity."

Section 1045 provides: "Where the action has been properly commenced by proceedings at law, either party shall have the right, by motion, to have any issue which heretofore was exclusively cognizable in chancery tried in the manner hereinafter prescribed in cases of equit-

able proceedings; and if all the issues are such as heretofore were cognizable in chancery, though none were exclusively so, the defendant shall have the right to have them all tried as in cases of proceedings in equity."

While the appellee did file an answer and cross-complaint without moving to transfer to equity, by permission of the court this answer and cross-complaint were withdrawn, and a substituted answer and cross-complaint filed in which equitable defenses were set up and equitable rights claimed, both the right of discovery and accounting, and a motion to transfer was made and allowed. As said by this court in *Daniel* v. *Garner,* 71 Ark. 484, 76 S. W. 1063: "Under the statutes of this State a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are exclusively cognizable in equity, he is entitled to have them tried as in equitable proceedings, and for this purpose to a transfer of the case to the equity docket or chancery court as the case may be." This case on this point has been many times cited and followed, one of the late cases so cited being *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21. See also *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826. As to the jurisdiction of equity in the first instance, it appears from the complaint that appellant sued for the value of royalty oil accruing to him from April 1, 1932, to the 1st day of ....., 1933. The complaint was filed June 12, 1933. He asked judgment for $800. It is manifest from the complaint that the action might well have been brought in the first instance in the chancery court upon an allegation that appellee was indebted to him for royalty oil run during such period, the amount of which he did not know, and that an accounting would be necessary to determine the amount thereof. In the answer and cross-complaint upon which the case went to trial, an equitable action by way of cross-complaint was stated against appellant, in that he had for a long period of time, the exact duration being unknown to appellee, wrongfully taken fuel gas from the pipe lines of appellee and diverted it to his own use in large quantities, the exact amount being unknown to it, but was known to

appellant, and it was prayed that he be required to disclose the amount thereof; that this matter involved an accounting for the quantity and value of gas taken. These allegations stated a cause of action cognizable in a court of equity, and the court did not err in transferring the case from law to equity, and the chancery court did not err in refusing to remand upon appellant's motion. *McClintock* v. *Thweatt,* 71 Ark. 323, 73 S. W. 1093; *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 144 S. W. 198; *Ferguson* v. *Rogers,* 129 Ark. 197, 195 S. W. 22; *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21; *Meriwether* v. *Dubose,* 186 Ark. 743, 55 S. W. (2d) 937.

Appellant cites and relies upon *United States* v. *Bitter Root Development Co.,* 200 U. S. 451, 50 L. ed. 550, to support his contention that equity has no jurisdiction, and *District 21, United Mine Workers* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. As we view these cases, the rights sought to be enforced therein in a court of equity were purely legal. The actions were brought in a court of equity to recover damages where the damages were plainly ascertainable. In the former, timber had been cut and stolen. The stumps were there and the amount of damages claimed was easily ascertainable. No accounting was involved. The same thing is true in the latter case. Here however the means of determining the amount of gas taken were not available to appellee except through appellant or collateral sources. We cannot agree that these cases throw any light on the question now before us. We are of the opinion that equity had jurisdiction.

It is next insisted that, even though equity did have jurisdiction, there is no proof in the record as to the quantity or the amount of gas stolen by appellant from appellee. We cannot agree with appellants in this contention. Without detailing the evidence we are of the opinion that the great preponderance thereof shows that for a period of three years or more prior to May 6, 1932, the appellant kept a secret connection between his fuel line and that of appellee, at a point where the two lines were only a few feet apart, through which he took appellee's fuel gas for use, and did use in the operation of five or six

wells on his leases, and for operating a large boiler and heater at his oil treating plant thereon. It shows that prior thereto appellant had a paid-for connection with appellee's gas line on two occasions, one in 1925 and one early in 1929; that during the three-year period prior to March 6, 1932, he kept his wells in operation as well as his oil treating plant by the use of gas; that when the secret connection was discovered and disconnected, all his operations immediately shut down and remained so for a considerable period of time. Witnesses testified as to the amount of gas required to operate the engines at his wells and at his oil treating plant each twenty-four hours, and it is shown that if such wells and plant were operating continuously over a period of three years the consumption would have been many times greater than that found by the court. We therefore conclude that the court's finding as to the amount of gas consumed was not only not against the preponderance of the evidence but was supported by it.

It is finally insisted that, even if we should find that equity had jurisdiction, and that appellee had established within reasonable certainty the amount of gas stolen by appellant, the chancery court did not and could not grant any relief because this is a controversy between two thieves, and that the court should leave them where it found them. But such is not the controversy. While appellant alleged that appellee had stolen his gas from his gas line, such allegation was abandoned or withdrawn, and there is no proof in the record to support it, even if not abandoned. Appellant is in no position to invoke the rule contended for. We find no error, and the decree is accordingly affirmed.

MUTUAL LIFE INSURANCE COMPANY *v.* MORRIS.

4-3893

Opinion delivered June 10, 1935.

Frederick L. Allen, E. P. Toney and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Wm. West and *W. W. Grubbs,* for appellee.

BUTLER, J. This appeal comes from the judgment of the lower court in favor of the appellee, and the only question presented is whether the trial court erred in instructing a verdict for the appellee.

The policy involved was issued by the appellant on March 11, 1931, on the life of Benjamin F. Morris in the sum of $1,000, the appellee being named as beneficiary therein. For an additional premium, the payment of total and permanent disability benefits and the waiver of premiums during total and permanent disability were provided in the policy. The insured, at the time of the execution of the policy and until June 13, 1932, was in the employ of the Standard Oil Company. His work required no physical labor, his duty being to watch the gauges to see that the proper amount of steam and water was maintained in the boilers of a pumping station. For a considerable time prior to June 13, 1932, he was not well, complaining of pains in his abdomen, but continuing

to perform his work until the date mentioned, when an examination revealed that he was suffering from appendicitis and that an operation was imperative. The premiums on his policy were payable quarterly and amounted to the sum of $9.62 per quarter. The last quarterly installment fell due on June 11, 1932, with a thirty-one day grace period in which it might be paid, which expired July 12, 1932. Four days after this the premium was forwarded to the home office of appellant with an application for reinstatement. The check for this premium was retained by appellant until August 25, 1932, when it was returned and the application for reinstatement denied. The insured did not work after June 13th, but went to Baton Rouge to a hospital where another examination was made. From there he went to the Veterans' Hospital at Hot Springs, where an operation was performed on July 1st. He remained in the hospital until July 30th, when he returned to Eudora, and later went to the Veterans' Hospital at Memphis, where, on September 4th, he submitted to another operation and died on the operating table. It is admitted that the insured did no work after June 13th, and that during all the time until his death he was totally disabled.

At the trial of the case, the above facts were established, and the policy of insurance was introduced in evidence. Thereupon the court instructed the jury to return a verdict for the beneficiary, Elizabeth Morris, for the sum of $1,016. This is the amount named in the face of the policy, plus $16, which was purchased by the insurer for the insured with a dividend of $7.65, due the latter on March 11, 1932.

The correctness of the court's instruction to the jury turns upon the construction of section 3 of the policy: "Waiver of Premium in Event of Total and Permanent Disability before Sixty. Benefit if no Premium is in Default.—If, while no premium on this policy is in default, due proof is received at the home office of the company (1) that the insured is totally disabled as a result of disease or of bodily injury which was not self inflicted, so as to be incapable of engaging in any occupation for remuneration or profit, (2) that such total disability has

continued without interruption for a period of at least four months (total disability of such duration being presumed to be permanent during its continuance), and (3) that such total disability commenced before the anniversary of the date of the policy on which the age of the insured at nearest birthday is sixty years, the company, during the continuance of such total disability, will

"Waiver of Premium. Waive payment of each premium under this policy which shall become due during such total disability, and refund each premium paid which became due during such total disability; but no premium shall be refunded, the due date of which occurred more than one year before the receipt at said home office of written notice of claim for waiver of premium.

"Benefit if Premium is in Default.—If any premium on this policy is in default when such due proof is received at said home office, the waiver of premiums shall be allowed as if there were no premium in default and the policy will be reinstated, provided (1) that written notice of claim for such waiver of premium shall be received at said home office not later than one year after the due date of the premium first in default and (2) that such total disability began either (a) before the due date of the premium first in default or (b) within thirty-one days after such due date. In the case of (b), such premium, together with interest thereon at the rate of five per cent. a year, must be paid to the company as a condition precedent to the allowance of the waiver of premiums and reinstatement of this policy. * * *

"General Provisions. Written notice of claim for waiver of premium must be received at said home office during the lifetime of the insured and during the continuance of such total disability, otherwise the claim shall be invalid; provided, however, failure to give such notice within the time provided for herein shall not invalidate any such claim hereunder if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible. In no case, however, shall any premium be waived or refunded the due date of which occurred more than one

year before the date of receipt at said home office of written notice of claim for waiver of premium."

It is the contention of appellant that, under the provision of the policy quoted, *supra,* before appellant would be entitled to a waiver of premium his disability must have continued for four consecutive months, and due proof thereof made within the life of the insured, that, as he was disabled for only three and a half months before his death and notice thereof was not received by appellant until after that event, the policy lapsed, and there was no liability to the appellee under its terms. In support of this contention, we are cited to a decision of the Supreme Court of Nebraska in the case of *Himelbloom* v. *Metropolitan Life Ins. Co.,* 257 N. W. 525, and to the cases of *Western & Southern Life Ins. Co.* v. *Smith,* 41 Ohio App. 197, 180 N. E. 749; *Avery* v. *New York Life Ins. Co.,* 67 Fed. (2d) 442; and *New York Life Ins. Co.* v. *Quinn,* (Miss.) 157 So. 902.

In the Himelbloom case provision is made for waiver of premiums in the event of total and permanent disability, which is defined as "a total and permanent disability which continues for six months." The waiver is not for premiums which have matured, but for such as become due after the date of the commencement of the disability, and then only as to such premiums as may become due within one year before the date of the receipt at the home office of the insurer of written notice of claim arising out of such disability. The insured became totally and permanently disabled on November 1, 1932. He defaulted in the payment of the premium due November 7, 1932, and died on February 13, 1933. Under that state of facts the court, after referring to the definition of "total and permanent disability" contained in the policy, held that, while the insured was in fact totally and permanently disabled from November 1, 1932, until his death, he was not totally and permanently disabled within the meaning of the policy.

In *New York Life Ins. Co.* v. *Quinn, supra,* the policy provided that the contract of insurance should automatically terminate if any premium on the policy should not be paid when due, except in case where the default oc-

curred after the insured had become totally disabled, in which event the policy would be restored if due proof was made of total disability not later than six months after default, and that such disability would continue for life, or had continued for a period of not less than three consecutive months. The insured brought suit to recover total and permanent disability benefits. It was shown that the policy lapsed for the nonpayment of premium due July 15, 1931, and no notice or evidence relating to any claim of disability benefit was received by the company until the filing of the suit, which date is not given. It will be presumed, however, from the opinion that suit must have been filed later than six months after the default. The court held that there was no competent evidence tending to establish the giving of any notice, and that under the terms of the policy the same had lapsed automatically unless it had been reinstated by making proof of disability within six months after the default.

In *Western & Southern Life Ins. Co.* v. *Smith, supra,* the policy provided that only the premium (and those thereafter) commencing with the anniversary of said policy next succeeding the receipt of due and satisfactory proof of total and permanent disability would be waived.

The stipulations in the policies involved in the last three cases, *supra,* as to the waiver of premiums is different from that in the instant case, as will be hereinafter noted.

In *Avery* v. *New York Life Ins. Co., supra,* the policy provided for waiver of payment of premium falling due after the commencement of total disability, and during its continuance where the same had already continued for a period of four months. The court held that proof of disability is made a condition precedent to the waiver of premium. The provision for the waiver of premiums is not set out in full, but in holding proof of disability a condition precedent the court relied upon the authority of *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230. In that case the policy expressly provided: "If any premium is not paid on the date when due, this policy shall cease and determine, except as hereinafter pro-

vided." Following this was the provision that, "upon receipt by the company of satisfactory proof that the insured is totally and permanently disabled as hereinafter defined, the company will: (1) Pay for the insured all premiums becoming due hereon after the receipt of such proof and during the continuance of the total and permanent disability of the insured." It will be noted that the contract under consideration in the Bergholm case automatically came to an end when any premium was not paid when due, and proof of disability had to be received by the company before it became obligated to pay for the insured any premiums, and then only those premiums which became due after the receipt of such proof. We assume that the contract in the Avery case, *supra,* was similar to that of the Bergholm case in the particulars we have pointed out.

In the case at bar the forfeiture for the nonpayment of premiums appears to be conditional. It is admitted that the insured was totally and permanently disabled within a short time after the premium of June 11 became due, and within the grace period. It is the settled doctrine of this court that, unless, by the inescapable language of the policy, notice of disability and proof thereof are made conditions precedent to recovery under disability clauses, it is the existence of disability that fixes liability and not proof thereof. *Mo. State Life Ins. Co.* v. *Case,* 189 Ark. 223, 71 S. W. (2d) 199; *Home Life Ins. Co.* v. *Ward,* 189 Ark. 793, 75 S. W. (2d) 379; *Ætna Life Ins. Co.* v. *Langston,* 189 Ark. 1067, 76 S. W. (2d) 50. The policy does not define total and permanent disability as did the policy in the Himelbloom case, *supra,* nor do we think it was the intention of the parties to the insurance contract to provide any such definition. The period of four months of continuing disability, as explained by the parenthetical clause following, was only for the purpose of making a *prima facie* showing of its permanency, without the necessity of making due proof thereof. The effect of this was to give the insured temporary benefit of the provision of waiver until such time as it could be determined whether or not the disability was total and permanent. We do not think that the policy, liberally construed, can

be said to contain any provision to the effect that disability has to continue four consecutive months before liability attaches. Nor is there any provision in the policy denying to the insured the privilege of establishing his total and permanent disability before four months have elapsed after the beginning of disability. That the time of the happening of the total disability was the commencement of the insurer's obligation to waive payment of premiums, and not the receipt of the proof thereof, is indicated by the provision to the effect that, after the proof has been received, any payment of premiums made after disability shall be refunded where such payments occurred within a year before the receipt at the home office of written notice of claim for waiver of premium. The only limitation upon the sufficiency of notice of claim is that it must be given not later than one year after due date of the premium first in default, and the only condition precedent to the allowance of waiver of premiums and reinstatement of the policy is the payment of the premium in default with interest at five per cent. per annum. On July 16, 1932, this premium was paid and retained by the company for forty days before its return with the advice that the policy had lapsed. This was only nine days before the operation during which the insured died, and at a time when it must have become generally known that his condition was extremely precarious. This, we think, was a substantial compliance with that provision of the policy which is made a condition precedent to the allowance of waiver of premiums.

The point is made that there can be no recovery for the further reason that, under the provisions of the policy, written notice of claim for waiver of premiums must be received at the home office during the lifetime of the insured, and during the continuance of the total disability, and, if not made within this time, the claim shall be invalid. The provision of the policy requiring written notice to be made during the lifetime of the insured further provides that failure to give notice within the time specified should not invalidate any claim if it was not reasonably possible to give such notice.

The notice was not given until October 28, 1932, after the death of the insured. Therefore he had a year after his disability began in which to give the notice. The evidence clearly shows that, from the time when the condition of the insured was discovered on June 13th until he died, he was critically ill and in no condition to look after his business affairs with scrupulous exactness. He died within the four months mentioned in the policy, and we think the circumstances abundantly bring him within the saving clause as to notice which we have stated. We conclude that the trial court correctly construed the provisions of the policy relied on, and that his action in directing the verdict was correct.

The judgment will therefore be affirmed.

STATE EX REL. LEE *v.* MCMILLIN.

4-3901

Opinion delivered June 10, 1935.

A. D. Whitehead, for appellant.

BUTLER, J. In a *habeas corpus* proceeding relative to the custody of a young child, the appellees, Maybelle McMillin, Pat Keeshan and W. T. Greer, executed a bond

to J. C. Barlow as sheriff of Phillips County, in the sum of $500 for the production of the child in court. Instead of producing the child as obligated, Maybelle McMillin fled with it beyond the borders of the State. Later, the court adjudged the custody of the child to William E. Lee, its father, and declared a forfeiture upon the bond. Process was issued and served on Keeshan and Greer to appear and show cause why judgment should not be entered against them for the amount named in the bond. On a hearing, the court found that it was without jurisdiction to determine whether or not there was a liability upon the bond which should be enforced. On appeal to this court that judgment was reversed, and remanded with directions to determine whether final judgment should be rendered against the principal in the bond and the sureties thereon. *State ex rel. Lee* v. *McMillin,* 187 Ark. 1003, 63 S. W. (2d) 631. On filing the mandate in the court below appellant took further testimony, which was merely a repetition of proof upon which the trial court had previously found that Maybelle McMillin, despite the orders of the court, had fled with the child, and, in addition, that her whereabouts and that of the child were still unknown.

The court entered a decree holding that the bond entered into was a bail bond, that its terms had been forfeited, and that the State of Arkansas should have and recover the sum named therein, less ten per cent., which should be allowed to the attorney who brought the suit. It was thereupon ordered that the appellees pay $50 to the attorney and the balance of $450 into the treasury of Phillips County.

It was the contention of the appellant in the court below that the sum named in the bond with six per cent. thereon from November 23, 1931, should be ordered paid to him as the party in whose interest the bond was taken, and that his solicitor should be allowed an attorney's fee of $100 to be taxed as costs in this case. He makes the same contention now on appeal.

Appellant contends that the trial court erred in decreeing that the bond is a bail bond, and that the attorney should recover ten per cent. thereof under the pro-

vision of § 4571 of Crawford & Moses' Digest. He insists that the bond is such as is contemplated by § 5096 of Crawford & Moses' Digest. We find no statutory authority for the execution of the bond in question, but, as its execution is not prohibited by statute nor contrary to public policy, and as it is based on a sufficient consideration, intended to serve a lawful purpose and entered into by competent parties, it is a valid bond at common law. *Bowen* v. *Lovewell,* 119 Ark. 64, 177 S. W. 929. While the obligee named in the bond is the sheriff of Phillips County, the appellant was the party interested, as the bond was made in order to protect him, and he is the person damaged by reason of the default of the obligors on the bond. We therefore conclude that the trial court should have given judgment against the appellees in favor of the appellant for the sum of $500.

On the question of attorney's fee, the contention of appellant cannot be sustained. The liability of the obligors on the bond is measured and limited by its terms. That liability is the sum of $500 and no more. The question of attorney's fee is a matter to be settled between the attorney and his client, for which the bond is not liable.

The decree of the trial court will therefore be reversed, and the cause remanded with directions to enter a decree against the appellees in favor of the appellant in the sum of $500.

YOUNG *v.* PUMPHREY.

4-3894

Opinion delivered June 10, 1935.

Nelson & Nelson, for appellants.

Taylor & Taylor, for appellee.

BAKER, J. This was an action filed by Olive M. Pumphrey against Clint Young and Jess Harris in the Osceola District of Mississippi County to recover possession of the north half of the northeast quarter of section 21, township 13 north, range 8 east.. Plaintiff set out her muniments of title, alleged that the defendants were in the unlawful possession of the land, prayed for possession and rents.

The defendants admitted that they were in possession of the said land, and pleaded that the land had forfeited for the nonpayment of taxes for the year of 1928, that it had been duly certified to the State, and that the Commissioner of State Lands had issued a donation certificate on April 15, 1932, and that they were holding under said donation certificate, and had placed on the property improvements that enhanced the value in the sum of $2,000.

The venue was changed to the Chickasawba District for trial. Judgment was rendered on the first day of February, 1935, at the regular term of circuit court by the court sitting as a jury. The court made certain findings of fact and declarations of law, rendered judgment thereon in favor of the plaintiff for the possession of the lands and a recovery of $210 for rents, sustained an attachment under which cotton had been seized, ordered sale thereof, and directed the issuance of writ

of possession to restore the lands to the plaintiff. The appeal is from this judgment.

No bill of exceptions was filed on this appeal. It will be observed therefore that the judgment will be tested according to the findings of fact made by the trial court and the conclusions of law based thereon, as set out in the judgment.

Such findings of fact as were made and set forth in the said judgment must be regarded by us as justified by whatever record was made at the trial. The relevant facts are to the effect that the State Land Commissioner on April 15, 1932, issued to H. P. Young a donation certificate covering the lands in issue as forfeited to the State for nonpayment of the State and county taxes for the year of 1928. Young never had taken possession or in any manner attempted to perfect his donation, did not move upon the land, did not make any kind of improvements as required by §§ 6676 and 6677 of Crawford & Moses' Digest. Young did attempt to assign or transfer the donation certificate to defendants Clint Young and Jess Harris.

The court further found that improvements were made upon the land of a value in excess of the rents, but found these improvements were made by Mitchell Smith, Clint Young and Jess Harris, after the issuance of the donation certificate to H. P. Young.

The court found further that Olive M. Pumphrey complied with the provisions of act No. 2 of the Second Extraordinary Session of the 49th General Assembly in 1934, which act was approved January 8, 1934, and in accordance therewith redeemed her property from the tax sale. That Clint Young and Jess Harris owed rents in the sum of $210.

The court declared that the donation certificate issued by the State Land Commissioner to H. P. Young was not assignable, and that the effort of H. P. Young or the attempt made by him to assign the certificate or transfer whatever interest he had in the land by reason thereof was ineffectual. That Clint Young and Jess Harris took no interest in the land, and were therefore

without the right of possession. We think the court was correct.

Section 6673 of Crawford & Moses' Digest provides: "Any person wishing to obtain such donation shall apply therefor to the Commissioner of State Lands, Highways and Improvements, and at the same time shall file in the office of said Commissioner his or her affidavit stating that he or she possesses the qualifications required by § 6671, and that the land applied for is for the purpose of actual settlement, occupancy, and cultivation by said applicant for his or her own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and that he or she had not heretofore had the benefit of any donation law of the State."

Reference to § 6671, *et seq.*, of Crawford & Moses' Digest, prescribing the qualifications of the applicant for a donation, is convincing that it is the policy of the State to grant these certificates of donation, not to every one who might apply, but to those only who are within the provisions and requirements of the law.

A donation certificate cannot be used for speculative purposes, and rights granted by it are personal, pertaining only to the individual to whom it is issued. It is not even color of title to the land. Section 6671 *et seq.*, Crawford & Moses' Digest; *McCracken* v. *Sisk,* 91 Ark. 452, 121 S. W. 725. The attempted transfer or alienation is prohibited and void. *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972.

It perhaps may be safely said that the certificate of donation is a permit or right granted to the certificate holder to enter upon the land belonging to the State in order to make the improvements required by law. Such entry is not a trespass. *McCracken* v. *Sisk, supra.* To hold otherwise, that is to the effect that the donation certificate amounts to a grant of interest in the land which is assignable or transferable, would be tantamount to a decision that the certificate holder could select other donees and deliver possession to those not possessing the qualifications to obtain certificates in the first instance, and who are not willing to comply with the re-

quirements of the law incumbent upon those who seek to donate State lands.

It must, on account thereof, be held that Clint Young and Jess Harris entered upon the lands without right. Their possession was illegal, that they were in fact and in law trespassers. The conclusion must be that the betterment statute, § 3703, *et seq.*, cannot avail the defendants in a recovery for any improvements that may have been made upon the property.

Section 10,120 of Crawford & Moses' Digest is not applicable to give relief, but would be if the certificate of donation had been issued to the defendants herein, for such improvements made by them subsequent to two years after sale and prior to appellee's redemption. Since Young and Harris did not enter upon the land under any certificate of donation issued to them at any time, or deed from the Commissioner, they cannot recover under the rule laid down in *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180, 241; *Beloate* v. *State,* 187 Ark. 17, 58 S. W. (2d) 423, and *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. (2d) 1003.

Whatever may be the value of the improvements or enhanced value of the property by reason thereof, the appellants cannot recover even to defeat the collection of rents.

Judgment of the circuit court was correct. It is affirmed.

LEWIS *v.* JACKSON.

4-3902

Opinion delivered June 10, 1935.

[redacted]

Pearson & Pearson, for appellant.

U. A. Lovell and *Sullins & Perkins,* for appellees.

BAKER, J. The appellant, James L. Lewis was engaged in business at Springdale, Arkansas. On or about May 28, 1934, he sent a truck loaded with eggs and wool to Springfield, Missouri. Kirk Edwards was the driver of the truck. E. L. Jones, a boy about 17 years of age, though not employed by James Lewis, was permitted to go on the trip with Edwards.

At Monett, Missouri, Jones, who was an experienced driver, undertook to drive the truck, and, while he was driving, an accident occurred in which the truck was turned over, and Jones was so seriously injured that he died a few hours later.

Mrs. James Jackson filed suit against Lewis, the owner of the truck, in whose business it was operated, for damages, alleging that the brakes were defective, that the steering gear of the truck was defective, and that on account of these defects the accident occurred in which E. L. Jones was killed. Plaintiff pleaded further that these defects were well known to both Kirk Edwards and to James Lewis; that Jones did not know and was not advised in regard to such defects. After the suit was filed, Jones' father, E. L. Jones, Sr., was made a party plaintiff, and the case proceeded to trial in the names of Mrs. James Jackson and E. L. Jones, Sr., as plaintiffs. Mrs. Jackson was the former wife of E. L. Jones, Sr., but they had been separated for several years.

It was alleged as to the defective brakes that the brakes would sometimes "grab" and would sometimes stop the truck.

The answer denied all material allegations of the complaint, pleaded further that Jones had full and complete knowledge of the danger, hazard, or risk in driving the truck for the reason that he had driven it a day or two before, but without the knowledge or consent of Lewis; that he assumed whatever risk there was incident to the operation thereof.

We do not find it necessary to set forth with any great detail the facts in relation to this accident. We think however that a proper decision of the issues must be dependent upon the facts established by the evidence rather than upon the several propositions of law, argued in the briefs filed.

A summary of the facts, though given the strongest probative value, when considered in support of verdict and judgment rendered, are about as follows: A day or two prior to the time of the accident, E. L. Jones was on some trip with Kirk Edwards, was permitted to drive, and at that time called the attention of Edwards to the fact that the brakes would "grab," and this matter was discussed by them. This is proved by the testimony of Kirk Edwards, who was called and testified as a witness for the appellees.

On the day of the accident, after reaching Monett, Missouri, Edwards complaining of being tired, Jones took the wheel to drive for Edwards. He had driven but a short time when somewhere near Republic, Missouri, in the vicinity of Blade's Filling Station, at the junction of highway No. 60 with highway No. 38, the truck left the paved part of the road, and the wheels on the left-hand side dropped from the pavement to the gravel about six inches lower than the top of the pavement, causing the truck to turn over and throw Jones and Edwards out of the cab. Jones was so seriously injured that he never regained consciousness thereafter.

Edwards and others who witnessed the accident say that the truck had been following a car for some distance going north up a slight grade to a point near the filling station at which place the road turned at a right angle sharply to the east. At the point where the accident occurred the truck was but a short distance behind the car it followed up the hill. Both truck and car were moving at a moderate rate of speed. The turning point started upon a downgrade. It was at this juncture of time and place that the truck was either driven off of the pavement or skidded therefrom causing it to overturn.

Edwards, in his examination in chief for the appellees, testified: "Q. Do you know whether or not he applied the brakes? A. I wouldn't be positive, I think he did. Q. Do you say you think he applied the brakes? A. I think he did. Q. Do you know whether or not there was anything wrong with your brakes or steering gear of the car? A. It was the brakes. Q. Just what was wrong? A. They grabbed. Q. You think he applied the brakes and it hung the wheel and over you went? A. Yes, sir." Edwards said he did not notice the car ahead till right on it, and that Jones "pulled around to go around the car."

The effect of the testimony of Mrs. Marjorie DuVall, who was driving the car only a short distance away, follows: "We were ahead of the truck; I was going north and turned east. I was not driving more than 12 miles an hour when I turned the corner. I saw the truck when it left the pavement and when it was in the gravel off of the pavement. When it hit the gravel, I noticed it. I was driving slow enough that I watched the car all the time, looking back and watching it. I was going slow enough that the car stopped itself. I saw it turn over. The truck had not attempted to pass me." Mrs. Kimmerman testified to substantially the same facts, saying: "I kept watching the truck, and the two fellows in it seemed to be laughing and talking, and all of a sudden the wheels on the left side got off the road and hit and started turning over. This was all of a sudden."

All of these witnesses were testifying on behalf of the plaintiffs, and the effect of the evidence above stated has been given its highest force or value to sustain the verdict of the jury.

The trial court sent the case to the jury over the objection of the defendant. The jury rendered verdict for $1,250, upon which judgment was rendered. From this judgment appeal has properly been brought to this court. Some incidental facts not stated above will be set forth in the analysis we make.

It can make little difference that E. L. Jones was a guest or passenger, nor can it make any substantial difference that he was permitted by Edwards to drive the

truck without the knowledge or consent of the owner of the truck. Lewis was called as a witness by the plaintiffs and testified that Jones had no right to take charge of or drive the truck, and that he did not know of any defect in the brakes as he had but recently had them repaired, and had not been advised that the effort to repair had been unsuccessful.

As stated above, the defects alleged were bad brakes which would "grab" and of steering gear in bad condition. No evidence was offered tending to show that the steering gear was bad, and that issue passed out of the case and was not submitted to the jury.

The evidence was sufficient to show the defective condition of the brakes, but there is no proof whatever tending to show that the injury was caused by reason of the defective brakes. It is just as reasonable to suppose from foregoing testimony that Jones intentionally or mayhap inadvertently drove the car off the pavement or drove so near the edge of the pavement that in making the turn the truck skidded to the gravel. Appellees rely on testimony of Kirk Edwards quoted above, but that evidence is not satisfactory. It is made clear by the questions and answers that he merely expressed an opinion. The opinion may be correct. The jury had no test for its accuracy. His opinion as stated by him could do no more than raise a similar surmise in the minds of the jury. There were no other facts or circumstances to justify a fixed conclusion. Plaintiffs alleged negligence in supplying a truck with brakes that would "grab" on some occasions. Was the jury warranted in a conclusion that the brakes "grabbed"? If so, was it warranted in going still further and by conjecture find that this second surmise of fact caused the truck to turn to the left and run off the pavement, or skid therefrom? No facts or circumstances have been called to our attention to justify such conclusions. Giving to the testimony its strongest probative value will not supply matters not proved, nor will surmises be converted into verities. The proximate cause of the fatal accident cannot be determined. The verdict was possible only by permitting surmise and conjecture to supply facts incapable of proof. This was error. See

Turner v. *Hot Springs Street Railway Co.*, 189 Ark. 894, 75 S. W. (2d) 675, and cases cited therein.

We are aware that the accident occurred in Missouri, and that the law applicable to the case must be the law of Missouri. No citation of authority from that jurisdiction has been called to our attention, nor have we found any, obviating the necessity of proving the negligence alleged. Since we have decided that the evidence does not establish liability of appellant, it is unnecessary that we discuss or decide other interesting questions appearing in the briefs of the parties.

The trial court was in error in not directing a verdict for the defendant. The judgment is therefore reversed, and the cause is dismissed.

ANHEUSER-BUSCH, INC., *v.* SOUTHARD.

4-3909

Opinion delivered June 17, 1935.

Nagel, Kirby, Orrick & Shepley, G. D. Walker and *Moore & Burke,* for appellant.

Jo M. Walker, for appellee.

JOHNSON, C. J. To compensate an alleged personal injury, this suit was instituted by appellee against appellant in the Phillips County Circuit Court. The pertinent allegations were:

"That he is a resident of Phillips County, Arkansas, and that the defendant is a foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of bottling and selling in the State of Arkansas certain beverages, among which is bottled beer known as Budweiser beer.

"That on or about the second day of August, 1934, the plaintiff purchased in due course of trade, at retail, a bottle of Budweiser beer, manufactured and sold by the defendant; that in drinking a portion of the beer contained in said bottle, plaintiff swallowed a foreign substance and immediately became nauseated and extremely ill; he then examined the contents of said bottle and discovered that it contained one moth and several small flies; that, as a result of drinking a portion of the contents of said bottle, plaintiff became seriously ill; was compelled to have the attention of a physician and suffered and continues to suffer extreme pain and mental anguish; that he was seized with spells of vomiting which lasted for several hours.

"Plaintiff further alleges that said bottle of beer had been manufactured and negligently sealed by said corporation with said moth and flies in said bottle; that said bottle was delivered to the plaintiff in due course of trade, and that the defendant, when it bottled said beer, well knew that it was to be offered for sale to the general public."

The prayer was for judgment in the sum of $2,975 and costs.

By answer appellant denied the material allegations of the complaint thus filed and affirmatively pleaded contributory negligence in bar of appellee's right of recovery.

The testimony adduced when viewed in the light most favorable to appellee, as we are required to do under repeated decisions of this court, was to the following effect: That on the afternoon of August 2, 1934, he purchased from a certain beverage vendor in the city of Helena a bottle of "Budweiser beer" which was manufactured by appellant for human consumption. The vendor removed the cap from the bottle, and appellee immediately took two or three swallows of its contents; that after two or three minutes appellee took another swallow of the contents of the bottle and swallowed some foreign substance which made appellee violently sick; that, upon examination of the remaining contents of the bottle of beer, it was found to contain a decomposed moth and two or three small flies; that the bottle and remaining contents thereof were immediately resealed by appellee and safely kept until the trial of this case when and where the contents were exhibited to the jury. The testimony in behalf of appellee in reference to his injuries and the extent thereof will be omitted because no contention is urged in this behalf or about the amount of the award if liability exists.

The testimony adduced on behalf of appellant was to the effect that "Budweiser beer" was manufactured under the most approved and modern conditions, and that it was a physical impossibility for foreign substances to find entrance into such bottle of beverage and that the contents contained carbon dioxide gas which is a germicide and therefore a preservative and that decomposition was impossible in its presence.

The court among other instructions gave to the jury in charge appellee's request No. 1 as follows: "The jury is instructed that it is the duty of the manufacturers of beverages to be offered for sale to the public to use such care in the manufacture, preparation and bottling of such beverages as will render them safe for human consumption, and that, if such manufacturers negligently permit foreign substances to be bottled in such beverages, and a purchaser is injured by drinking a bottle of such beverage containing such foreign substance, and on account of such foreign substance, the man-

ufacturer would be liable to such purchaser for such negligence,''—of which complaint is urged, and gave appellant's request No. 6 as follows:

''You are instructed that the law only requires that the defendant, in the manufacturing of its beer, exercise ordinary care, and ordinary care as herein used means the exercise of such care and caution as would be exercised by an ordinary prudent person under similar circumstances and like conditions, and if you find from the evidence in this case that the defendant, Anheuser-Busch, Inc., did exercise ordinary care in the manufacturing of its beer and in the manufacture thereof exercised every precaution known to the science of brewing beer, then the defendant would not be guilty of negligence and your verdict should be for the defendant.''

The jury returned a verdict in favor of appellee for the sum of $250, and this appeal comes from the judgment entered thereon.

Appellant's first contention for reversal is that the court erred in giving to the jury appellee's requested instruction No. 1, heretofore quoted, and the contention is that said request makes appellant an insurer of the contents of the bottle of beer. This contention is grounded upon the argument that the use of the words ''use such care in the manufacture, preparation and bottling of such beverage as will render them safe for human consumption, etc.,'' makes it an insurer. The words ''use such care'' has direct reference to the degree of care required in other instructions given, and when appellant's request No. 6, heretofore quoted, which was given in charge, is read in connection with appellee's request No. 1, there is no uncertainty that appellant was only required to use ordinary care in the manufacture of its beverages. In other words, when the two instructions are read together, they state the law as a harmonious whole, and no conflict appears.

Appellant next urges that the court erred in permitting the remaining contents of the bottle of beer to be exhibited to the jury as testimony. This contention is based upon remoteness of time of exhibition plus the testimony to the effect that carbon dioxide gas is a pre-

servative, and that, when the bottle of beer was opened, this gas escaped therefrom, thereby permitting the contents of the bottle to change or any foreign substance contained therein to decompose. Appellee testified that the remaining contents of the bottle of beer were in the same condition when offered in testimony that it was when first opened and a part of its contents consumed. This testimony made the contents of the bottle *prima facie* admissible in testimony (see 10 R. C. L., § 176, title, Evidence), and after its admission the weight to be given such testimony was for the jury. No error was therefore committed in the admission of this testimony. Finally, appellant contends that the verdict of the jury was based on speculation and conjecture, and therefore should not be permitted to stand. *Great Atlantic & Pacific Tea Co.* v. *Gwilliams,* 189 Ark. 1037, 76 S. W. (2d) 65, is cited in support of this contention. In that case we stated the law as follows: "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,"—but such is not the state of the testimony presented in this record. Practically, if not all, the witnesses agree that there was some foreign substance in this bottle of beer immediately after it was opened for the purpose of consumption. Therefore it was peculiarly a question of fact for the jury's determination whether such foreign substance entered the bottle through the carelessness and negligence of appellant in its manufacture, and the evidence is amply sufficient to support the jury's finding that it did and that appellee was injured thereby.

No error appearing, the judgment is affirmed.

RODGERS *v.* CARSON LAKE ROAD IMPROVEMENT DIST. NO. 6.

4-3859

Opinion delivered June 17, 1935.

Elcock & Martin and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

Cecil Shane and *Daggett & Daggett,* for appellees.

JOHNSON, C. J. Carson Lake Road Improvement District No. 6 of Mississippi County was organized in 1929 pursuant to and by authority of §§ 5399 *et seq.* of Crawford & Moses' Digest commonly known as the Alexander Road Law.

To effect the contemplated improvements, bonds were issued in the total sum of $370,000, and benefits were duly assessed against the real property situated in the district to secure the due payment of the bonds and interest. The bonds drew interest at the rate of six per cent. per annum payable semiannually in May and November each year. The semiannual interest payment which was due on May 1, 1932, aggregating $9,250 was in part defaulted by the district, and thereafter L. F. Rodgers, as trustee for the bond-owners and holders, instituted suit in the Mississippi County Chancery Court to enforce collection of delinquent benefit assessments, to enforce the obligations of its bond contract and for other purposes not necessary to here set out. To facilitate these ends, the chancellor on September 12, 1932, appointed Charles E. Sullenger as receiver, and soon thereafter he qualified as such and acted in the premises until this proceeding was instituted and determined.

The second annual report of the receiver, which was filed at the end of his second year's receivership, reflects that there is $37,475 in past-due interest payments in default.

On September 17, 1934, Joe Collum, R. E. L. Wilson, Jr., and R. H. Cromer, who constitute the board of commissioners of Carson Lake Road Improvement District No. 6, and J. H. Crain, a taxpayer within said district, filed their petition of intervention in said receivership matter in which it was, in effect, alleged: That the appointment of a receiver by the chancery court is contrary to the spirit of the law and of good business principles; that it was a serious business mistake for the court to so adjudge in the first instance; that § 545, Crawford & Moses' Digest, authorizing such appoint-

ment upon default by the district, is in violation of § 15 of art. 7 of the Constitution of 1874; that said section (§ 545, Crawford & Moses' Dig.) was expressly repealed by act 46 of 1933; and that the bond-owners and holders have a complete and adequate remedy at law; therefore that equity has no jurisdiction of the subject-matter, and the receivership should be dissolved and the receiver discharged.

The trustee for the bond-owners and holders responded to interveners petition by denying the material allegations thereof and affirmatively alleged that the intervening commissioners of said district, their employees and business associates, own approximately fifty per cent. of the lands situated in said district and have paid no taxes or assessments for the past four years; that, while said district was being operated by interveners, they failed and refused during the years 1931 and 1932 to bring any suits to enforce delinquent assessments, though such delinquencies were many, and made no effort in this behalf, thereby permitting a default in the district's obligations which superinduced this proceeding.

The chancery court determined that § 5451, Crawford & Moses' Digest, is contrary to § 15 of art. 7 of the Constitution and therefore void; moreover, that said section was repealed by act 46 of 1933, and that the best interests of the taxpayers of the district would be subserved by the dissolution of the receivership. Proper orders were made to this effect, and this appeal follows.

Section 5451, Crawford & Moses' Digest, is not contrary to § 15 of art. 7 of the Constitution. This section of the Constitution authorizes the establishment of chancery courts by the Legislature, and, when so established, they draw unto themselves such jurisdiction as was exercised by such courts under the common law and common law practice. The power to appoint receivers by the chancery courts was fully recognized at common law, and it is one of its ancient prerogatives. 23 R. C. L., p. 32, § 30, title "Receivers," states the law as follows:

"The power to appoint a sequestrator or receiver seems to have been exercised by the chancellor as early as the time of Edward VI. At all events, the appointment

of a receiver is one of the oldest remedies in the chancery court. This power is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it."

True, we have consistently held since *Hempstead & Conway* v. *Watkins,* 6 Ark. 317, that the Legislature is without power to add to, limit or abridge the jurisdiction conferred on chancery courts or circuit courts acting as such by the Constitution of this State. See *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230; *German National Bank* v. *Moore,* 116 Ark. 490, 173 S. W. 401; *Wilson* v. *Lucas,* 185 Ark. 183, 47 S. W. (2d) 8. But we have never held that, where the subject-matter was within chancery court's ancient jurisdiction, the Legislature was without power to regulate the exercise thereof. In fact, we expressly decided to the contrary in *Marvel* v. *State,* 127 Ark. 595, 193 S. W. 259, 5 A. L. R. 1458, where we stated the rule as follows:

"The act in question has not conferred upon the chancery courts of this State any additional jurisdiction. It has merely prescribed a new condition upon which this ancient jurisdiction may be exercised. The act is remedial in its nature, and, while the Legislature cannot enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the Legislature to prescribe the procedure for the exercise of this jurisdiction and to prescribe new conditions under which that jurisdiction may be exercised."

The views thus stated are in full accord with *United Mine Workers* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. There the receivership was not ancillary or incidental to any pending suit in equity, whereas, in the instant case it is ancillary and incidental to a suit one object of which was to enforce collections of past-due taxes or assessment of benefits made necessary because of the non-activity of the duly constituted board of commissioners and other well recognized equitable grounds. Other cases of similar import cited by interveners are grounded upon reasons

similar to the last case cited and have no application to the facts of this case.

Moreover, legislative enactments not substantially different from § 5451, Crawford & Moses' Digest, have ever been considered and treated by this court as in aid of and not impairing the common law and constitutional jurisdiction of chancery courts in this State and therefore constitutional and valid. *Sewer Improvement Dist.* v. *Delinquent Lands,* 188 Ark. 738, 68 S. W. (2d) 80; *Driver* v. *Lanier,* 66 Ark. 126, 49 S. W. 816; *Buchanan* v. *Hicks,* 98 Ark. 370, 136 S. W. 177; *Corn* v. *Skillern,* 75 Ark. 148, 87 S. W. 142; *South Miller County Highway Dist.* v. *Dorsey,* 174 Ark. 553, 297 S. W. 833. The proposition of law that equity or chancery courts since ancient times have assumed jurisdiction to enforce liens against real estate needs no citation of authority to support it. At the time this suit was instituted, semi-annual interest payments were in default, therefore equity had jurisdiction of the subject-matter, and this receivership was merely an incident to the enforcement of the primary jurisdictional matter. It follows that § 5451, Crawford & Moses' Digest, does not offend § 15 of art. 7 of the Constitution, but is in aid thereof and must be sustained as against constitutional attack.

It is not necessary to decide in this proceeding whether or not § 5451, Crawford & Moses' Digest, is repealed by act 46 of 1933 or the constitutionality of said act in the event such repeal is effected thereby. This receiver was appointed in September, 1932, and immediately thereafter entered upon the discharge of his duties. Act 46 of 1933 was not passed for several months subsequent thereto. Said act does not purport to be retroactive in scope or effect and should not be given a retroactive effect unless the language employed therein expressly so provides. We find no such mandate in the act. Neither expressly nor by implication does this act undertake to discharge or dissolve pending receiverships in the courts of this State; therefore it has no application to the facts here presented, and the dissolution of the receivership in this proceeding cannot be justified

because of it. We therefore pretermit a discussion of the constitutionality of act 46 of 1933.

It is next insisted that the dissolution of a receivership rests in the sound discretion of the chancery courts. Concededly this is a law in this State, but the question then presents itself, did the chancellor abuse this discretion in dissolving the receivership and discharging the receiver in this proceeding? This question should be tested by the facts and circumstances existing at the time of the dissolution of the receivership and not in 1932 when the receiver was first appointed. If conditions existed at that time which necessitate a continuation of the receivership, then it should be continued irrespective of conditions when such receiver was first appointed. The determination of this question rests upon a question of fact. The record reflects that this improvement district now has outstanding in excess of $37,000 past-due interest coupons, which are in default. Until receivership, no aggressive action had been assumed by the commissioners of the district to effect collections of past-due assessments or taxes. Practically one-half the lands in the improvement district belong to the commissioners or their business associates, and they have paid no assessments or betterment taxes for the past four years. Can these commissioners be expected to aggressively collect past-due taxes? We emphatically answer this question in the negative. Due to the non-activity of the commissioners and due to their individual refusal to pay betterment taxes when due, the district is now in default in a large sum of money, and the bond-owners and holders have a legitimate cause to suspect non-activity on their behalf if again entrusted with the management of the district's affairs and the collection of its taxes. The non-activity of these commissioners superinduced the district's present financial straits.

The receivership should not have been dissolved unless and until all past-due obligations of the district were discharged, and the chancellor abused his discretion in deciding otherwise.

For the reasons stated, the case must be reversed and remanded with directions to reinstate the receiver,

and for further proceedings not inconsistent with this opinion.

RAILWAY EXPRESS AGENCY, INC., *v.* MCADAMS.

4-3952

Opinion delivered June 17, 1935.

A. M. Hartung and *W. C. Rodgers,* for appellant.
James S. McConnell and *J. S. Butt,* for appellees.

SMITH, J. Appellee is a seed and plant dealer at Nashville, Arkansas, and has license to sell his produce under Federal regulations. Appellant is a common carrier engaged in the transportation of these and other commodities. In a case brought in the Howard Circuit Court three separate causes of action were adjudged arising out of the relation between these parties of shipper and carrier.

The first shipment involved two consignments of radishes containing 139 crates of 100 bundles each of the invoice value of $243.25. These were shipped to Coyne & Company at Chicago on December 14, 1933, and upon arrival the consignee refused to accept the shipment on account of the condition of the vegetables. Appellant's agent at the point of shipment was so advised, and he communicated that information to appellee, the shipper. Appellant's agent at Chicago was then advised by appellee by wire to sell the radishes to the best advantage, and they were delivered to Coppersmith & Company, who were responsible dealers in such produce. The radishes were sold for $5, which appears to

have been the best price obtainable. This was $84.69 less than the express charges. The complaint alleges that the radishes were shipped in good merchantable condition, and that they were damaged because appellant carelessly and negligently transported them in hot and improperly ventilated cars and were damaged through the lack of ventilation. We are convinced, after a careful consideration of the testimony, that it is insufficient to support these allegations, and that there can be no recovery on this count.

The second cause of action was based upon a consignment of tomato plants to the Ladago Canning Company at Pulaski, Illinois, of the invoice value of $157.16. It appears, however, that there was no recovery of damages on account of this shipment, and no further reference will be made to it.

The third count was based upon a shipment of 155 crates of tomato plants, containing 310,000 plants, of the invoice value of $310. The plants were shipped C. O. D. to the Summit Canning Company in New Castle, Indiana, and arrived at their destination about 9 A. M., June 2nd. The consignee declined to receive the plants because of the C. O. D. charge, and appellant's agent at New Castle wired appellee at 11 A. M. on June 2nd that delivery would be accepted by the consignee upon the condition only that the collection of the C. O. D. charge was waived. At 9:32 A. M. on the same day the consignee wired appellee to the same effect. In another telegram on the same day the consignee wired that the plants were refused because they were small, spindly and dry.

Upon receipt of these telegrams appellee wired numerous dealers in various parts of the country, and finally received an offer for the plants from the Ozark Canning Company, of Springfield, Missouri. He sent a telegram to appellant at New Castle asking an exact statement of the condition of the plants, which was delivered at 2 P. M. on June 3rd. In response to this telegram appellant's agent answered by wire at 5 P. M. on June 3rd that the plants were in apparent good order. Appellee wired a reshipment order, which was received Monday, June 5th, the exact time of day not being shown

with certainty. It appears, however, that about 5 P. M., June 3d it was determined at a conference between appellant's agent and the consignee's manager that the plants would be worthless if allowed to remain in the crates which contained them that night, and they were delivered to E. S. Matlock, the manager of the consignee, who testified that the plants were carried to the consignee's warehouse, where they were watered and other efforts made to preserve them. The reshipment order was not executed because it was thought that the value of the sound plants at that time would not equal the additional express charges, which would have been $100. Matlock testified that he was able to salvage only 38,000 of the plants, and that the balance was dumped or thrown away as worthless.

It is earnestly insisted that no breach of the carrier's duty in regard to the tomato plants was shown, and that there could be no recovery on this account. It is insisted also that the consignee, and not the consignor, has the right to sue.

We do not concur in either contention. The carrier had no right to deliver the C. O. D. shipment without making the collection. It is argued that the carrier had the right to sell the plants if the express charges were not paid. This right may be conceded, but this is not what it did. No sale was made. On the contrary, there was a delivery to the consignee without making the collection. The shipper did not agree that this should be done, nor did he waive the collection of the C. O. D. charge when advised that the delivery could not otherwise be made.

It must not be overlooked that, after appellee had been advised that the shipment would not be accepted unless the C. O. D. charge was released, appellee wired appellant's agent at New Castle for an exact statement of the condition of the plants. This information was evidently desired in making another sale, which was later made. An answer was wired by appellant's agent at 5 P. M. on June 3d that the plants were then in apparent good order. The agent explained this telegram in his deposition by saying that he meant that they were

in as good shape as it was possible to keep them with the weather hot and the plants already two days in appellant's hands. That qualification, however, was not contained in the telegram, and the explanation was, of course, one of the many facts to be considered and weighed by the jury.

As to the contention that the consignor had no right to sue, it may be first said that the pleadings raised no such issue. Moreover, the testimony of the consignee makes certain the fact that it claims no right to sue for the damages. It disclaims any interest, and explains its refusal to accept the shipment and pay the C. O. D. charge by attempting to show that the delivered plants did not conform to the contract of purchase. In its telegram refusing to accept the plants it was stated that they were small, spindly and dry. It is true a delivery was made to the consignee's manager, which may be treated as a delivery to the consignee itself, but this is why the carrier must be held responsible. The delivery was made without collecting the C. O. D. charge. The consignee's manager makes certain the fact that he did not accept the delivery as consignee, but with the kind intention only of minimizing the damages. But that action made it impossible for appellee to complete the resale of the plants to the dealer in Springfield, Missouri, and appellant's wrongful delivery was responsible for that result. As to the general conditions under which a consignor may sue, see § 399 of the chapter on Carriers, 4 R. C. L., page 942, and the cases cited in the note to that section.

We conclude therefore that the carrier was properly held liable to appellee for the value of the C. O. D. shipment amounting to $310. It should have credit, however, for the amount of its express charges on the other two shipments, less the money, if any, which it may have in its hands derived from any one or all of these shipments. The judgment here appealed from will be reversed, and the cause will be remanded, with directions to render judgment only for the $310 C. O. D. shipment, less the credits indicated.

HODGE *v.* HODGE.

4-3910

Opinion delivered June 17, 1935.

[redacted]

Osborne W. Garvin, for appellants.

F. W. A. Eiermann, for appellee.

SMITH, J. Lillian Hodge brought this suit to have a resulting trust declared in her favor upon a lot in the city of Little Rock the title to which was outstanding in the name of her son Manzo Hodge at the time of his death. The suit was brought against Nettie Hodge, the widow of Manzo. It appears that Manzo was also survived by three infant children, who were not made parties. The relief prayed was granted, and this appeal is from that decree.

It appears from this brief statement of facts that the case, in its essential features, is identical with that of *Freeman* v. *Russell,* 40 Ark. 56. In that case the devisees of a mother sued the administratrix, widow and one of the heirs of the testatrix's deceased son, Wm. D., to have a resulting trust declared. They failed to make Robert L. Freeman, an infant nonresident heir of the testatrix's son, a party to the suit. The relief prayed was granted, and the minor was joined with the other defendants in the application here for an appeal from that decree. The opinion there, if copied here, might, with the substitution of names, serve as an opinion in this case. The court declined to express any opinion upon the merits of the case for the reason that proper parties were not before the court. In so holding the court said: "The nonresident defendant, Robert L. Freeman, appears from the bill to be entitled, if there were no resulting trust, to a third interest in the land as heir of his uncle, Wm. D. No decree affecting his title should have been pronounced against him, without service and

a substantial defense by guardian. He was an essential party, as his rights were the principal object of attack. They were permanent if he has any. The dower is transient. The court was not asked to pronounce a decree against the widow, saving his rights, and ought not to have done so if it had been asked, unless they had been conceded. For, upon any attempt on his part to assert them afterwards, precisely the same litigation would have to be gone over, upon issues requiring the same proof. Courts of equity ought not to do justice by piece-meal when it can be done in one suit without great inconvenience. This, indeed, the court meant to do, but was, so far as the transcript shows, mistaken, in supposing it had before it the parties to be bound."

The decree in the case cited was reversed, and the cause remanded with directions to make the minor heir a party, and it was stated that he was not bound by the proof then taken. This decree must be reversed for the reasons there stated, and it is so ordered.

WASSON *v.* GROVEY.

4-3860

Opinion delivered June 17, 1935.

Charles S. Harley and *Nelson H. Sadler,* for appellant.

Malcolm W. Gannaway and *William D. Hopson,* for appellee.

SMITH, J. The State Bank Commissioner, in charge of the Union Trust Company for liquidation, brought this suit against appellee, F. C. Grovey, upon his promissory note for $500 payable to the order of the bank. Liability upon the note is conceded, and the insolvency of the bank is not denied. Appellee filed an answer, in which he alleged that he had on deposit in the insolvent bank as his own funds more than $500 in the name of "Mutual Benefit Health & Accident Association, by F. C. Grovey," and he prayed that these funds or a sufficient amount of them be offset against any judgment recovered against him.

Grovey testified concerning this account as follows. He was the general agent of the insurance company, and used this account as his general checking account. It was over $500 in amount at the time suit was brought. No one else had made any deposits for the benefit of this account, and no one else was authorized to draw checks against it. It was his practice to deposit insurance premiums as he collected them for the insurance company. A debtor and creditor relationship existed between himself and the insurance company for such part of said collections as were due the insurance company, because, at the end of each month, the insurance company would bill him for the net amount due it. The amount due the insurance company had been paid, and the balance of the deposit belonged to appellee. No disclaimer of ownership of the deposit was filed by the insurance company, and it was not made a party to the suit. The question of a defect of parties was properly raised and preserved.

The case was submitted under an instruction which told the jury that appellee had the right to offset the deposit if it was found that he was the owner of it. There was a verdict in appellee's favor, from which is this appeal.

The right of offset is not questioned, but it is insisted that proper parties were not before the court to

adjudge that question, and we think appellant is right in this contention.

Prima facie, the insurance company has an interest in this deposit, and the extent of that interest can only be determined in a proceeding to which it is a party. No disclaimer of this interest was filed. It is universal and elementary law that any person who has title to or an interest in the subject-matter of litigation, who may be adversely affected by the adjudication thereof, is a necessary party to such litigation.

This deposit was apparently made by an agent in the name of a disclosed principal, and the checks upon it were so drawn. The attempt to plead the deposit as an offset against an individual demand against the agent himself is, in effect, an attempt by the agent to sue in his own name and for his own benefit on a deposit contract carried in the name of the principal. Unless specially authorized, the agent has no such authority. See § 504, chapter on Agency, 2 C. J., page 829.

If the insurance company has an interest in this deposit, the fact that its agent was permitted, in the trial from which this appeal comes, to use it in extinguishment of the demand of the bank against him, would not prevent the insurance company from also asserting its interest against the bank, as it is not bound by the judgment from which this appeal comes, for the reason that it is not a party to this suit.

The judgment must therefore be reversed, and upon a new trial the insurance company must be made a party or competent evidence offered that it claims no interest in the deposit outstanding in its name before it may be used as an offset against an admitted liability. Judgment reversed, and cause remanded.

CHERRY *v.* OVERMAN.

4-3978

Opinion delivered June 17, 1935.

[redacted]

Joseph Brooks and *Robert J. Oliver,* for appellant.

Verne McMillen, Ed I. McKinley, Jr., and *Carl F. J. Jaggers,* for appellee.

HUMPHREYS, J. Appellant brought this suit to enjoin appellees from issuing interest-bearing bonds in the sum of $50,000 to liquidate an indebtedness incurred by the city of Little Rock between October 7, 1924, and December 7, 1924, which was a valid, subsisting indebtedness of said city on the latter date.

It is alleged that, pursuant to and in conformity with amendment No. 10 to the Constitution of the State of Arkansas, the city of Little Rock issued interest-bearing bonds in the sum of $1,910,000 to retire its existing indebtedness on October 7, 1924, and that the maximum amount of three mills authorized by said amendment was levied on the taxable property of said city to pay the principal and interest of said bonds as they mature, but that the revenue derived and to be derived from said three-mill levy is not sufficient to meet the maturities of said bond issue.

It is also alleged that on May 13, 1935, the city council of Little Rock enacted ordinance No. 5238, which stated that, through a misunderstanding as to when amendment No. 10 to the Constitution became effective, the bond issue of May 12, 1925, funded only the indebtedness which had accrued to October 7, 1924, and failed to

fund the indebtedness of the city accruing between October 7, 1924, and December 7, 1924.

A demurrer was filed to the complaint by appellees, which was sustained by the court, and, appellant refusing to plead further and standing upon his complaint, same was dismissed by the court, from which is this appeal.

The only question arising on this appeal is whether the city may issue interest-bearing bonds to retire its valid, subsisting indebtedness which accrued between October 7, 1924, and December 7, 1924, under amendment No. 10 to the Constitution and under Enabling Act 210 of the Acts of 1925, after having issued $1,910,000 in interest-bearing bonds to fund its valid, subsisting indebtedness on October 7, 1924, and after having levied a three-mill tax on the taxable property of said city to meet the maturities of said bond issue. It is admitted by the demurrer that the revenue derived and to be derived from the three-mill levy will not be sufficient to pay the interest and principal as it matures on the bonds already issued. In other words, that the three-mill levy will be more than absorbed in meeting the maturities of the bond issue of $1,910,000. Amendment No. 10 to the Constitution contains the following provision:

"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."

The Enabling Act of amendment No. 10 provides: "Before or after the issue of said bonds * * * the city council of such city shall levy a tax, which on the existing assessed value of the property of such city will suffice to retire said bonds as they mature, with five (5) per cent. added for unforseen contingencies, nor shall any tax in excess of the three mills on the assessed value existing at the time of such levy ever be levied in any year. The money derived from such taxes shall be pre-

served as a separate fund for the redemption of such bonds."

Prior to the adoption of amendment No. 10 to the Constitution cities were prohibited from issuing interest-bearing evidences of indebtedness. Their only authority therefore to issue interest-bearing bonds must be found in this amendment. Although the authority is granted to them under said amendment to issue interest-bearing bonds to fund all their outstanding, valid and subsisting debts on December 7, 1924, yet the bond issue must be made on such a basis that the three-mill levy on the taxable property therein will meet and pay all maturities. This court said in the case of *Hagler* v. *Arkansas County,* 176 Ark. 115, 2 S. W. (2d) 5, that: "The plain mandate of the Constitution as amended was to authorize the counties to get out of debt and to stay out of debt. And it is apparent that the only way that many of them can do this is to take up all indebtedness existing at the time amendment No. 10 to the Constitution of Arkansas became effective, by a bond issue, to be retired by the levying of a tax not to exceed three mills for this purpose in addition to the general county levy for county purposes."

Appellees cite and rely upon the case of *Caskey* v. *Holmes,* 190 Ark. 183, 77 S. W. (2d) 971, as supporting their contention that, where a mistake of law or fact was made in ascertaining the amount of the outstanding, valid, subsisting indebtedness against a city on December 7, 1924, and bonds insufficient in amount to pay the entire indebtedness as of that date are issued, an additional bond issue for the deficiency might be issued under amendment No. 10 to the Constitution. It was so held in that case, on the assumption, of course, that the three-mill maximum levy authorized by the amendment and enabling act would be sufficient to meet the maturities of the entire bond issue. In the instant case, no such presumption can be indulged, for it is admitted that the maximum annual levy of three mills authorized by the amendment and enabling act has been and will be more than absorbed to meet and pay the maturities of the bond issue of $1,910,000 already issued and sold. No part of the maximum

three-mill tax already levied and to be levied annually on the taxable property of Little Rock can be diverted and used for the payment of the maturities of the proposed bond issue because the revenue derived and to be derived therefrom must be applied to the payment of the maturities of the bonds heretofore issued in the sum of $1,910,000. The amendment prohibits any increase in the levy, and no other levy being available, the authority of the city to issue additional interest-bearing bonds has been exhausted.

The decree is reversed, and the cause is remanded with directions to enjoin appellees from issuing additional interest-bearing bonds to fund the debts of the city which accrued between October 7, 1924, and December 7, 1924.

BALDWIN *v.* WINGFIELD.

4-3897

Opinion delivered June 17, 1935.

R. E. Wiley, Henry Donham and *Wm. P. Bowen,* for appellants.

J. H. Lookadoo and *Lyle Brown,* for appellee.

MEHAFFY, J. This suit was begun by appellee in the Clark Circuit Court to recover damages for injuries to her eye. She alleges that she boarded the train at Little Rock on February 17, 1934, after purchasing a ticket to Arkadelphia. She went to the window before the train started, to call to her husband, and noticed that the glass in the window was cracked clear across. It was alleged that somewhere near Benton, while she was sitting near a window in the train, the glass in the window by which she was sitting broke and part of the glass struck her in the left eye. She alleged that the appellants knew, or should have known, the unsafe condition of the window. Her eye was permanently injured, and she prayed judgment against appellant in the sum of $3,000.

Appellants filed motion to require appellee to make her complaint more definite and certain, in that she failed to allege in what respect the window was in an unsafe condition. In response to this motion, appellee filed an amendment alleging that the negligence complained of was that the glass in the window was broken, and had been broken for some time; that it was not properly fastened in the frame of the window, and that the train was operated in such a manner that there was a sudden jerk which shattered the glass in the window, and that particles of the glass struck her in the eye.

Appellants filed answer, denying the allegations of the complaint and alleging that, if appellee was injured, her injuries were due to some person, unknown to appellants, throwing a rock through one of the windows of the coach in which appellee was riding, and that, if appellee sustained any injuries, they were the result of an unavoidable accident.

Appellee testified that she lived at Arkadelphia; was 36 years old, washed, ironed and cooked for a living; on February 17, 1934, she sustained the injury; glass fell out of the window and struck something and fell over her; bought a ticket at the Union Station at Little Rock to ride the Missouri Pacific train to Arkadelphia; got on the train, took a seat, and between Little Rock and Benton the glass fell out of the window; it was cracked clear across; she knew this before she left Little Rock; her

husband went down the steps to help bring her luggage, and she had left her umbrella in the station; went to the window to wave to him to bring her umbrella. The train gave a sudden lurch, and she thinks that is what shook the glass out of it; and some of it got in her eye; her eye has been giving her considerable trouble ever since; it never bothered her before, and she never used glasses before; now she cannot go without them; before the injury she was getting $3 and $3.50 a week for ironing alone, but has been unable to do anything since the accident.

On cross-examination she testified that she was riding on the right-hand side of the coach coming to Arkadelphia and the window that was broken was on the opposite side of the aisle from her, not directly opposite, but was the next window back of her. The glass was cracked clear across. They say there was a rock found after the accident, that landed on Tansie's coat; she saw the rock after the conductor took it and stood in the aisle and said: "Here is what did it." Most of the top part of the window was broken, the upper part fell out; it shattered and got in her eye while she was sitting clear across the aisle from it. There were not many people in the car; Dr. Ross and Dr. King treated her eye; the rock that they showed her was about the size of her fist; the train gave a sudden jerk before it fell out she thinks that is what shook it out; the train stopped after the accident, but was not a station stop; it stopped because of all the excitement going on. This was all of the appellee's testimony.

Tansie Williams testified for the appellant that she remembered getting on the train at Cypress Junction one night in February when Bettie Sue Wingfield was on the train; she knows her; on that trip between Cypress Junction and Malvern a rock was thrown through the train; witness and appellee were both in the colored car; she was not in the coach when the rock was thrown through, but was in the lavatory; saw the window after it was broken, but paid no attention to it before; the rock was found in her husband's pocket; his coat was on the back of the seat that appellee was sitting in; she was com-

ing out of the lavatory when they found the rock; did not pay any attention to the window if it was broken.

Theoplis Williams testified that he was on the train in the back end of the colored part of the coach, and when the rock came through he heard it crash; it sounded like a gun or something; the rock knocked a little hole in the window; saw the rock after it was all over; saw the window after it came through; paid no attention to the window before, but did not notice anything wrong with it; was working for the railroad at the time; saw the hole and saw the shattered glass.

Tansie Williams, recalled, testified that she saw the broken glass on appellee and helped clean it off.

John Williams testified that he was on the train riding behind appellee; saw the rock after they found it and heard the crash as it came through the window; does not know who found the rock, but it was found either in his overcoat or in his wife's coat; when the coat was picked up the rock dropped out; the rock did not seem to shatter it much, just knocked a hole through the window; if there was anything wrong with the window before, he did not notice it; did not see any crack in the window; there was no unusual jerk of the train at the time the rock was thrown; everybody seemed to think it was a shot when the rock came through; it just broke a little round hole through the window about the size of the rock and shattered it a little.

M. C. Wilbanks testified that he worked for the railroad company and was gang foreman; was on the train when the rock was thrown through the window of the colored coach; he was riding in the smoker right behind the colored car and heard the commotion; the train was just south of Benton at the time; does not remember whether the train slowed down or not; heard a racket in the colored car, went in there, and found a hole through the window; some man found a rock in a seat in some man's coat; turned the rock over to the conductor; the window had a hole in it about the size of a saucer; it went through the glass somewhere near the middle of the window; does not remember where the train stopped after that, but they did not try to find who threw the rock; the

train was not stopped at all; did not remember any unusual jerk of the train.

A. J. Spear, conductor on the train, testified that it was said a rock was thrown through the window of the colored coach; went into the colored coach and made an investigation; was in the rear car when he first learned of the commotion in the colored car; a man came back and said that somebody had thrown a rock through there; examined the window and found the center part was broken, a place about the size of a saucer; did not notice anything wrong with the window besides a hole through it; none of the glass was broken out where it fastened to the frame; the rock was afterwards found; thinks it was taken out of a pocket; was turned over to witness and he turned it over to the special agent; did not notice any unusual movement of the train; if the window was cracked when it left Little Rock, he knew nothing about it; the train was inspected at Little Rock, Poplar Bluff and Texarkana; after the accident witness made inquiry, and nobody complained of being hurt; did not stop the train.

W. D. Traylor, porter on the train, testified that he did not remember any unusual jerk; observed the window in the coach where it was said a rock was thrown through; there was a hole in the window about the size of a hen egg; does not remember what part of the window the hole was in; does not remember seeing anything wrong with the window when it left Little Rock, but did not particularly make any observation.

The engineer on the train, J. L. Fisk, testified that he did not remember any sudden jerk or lurch of the train; remembers that it was reported to him that a rock had been thrown through the window.

J. H. Sheppard, city marshal of Gurdon, a passenger on the train, testified that he was in the colored coach with a colored prisoner; heard the commotion and went to investigate and found that there was a hole through the window; saw the rock that they said they found in the coach; there was nothing wrong with the window except the hole in it; did not notice any unusual lurches or jerks.

A. J. Goolsby, car inspector at Texarkana, inspected the car when it came into Texarkana, and his record shows that there was a glass broken on the left side; did not notice any defect in the window frame.

J. C. McCabe testified that he lives in Little Rock and works for the railroad company and is passenger car foreman; inspected train No. 3 on February 16th; the inspection was done under his supervision, and he made a record; did not observe any crack in the window; if he had found anything of that sort, he would have made a note of it; had with him a window of the type that was in the car.

There was a verdict and judgment for appellee for $250, and the case is here on appeal.

The appellants first contend that the court erred in refusing to give their instruction directing a verdict for them.

It will be observed that there is no testimony in the case for appellee except her own testimony, which is to the effect that the window was broken before it left Little Rock, and that a sudden lurch of the train caused it to shatter and caused some of the particles to go into her eye. No one contradicts the evidence of appellee that the window was broken when it left Little Rock, except the inspector testifies that it was inspected under his supervision, and, if there had been anything wrong with it, he would have made a note of it. While it was inspected under his supervision, the person who made the inspection did not testify. The inspector did not claim that he did it personally.

This court does not pass on the credibility of witnesses nor the weight to be given to their testimony. When the jury has returned a verdict and the trial court has refused to set it aside, this court cannot interfere if there is any substantial evidence to support the verdict.

In the instant case the appellee swears positively that the window was broken when the train left Little Rock. Several witnesses testify that if it was broken they did not notice it; but if they had testified that it was not broken, this would still have been a question for the jury, and this court could not interfere with its verdict.

This court has said: "We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physically impossible that appellee was injured as a result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner." *Mo. & N. A. Ry. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478.

It may be that it is improbable that the injury occurred in the instant case as stated by the appellee, but it is not physically impossible.

In determining whether there was sufficient evidence to submit the cause to the jury, we look at the evidence of the appellee alone. It is true the appellant's witnesses testified about a rock being thrown through the window. There is no direct evidence that any one threw a rock through the window, and there is no evidence as to who found the rock. The only evidence is that witnesses say that some one found a rock in the pocket of a coat lying on the seat by appellee. Numbers of witnesses testified that they heard the crash, and some of them said it sounded like a shot; but all these witnesses were present in the trial court, the jury and trial judge heard them testify, observed their demeanor on the witness stand, and had an opportunity, that we do not have to weigh their evidence and pass on their credibility.

"The fact that the appellate court would have reached a different conclusion had the judges thereof sat on the jury, or that they are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of a verdict based on conflicting evidence." 4 C. J. 859, 860.

"The verdict of a jury cannot properly be disturbed on appeal merely because of its appearing to be against the clear weight of the evidence, or because, if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did. If the verdict has any credible evidence to support it, any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations, it is proof against

attack on appeal, and that must be applied so strictly, on account of the superior advantages of court and jury for weighing the evidence, that the judgment of the latter approved by the former is due to prevail, unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving legitimate effect to the presumption in its favor and the makeweights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record." *Barlow* v. *Foster,* 149 Wis. 613, 136 N. W. 822.

"Under our system of jurisprudence it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. * * * When there is a total defect of evidence as to any essential fact, or a spark, a 'scintilla,' as it is termed, the case should be withdrawn from the consideration of the jury." *Cunningham* v. *Union Pac. Ry. Co.,* 4 Utah 206, 7 Pac. 795; *Equitable Life Assurance Society* v. *Felton,* 189 Ark. 318, 71 S. W. (2d) 1049; *Healey & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. (2d) 242; *Brown* v. *Dugan,* 189 Ark. 551, 74 S. W. (2d) 640; *C. R. I. & P. Ry. Co.* v. *Britt,* 189 Ark. 571, 74 S. W. (2d) 398.

There are many other decisions of this court to the same effect. The settled rule is that, if there is any substantial evidence to support the verdict of a jury, this court cannot disturb it, although we might think that it was clearly against the preponderance of the evidence, and, if we had to decide the facts, would decide differently. While the evidence is unsatisfactory, yet we cannot say that there was no substantial evidence to support the verdict.

Appellant next contends that instruction No. 1 given by the court as requested by appellee is erroneous. The specific objection made to the instruction is "that there

is no proof to establish that the broken condition of the window, as testified by plaintiff, caused it to fall out—no testimony to that effect, and it is merely a guess."

We do not agree with appellants in this contention. If the evidence of the appellee is true, and the jury had a right to believe it, the window was broken before the train left Little Rock; and, if there was a lurch of the train which shattered the glass and threw some of the glass on appellee, this is not merely a guess. At any rate, this was one of the questions submitted to the jury, and its finding is conclusive.

It is next contended that the court erred in giving appellee's requested instruction No. 2. The specific objection to that instruction is: "That the undisputed testimony shows that the glass was caused to shatter by a rock being thrown through the window." This is not the undisputed testimony. The appellee testifies that the lurch of the train caused the window to shatter, and no one testifies to the contrary. To be sure, the testimony of appellants' witnesses shows that there was a crash, and that the window was shattered, and they found a rock in the car. This is the evidence with reference to the rock being thrown. The witness who found the rock did not testify, and no one saw the rock thrown through the window. This was also a question for the jury, and its finding is conclusive.

It is next contended by the appellants that the court erred in giving appellee's requested instruction No. 3. The only objection to this instruction is that it is abstract. It defined "negligence," and this was a proper instruction to the jury. The appellants were charged with negligence, and it was proper to tell the jury what constituted negligence.

Appellants requested a number of instructions which were given by the court. Its instruction No. 2, after stating what the appellee claimed in her complaint, is as follows: "You are instructed that the burden of proof is upon the plaintiff in this case to prove, not only that she sustained an injury, but that the defendants were negligent in the manner complained of by her, and that such negligence was the proximate cause of the injuries which

she sustained, and she is required to prove this by a greater weight of the evidence. If she had failed to make such proof by a greater weight of the evidence, then your verdict should be for the defendants."

Other instructions were given at the request of the appellants defining the duties the appellants owed the passengers, and we find no error in the court's instructions.

The court having properly instructed the jury, and there being some substantial evidence to support the verdict, the judgment is affirmed.

SMITH, J., (dissenting). I quote from the transcript verbatim the entire testimony of the plaintiff explaining the manner and cause of her injury. She testified as follows: "Well, the glass fell out the window. It struck something and fell all over me. That's all I know, it happened so quick. The glass was cracked clear across. I knew that before we left Little Rock, because I got on the train and my husband came down the steps to help bring my baggage down, and I left my umbrella in the station, and I put my baggage on the left-hand side and went to the window to wave at my husband to bring my umbrella, and the window glass was cracked clear across. When the window fell out, it (the train) just gave a sudden jerk. Really, I think that's what shook the glass out of it. Some of it (the glass) got in my eye. I made the remark—I didn't know what it was—I says 'I got a cinder or glass, one, in my eye,' and I caught my eye like that." Other testimony of the witness related to the extent of the injury and the suffering it had occasioned.

On her cross-examination the witness stated that the broken window was on the opposite side of the car, across the aisle and one seat to her rear. She did not state that she was riding backward. Her own testimony and that of all the other witnesses makes the fact certain that she was facing the direction in which the train was moving. No explanation was offered by her as to how, under these circumstances, glass which fell to the rear of her and across the car from her could reach her eye. One is reminded of the Irishman who said his enemy was a

coward, who would not have dared hit him in the belly, if his back had not been turned.

When the rock was found appellee heard the conductor say: "Here's what did it." She did not then say nor did any one else suggest that the train had stopped or started suddenly or that there was a "jerk" of any kind which might have broken the window. She further testified as to the cause of her injury, on her cross-examination, that most of the top part of the window was broken. "It fell out or something, the upper part of it did. The window was cracked kinder catercornered like, but didn't go clear down to the corner. I don't know what it (the glass) hit when it fell, just hit on the face of the window or something. The rock which they showed me was about the size of my fist. The train made a jerk before the window fell out. That's what shook it out I think. Just a sudden jerk at the time of the accident. It was not at a station. I don't know how far the train run before it stopped. It stopped because of all that excitement was going on, I guess." No other testimony relating to the manner of the injury was offered by appellee or in her behalf.

Ten witnesses were called on behalf of the defendant. Some—but not all of these—were employees of the railroad company.

It is made as certain as any fact can be made by human testimony that some miscreant threw a rock into the moving train, which knocked a hole in the window glass. There was a loud report which everyone heard. Some thought a pistol had been fired, and there was great commotion and excitement. Passengers came from the rear of the car in which appellee was riding, used as a smoker. No one suggested there had been any sudden stop or jerk. Had there been, under the circumstances some one would have heard or felt it, and have remembered it. But all the witnesses for defendant testified that there was "no jerk" or other violent or unusual motion of the train. There was an inner and an outer sash to the window, one was up and the other was down, and the witnesses, including appellee herself, testified that only the upper portion of the sash was broken, and

a number of the witnesses who examined it testified that there was a hole in the top of the sash which some of the witnesses testified was as large as their fist, others said it was as large as a saucer. Some of the flying glass was knocked across the car. Two passengers, a section-hand and his wife, had their wraps on a seat back of the one in which appellee sat, but were not occupying that seat at the time the window was broken. An indentation in the wall opposite the window was found, and a rock was also found in this seat. One witness said it was in a pocket of an overcoat which was lying on the back of the seat. It is not certain just where the rock was found. The most definite information on this subject was elicited in the cross-examination of appellee by counsel for appellant. He asked appellee this question: "Q. It landed in Tansie's coat, didn't it?", and she answered: "That's what they say."

The owner of the coat was asked about finding the rock, and he testified as follows: "I don't know who found the rock, but anyway I had an overcoat lying on the seat, and my wife had a coat lying on the seat, and the rock was found in one of the coats. When the coat was picked up the rock dropped out." It is not even intimated by the learned and astute counsel for appellee that the rock had previously been in the pocket of the witness, who was a friend of appellee, and no one denies that the rock was thrown into the car.

It is not insisted that the railroad company would be liable if appellee's injury was caused by some one throwing a rock into the car. It does not appear to me to be consonant with the physical facts that appellee was injured in any other manner. It is chimerical to believe there is any other conclusion. Appellee was not recalled to deny, and no witness denied, any of the testimony about the loud crashing noise, which sounded like a pistol; about the circular hole in the window; the indentation in the wall of the car, and the finding of the rock in the seat opposite the window, all of which facts were observed and were commented upon at the time by the various witnesses who testified in the case. These facts are undisputed, and it appears arbitrary to me to dis-

regard the only reasonable inference that may be deduced from them.

In my opinion the judgment should be reversed, and the cause dismissed.

I am authorized to say that Justices McHaney and Baker concur in the views here expressed.

Bradley *v.* Humphreys.

4-3884

Opinion delivered June 17, 1935.

T. L. McHaney and *C. A. Cunningham*, for appellant.

C. M. Buck, for appellees.

McHaney, J. Appellant is the receiver for the First National Bank of Blytheville, Arkansas, hereinafter called the bank. Appellee, Mrs. Humphreys, is the widow of the late Louis Humphreys, who died in California in 1928. The other appellee, Mrs. Myrtle Sheeley, is the sister of Mrs. Humphreys.

Mrs. Humphreys and her husband resided in Blytheville until 1924, when they went to California on account of Mr. Humphreys' health. At that time he was the owner of 21 shares of stock in the bank of the par value of $2,100. He was also the owner of a homestead in Blytheville, the home in which they lived prior to their depart-

ure for California. After the death of Mr. Humphreys, this stock and the homestead were treated as the property of his widow, but just how she acquired title thereto is not shown. On November 30, 1930, the bank ceased to operate for a time. It was reorganized and reopened for business in February, 1931. In the reorganization proceedings, the stock of the bank was reduced by one-third. The Humphreys stock was reduced from 21 shares to 14 shares, the old stock being surrendered, and the new stock issued in the name of Mrs. Louis Humphreys. On October 31, 1931, the bank again closed its doors, and was placed in the hands of appellant Bradley as receiver for liquidation. On November 27, 1931, Mrs. Humphreys mailed to the circuit clerk in Blytheville a deed to said homestead, conveying same to her sister, Mrs. Sheeley, for a consideration expressed in the deed of $10. The deed and acknowledgment were dated October 1, 1931. The notary testified that the actual date of the acknowledgment and the signature to the deed was November 5, 1931.

Appellant brought this action against appellees to recover judgment against Mrs. Humphreys for $1,400, the assessment of 100 per cent. levied, by the Comptroller of the Currency, on February 15, 1932, against her and all other stockholders of the bank, and for cancellation of the deed from her to her sister, Mrs. Sheeley, as having been made in fraud of creditors, and particularly in fraud of said stock assessment.

Trial resulted in a decree for appellant for $1,400 against Mrs. Humphreys with interest. The complaint, in so far as it related to Mrs. Sheeley and the cancellation of the conveyance of the real property in Blytheville to her, was dismissed for want of equity, because the court found that the homestead had not been abandoned. From the latter part of this decree this appeal is prosecuted.

Two questions are raised by this appeal: (1) Was the homestead abandoned? (2) Is the finding of the trial court that it had not been abandoned against the preponderance of the evidence?

(1) Our Constitution, § 6 of article 9, makes the following provision with reference to the owner of a

homestead who dies leaving a widow and no children, as is the fact in this case: "If the owner of a homestead dies, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life." Then follows the provision relating to such an owner who dies leaving children. It is undisputed in this record that at the time Louis Humphreys removed from Blytheville to California, he was the owner of a homestead. It is a disputed question of fact as to whether he went to California temporarily for his health or permanently for business reasons. As stated in *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. (2d) 63: "It is the rule of law in this State, announced by many decisions of this court, that the question of whether there has been an abandonment of a homestead once established is almost entirely a question of intent on the part of the homestead owner so to do. In other words, in order to constitute an abandonment of a homestead, the owner must leave it with the intention of renouncing and forsaking it, or leaving it never to return. The law does not require continuous occupation of the homestead to continue it as such." We there quoted from *Euper* v. *Alkire & Co.,* 37 Ark. 283, as follows: "When a homestead right has once attached, a continuous actual occupation is not indispensable for its preservation. It is well settled by the authorities that a removal from the homestead for a temporary purpose, or with the intention of returning and again occupying it, is not such an abandonment as will forfeit the homestead right." And in *Gillis* v. *Gillis,* 164 Ark. 532, 262 S. W. 307, quoted in the Butler case, we said: "The question of whether one who removes from his homestead has abandoned same is one of intention, which must be determined from the facts and circumstances attending each case."

Here there is ample evidence to support the court's finding that Louis Humphreys did not leave his homestead and go to California for the purpose of abandoning same. It is testified to by the appellees that he left because of the condition of his health, and frequently

talked of and prepared for returning, but, by the advice of his physician and on account of the condition of his health, he was constrained to remain longer. There is some evidence contradicting this testimony, but we are of the opinion that the preponderance of the evidence supports the finding that there was no abandonment. At least we cannot say that the finding is against the preponderance of the evidence. It is conceded that he did not acquire another homestead in California.

By the provisions of the Constitution above quoted, the only qualification of the widow's right to enjoy the rents and profits of the homestead during her natural life is the clause, "if the owner of the homestead dies, leaving a widow, but no children, and said widow has no separate homestead in her own right." Here, as we have seen, Mr. Humphreys died the owner of a homestead, leaving a widow and no children, and the widow had no separate homestead in her own right. She therefore succeeded to the homestead right of her husband. As said in *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205, quoted in the Butler case, *supra*: "Our Constitution gives the homestead to the widow for life, without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants." And we have many times held that occupancy of the homestead by the widow is not necessary to her right to enjoy the rents and profits, and this, too, even though she marries again and removes to the homestead of her husband. See *Butler* v. *Butler, supra,* and *Colum* v. *Thornton, supra.*

In this view of the case, it becomes unimportant to discuss the conveyance of Mrs. Humphreys to her sister, for creditors have no right to complain of the conveyance of a homestead. We find no error, and the decree is accordingly affirmed.

BRANDON TIE & LUMBER COMPANY *v.* OSBORN.

4-3915

Opinion delivered June 17, 1935.

Joe C. Barrett, for appellant.

McHANEY, J. Appellee contracted with appellant to cut, peel and deliver at a certain place, piling timbers. For cutting, peeling and delivering he was to receive four cents per lineal foot. For peeling and delivering piling already cut in the woods, he was to receive three cents per lineal foot. Both parties agree that this was the contract. The difference between them is in regard to the place of delivery. Appellee sued appellant for $202, claiming that appellant, through its agent, Joe Nelson, discharged him from the job and put another in his place to do the work before it was completed. Appellant defended on the ground that it did not discharge him, but that appellee gave up the job, failed to complete his contract, and consented to and approved of the selection of another to complete the work. Both questions were submitted to the jury, and it found against appellant and for appellee for $150. Judgment was entered accordingly.

For a reversal of the judgment, appellant first contends there was no substantial evidence to support the verdict, and that the court erred in refusing to direct a verdict in its favor at its request. We cannot agree. Appellee testified quite positively that Nelson ran him off the job, told him he didn't have any job there any longer.

This was denied by Nelson, who stated that appellee asked him to get some one else to do the job. This was sufficient to take this question of discharge to the jury.

It is also argued that the court submitted the wrong measure of damages. Appellant asked an instruction that the measure of damages, if any, recovered is the difference between the contract price for full performance of the contract and the cost of completing same. The court correctly refused this instruction, conceding it to be a correct declaration in a proper case. Here the contract did not call for any definite amount of piling which had to be cut, peeled and hauled or any definite amount already cut, which had to be peeled and hauled. So there is no room or no basis for the application of such a measure of damages.

The principal questions were ones of fact, and since there was substantial evidence to support the verdict, we must permit it to stand. The instructions given correctly applied the law to the facts of this case, so the judgment must be affirmed.

WOLFF *v.* NATIONAL LIBERTY INSURANCE COMPANY.

4-3903

Opinion delivered June 17, 1935.

Sam M. Levine and *Frauenthal & Johnson*, for appellant.

Verne McMillen, for appellees.

BUTLER, J. Appellant, Leo Wolff, is a merchant engaged in business in the town of McGehee, Arkansas. His

place of business was located in a building known as the Graystone Hotel Building, his merchandise being stored in two rooms therein. The building was situated in block 51 of the town of McGehee. A part of the building was constructed prior to 1925, and in that year it was extended toward the north by the construction of an "annex" or addition thereto. The original building with the annex was so built as to constitute one building. In a room at the southeast corner of the building fronting on what is known as Railroad Street appellant maintained his store proper, from which he sold merchandise at retail to his customers. The building faced Railroad Street, and the front extended to the north. Next to said room, in the southeast corner of the hotel, was the lobby; then there was a coffee shop, and immediately north of that was a barber shop, at the rear of which was the hotel kitchen. At the far end of this kitchen was a little jewelry store facing on another street, and just beyond that was the room where the appellant stored the greater amount of his merchandise to be used as occasion required. This last-mentioned room was in that part of the building which was annexed to the original hotel building in 1925. Appellant kept about $12,000 worth of merchandise in said southeast corner store room and about $60,000 worth in the room situated in the annex.

In McGehee, which is a comparatively small town, the names of its streets are not generally known, and the houses are not numbered. The buildings are known by some specific name or by the name of the owner or the occupant. None of the store rooms in the Graystone Hotel Building had any street numbers or were known by any number except on a map prepared especially for the use of insurance companies. Appellant maintained a single business, keeping but one set of books and one inventory, with his merchandise stored as heretofore stated.

A fire occurred in the Graystone Hotel Building, totally destroying the merchandise in the annex and damaging that contained in the southeast corner room used by appellant. Appellee, National Liberty Insurance Company of America, prior to this fire, had issued its

policy insuring the appellant against loss or damage by fire. It denied liability for any loss or damage to the goods stored in the room in the annex, which on its map is designated as No. 109, and asserted that the coverage only extended to the merchandise in the retail store room proper, which on its map is designated as "No. 101 North Railroad Street, block 51, original town of McGehee, Arkansas, map No. 2, serial No. 6115."

Appellant brought this suit to recover the face of the policy in the sum of $2,500. The appellee answered, admitting the value of the merchandise, the destruction by fire of all the merchandise in the warehouse and the damage to the merchandise in the "retail store," but setting up as a defense the coverage clause of the policy, contending that it did not insure the merchandise in any place except the retail store. A demurrer to the answer was interposed on the ground that it did not state facts sufficient to constitute a defense to the complaint, with a prayer that the said answer be stricken from the record, and that recovery be adjudged on the prayer of the complaint. The demurrer was overruled, whereupon appellant and appellee introduced a number of witnesses. At the conclusion of the testimony, the court instructed the jury to return a verdict of $152.08 in favor of the appellant, the admitted *pro rata* damage to the merchandise contained in the "retail store." A verdict for said sum was accordingly returned by the jury, and a judgment for said amount made and entered, from which comes this appeal.

The coverage clause in the policy is as follows: "$2,500 on stock of merchandise, consisting principally of dry goods, ready-to-wear, boots and shoes and including all merchandise owned by the insured or held in trust or on commission, or consignment, or sold but not removed, for which the insured may be legally liable.

"All while contained in the two-story approved composition roof, brick building, and additions thereto, and while on sidewalks and platforms adjacent to said building, and while loaded on cars, trucks and wagons within 100 feet thereof, and situated No. 101 North Railroad

Street, lot ....., block 51, original town addition to the city of McGehee, Arkansas, map No. 2, serial No. 6115."

It was in evidence on behalf of appellee that the map referred to in the policy was what is known as "Sanborn's Insurance Map" of the town of McGehee, which is compiled for the benefit of insurance companies and agents who write insurance. This map shows the "retail store" as No. 101 North Railroad Street, and that the warehouse is No. 109 on said map; that the rate of insurance on No. 101 is less than that on No. 109, and that where both locations are included in a policy the higher rate would be charged; that the rate actually charged was that governing the location No. 101. The agent who wrote the policy testified that it was not his intention to write the policy so as to insure the merchandise contained in location No. 109. He further testified that he supposed the retail store and the warehouse were two separate businesses, and that appellant was keeping two sets of books.

There was a conflict in the evidence as to whether or not the agent, before the delivery of the policy, was apprised of the fact that it was appellant's purpose in securing the insurance to have it cover all the merchandise in the Graystone Hotel Building. We think the rate charged, what the parties to the contract might have intended the effect of the policy to be, and the evidence relating to these matters is immaterial, for, as we construe the coverage clause in the policy, there is no ambiguity, and the intention of the parties must be determined from its language.

The appellee bases its contention that the coverage was limited to the merchandise in the retail store on that part of the foregoing "coverage clause" which describes the property insured as "situated No. 101 North Railroad Street, lot ....., block 51, original town addition to the city of McGehee, Arkansas, map page No. 2, serial No. 6115," and cites the case of *Bumpas* v. *American Central Ins. Co.*, 79 Atl. 848, in support thereof. In that case the property insured was "a building known on the map as Thurston's Saw & Planing Mill." It was established that the map referred to was a section of "San-

born's Map," which gave the location of buildings, and was made for the use of fire insurance companies and their agents. The insured had two one-story steel-roofed buildings, and both were used for various mill purposes. One of the buildings was destroyed by fire, and the only question before the court was, which of the two mill buildings was covered by the policy? The building which was burned was not described on Sanborn's map, and was not covered by the policy because the descriptive clause, as given by the map, made certain the identical building intended to be insured and rendered the coverage clause unambiguous. There is, however, a marked dissimilarity between the coverage clause involved in the case cited and that in the case at bar. The clause under consideration does not limit the insurance to the merchandise contained in No. 101 as contended by the appellee, but insures "all merchandise owned by the insured * * * while contained in the two-story, approved composition roof, brick building and additions thereto." The concluding phrase, "situated No. 101 North Railroad Street, etc.," does not limit and subtract from the coverage before recited, but is for the purpose of indicating the particular building above referred to as "a two-story * * * brick building." There is no doubt in our minds but that when a merchant in a town like McGehee applies for and receives a policy insuring him against loss or damage by fire of "all merchandise" owned by him while contained in a certain building and additions thereto, he would have a right to, and would, believe that the policy meant what it said, and that the phrase, "situated No. 101," etc., could have no other purpose than to designate the building containing his merchandise.

There is some basis for the construction placed by the appellee on the provisions of the policy quoted, but, to say the least, the construction we have placed upon them is as reasonable as that contended for by it. Under well-settled principles, where the provisions of a policy are susceptible of two equally reasonable constructions, one favorable to the insurer and the other to the insured, the latter will be adopted. This is because the language is chosen by the insurer with the aid of experts employed

for the purpose of writing the policy, and the insured has no voice in the matter. Therefore, where either of two constructions may be adopted, it is fair that that which will sustain the claim and cover the loss will be chosen. See *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364, and cases there cited. The conclusion we have reached is supported by the doctrine announced in 3 Couch, Cyc. of Ins., p. 2437, § 747a, note 42, and the cases of *German A. F. Ins. Co.* v. *Messenger,* 25 Colo. App. 153, 136 Pac. 478; *West* v. *Old Col. Ins. Co.,* 9 Allen (Mass.) 316; and *Fair* v. *Manhattan Ins. Co.,* 112 Mass. 320. See also note C to 33 L. R. A. (N. S.) 156.

We have examined the case of *Old Col. Ins. Co.* v. *Berryman Realty Co.,* 193 Ky. 7, 234 S. W. 748, and other cases cited by the appellee, but find in them nothing in conflict with the views we have expressed.

We conclude that the trial court erred in overruling the demurrer to the appellee's answer, and its judgment should be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

COLORADO LIFE COMPANY *v.* POLK.

4-3916

Opinion delivered June 17, 1935.

Daggett & Daggett, C. A. Windsor and *W. H. Daggett*, for appellant.

A. M. Coates, for appellee.

BUTLER, J. Action to recover for sick disability benefits on appeal here from a verdict and judgment in favor of the plaintiff in the court below, for $219.99, penalty and attorney's fee.

The material provisions of the policy sued on are set out in appellant's abstract of the record as follows:

"No indemnity shall be payable for sickness, the cause of which originates or begins prior to the fifteenth day after the date of this policy, or last reinstatement hereof."

"The first seven days' indemnity payable hereunder on account of any claim arising from disability of the insured due to sickness, as herein conditioned and provided, shall be limited to one-half the indemnity that would otherwise be payable."

"Monthly Indemnity for Sickness. Part Four Sec. (2). Confining Sickness: If, as a result of sickness of the insured, he be so disabled as to be necessarily and continuously confined within the house and therein regularly visited by a physician, * * * at least once in each week and shall be necessarily prevented from performing any and every duty pertaining to his occupation, the insured shall be deemed totally disabled, and the company will pay for the period the insured is necessarily and continuously so confined and so attended, the monthly indemnity shown in Part One hereof."

"PART FOUR. Sec. (b). Non-Confining Sickness: If, instantly following such confining sickness, or as a result of sickness which shall not so confine the insured, he shall be regularly attended by a physician * * * and he shall be so disabled that he be necessarily and continuously prevented from performing any and every duty

pertaining to his occupation, the insured shall be deemed totally disabled, and the company will pay for the period, not exceeding six consecutive months, the insured is continuously so disabled and so attended, one-half the monthly indemnity shown in Part One hereof."

"Hospital Benefit or Graduate Nurse Fees. Part Five. If, as the result of an accident or sickness, the insured be necessarily confined to a Government Hospital or in a regularly incorporated hospital legally licensed * * * the company will reimburse the insured for the charges of such hospital on account of such confinement for a period not exceeding two months. Such reimbursement to be at a rate not exceeding an amount per month equal to fifty per cent. of the monthly indemnity stated herein."

"Additional Provisions. 7. (a) If any disability for which any indemnity be payable hereunder, or confinement or nurse services as provided for under Part Five hereof, be for a greater or less period than one month, the indemnity, or reimbursement, shall be in such proportion to the monthly rate of indemnity as the time of disability, confinement or services, as herein conditioned and provided, shall be proportionate to one month (30 days)."

The policy was issued on the 14th day of April, 1934, and while it was in effect on the 14th day of May the insured was taken ill, and on the next day entered a hospital in Memphis where he was operated on, remaining confined there for a period of seven days. Immediately thereafter he returned home, and was confined to bed for an additional seven days, and for a period of two weeks thereafter he was unable to perform any of his duties. Immediately after his return from the hospital he gave notice of his illness to appellant company which denied liability. This suit followed. The insured alleged that he was confined in the hospital for a period of seven days, for an additional seven days at his home, and partially confined for a further period of two weeks, making a total of thirty days of confining and nonconfining illness, and that defendant was indebted to him therefor

in the sum of $119.99; that it was further indebted to him for expenses incurred while at the hospital in the sum of $105.35, making a total of $235.34, for which sum he prayed judgment with 12 per cent. penalty and a reasonable attorney's fee.

The answer denied the allegations of the complaint, and set up as an affirmative defense paragraph 4 of "Additional Provisions" of the policy, to-wit, "that no indemnity shall be paid for sickness the cause of which originates or begins prior to the 15th day after the date of this policy."

The testimony is in conflict as to the commencement of insured's illness which occasioned his operation and confinement—some to the effect that it began beyond the 15th day of the date of the policy and others to the effect that it arose within the fifteen-day period from said date. Appellant concedes that the verdict of the jury is conclusive on that question and precludes further consideration of its affirmative defense. It contends, however, that, under the evidence adduced by the appellee, he was not entitled to recover for more than seven days' confinement in the hospital at $3.33 per day, and that he cannot recover for the succeeding seven days of confining illness at his home for the reason that he failed to show that during said period he was so disabled as to be necessarily and continually confined within the house and therein visited by a physician at least once each week; that he was not entitled to recover for partial disability for the time alleged for the reason that in his proof furnished the company no claim was made therefor.

A sufficient answer to the contentions made relative to the insured's confinement at home and the nonconfining illness is that there was no issue raised on these questions in the trial court, and they cannot be presented here for the first time. *Jones* v. *Kelley Trust Co.,* 179 Ark. 857, 18 S. W. (2d) 356; *Andrews* v. *Sw. Hotel Co.,* 184 Ark. 982, 44 S. W. (2d) 695; *Gibson* v. *Denton,* 190 Ark. 569, 79 S. W. (2d) 732.

The court below was requested by the appellant to instruct the jury that it could only find for the appellee

for a sum equal to the number of days he spent in the hospital at $3.33 per day, which would amount to $20 if confined for six days or $23.33 if for seven days. The court refused to so instruct the jury, but instead gave the following: "You are instructed that, under the policy provision relating to hospital benefits, the reimbursement of the plaintiff is to be at a rate not exceeding an amount per month equal to 50 per cent. of the monthly indemnity stated in the policy. Therefore, under the policy provision, the reimbursement provided for one month, or 30 days' hospitalization is $100." It is contended that the trial court erred in this particular. The contention seems to be based on subdivision A of § 7 of "Additional Provisions," which attempts to limit the recovery of hospital expenses in this manner, if the confinement "be for a greater or less period than one month, the indemnity or reimbursement shall be in such proportion to the monthly rate of indemnity as the time of disability, confinement or services, as herein conditioned and provided, shall be proportionate to one month (thirty days)." This paragraph is of doubtful meaning, but to give it the effect contended for by the appellant creates a conflict with the provision for "hospital benefit or graduate nurse fees," which has been quoted above, and which in substance provides for reimbursing the insured for hospital expenses for a period not to exceed two months in an amount equal to the monthly indemnity which, under the policy, is fixed at $200 per month.

The policy in this case contains numerous provisions which appear to us not to have been drafted for the purpose of "informing the insured of the true extent of his protection or the limitation on the insurer's liability, but rather chosen with particular reference to its own interest. This is apparent from an inspection of the policy at hand with its involved phraseology and numerous exceptions, conditions and ambiguous provisions." (*American Indemnity Co.* v. *Hood,* 183 Ark. 266, 35 S. W. (2d) 353.) With the rule in mind that provisions of insurance policies must be harmonized if possible, but, in case of doubt, the provision will be construed most strongly against the insurer and in favor of the insured (*Travel-*

er's Protective Ass'n v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364), we are of the opinion that the trial court properly refused the instruction requested and correctly declared the true meaning of the policy.

On the question of the allowance of penalty and attorney's fee, but little need be said. As we have seen, the amount recovered was substantially that due under the policy. At the conclusion of the evidence, appellee was permitted, over the objection of the appellant, to amend his complaint by reducing his claim for hospital bills in the sum of $5.35, and by offering to accept the sum of $219.99 in full satisfaction of his claim. At no time had the appellant offered to pay any sum under its policy, but had denied any liability whatever, and had maintained this position throughout the trial. If appellant wished to avoid the penalty and attorney's fee, it might have offered to confess judgment for the amount which the appellee claimed after his amendment was allowed. It did not do so, but maintained its original position that no liability attached, electing to proceed to a final decision on that claim. The amount of the reduction was inconsequential, and, in view of the denial of liability, the court did not err in assessing a penalty and allowing an attorney's fee. *Life & Casualty Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657, and cases there cited.

It follows that the judgment of the trial court should be, and it is, affirmed.

PICKENS *v.* WESTBROOK.

4-3917

Opinion delivered June 17, 1935.

House, Moses & Holmes and *Harry B. Solmson, Jr.*, for appellant.

Chas. Q. Kelley, Sam Rorex and *John L. Carter*, for appellee.

BAKER, J. Arch Pickens was operating the McGehee Hotel Coffee Shop and G. G. Woods was employed by him as watchman whose duties required him to remain at or near a door through which employees of the hotel and coffee shop entered or left the building. It was the duty of the watchman to see that employees upon entering the hotel registered by punching a time clock, and not to permit them to carry packages from the hotel upon leaving without having an O. K. or some mark of approval showing that the package had been investigated and inspected by some one in charge. This watchman performed the same duties for the hotel and for the coffee shop. The appellant here had the coffee shop under a lease and operated it as his own business to the exclusion of the hotel management. At certain times of the day it was the duty of Woods to operate an elevator for the carrying of freight in the hotel building. Near this rear door, used as an entry and exit by the employees, Woods had a chair and desk, and, except while operating the elevator, kept check upon the employees as they might enter or leave the building. Outside of this back passageway was a receptacle for trash referred to as the trash barrel.

On August 15, 1934, a negro, Stewart, employed by Pickens, attempted to leave the rear door when he was stopped by the watchman who advised him that it was

his duty to be at work for Mr. Pickens and closed the door, refusing to permit the negro to leave. The negro gave as his excuse that he was going to the trash barrel. Woods shut the back door refusing to allow Stewart to pass, and thereupon a controversy arose between him and the negro.

Stewart assumed a somewhat threatening attitude, but turned and went back downstairs to the place where he had been working, in or around the kitchen. Woods, being angry, followed the negro down the stairway, whereupon Stewart seized a bottle, and finally a cleaver with which he faced Woods assuming an air of defense. Woods left the basement of the hotel, and, instead of returning to his place of employment, went across the river to North Little Rock where he procured a pistol, and with it returned to the hotel. Having armed, he went to the boiler room in the basement following or hunting Stewart. Upon entering the boiler room he found or saw the appellee, Ed Westbrook, who was standing near the engineer's desk reading a paper. The engineer, Johnson, upon observing Woods' highly nervous state, seized him by the arm, but not in time to prevent the firing of two shots. These struck the appellee, inflicting flesh wounds through the thighs.

The appellee, though not dangerously wounded, was quite painfully so, and by reason thereof was confined to the hospital for fifteen days and at his home for a short time, and was unable to work for another thirty days. He sued Pickens and recovered a judgment for $1,200. The appeal is from this judgment.

Several questions are presented upon this appeal for our determination. The first one of these challenges the sufficiency of the evidence to support or sustain the judgment. If that be settled in favor of the appellant, the other questions pass out of the case.

Stewart, the employee with whom Woods had the controversy, was not called as a witness.

Plaintiff's testimony related rather to the extent and effect of the injuries than to matters showing the liability of the appellant therefor. He did, however, testify that Stewart had worked at the coffee shop for about a

year, and that silver and sandwiches had been missing, and Stewart was suspected. But a short time prior to the shooting, Mr. Pickens had called a meeting of his employees, and discussed with them the fact that petty thievery had been going on, and it would have to stop; advised the employees that he had instructed Mr. Woods to stop any one who was leaving the building and to see that any packages that employees were carrying had an O. K.; that Woods had the authority to stop any one who was taking property from the coffee shop.

Mr. Johnson testified that Woods' duties were to stop any one who was taking packages out of the building without an O.K., and explained that Woods' desk was about fifteen feet from the rear door and a short distance from the stairway that leads down into the coffee shop and boiler room in the basement; that a garbage barrel was kept in another room near the one where Woods' desk was located.

Johnson was an eye-witness to the shooting. The shooting took place in the boiler room where the employees went to get drinking water. Woods came into this boiler room and was very nervous; that Stewart had just run into the room and had hidden himself behind a switchboard. His opinion was that Woods accidentally shot Westbrook; that Woods was so highly nervous and jerky that he could hardly walk.

Pickens testified that Woods watched his employees in return for which he gave Woods his meals. William Stewart had been employed as a kitchen helper. He had at one time caught Stewart selling sandwiches to the boys in the barber shop, and had discharged him; that he had lost some silver from the coffee shop. He said also that he had meetings once or twice a month with his employees to discuss methods of improving the service and preventing loss of property. He had authorized Woods to stop his employees to see that they did not carry out packages that had not been O.K.'d. He did not tell Woods specifically to do anything when an infraction of the rules occurred. He had not authorized Woods to carry or have a gun or pistol on the premises. He did not know that he had one. He had known

Woods for about ten years; that he believed him to be about 70 or 75 years of age; that he was a very good man but of nervous temperament. He knew that Woods had a gun at his home. Woods' job was to drive the elevator and watch the employees of the hotel and see that they did not carry out packages not properly marked.

Jennings, called as a witness of the defendant, testified as follows: That Woods' duties were to watch the employees. He was supposed to see that all packages were O. K. If not, he was supposed to take the package and get an O. K. from the proper department. At the noon hour he relieved the elevator operator and worked from 11 to 12. Asked if Woods was authorized to have a pistol or gun, he said: "No, the duties he performs is not of a serious nature. Any employee that should want to resist giving him a package or letting him inspect a package, he could notify me. That position does not require any one to have a pistol." His duties were to watch every one passing through the back door.

Woods' explanation of the altercation is this: "Well, Stewart came upstairs, I had instructions from Mr. Pickens. I had charge of the help while they were on duty. They had no business going out to the back alley or going out the back door. I was standing there and I said, 'Where are you going, Red,' and he said, 'I am going out here to this trash barrel.' I said, 'Don't Mr. Pickens need you downstairs?' And he said, 'I want to look through this trash barrel.' I put my hand up to shove him back and went to shut this door. One door was shut; went to shut the other, and he drew back his fist and said, 'White man, don't do that.' He turned around and went downstairs, and I followed him downstairs. When I got downstairs, he was talking to Westbrook. Stewart didn't see me and Westbrook told Stewart I was coming. Stewart walked around in front of the range and he picked up a coke bottle and put it in his pocket. Made the remark that 'Am not going to let him do anything to me.' He went further and went by the block and picked up a cleaver and turned around and faced me with it. I started toward him and he had that cleaver, and he laid it down and picked up four beer

bottles and drew the beer bottles back. I was no match for the young negro with the bottles, and I turned around and went and got my gun and went down there." He further stated that he did not allow any employee to leave the building without proper O. K., and if there was no proper O. K. they could not leave without it.

The foregoing is the effect of all testimony relative to the duties of Woods. He was charged with the duty of observing the employees upon entering or leaving the building. He could refuse permission to take packages out of the building, stop any employee who had a package that had not been O. K.'d by the department from which it had been taken from the hotel, or from the coffee shop. Pickens had explained this to his employees. They knew they did not have the right to go through this passageway to the outside while on duty, and particularly they had no right to carry packages out without obtaining consent so to do from the department from which they were taken.

Stewart had attempted to pass through this door, was prevented from doing so by Woods who closed the door. Both Stewart and Woods became angry. Stewart returned to his place of work downstairs in the kitchen. Woods left his post of duty and followed to the basement. Woods had no duty to perform in the coffee shop, boiler room or other parts of the basement, so far as this record discloses. He had pursued Stewart to renew the difficulty which had occurred upstairs; Stewart assumed a defiant attitude and Woods became more enraged.

Instead of returning to his proper place and assuming the discharge of his duties, he left the hotel and armed himself and returned to the hotel but not to a resumption or discharge of his duties. He went on a hunt for Stewart in the basement. He followed Stewart to the boiler room where he had hidden himself behind a switchboard. In his highly nervous and agitated condition he shot the appellee. Neither the manager of the hotel nor coffee shop had any information of the impending trouble.

Was there any liability of the appellant for this unjustifiable conduct of Woods?

Ordinarily, it happens, the answer would be by the verdict of a jury, but in matters when there can be no dispute as to the testimony, or the value or effect thereof, or where reasonable minds must reach the same conclusions from the stated facts, the court should declare the legal effect. *Rock Island Plow Co.* v. *Rankin Bros. and Winn,* 89 Ark. 24, 115 S. W. 943; *St. L. I. M. & Sou. Ry. Co.* v. *Coleman,* 97 Ark. 438, 135 S. W. 338; *Maney* v. *Dennison,* 110 Ark. 571, 163 S. W. 783; *Am. Cent. Ins. Co.* v. *Noe,* 75 Ark. 406, 88 S. W. 572; *Mifflinburg Bank* v. *Kuhn,* 161 Ark. 411, 256 S. W. 370; *Fowler* v. *Hammett,* 162 Ark. 307, 258 S. W. 392; *C., R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15; *Barnes* v. *Hope Basket Co.,* 186 Ark. 942, 56 S. W. (2d) 1014.

A discussion by this court of the proposition of the servant's conduct and the liability of the master therefor, applicable to the facts above is found in *American Ry. Express Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598. If the servant, at the time of inflicting the injury, was acting within the scope of employment, or apparent scope thereof, and such injury was proximately the result of some wrongful or negligent act, the improper conduct is attributable to the master. This is true, although the servant acted in wilful disobedience of orders or prescribed rules of conduct; but if, on the other hand, in disregard of the duties of his employment, he leaves his employer's business, though momentarily, and engages in enterprises that are wholly his own, and, while so engaged in accomplishing such individual desires or objectives, he wrongs another, he alone is responsible.

One of our best considered cases, in which the rule is most clearly announced, is the Mackley case, *supra.* The rule, however, is uniform, as may be determined by the following authorities: *Bryeans* v. *Chicago Mill & Lbr. Co.,* 132 Ark. 283, 200 S. W. 1004; *E. L. Bruce Co.* v. *Yax,* 135 Ark. 480, 199 S. W. 535; *Sweeden* v. *Atkinson Imp. Company,* 93 Ark. 397, 125 S. W. 439; *Hough* v. *Leech,* 187 Ark. 719, 62 S. W. (2d) 14. The above announcement of the law has been uniformly followed by this court. We think it sound in principle, and from this rule there should be no deviation.

In observance of the principles in the cases cited, but one conclusion can be reached. Woods, in the fit of anger, was attempting to punish Stewart for the insult and wrong of which he found himself the outraged victim. He was not trying to right any wrong done to his employer, but was attempting to satisfy himself by punishing Stewart, who had so grievously outraged his dignity. No doubt, he thought Stewart had been insolent to him, who, no doubt, had been accorded respect and veneration by others. One witness says he was about 75 years old, a good man. It does not appear that the belligerent tendency displayed by Woods was any part of the qualifications causing him to be employed by the appellant. His employment did not call for any show of force or authority, and it does not appear from any evidence that it was expected of him by either his employers or their employees.

Woods' conduct, the basis of the complaint, was wholly his own, entirely dissociated from any duty he was required to perform under his employment. This may be stated after indulging every reasonable inference that may be drawn from all the proof.

The conclusion must be reached from the authorities above cited, and, on account thereof, there was no liability of the appellant.

The court erred in not directing a verdict for the defendant. There has been a full development of all issues upon the trial in the circuit court.

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

LEE *v.* LEE.

4-3926

Opinion delivered June 24, 1935.

Martin, Wootton & Martin, for appellant.

Walter J. Hebert and *Murphy & Wood,* for appellee.

JOHNSON, C. J. Appellant and appellee, while temporarily residing in Hot Springs in August, 1934, were married in conformity to the laws of this State. A few days subsequent thereto appellant instituted this annulment proceeding in the Garland Chancery Court in which he alleged that, at the time of the marriage, he was suffering from amnesia which rendered him incapable of contracting a valid marriage. Subsequently, he filed an amendment to his complaint in which he alleged that, at the time of his marriage to appellee in Arkansas, he had a living wife—not divorced, living in the State of Florida. Appellee answered the complaint thus filed, and denied the material allegations thereof and amendment thereto, and also prayed temporary alimony, suit money and attorneys' fees.

The chancellor heard testimony upon appellee's prayer for temporary alimony, suit money and attorney's fees, and made and entered an order allowing her the sum of $100 per month beginning September, 1934, and continuing until the suit was finally terminated as temporary alimony, and allowed $200 attorneys' fees and $25 suit money.

The testimony adduced on behalf of appellee tended to show that she had no property in her own right, and no funds with which to defend the suit instituted by appellant, and that she contracted her marriage with appellant in good faith, and without knowledge of any existing disability in him to so contract marriage. Appellant's affidavit was filed in support of his contention in which he swore that, at the time of his marriage to appellee in Arkansas, he had a living wife, not divorced, residing in the State of Florida.

This appeal asserts lack of power in the chancery court to make the order of allowances referred to. This contention is grounded upon the proposition that since

the uncontradicted testimony of appellant shows that he had a living wife, not divorced, residing in the State of Florida at the time of his marriage to appellee in Arkansas, the Arkansas marriage contract is void from its inception, and no marital rights can be predicated thereon.

In *Gossett* v. *Gossett,* 112 Ark. 47, 164 S. W. 759, we held that, where either party to a marriage contract had a living husband or wife, not divorced at the time of the subsequent marriage contract, the subsequent marriage contract was void and not merely voidable. It follows from this that appellant's contention here urged must be decided upon the basis that his Arkansas marriage contract is void if it be established that appellant had a living wife, not divorced at the time of the consummation thereof. Appellant cites and relies upon as decisive of his contention *Fountain* v. *Fountain,* 80 Ark. 481, 97 S. W. 656. This case has no application to the facts here presented. In the case referred to, the wife brought suit for divorce, and the husband by answer denied the validity of the marriage contract. Proof was heard by the lower court on the preliminary question of temporary alimony and attorneys' fees, and we held, as the lower court had, that the proof was sufficient to warrant the allowance and affirm the order in this behalf.

Morgan v. *Morgan,* 149 Ga. 625, 97 S. E. 675, 4 A. L. R. 925, is also cited and relied upon by appellant as supporting his contention. This case arose between a husband who was under statutory disability of minority at the time of his marriage contract and his wife who sought temporary alimony and attorneys' fees. The court held the wife not entitled to such allowances pending the suit. Conceding this case to be rightly decided, it has no application to the facts of this case. There the minor husband had no capacity to contract marriage, whereas in the instant case the husband has no impediment save that created by his own act. Moreover, *Morgan* v. *Morgan, supra,* is not supported by the weight of authority on this subject.

I R. C. L., § 66, title "Alimony," states the general rule as follows: "Where an annulment of the marriage is

sought by the husband, who admits that a ceremonial marriage took place, but claims it to have been illegal and void, the wife is entitled to a reasonable allowance to enable her to make a proper defense to the suit, provided she denies on oath the allegations on which such invalidity is based."

Bishop on Marriage, Divorce and Separation, vol. 2, § 925, states the general rule as follows: "If parties enter upon cohabitation under a marriage which in fact is void, a *fortiori* under a voidable one, this reasoning shows that, upon a suit between them to set it aside and declare it void, there may be temporary alimony. * * * Not perhaps following this form of reasoning, but in some form conducing to the same result, the courts have generally held the mere *de facto* marriage to be adequate for temporary alimony and suit money in the nullity suit, whether on the allegation that the marriage was void or that it was voidable."

Keezer, Marriage and Divorce, 2d ed., § 711, *et seq.*, states the general rule as announced by Bishop, *supra,* and cites authorities throughout the United States in support thereof. The general rule deducible from the great weight of American authority is that, when a *de facto* marriage is admitted or established, and the wife is otherwise entitled to temporary alimony, suit money and attorney's fees, such allowances may be made pending the suit, irrespective of the speculative outcome of such suit. See annotations, 4 A. L. R., page 926, 26 L. R. A. (N. S.) page 500, in addition to the authorities cited, *supra.*

Appellant not only admits a *de facto* marriage to appellee, but invokes the aid of a court to destroy its *prima facie* validity, and we know of no sound rule of law or reason which denies to appellee the ordinary right of temporary alimony, suit money and attorneys' fees while defending such litigation.

No error appearing, the decree is affirmed.

CARSON *v.* OZARK NATURAL GAS COMPANY.

4-3919

Opinion delivered June 24, 1935.

Roy Gean, for appellants.

Miles, Armstrong & Young, for appellees.

SMITH, J. On August 25, 1928, appellant entered into an oil and gas lease with the Lavaca Oil & Gas Company which was soon thereafter assigned to appellee. The lease covered a tract of thirty-one acres and its provisions, material to this litigation, are as follows. For the consideration of $15 the right was granted "of mining and operating for oil and gas and laying pipe lines," etc. This lease was to remain in force for a term of ten years, and as long as oil or gas or either was produced from the leased land.

As a consideration the lessee agreed, "to pay the lessor two hundred dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said

land during the same time by making his own connections with the wells at his own risk and expense."

It was provided in the lease that, if no well was commenced on or before August 25, 1929, the lease should terminate as to both parties, unless the lessee on or before that date should pay or tender to the lessor at the City National Bank of Fort Smith the sum of 50 cents per acre, "which sum shall operate as a rental and cover the privilege of deferring a commencement of a well for twelve months from said date. * * * In like manner and upon like payments or tenders the commencement of a well may be further deferred for a like period of the same number of months successively."

Appellees owned gas leases adjoining appellant's land on all sides, and in 1929-1930 drilled producing wells on the four sides of appellant's land all of which were within a quarter of a mile of it. Appellant requested appellee to drill upon his land in 1930 and renewed the demand in 1931. The $15 rental was paid and accepted in 1930, and this rental was also paid in 1931 with an additional payment of $70 for that year, this being paid upon the agreement that appellant would not demand that a well be drilled in 1931.

Appellant testified that appellees' manager promised to do something about the well in 1932, but did not drill the well. A few days before the anniversary date of the lease in 1932, appellee deposited $15 to the credit of appellant with the depository named in the lease. When advised that the deposit had been made, appellant returned it and made formal demand that appellee drill an off-set well on his land. A formal letter of demand was addressed to appellee under date of August 25, 1932, and upon the same date appellee executed a release of the oil and gas lease. This release was filed and recorded September 3, 1932, but appellant testified that the release was not sent him, and that he knew nothing of it at the time, and that he was only told by appellee that the lease had been canceled.

Appellant testified that this field had been producing gas for many years, and that the wells were placed approximately one for each forty-acre tract of land ex-

cept that there is no well on his 31-acre tract. A geologist testified that one or more and probably all the adjacent wells were drawing gas from appellant's land.

This suit was brought by appellant to recover damages for the failure to drill on his land, and from a verdict against him, which was directed by the court, is this appeal.

The action of the court in directing a verdict against appellant is defended upon the authority of the case of *Clear Creek Oil & Gas Company* v. *Brunk,* 160 Ark. 574, 255 S. W. 7. The opinion in that case reaffirmed the holding in the case of *Blair* v. *Clear Creek Gas & Oil Company,* 148 Ark. 301, 230 S. W. 286, where it was decided that, when a lessee drills wells on adjoining lands which drain the leased land, it constitutes a breach of the contract on the part of the lessee to fail to drill protection wells on the leased land to prevent drainage, and that there is an implied covenant on the part of the lessee to thus protect the premises. It was held in the Brunk case, *supra,* to quote a headnote: "Where the lessor in an oil and gas lease accepts rentals from his lessee after knowledge of a breach of agreement to drill a well instead of declaring a forfeiture and suing for damages, he will be held to have waived the breach and the consequent damages therefrom."

It is insisted that when appellant definitely refused to continue to receive the annual rental, and threatened to sue for the breach of the implied covenant to protect his land by drilling a well as demanded, appellee then canceled the lease and surrendered the premises, and it was evidently upon this theory that the verdict was directed in appellee's favor.

It is true, of course, that appellant, having accepted the annual rental up to August 25, 1932, cannot sue for any damages accruing prior to that time. The Brunk case, *supra,* so expressly decided. The rent was paid as the contract provides for the purpose of deferring for a year the obligation to drill the well. It is true also that appellee has the right to cancel this lease. Indeed it cancels itself when the lessee fails to drill or to pay the

rent which postpones the obligation to drill and surrenders the property.

Now, if it were true in fact that appellee had paid the rent up to August 25, 1932, at which time the lease was canceled, and the lease properly surrendered, there could be no recovery of damages. Appellee's rights under the lease would have expired, and the obligations incident to the lease would have terminated. But such is not the case. As has been stated, the lease gave the lessee the right not only to explore for oil and gas, but to lay pipe lines, and this right was exercised. Appellant testified, and it is not denied, that pipe lines were laid across the north side of his land, and they are now in use. This was a right conferred by the lease contract. In other words, appellee, without paying the annual rental, continued to enjoy all the rights which that payment, if accepted, would confer. It continues to drain the gas under appellant's land according to the geologist, and uses a pipe line across appellant's land in furtherance of that purpose, and is continuing to do so. The release must therefore be treated as the declaration of an unexecuted intention—that of canceling the lease and surrendering possession.

Appellee has not therefore canceled this lease and surrendered possession as it might have done. The case made is that of a lessee who retained possession after August 25, 1932, without paying rent, and it must therefore respond in damages. How are these damages to be measured?

Appellant's counsel conceded in the oral argument that a single well would have sufficed under the requirements of the lease, and this concession appears to be well made. The undisputed testimony, appellant's own testimony, is to the effect that throughout this old and developed field there has been drilled, and is in operation about one well for every forty acres of land. Appellant's tract consists of 31 acres. The geologist testified that gas was being produced on all sides of this small tract of land, and would, no doubt, be found under it if a well were drilled. Now, the contract required the lessee to pay $200 each year for any well where gas only

is found, and this rental is much less than the cost of drilling a well. This rental value of a single well appears to be the fair and proper measure of the damages to be recovered, and, as that basis is to be adopted, appellant would be also entitled to recover the value of the gas which he was entitled to have for his domestic use less the cost of making connections.

The judgment will therefore be reversed, and the cause remanded, with directions to award judgment for the rental value of a single well from August 25, 1932, until the possession of the leased property is surrendered, and also the value of the domestic gas less what the cost of connections would have been.

ARKANSAS POWER & LIGHT COMPANY *v.* THOMPSON.

4-3932

Opinion delivered June 24, 1935.

Brundidge & Neelly, for appellant.

W. J. Dungan, for appellees.

HUMPHREYS, J. This suit was brought in the circuit court of Woodruff County by appellant against appellees to recover $871.15 for electrical energy appellees agreed to purchase from it to operate the cotton gin they owned and ran in the town of McCrory during the cotton ginning seasons of 1932-33 and 1933-34 under and by virtue of a written contract entered into between appellant and appellees on the 28th day of July, 1932. Appellant alleged in the complaint that it had complied with all the conditions of the written contract and had been ready and willing at all times to furnish appellees with electrical energy as provided in the contract, but that appellees had failed and refused to use electrical energy in operating their cotton gin for the years 1932-33 and 1933-34 during the ginning seasons.

Appellees filed an answer denying that appellant had complied with the condition of the contract requiring it to connect its power lines with the gin so that electrical energy might be available to them for the operation thereof.

The cause was submitted, and at the conclusion of the evidence the court instructed the jury to return a verdict for appellees, over the objection and exception of appellant, and rendered a judgment upon the verdict dismissing appellant's complaint, from which is this appeal.

The contract sued upon contained the following paragraph:

"The company reserves the right to disconnect electric services from the premises of the consumer upon the conclusion of the ginning season, that is, not later than March 1 of each and every year of the within contract, and agrees to reconnect same on or before September 1 of each and every year of the within contract."

Ben H. Marshall, who was assistant division manager for appellant in 1932, and who was division manager

when called as a witness by appellant, identified the contract as the contract entered into between appellant and appellees, and stated that appellant connected up appellees' gin, and that it was connected up for the seasons 1932-33 and 1933-34, but that the fuses were not put in. The witness then answered the following questions propounded by the court:

"The Court: What do you mean by 'connect'? A. In the contract it says that we agree to connect to the gin building and set our transformers; and these fuses are a protective devise that we remove to protect our transformers and the gin equipment. The Court: Whose duty is it to furnish the fuses? A. We furnish the fuses. The Court: Whose duty is it to take them out and put them back? A. It is the duty of the Arkansas Power & Light Company. The Court: In this case, did you take these fuses and put them in so that the defendant could run his gin under this new contract? A. Not under this contract. The Court: Could he run without the fuses? A. No, sir. The Court: Did you ever furnish the fuses and put them in there so that he could operate his gin? A. No, sir, we did not; we were not requested."

In the course of the trial and before the court instructed a verdict for appellees, the appellant offered to prove that a similar contract to the one sued upon had been entered into between it and appellees on the 3d day of June, 1928, for a five-year period, and that during its life appellees had always requested that fuses be put in before they were put in; and also offered to introduce the contract. These requests were refused over appellant's objection and exception.

Appellant also offered to prove that, under similar contracts with other ginners in the town of McCrory, the custom was for ginners to request that fuses be put in before it put them in. The court refused to allow it to make proof of the custom over the objection and exception of appellant.

Appellant contends that the trial court committed reversible error in excluding the testimony offered.

The old contract had expired, and what the parties did under it would not waive any right they might have

under the new contract, even though the provisions in the two independent contracts were similar. This court said in the case of *Southern Coal Company* v. *Searcy,* 152 Ark. 471, 238 S. W. 624: "For the same reason, prior course of conduct between the parties under similar contracts cannot be invoked as a waiver of an express and unambiguous stipulation in the new contract. *Citizens' Nat. Life Ins. Co.* v. *Morris,* 104 Ark. 288, 148 S. W. 1019; *Robnett* v. *Cotton States Life Ins. Co.,* 148 Ark. 199, 230 S. W. 257. Regardless of the prior course of conduct between the parties, they have the right to make their own terms under a new contract, and neither general custom of trade nor the prior course of conduct of the parties themselves can serve to defeat the plain letter of the new contract."

Under the rule announced in that case, the court was correct in refusing to permit appellant to introduce the old contract, or the course of conduct between the parties under it.

The provision in the new contract set out above is unambiguous and imposed the absolute duty upon appellant to connect its electrical energy with the gin on or before September 1 of each and every year, and this could only be done, under the undisputed evidence, by putting in fuses. It reserved the right to make the connection itself and to make it not later than September 1 each year during the life of the contract. There being no ambiguity in the provision of the contract, usage and custom cannot be used to change the plain meaning thereof. This court said in the case above cited:

"It is the settled rule of law in this court that usages and customs of trade cannot be invoked to defeat the express terms of a contract, and that such usages and customs are only applicable where the contract is silent or where its terms are ambiguous."

Under the rule just quoted, the trial court correctly excluded the testimony offered relative to usage and custom.

Appellant, having breached the contract by failing to put in the fuses to effect the connection between the electrical energy and the gin, is not entitled to recover any

sum for electrical energy which was not available for use to appellees in the operation of the gin; therefore the court did not err in dismissing its complaint.

The judgment is affirmed.

SINCLAIR REFINING COMPANY *v.* GRAY.

4-3913

Opinion delivered June 24, 1935.

Malcolm W. Gannaway, for appellant.

Edward Gordon, for appellees.

MEHAFFY, J. This suit was begun in the Conway Circuit Court by Elmer Gray, Jr., by his guardian and next friend, Mrs. Princess C. Gray, and Mrs. Princess C. Gray against the appellant, Sinclair Refining Company, to recover damages for injury received by Elmer Gray,

Jr., four years old, caused by an explosion at the gasoline tank belonging to appellant. The appellant had leased from Prince Clergett certain land located on the north side of highway 64, west of Morrilton, Arkansas, and had placed on said land certain underground gasoline tanks and other equipment for the retailing of gasoline and servicing of automobiles. Prince Clergett was placed in charge as agent of appellant and operated the station using the tank and equipment until January 9, 1934, when the lease agreement and other agreements were canceled. The appellant however did not remove its tanks and equipment, but continued to use them through its agents. One of the agents of appellant was J. M. Merrick.

Merrick testified that he was appellant's agent at the time the appellee, Elmer Gray, Jr., was injured; that he sold the gasoline to Bill Russell. The witness also testified that he did not think the contract was actually canceled on January 9th because the cancellation agreement had to be sent to the office and forwarded back to Mr. Benbrook, and in his judgment it was later than the 9th before it could be sent for cancellation.

Frank Hawkins testified that he was a truck driver for Merrick, agent of the appellant, engaged in the delivery of gasoline and other oil products; that he delivered the gasoline to Russell, but at the time he delivered it he thought it was for Clergett.

Bill Russell testified that he was present when Frank Hawkins delivered the gasoline to Clergett's filling station; saw Hawkins open the lock on the tank; that he used the axle of a Ford car to pry it open; saw Hawkins put the gasoline in the tank and try to lock it, but Hawkins said the lock would not hold, and told witness that he would have to get another lock, and that he, Hawkins, would bring one next time he came.

After the gasoline had been delivered into the tank and the lock had been broken off, on January 12, 1934, Elmer Gray, Jr., while visiting his grandmother, who lived on the property leased by appellant where said tanks were located, was attracted to the fill pipe used to fill one of the underground tanks, and the child raised

the top or flap of the pipe and struck a match, causing an explosion which seriously injured the child.

Quite a number of witnesses testified, but we deem it unnecessary to set out their testimony because the undisputed facts show that the appellant owned and controlled the tank, pipe and equipment. The undisputed proof also shows that the lock had been broken from the pipe sometime in December. There is no dispute about the fact that the child was injured by the explosion, which would not have occurred but for the broken lock. There is no dispute about the extent of the child's injury.

There was a jury trial, and a verdict and judgment for appellee for $500. The case is here on appeal.

Appellant states that its theory is that the record shows conclusively that it had no control or right of control over the property where the boy was injured; that the gasoline which caused the injury did not belong to it, but belonged to Bill Russell; that it had no control over said gasoline; and that attractive nuisance doctrine has no application.

Appellant cites and relies on *Constantin Refining Company* v. *Martin,* 155 Ark. 193, 244 S. W. 37. In that case the Constantin Refining Company had brought in an oil well. There was no evidence of any escape of gas at the mouth of the well or anywhere near there, but a few days after the well was capped, it was found that there was an escape of gas through fissures in the earth to the surface, and at a point 950 feet distant from the well there was a crater formed in the bed of a small stream of water. There was no evidence that the escape of the gas was caused by the capping of defendant's well. The crater was on another tract of land than that on which the well was located, a tract in which the defendant had no interest, and over which it had no right to exercise control. It was on a tract of fenced and cultivated land, known as Parnell field. A railroad track was between defendant's tract of land and the Parnell tract, and the track was on a dump or embankment 12 feet high. The facts in that case are wholly different from the case at bar, and the court said in that case that it could discover no act of negligence. There was no negligence in bring-

ing in the well, and it conducted its operations in accordance with the usual methods. There was no negligence in capping the well; the defendant not only had a right to do that, but the law compelled it to do so. There was no negligence in the formation of the crater, for that resulted by reason of the natural pressure of oil and gas through the fissures in the earth. In that case Judge HART wrote a strong dissenting opinion holding that the Constantin Company was liable.

The next case referred to and relied on by appellant is *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Waggoner,* 112 Ark. 593, 166 S. W. 948, 52 L. R. A. (N. S.) 181. In that case the C. J. Lincoln Company had shipped over the line of railway an empty alcohol barrel. The barrel was received by the railroad company at Little Rock and shipped over its line to Ward. When it reached Ward, it was unloaded and set out at the end of the platform. There was nothing to call the agent's attention to the barrel as having explosives in it or as being dangerous. Waggoner had gone to the station to take the train to Judsonia, and his wife and two boys accompanied him to the station. While he was in the waiting room, the boys were playing on the station platform around the empty barrel. The barrel had a half-inch cork stopper in a hole in the end. The stopper was pulled out, and one of the boys stuck a match to it, and there was an explosion. Waggoner was ten years old, and the court said it could not say as a matter of law that he was guilty of contributory negligence. The court stated the rule to be as follows:

"Where the owner permits to remain unguarded on his premises, something dangerous which is attractive to children, and from which an injury may reasonably be anticipated, he may be liable."

In the instant case the undisputed proof shows that the owner of the tank and pipes permitted them to remain on the premises where they were located unguarded, and with the lock broken off so that the cap was not securely fastened.

Appellant next cites *Catlett* v. *Railway Company,* 57 Ark. 461, 21 S. W. 1062. There was no proof of negli-

gence at all, and no proof of any wrongful conduct on the part of the railway company. Catlett, a boy of eleven years of age, although he had been repeatedly warned not to do so, climbed on a moving train and was injured. The evidence shows that no one in charge of the train saw Catlett attempt to get on, or knew anything of the accident at the time. Of course the court held that there was no evidence of negligence.

In the instant case there is no dispute about the lock being broken, and the pipe being left in an unsafe condition.

It is next argued by the appellant that Hawkins was in the employ of Merrick and not in the employ of appellant. There is no dispute about Merrick being the agent of the appellant, and Hawkins was one of his truck drivers. But, if he had been a stranger, the appellant would be liable because, if it left the equipment, which was to be used to store and deliver gasoline in an unsafe condition, then any one could put gasoline in the pipes, and if a stranger did, and injury resulted, the appellant would be liable because it permitted its equipment to be in such condition that it could be used by any one, and the only purpose of its use was to store a dangerous agency.

The appellant was not an insurer, but it was bound to exercise such care and diligence as to avoid injury to the health and property of others by the escape of gas. The care and diligence should always vary according to the exigencies which require vigilance and attention. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business which involves little or no risk. 28 C. J. 590-591. See *Nashville Lbr. Co.* v. *Busbee,* 100 Ark. 76, 139 S. W. 301.

In the instant case, if the evidence showed that the appellant had used reasonable care, it would not be liable, but whether it did or did not was a question for the jury, which was properly submitted to it under correct instructions.

In another case we said: "While it is true that the deceased could not have been killed by the escaping gas if he had not unscrewed the riser, still he had the right

to remove this apparently disconnected and dead gas pipe from his premises." *Pulaski Gas Light Company* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189.

It is true in this case that the child would not have been injured if he had not struck the match, but, as he is too young to be guilty of contributory negligence, the striking of the match did not bar his recovery. Moreover, but for the negligence of appellant in leaving the lock broken and the pipe unguarded, the injury could not have occurred.

Appellant's specific objection to the instructions is that they made the test of liability the ownership and control of the gasoline tank, instead of making the test of liability the ownership or control of the gasoline which was in the tank. The gasoline would not have caused the injury, but for the negligence with reference to the pipe. The gasoline would have been perfectly harmless but for appellant's negligence. We think the trial court was correct in holding that the sole test was the ownership and control of the tank and equipment. The jury were fully and fairly instructed, and it would serve no useful purpose to discuss the instructions separately.

We find no error, and the judgment is affirmed.

SULLIVAN *v.* STATE.

Crim. 3936

Opinion delivered June 24, 1935.

Floyd Terral, for appellants.

Carl E. Bailey, Attorney General, and *Guy E. Williams*, Assistant, for appellee.

BAKER, J. On September 17, 1934, the prosecuting attorney filed a petition in the first division of the Pulaski Circuit Court alleging that a building known as the Old Heidelburg Inn, on the Conway Pike, operated by Ernest Sullivan as a roadhouse, was a nuisance in that intoxicating liquors were sold on the premises in violation of the law. The prayer was for the abatement of the nuisance by restraining the operators and closing the place. On the same day the court granted a temporary order restraining Ernest Sullivan from further continuance of such nuisance, and the sheriff was ordered to close the Old Heidelburg Inn. On September 24, the matter came on for final hearing. Mary Sullivan became a party to this proceeding. She was the owner of the property. The record does not disclose whether she made herself a party voluntarily or came in upon notice served, but Mary Sullivan and W. E. Sullivan were parties defendants in the proceeding. The record recites as follows: "Wherefore the court doth hear the testimony in behalf of the State and of the defendants," and found that at the time Mary Sullivan and W. E. Sullivan had been operating the property known as Old Heidelburg Inn on the Conway Pike; further that "Mary Sullivan and W. E. Sullivan had been engaged in the sale of intoxicating liquors at such place to such an extent as to constitute a public nuisance, and that the same should be abated." The temporary order was made permanent. The order in reference to W. E. Sullivan was in the following language: "That the said W. E. Sullivan be, and he is, hereby permanently enjoined from conducting, maintain-

ing, carrying on, and engaging in the sale and traffic of intoxicating liquors, either directly or indirectly, in violation of the laws of this State, at said location or anywhere else in Pulaski County."

The order as to Mary Sullivan is as follows: "That the owner of the said property, Mary Sullivan, is hereby permanently restrained from permitting any tenants of said property to engage in or be interested, either directly or indirectly, in the sale or traffic of intoxicating liquors."

Thereafter on March 8, 1935, the prosecuting attorney filed a petition to cite Mary Sullivan and W. E. Sullivan to answer for contempt in the matter of the violation of the restraining orders issued against them. They were notified to appear on March 8, but the case was continued to March 16, for trial.

The petition praying for the citation alleged that at the building known as the Old Heidelburg Inn owned by Mary Sullivan and operated by Jack Mann, Amelia Mann Truby, Frank Truby and Ernest Sullivan, the said parties were engaged in the traffic in intoxicating liquors in violation of the injunction issued against defendants on September 24, 1934.

Upon trial the court found the defendants, W. E. Sullivan and Mary Sullivan, guilty of contempt and punished W. E. Sullivan by ordering his confinement in the Pulaski County jail for a period of thirty days. Mary Sullivan was punished by an order directing the sheriff to close and padlock the Old Heidelburg Inn for a period of twelve months, and enjoined Mary Sullivan or any one claiming under her from using the said premises for said period.

From these orders and judgments of the circuit court the record thereof has been brought here by certiorari to test the legality of the orders and judgments of the circuit court. W. E. Sullivan made a bond in the sum of $300 to stay the order of the circuit court until final judgment here.

Upon the trial several witnesses were examined, some of whom testified that they bought intoxicating liquors in said building on or about February 10. All the

witnesses examined saw these liquors on tables where customers were served. Deliveries of two purchases about which evidence was offered were made by negro waiters. Other testimony was to the effect that on or about the same date patrons at different tables had intoxicating liquors, that the bottles containing the same were on the tables where the customers were eating.

A search and examination brought about by the death of one Vincent Addy, who was thought to have been foully dealt with at or in the Old Heidelburg Inn, disclosed a small quantity of liquor hidden in the building. There were found about 150 to 200 empty whiskey bottles in a garbage heap or receptacle kept near the building together with two cartons in which liquor had been shipped or transported. Labels on bottles and brands on cartons were the same. Proof was offered showing that the business at that time was being conducted by W. E. Sullivan, Jack Mann, Amelia Mann Truby and Frank Truby; that W. E. Sullivan and wife, and Frank Truby and wife resided or lived in the building; that W. E. Sullivan, the Manns and the Trubys were partners in the operation of the business. There was no direct proof of any sale made by W. E. Sullivan, or of his actual interest in any sale.

It is urged on that account that he had not violated the permanent injunction issued against him. It is also urged that Mrs. Mary Sullivan, the owner of the building, had not been present since some time in January, when she had rented the property to Mann, Truby and others, and did not know of the illegal traffic. She urged that, at the time she had rented the building, she had exacted from the tenants a promise not to sell liquor therein.

It is argued, upon this showing, that the conviction upon the citation was not justified, and that they should be discharged from custody. It is also urged that the injunction against W. E. Sullivan to the effect that he was enjoined from the sale of liquor in the said building or elsewhere in Pulaski County is an injunction against a prospective violation of the law, and therefore cannot be maintained.

It should not require any extended discussion or argument to convince any one that the order and judgment of the circuit court was correct. It must be conceded that a proceeding of this kind is to abate a nuisance conducted at a particular place. If it be conceded that, to the extent that the court enjoined W. E. Sullivan from the sale of liquor "elsewhere in Pulaski County," the order was in excess of power, that in no particular impairs the validity of the restraint in so far as it related to Old Heidelburg Inn. It is not contended, as a matter of defense, that Old Heidelburg Inn as conducted at that time was anything more or less than a resort to which those so inclined might go, and according to the testimony engage in public carousals with congenial company whose entertainment and pleasure consisted in part, at least, in the consumption of intoxicating liquors.

It must be said that, if these liquors were not furnished directly by those who owned and operated the business, they furnished the means to make easier of access such quantities of liquors as might be desired. Waiters who served the tables said that empty bottles were gathered up from under the tables where customers had been served. It is not conceivable that this condition could have prevailed as the ordinary course, against the will and desire of those who conducted the business. No conclusions can be reached except that those interested in the business built its popularity of whatever kind it had by consent and connivance, if not by active participation therein.

The injunction issued on September 24, 1934, was wholly ineffectual. Mrs. Mary Sullivan, the owner of the building, appeared in court, and was present when the injunction was ordered. She and W. E. Sullivan were represented by counsel. It was within their power to compel obedience from those who operated the business, and to prevent unseemly and disorderly conduct. One witness even testified that, when he wanted some liquor, he went to a well-known bootlegger, made known his wishes, and the liquor was delivered to him by a waiter. Another witness gave to a waiter his order for liquor, and in a few minutes the liquor was served on his table

in the presence of others who saw the delivery. Mrs. Mary Sullivan urges the fact that she did not go about the place, but only exacted a promise from those whom she put in charge that they would not carry on the traffic. Her statement may be true, but she was not sufficiently concerned to make an inquiry in regard to the nature or kind of business conducted by those who paid her rents for the use and occupancy of the building.

She was the owner, expecting rents from the property, perhaps nothing more. Notice of the nuisance was brought home to her in the suit she had defended to prevent this injunction. It was then within her power to control the situation by ejection or expulsion of occupants who would not respect the orders of court. Those who expect protection from the law to their property, and who desire to exercise and enjoy their civil rights without let or hindrance from irresponsibles, should obey the law, lend assistance to the orders and mandates of courts.

Owners and operators of resorts and the habituees are not the only parties affected. The public generally has rights that must be protected. Taxpayers are interested in the matter of expense incurred for police supervision. The moral aspect of every community is always so affected to a degree by brothels and resorts that the State, to restore the customary moral status, is justified by necessity as well as law to take charge and compel obedience to the mandates of decency. Those who engage in vice and lawlessness, whether as active participants, either secretly or by device, may not expect unmerited mercy or favor because of the fact that they did not possess sufficient cunning to evade detection.

The evidence herein justifies the orders made. The law is act 109 of Acts 1915, approved March 6, 1915. See chap. 99, Crawford & Moses' Digest, § 6196 *et seq.*

According to the writer's view the case of *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459, is not so strong a case as the one under review. Not a sale was proved there. In that case the business was that of taking orders for a liquor house at Monette, Mo. This court upheld the trial

court in its order to abate a nuisance. *Nichols* v. *State,* 171 Ark. 987, 287 S. W. 190.

In the Nichols case cited above, the regularity of the proceedings was questioned as affecting the jurisdiction of the court. The particular point was that defendant did have the proper notice. She, Nichols, was present and went to trial. This was a waiver of notice.

W. E. Sullivan contends he had no notice of the order permanently restraining him from maintenance of the nuisance. This order was made September 24, 1934. He was present at that trial. The record he presents here so recites. No other notice was required, unless required by the court's order.

Section 5818, Crawford & Moses' Digest, expressly provides that it shall not be necessary to serve notice or order of injunction when notice of application therefor is given. He defended the injunction suit; therefore had notice of that proceeding. He defended here.

There was no error prejudicial to the rights of Mrs. Sullivan or W. E. Sullivan.

Petition denied.

SUTTON *v.* STATE.

Crim. 3938

Opinion delivered July 1, 1935.

John F. Clifford, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. By apt averments appellant was indicted by the Pulaski County grand jury for the crimes of forgery and uttering a forged instrument as defined by §§ 2460 *et seq.,* of Crawford & Moses' Digest. Upon trial to a jury appellant was acquitted of the charge of forgery but was convicted of uttering a forged instrument as charged in the second count of the indictment, and his punishment assessed at five years in the State penitentiary, from which this appeal comes.

Appellant contends that the testimony is insufficient to support his conviction. The pertinent testimony adduced by the State and upon which appellant's conviction rests was to the following effect: That on August 4, 1934, appellant was called upon by W. A. Goad, Jr., a son of W. A. Goad, Sr., deceased, for a showing in reference to payments of rentals by appellant upon certain premises occupied by appellant situated in Little Rock which belonged to the estate of the said W. A. Goad, Sr., deceased. In response to this request appellant delivered to W. A. Goad, Jr., who was the administrator of the estate of W. A. Goad, Sr., deceased, the following receipt purporting to have been signed by W. A. Goad, deceased, namely:

"June 11, 1934, received of R. K. Sutton eighty dollars ($80) for four (4) months rent in advance on cafe located at 2317 Wright Ave., Little Rock, Arkansas, rent to begin when all utilities are connected. W. A. Goad."

The testimony established that this receipt did not and does not bear the genuine signature of W. A. Goad, deceased.

This testimony falls far short of establishing appellant's guilt of uttering a forged instrument. In the early case of *Elsey* v. *State,* 47 Ark. 572, 2 S. W. 337, we announced the material elements constituting uttering and publishing of a forged writing to be an intent to defraud and knowledge of the falsity of the instrument uttered.

We there said: "To constitute the offense of uttering and publishing a forged writing, it is necessary that there be an intent to defraud, and that there should be a knowledge of the falsity of the document. A receipt may be uttered by the mere exhibition of it to one with whom the party is claiming credit for it, though he refuse to part with the possession."

For the purposes of this opinion, we concede that the testimony adduced by the State establishes that the receipt mentioned in the indictment and heretofore set out did not bear the genuine signature of W. A. Goad, deceased, and is a forged instrument, but it does not follow from this that the crime of uttering or publishing said instrument by appellant had been established. Under the rule of law heretofore stated, it is equally as important that appellant's intent to defraud and his knowledge of the falsity of the instrument at the time of its uttering be established by testimony as it is to show that the instrument is a forgery.

Testimony on behalf of the State establishing the intent of appellant to defraud by the uttering of said instrument is wholly lacking in this record. No witness testified that appellant owed W. A. Goad, deceased, or his estate $80 or any other sum of money at the time this alleged forged receipt was uttered and published. If appellant did not owe W. A. Goad, deceased, or his estate any sum of money, certainly the presentation of such receipt to W. A. Goad, Jr., was not fraudulent.

The burden rested upon the State to establish appellant's guilt beyond a reasonable doubt, and this it wholly failed to do.

For the reasons stated, the cause is reversed and remanded for a new trial.

MEEKS *v.* WAGGONER.

4-3985

Opinion delivered July 1, 1935.

Trimble, Trimble & McCrary, for petitioners.

John R. Thompson and *W. P. Beard,* for respondent.

McHANEY, J. On January 11, 1935, Ethel E. Smith and her husband, J. C. W. Smith, filed an action in the Lonoke Circuit Court against the Magnolia Petroleum Company, a foreign corporation, and against the petitioners, Jim Meeks and Ewell Smith, to recover damages for personal injuries alleged to have been sustained by the plaintiff, Ethel Smith, caused by their joint negligence in painting a strip across the sidewalk adjacent to a filling station, in the city of Little Rock, owned by the Magnolia Petroleum Company and operated by the petitioners as servants and employees, in that she stepped upon the wet paint on the sidewalk, slipped, fell and was injured thereby. Service was had upon the Magnolia Petroleum Company in Lonoke County by delivering a copy of the summons to its agent therein. Service was had upon the petitioners in Pulaski County, they being residents and citizens thereof. Thereafter, in apt time, they appeared in the Lonoke Circuit Court, especially for the purpose, filed their motion to quash the service had upon them and objected to the jurisdiction of the court on this ground. The court overruled the motion to quash the service, and held that it had jurisdiction of the parties. They thereafter filed their petition in this court for a writ of prohibition against W. J. Waggoner, judge of the Lonoke Circuit Court, in which they alleged want of proper service upon them and lack of jurisdiction of the person of the petitioners by the Lonoke Circuit Court.

Plaintiffs and petitioners are all residents of Pulaski County and the Magnolia Petroleum Company, the other defendant to the action, has its principal Arkansas office and place of business in Little Rock in said county. However the latter is a foreign corporation, doing business in Lonoke County, and has an agent and place of business therein. It seems to be conceded that the Magnolia Petroleum Company has been properly served with process in Lonoke County, and it is not a party to this proceeding. The petitioners contend with some degree of force and justice that, since they are residents of Pulaski County, and since plaintiffs in the action in Lonoke County are also residents of Pulaski County, and since all the witnesses reside in Pulaski County, and the Magnolia Petroleum Company has its principal office and place of business in said county, the action should have been brought in Pulaski County where all the parties reside, and they should not be compelled to go out of the county of their residence to defend the action.

The Legislature however prescribes the venue of actions and the manner of serving summons upon defendants, and with the wisdom of its action in such matters the courts have nothing to do. After prescribing the venue of actions in many particular cases, it is provided by § 1176, Crawford & Moses' Digest, as follows: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned."

The joint defendant, Magnolia Petroleum Company, has been properly served in Lonoke County, therefore, under the plain provisions of § 1176, the petitioners were properly brought into the action in the Lonoke Circuit Court. One of the three defendants was properly summoned in Lonoke County. Therefore the venue was properly laid as to the other defendants, petitioners herein. As said by Mr. Justice FRAUENTHAL in *Wernimont* v. *State,* 101 Ark. 210, 142 S. W. 194, quoted with approval in *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325: "It is the policy and spirit of our law, enacted into statute by our Legislature, that every de-

fendant shall be sued in the township or county of his residence. To this general principle there are statutory exceptions, chiefly in cases where there is a joint liability against two or more defendants, residing in different counties. In such cases it is provided that suits may be brought in the county of the residence of any of the defendants, and service of summons can be had upon the other defendants in any county, thereby giving jurisdiction over their persons to the court wherein the suit is thus instituted. Kirby's Digest, §§ 6072 and 4558. But, before this jurisdiction can be acquired by virtue of these statutes over the person of such defendants nonresident of the county wherein the suit is instituted, it is essential that the defendant resident of the county where the suit is brought shall be a *bona fide* defendant. By our statute, it is further provided that, before judgment can be had against such nonresident defendants, a judgment must be obtained against the resident defendant. Kirby's Digest, § 6074."

In *Metzger* v. *Mann,* 183 Ark. 40, 34 S. W. (2d) 1069, Metzger was served in Faulkner County. Other defendants, nonresidents of Pulaski County, entered their appearance in the action. We held that Metzger was not properly served because the joint defendants did not reside, and were not summoned in Pulaski County, having entered their appearance only. The situation is different here. While the Magnolia Petroleum Company may not be said to reside in Lonoke County, it was personally summoned there, and this gave the court jurisdiction of the petitioners, residents of Pulaski County. See also the recent case of *Arkansas Democrat* v. *Means,* 190 Ark. 948, 82 S. W. (2d) 256. Other cases cited by counsel for petitioners are not in point, and we think it would serve no useful purpose to distinguish them in this opinion. Suffice it to say that, under the plain provisions of said § 1176, Crawford & Moses' Digest, the Lonoke Circuit Court acquired jurisdiction of petitioners by service in that county on one of the alleged joint tortfeasors.

The writ will be denied.

JOHNSON *v.* DONHAM.

4-3986

Opinion delivered July 1, 1935.

Price Shofner, for appellant.

Fred A. Donham, for appellee.

BUTLER, J. On the first Monday in January, 1935, the quorum court of Pulaski County made the following appropriations for the office of prosecuting attorney:

"Salaries	$17,500.00
"Contingent expenses	2,500.00
"Library	2,500.00."

The prosecuting attorney's office is situated in the Pulaski County courthouse. The purpose of the appropriation for the library of $2,500 was to enable the purchase of a law library to be located in the office of the prosecuting attorney, and this suit is to enjoin its purchase. The court below denied the prayer of the complaint, and the case is here on appeal.

There are several questions raised by the appellant, but there is no occasion to notice any except the first, namely, has the quorum court the authority to appropriate county funds to purchase a law library for the use of the prosecuting attorney's office? The appellee contends that this authority is found in § 28, art. 7 of the Constitution, and § 2279 of Crawford & Moses' Digest. We are cited to the cases of *State use of Prairie County*

v. *Leathem & Co.,* 170 Ark. 1004, 282 S. W. 367, and *Craig* v. *Grady,* 166 Ark. 344, 266 S. W. 267, as authority for the position assumed.

Section 28, art. 7 of the Constitution, authorizes the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concern of respective counties.

That part of § 2279 of Crawford & Moses' Digest quoted by appellee as sustaining his contention is as follows: "The county court of each county shall have the following powers and jurisdictions: * * * to have the control and management of all the property, real and personal, for the use of the county; to have full power and authority to purchase or receive by donation any property, real or personal, for the use of the county, and to cause to be erected all buildings and all repairs necessary for the use of the county; to sell and cause to be conveyed any real estate or personal property belonging to the county, and appropriate the proceeds of such sale for the use of the county; to disburse money for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

We are referred to no particular clause in the constitutional provision, or the section of the Digest, quoted *supra,* which is thought to uphold the contention here made. We discover no express provision giving to the court the power to expend money for the purpose of purchasing a law library, nor can we find any from which that power might be implied. The "county purposes" for which the county's money may be disbursed are those purposes which promote the welfare of the county as a whole and of its citizens—such as, the erection of county buildings, bridges over county roads, and such other purposes as would promote the general health and welfare of its citizens—and could hardly be extended to include the purchase of a law library for the use of a State or district officer as is the prosecuting attorney. This is true, although the title to the books purchased might be in the county.

Section 2279 authorizes the county court to purchase real or personal property for the use of the county. The intention of the act is not to authorize the purchase of any and all kinds of personal property, but only such as is necessary for the conduct of the affairs of county government, as court records, furnishing for county buildings, food and clothing for county prisoners and the like.

The effect of the decisions cited *supra* is, that where an express power is given the implied power arises to do those things necessary to carry the express power into effect. The point in those cases was that, as the county court was the general fiscal agent of the county with supervisory power over the collection and preservation of county funds, it has the implied power to employ an expert accountant to examine the accounts of its officers clothed with the authority to collect and disburse revenues. We perceive no principle announced in those cases applicable to the instant case. Our conclusion therefore is that the provisions of the Constitution and statute relied upon confer no authority, either express or implied, for an expenditure of the funds of the county such as is sought to be prevented in this case.

Appellee cites, as ample authority for the contemplated purchase, § 4 of act 74 of the Acts of 1933, which is as follows: "The prosecuting attorney of each of said districts shall be allowed the sum of eight thousand five hundred ($8,500) dollars per annum for the contingent expenses of his office, including telephone, telegraph, postage, printing, office supplies and equipment, office rent, stationery, traveling expenses, special services, operation of cars, and such other expenses which, within the discretion of the prosecuting attorney, are a proper expense of the office; and, also include necessary expenses in connection with the proper investigation of trials before the grand jury or any court of the county." If we give effect to the act cited, it affords no authority for the contention of the appellee. That act provides for $8,500 to be allowed the prosecuting attorney as "contingent expenses of his office." As "contingent expenses," it names expenses for certain specific items and

concludes with: "such other expenses, which, within the discretion of the prosecuting attorney, are a proper expense of the office." If we treat the phrase, "such other expenses" as relating to the expenses for the specific items named, then the expenses allowable would be only for items of the same generic class as the items specifically named. A law library cannot, by any legitimate construction, be deemed to come within the class of any of the specified items. This phrase "such other expenses" must therefore relate to the ordinary "contingent" expense of the office—that is, such expenses as might ordinarily be expected to arise in the conduct of the office, but which might not occur. It must be conceded that the discretion given the prosecuting attorney in the expenditure of the $8,500 is unusually broad, but we do not think it can be legitimately stretched so as to give authority for the purchase contemplated.

From the views expressed it follows that the decree of the trial court must be reversed, and the cause is remanded with directions to grant the prayer of appellant's complaint.

WISEMAN *v.* ARKANSAS-LOUISIANA PIPE LINE COMPANY.

4-3983

Opinion delivered June 24, 1935.

Chrisp & Nixon, for appellant.

H. C. Walker, Jr., W. H. Arnold, Jr., and *Moore, Gray, Burrow & Choiwning*, for appellee.

McHaney, J. Appellant, who is the Commissioner of Revenues for the State of Arkansas, brought this action in his name as such Commissioner for the use and benefit of the State. He alleged that he has information, and it is his belief, that, from February 1, 1930, through September 30, 1934, the appellee sold and delivered to the Arkansas Western Gas Company 1,698,772,000 M.C.F. of natural gas, an itemized list of said deliveries being attached to the complaint, and made a part thereof. He further alleged that said gas had a value of ten cents per M.C.F. at the point of severance, and that there is due the State a severance tax of 2½ per cent. of the value of said natural gas amounting to the sum of $42,669.30. Prayer was that the court ascertain the correct amount due as a severance tax, and that judgment be rendered in appellant's favor for said sum.

An amendment was filed to the complaint which alleged the consent of the Arkansas Corporation Commission for the bringing of said suit.

Thereafter, appellee filed a demurrer to the complaint and amendment on the ground that this is a suit for the collection of back taxes, and that under the law it can be brought only by the Attorney General for and on behalf of the State and in its name, and that appellant has no power under the law to maintain this suit. The court sustained said demurrer, and, on appellant's declining to plead further, the cause was dismissed for the want of equity.

The only question presented for our consideration is whether the appellant, Earl R. Wiseman, as Commissioner of Revenues for the State of Arkansas, has the power to maintain this suit, or whether it is a suit under

§ 10,204 of Crawford & Moses' Digest? It is true that in *State* v. *Republic Mining & Manufacturing Co.,* 185 Ark. 1119, 52 S. W. (2d) 43, it was held that said § 10,204 of Crawford & Moses' Digest conferred authority upon the Attorney General to sue for the collection of overdue taxes from corporations from all sources, including the severance tax, and that said statute did not limit him to collecting back taxes on property alone. This decision was rendered July 4, 1932. In 1933, the Legislature enacted act 82, page 245, of the Acts of 1933, § 9, which reads as follows: "The Commissioner of Revenues shall have the authority to institute and prosecute in his name as such all suits and other proceedings necessary for the collection of any taxes collectable by him, and which have become delinquent." This is broad language and confers plenary power upon the Commissioner of Revenues in the institution and prosecution of suits in his name "for the collection of any taxes collectable by him, and which have become delinquent." The collection of the severance tax is a duty imposed upon the Commissioner by act 283 of the Acts of 1929, p. 1187. We think the complaint is sufficiently definite to charge that appellee has severed a large amount of natural gas upon which a severance tax is due, and which has not been paid. Such being the case, under the allegations of the complaint, the tax is delinquent. Since this is a tax collectable by him, and since it has become delinquent, by the plain provisions of § 9 of the act, the Commissioner has been given authority to institute and maintain this action, and to this extent the authority conferred by § 10,204 of Crawford & Moses' Digest upon the Attorney General has been taken away from him, and conferred upon the Commissioner of Revenues. The Commissioner of Revenues has nothing to do with the collection of taxes on property, and therefore § 10,204 still confers authority upon the Attorney General to bring and maintain actions against corporations for back taxes on property.

Act 82 of the Acts of 1933 was passed, subsequent to our decision in the case of *State* v. *Republic Mining & Mfg. Co., supra,* and the Legislature, no doubt, had this decision in mind, and it was its purpose to change the

rule announced therein. As we said in *State ex rel. Att'y General* v. *Standard Oil Co. of Louisiana,* 179 Ark. 280, 16 S. W. (2d) 581: "The power of the State to maintain suits such as the one at bar being purely statutory, the method and procedure prescribed by the statute must be followed as a condition precedent to its right to maintain such an action, as judgment and discretion are involved, and must be exercised by those on whom the law has placed the power and authority to act."

The authority conferred upon the Commissioner by said act of 1933 is further confirmed in act 131 of 1935, § 1 of which reads as follows: "The Revenue Commissioner of the State of Arkansas is hereby given authority to promulgate any and all regulations, rules and orders which he may deem necessary to effectively collect all taxes, penalties, delinquencies, default and other moneys required by law to be collected by the State Revenue Department, and suits may be filed in the name of the Commissioner of Revenues and at his instance to recover money due and payable to the State and collectable by him. Within ten days after any amount of money is due and payable the Revenue Commissioner shall take steps to collect the same."

We think there is no doubt about the authority of the Commissioner as conferred by the act of 1933, but, if there be any such doubt, the language just quoted in the act of 1935 would lay all doubt at rest. It clearly directs the Commissioner and confers power upon him to bring suit to collect "all taxes, penalties, delinquencies, default and other moneys required by law to be collected by the State Revenue Department, and suits may be filed in the name of the Commissioner of Revenues and at his instance to recover money due and payable to the State and collectable by him."

But appellee says that this operates as a repeal of said § 10,204 by implication, and that repeals by implication are not favored. While it is true that repeals by implication are not favored, said § 10,204 has not been repealed except in this, that the power theretofore conferred upon the Attorney General to bring such a suit as

the one at bar has been taken away, and conferred upon the Commissioner of Revenues.

The decree will be reversed, and the cause remanded with directions to overrule the demurrer, and for such other and further proceedings as may be according to law, the principles of equity, and not inconsistent herewith.

LOLLIS *v.* LOLLIS.

4-3922

Opinion delivered June 24, 1935.

Williams & Williams, for appellants.

Reynolds & Maze, for appellee.

BUTLER, J. G. M. and J. C. Lollis filed a complaint in the Johnson Chancery Court against J. H. Lollis, as defendant. They alleged that they had conveyed certain lands by deed to the defendant for the purpose of enabling him to secure a loan on said lands for their benefit, with the understanding that, if the loan was not secured, he was to reconvey the lands to them; that said

loan had not been secured, and that defendant had failed and refused to reconvey the lands as agreed upon. The defendant answered denying the allegations of the complaint, and cross-complained, alleging that, at the time the deed was executed, the grantors were indebted to him in a large sum, offering to make reconveyance upon the payment thereof, and praying that, in the event they should fail to pay the debt, the title to the lands be quieted in him. Defendant further alleged that the recorder of deeds had inadvertently omitted from the record the north fractional half of northwest quarter of section 36, township 9 north, range 23 west, containing 74.44 acres, and that the plaintiffs, subsequent to the execution of their deed to him, had executed and delivered to L. A. Williams and W. J. Morrow, Jr., a mortgage by which the lands above mentioned were conveyed; that this mortgage was received by the said Williams and Morrow with full knowledge of the rights of defendant, and that same should be canceled as a cloud upon his title. Plaintiffs replied to the cross-complaint, alleging that the deed as originally executed was for the express consideration of one dollar and other valuable considerations, and that the lands embraced in said deed as originally drawn were two tracts, to-wit, the south fractional half of northwest quarter of section 36, and the southwest fractional quarter of section 36, all in township 9 north, range 23 west, containing 142 acres; that said deed had been fraudulently altered by changing the consideration to "nine thousand dollars," and by adding the north fractional half northwest quarter of section 36, township 9 north, range 23 west, containing 78 acres; that said alterations were made by the defendant, or with his connivance and knowledge, in order to exact from plaintiffs a greater sum than was due, and for the purpose of defeating the mortgage given Williams and Morrow. Further replying to the cross-complaint, plaintiff alleged that the sole purpose of the execution of the deed to the defendants was to secure a loan in order to pay their indebtedness to him, and that since the execution of the deed they had paid the entire indebtedness and a sum of $450 in excess thereof for which they prayed judgment.

Williams and Morrow intervened, alleging the execution of the mortgage to them, denying that they had any knowledge that the lands mortgaged to them had been previously conveyed to J. H. Lollis, and praying that their mortgage be declared paramount and superior to the title conveyed to the said J. H. Lollis. Prior to the filing of the reply to the cross-complaint, J. H. Lollis died, and the cause was revived in the name of his widow, heirs at law and personal representatives.

On the issues joined evidence by depositions was taken by the parties, and the cause was submitted to the court on the pleadings and evidence adduced. The court found that the deed executed to J. H. Lollis was, in fact, a mortgage given to secure an indebtedness existing and due him on the date of the deed, January 28, 1928, in the sum of $1,000, and that the lien thereof was superior and paramount to the interest of the said Williams and Morrow. Judgment was entered for the said $1,000 with interest thereon at the rate of 6 per cent. per annum from January 28, 1928, and the court ordered that, if the judgment be not paid within a time certain, the lands mentioned in the deed, to-wit, south fractional half of northwest quarter and southwest fractional quarter of section 36, 74.92 acres in first tract, 67.25 acres in second tract, and accretions thereunto belonging, and the north fractional half northwest fractional quarter, section 36, containing 78.44 acres, all in township 9 north, range 23 west, be sold to satisfy said judgment and decree. Plaintiffs and interveners have appealed, and defendants have prosecuted their cross-appeal.

Incidental to the main contention, the parties to the action present certain questions regarding the effect of the pleadings and the competency of some of the witnesses. These questions are unimportant, since it is our conclusion, after a careful examination of the competent and relevant testimony, the decree must be affirmed.

It was, and is, the contention of the appellants (plaintiffs) that the debt secured by the deed of January 28, 1928, has been settled and paid off, while the appellees contend that the chancellor erred in his finding that only $1,000 was the debt due, their contention being that

the evidence shows that it was not less than $3,600. The books of J. H. Lollis, deceased, were introduced in evidence which, it is contended, established the indebtedness due on January 28, 1928, at a sum in excess of $8,000. G. M. Lollis and J. C. Lollis admitted that $1,000 was due on that date, but testified that the same had been paid in various ways and in varying amounts.

From an examination of all the evidence as the same has been preserved in the record and presented to us, we are uncertain as to the true state of the account between G. M. and J. C. Lollis on the one hand, and J. H. Lollis on the other, but we are of the opinion that the conclusion reached by the trial court is not against the preponderance of the testimony, and it must therefore stand.

One of the principal contentions made by appellants (plaintiffs) is that there was a material alteration in the deed, and that this avoids the same. An examination of the original deed shows that the consideration was first written, "one dollar and other valuable considerations"; that this was partially erased and over it was written "nine thousand dollars." There is testimony to the effect that, when the deed was executed and delivered to J. H. Lollis, the consideration first written had not been erased, and the erasure and substitution was after the delivery and without the knowledge or consent of the grantors. The deed was prepared in the office of a local bank where there were two typewriters of different sized type. The person who wrote the deed used a printed form and filled in the blanks for the consideration and description of the property conveyed by using a typewriter. The type used to write the words "nine thousand dollars to us in hand," was different from that first used. The scrivener, who was the cashier of the bank, testified that he did not remember what consideration was put in the deed, but thought it was an even number of dollars, and that he did not remember about the change. There is no testimony tending to show by whom or when the change was actually made. This, however, is immaterial, for, if there was an alteration of the express consideration in the deed after its execution and

delivery, the same would not be a material alteration. The reason is that the consideration expressed in a deed is not conclusive, but may be contradicted or explained. At best it is but *prima facie* evidence of a fact which, if omitted from a deed, might be supplied by parol testimony, and does not affect the rights or liabilities of the parties. Therefore, it is competent to show by parol evidence that the amount of a consideration is different from that recited in the deed, and that the recital that, it had been paid, may be contradicted. If this were not true, then the deed, absolute on its face, could not be treated as a mortgage. Devlin on Real Estate, vol. 2, 3d ed., p. 1495 *et seq.; Lay* v. *Gaines,* 130 Ark. 167, 196 S. W. 919; *Lasker-Morris Bank & Trust Co.* v. *Jones,* 131 Ark. 576, 199 S. W. 900; *Sutton* v. *Sutton,* 141 Ark. 93, 216 S. W. 1052; *Wade* v. *Texarkana, etc., Ass'n,* 150 Ark. 99, 233 S. W. 937. Since, despite the alteration, the rights and liabilities of parties were not changed, there was no material alteration. *Woods* v. *Spann,* 190 Ark. 1085, 82 S. W. (2d) 850.

The evidence on behalf of the appellants (plaintiffs) was to the effect that only two tracts of land were described in the deed when executed and delivered to J. H. Lollis, and that the tract mortgaged to Williams and Morrow was not in the deed, but was inserted after its execution and delivery without the knowledge or consent of the grantees. All the witnesses who testified to this, had a direct interest in the result of the lawsuit, and their testimony was contradicted by the person who drafted the instrument who testified that the deed had not been altered with respect to the description of the property conveyed. We have not overlooked the contention made by appellants (plaintiffs) that there is a difference in the use of certain letters in writing the description of the first two tracts, and in writing the description of the third tract. We have examined the original deed having regard to the criticism made and conclude that it is not of sufficient merit to overturn the testimony given in support of its authenticity. In fact, we find from an inspection of the deed nothing of such an unusual nature as would overturn the finding of the trial judge.

The conclusion that the lien of the deed to J. H. Lollis was superior to that of the mortgage to Williams and Morrow implies the finding that the interveners had knowledge of the rights of J. H. Lollis in the lands mortgaged or of circumstances which would put them on inquiry. Contemporaneously with the execution of the deed, an agreement was signed by J. H. Lollis which recited that on the date named G. M. and J. C. Lollis had conveyed by deed "their farm in the Arkansas River bottom near Knoxville, Arkansas, consisting of about 225 acres," which was to be reconveyed to them "when they have cleared the indebtedness against them held by the said J. H. Lollis." The lands conveyed were not described further than that part of the agreement first quoted. Williams and Morrow testified that this agreement was in their possession, and they, of course, knew from it that G. M. and J. C. Lollis had deeded about 225 acres of land to J. H. Lollis. The three tracts lay parallel with each other, and constituted a single tract of land containing in the aggregate approximately the number of acres named in the contemporaneous agreement, whereas the first two tracts contained approximately 144 acres. Williams and Morrow testified that when they were about to take the mortgage they examined the record, and found only two tracts named in it, but that the 78-acre tract would be required to make the 225 acres. This was sufficient to put them on inquiry which, if pursued with ordinary diligence and understanding, would have given them knowledge of the true facts and constitutes notice. *Waller* v. *Dansby,* 145 Ark. 306, 224 S. W. 615; *Shoptaw* v. *Sewell,* 185 Ark. 812, 49 S. W. (2d) 601.

The decree of the trial court, both on appeal and cross-appeal, is affirmed.

S. & C. TRANSPORT COMPANY *v.* BARNES.

4-3927

Opinion delivered July 1, 1935.

Allan Robinson, J. R. Surrency and *Brown & Bradley,* for appellants.

Robert S. McGregor and *W. W. Sharp,* for appellees.

JOHNSON, C. J. Separate actions were instituted by appellees, Kenneth C. Barnes, Mrs. Kenneth C. Barnes, Mrs. Arnie Ray, Mrs. Annie Worsham and Clarence Barnes, against appellants, S. & C. Transport Company, a foreign corporation, and S. J. Bage in the Monroe Circuit Court to compensate personal injuries and also the

destruction of an automobile, the property of appellee, Kenneth C. Barnes, which occurred in and by reason of a collision between said automobile and a truck and trailer driven by appellant Bage on July 7, 1934.

The complaints respectively alleged that Bage was an employee and servant of S. & C. Transport Company at the time of the collision, and was in due performance of his duty as such; that the collision was due to the carelessness and negligence of Bage in suddenly driving his truck and trailer from behind a car which he was following and entering the left side of the highway which was being traveled by appellees, thereby carelessly and negligently striking appellees' automobile, destroying it, and inflicting the very serious personal injuries complained of.

Appellant S. & C. Transport Company files answers denying all the material allegations of the complaints and specially alleged that Bage was, at the time of the collision, an independent contractor.

Appellant S. J. Bage answered the complaints of appellees by denying all material allegations thereof and specially affirmed that at the time of the collision he was an independent contractor and not an employee or servant of his co-appellant; moreover, that the collision was due solely to the negligence of Kenneth C. Barnes, the driver of the automobile. The specific negligent acts of Kenneth C. Barnes relied upon by appellant Bage as a defense are not set out in the answer. The several causes were consolidated for trial, and the testimony adduced by appellees, when viewed in the light most favorable to them, warranted the jury in finding: That on July 7, 1934, appellees Kenneth C. Barnes, accompanied by his wife and son, Mrs. Ray and Mrs. Worsham, co-appellees herein, were upon a journey from Madison, Tennessee, to Coleman, Texas, and, while traveling in a westerly direction across the State of Arkansas and at a point near Brinkley, and while driving at a moderate rate of speed and upon the right-hand side of the highway, were suddenly met head-on by the truck and trailer which was being driven by appellant Bage; that the Barnes automobile was completely wrecked by the im-

pact, and appellees and each of them received very serious and more or less painful and permanent injuries on account of said collision; that at and prior to the collision appellant Bage was driving a truck which was drawing a large trailer, the property of S. & C. Transport Company, and was returning to East St. Louis from a trip to Southwest Arkansas where a delivery of a load of new automobiles had been effected under the directions and control of the said S. & C. Transport Company.

The testimony on behalf of appellants was to the effect that Bage owned the truck and had borrowed the trailer from his co-appellant for use in making deliveries of new automobiles, and that appellant, S. & C. Transport Company, had nothing to do with the directions or control of the manner and means of effecting deliveries of the cars which were being transported. Moreover, that Bage at the time of the collision was transporting a car owned by one Mr. Darby under a private contract of hire, and was therefore not in performance of any duty for the master while engaged in this private enterprise.

Instructions were given by the trial court to the jury in charge which will be hereinafter adverted to covering all issues of fact reflected by the testimony. The jury returned verdicts in favor of appellees and against appellants jointly as follows:

Kenneth C. Barnes	$10,000
Mrs. Kenneth C. Barnes	10,000
Mrs. Ray	10,000
Mrs. Worsham	10,000
Clarence Barnes	3,500

On the presentation of appellants' motion for new trial, the court reduced the above awards as follows:

Kenneth C. Barnes to	$5,000
Mrs. Kenneth C. Barnes to	4,000
Mrs. Arnie Ray to	4,500
Mrs. Annie Worsham to	3,750
Clarence Barnes to	2,000

and entered judgments accordingly, and thereupon overruled said motion for new trial. Both appellees and appellants saved proper exceptions and have appealed and cross-appealed respectively from the modified judgments.

Appellant S. & C. Transport Company's primary contention for reversal is that as a matter of law Bage, the driver of the truck and trailer at the time of the collision, was an independent contractor—directing and controlling the manner and means of carrying on his business, and that therefore the liability to appellees, if any, falls upon Bage and not it.

The trial court submitted this issue of fact to the jury under instructions, the form of which are not here complained of, and we think properly so. Appellant S. & C. Transport Company's president, Mr. Smith, testified that their headquarters were situated in East St. Louis, and it operates eight or nine trucks and trailers in ten or twelve different States under licenses and permits issued by the respective States; that his company procured the order for hauling the cars transported by Bage and furnished to him the permit to operate in this State; that his company collected the charges for delivering the new cars and paid to Bage 75 per cent. of the amount collected; that, under the directions of witness, Bage had the name of "S. & C. Transport Company" painted on both sides of his truck; that safe delivery of the new cars hauled by Bage was guaranteed by the S. & C. Company, and its responsibility in this behalf was insured by an insurer. Under repeated decisions of this court, the above testimony is amply sufficient to support the jury's finding that the relationship existing between appellant S. & C. Transport Company and Bage was that of master and servant or employer and employee and not an independent contractor. *Monk* v. *Jones,* 190 Ark. 1117; *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680; *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. (2d) 320; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6.

Next appellant S. & C. Transport Company urges that Bage, by his contract of hire with Darby to haul his automobile upon his return trip from Southwest Arkansas to East St. Louis, deserted his master's business for that of his own private affairs, and was therefore without the scope of his authority at the time of the collision. *Keller* v. *White,* 173 Ark. 885, 293 S. W. 1017, is cited

as conclusive of this contention. We cannot agree. In the case cited, White was conclusively shown to have been upon no business of the master at the time of his injury whereas in the instant case Bage was returning to appellant S. & C. Transport Company's headquarters at East St. Louis, Illinois, from a trip made to Southwest Arkansas at his master's demand, by its direction and under its control. Under facts and circumstances not materially different from the ones here under consideration, we stated the applicable rule as follows:

"Where an agent, driving a truck over a route for the purpose of delivering and selling merchandise, in returning to the principal's place of business, towed an automobile of his own accord, and at an intersection skidded the truck through a filling station, causing the car being towed to strike plaintiffs' car and injure plaintiffs, *held* that the principal was liable, since, although he exceeded his authority, he had not, as a matter of law, completely abandoned the principal's business. *Campbell Baking Co.* v. *Clark,* 175 Ark. 899, 1 S. W. (2d) 35.

Appellants next urge that the trial court erred in reducing the jury's awards and not granting a new trial. *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851, and *Spadra Creek Coal Co.* v. *Callahan,* 129 Ark. 448, 196 S. W. 477, are cited in support of this contention. These cases do not support the contention urged. There we were dealing with the question of the sufficiency of the testimony to support a jury's verdict or whether or not such verdict rested with the weight of the testimony. Certainly if a jury's verdict is contrary to the testimony, and the trial court so determines, or is without testimony to support it, nothing can be done save grant a new trial; but this rule has no application to the facts of this case. Here the testimony is conclusive that liability exists, and the trial court reduced the awards at the invitation and request of appellants, and they are therefore in no position to complain, were it determined that this ruling was erroneous. Inherently courts of record have the power to reduce jury awards to conform to the established facts as is established by our repeated actions in this regard. *St. Louis & N. A. Ry. Co.* v. *Mathis,* 76 Ark. 184, 91 S. W.

763; *St. Louis Iron Mt. & Southern Ry. Co.* v. *Adams,* 74 Ark. 326, 85 S. W. 768; *Fordyce* v. *Hardin,* 54 Ark. 554, 16 S. W. 576; *St. L. I. M. & S. Ry. Co.* v. *Warner,* 65 Ark. 619, 48 S. W. 222; *St. L. I. M. & S. Ry. Co.* v. *Williams,* 92 Ark. 534, 123 S. W. 403; *St. L. I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874; *St. L. I. M. & S. Ry. Co.* v. *Brown,* 100 Ark. 107, 140 S. W. 279; *Fowler* v. *Johnson,* 11 Ark. 280; *Hay* v. *Bank of State,* 5 Ark. 250; *McFarland* v. *State Bank,* 4 Ark. 44.

Neither can we agree that prejudicial error is made to appear in granting and refusing instructions to the jury in charge. We have carefully considered all instructions granted and refused by the trial court, and it must suffice to say that the instructions given, when considered as a whole, were fair, complete and free from prejudicial error and covered all controverted issues of fact tendered by the admitted testimony.

Finally, appellants contend that the modified judgments as entered by the trial court are excessive. The testimony reflects that each of appellees was painfully, seriously and more or less permanently injured by the collision and has suffered and will continue in the future to suffer from the effects thereof. This testimony, without quoting it in detail, is amply sufficient to support the modified judgments.

It follows that no prejudicial error is made to appear from appellants' appeal, and the judgments against them must therefore be affirmed.

On cross-appeal appellees contend that the trial court abused its discretion in reducing the jury's awards. Without reviewing the testimony in reference to the extent of appellees' injuries, it suffices to say that the jury's awards, until modified, were clearly excessive, and the trial court was justified in making the reductions, but erred in not granting a new trial upon appellees' refusal to accede to the remittiturs. See cases cited *supra.*

If appellees elect within fifteen days to accede to the remittiturs of the trial court and waive the error indicated, the judgments will in all things be affirmed; otherwise they must be reversed and remanded on cross-appeal.

DERMOTT GROCERY & COMMISSION COMPANY *v.* KENNEDY.

4-3929

Opinion delivered July 1, 1935.

John Baxter, for appellant.

W. W. Grubbs and *J. R. Wilson,* for appellees.

SMITH, J. This litigation arose out of a wreck on Highway 65 near Eudora. Mrs. Hazel Kennedy, a plaintiff below, was riding in a Ford sedan traveling south as the guest of Alvin Meyer, who was driving the car. They observed two trucks coming in the opposite direction. One truck was owned by the Eudora Ice Company, the other by the Dermott Grocery & Commission Company. The grocery company truck was in front, and the other was trying to pass it, and a race resulted. The evidence tends to show that as the ice company truck would attempt to pass the other, the latter would "weave" into the road, as witnesses expressed it, and block the passage.

Julius Hester, who probably had a better view of the collision out of which the litigation arose than any other witness, testified as follows: When the approach of the racing trucks was observed, Meyer stopped his car after driving as far to the right of the road as he could get it, the two right wheels being off the pavement. Witness stopped his car to the rear of Meyer's car. "The grocery company's truck looked like it was weaving out into the road, and had hit the ice truck and caused it to

run into Alvin Meyer, and the Dermott Grocery Company truck ran on around the wreck and turned over in the ditch."

The evidence on the part of the defendants was to the effect that Meyer did not stop his car, and did not pull over to the extreme right side of the road. It is insisted that he should have done so when he saw the impending danger, and that, had he done so, there would have been sufficient space in the road for the three cars to pass abreast.

Mrs. Kennedy testified that when she saw the trucks coming at great speed she told Meyer, the driver, to pull over on the right and to stop his car, and that he drove to the right as far as could be done with safety and stopped his car before the impact. It is argued that this testimony shows that, although Mrs. Kennedy was riding as a guest, she had assumed to direct the driver, and he had obeyed her directions, and that she should be treated as a co-operator of the car, and that the negligence of Meyer should therefore be imputed to her, as he was obeying her orders. But, as has been said, it is denied that Meyer stopped his car or drove it over to the extreme right side of the road.

Mrs. Kennedy's husband was a party to the suit, and sued for the hospital and other bills which he incurred in having his wife treated for her very serious injury, and there were separate verdicts for both plaintiffs against the owners of each of the trucks.

The court appears to have given all of the instructions requested by the defendants except one which, if given, would have instructed the jury that a verdict might be rendered disallowing any damages to Mr. Kennedy, even though a verdict should be returned in favor of his wife, but the refusal to give the instruction is not argued as error calling for the reversal of the judgment. Moreover, it appears to have been properly refused.

Only two assignments of error are argued for the reversal of the judgment. These are that the court erred in giving plaintiffs' requested instructions numbered 5 and 12.

Instruction numbered 5 reads as follows: "The court instructs the jury that the degree of care which the drivers of automobiles and motor vehicles are bound to exercise is commensurate with the dangers to be anticipated, and the injuries that are likely to result from the use of vehicles of that character. The more dangerous the character of the vehicle, the greater degree of care required in its operation."

The objection to this instruction is that it is argumentative in form and permits the jury to set up a test of negligence without regard to the standard which the law requires and has established. The intruction is not open to the objection made, when read in connection with other and accurate instructions defining negligence and ordinary care. But it is true, of course, that, in determining whether ordinary care was exercised, it was proper for the jury to take into account "the dangers to be anticipated," and we think there was no error in giving the instruction.

The assignment of error chiefly relied upon for the reversal of the judgment is that error was committed in giving instruction numbered 12, which reads as follows: "You are instructed that no evidence has been introduced to show that the plaintiff, Mrs. Hazel Kennedy, was guilty of any contributory negligence, and you will disregard that defense of the defendants altogether."

It is argued that the jury might have inferred that, if the car of Meyer had not been operated negligently, there would have been plenty of room for all of the cars to have passed side by side without a collision, and that, if so, plaintiff, although a guest, was responsible for Meyer's negligence, as he was driving the car in accordance with Mrs. Kennedy's directions. But the only testimony as to any directions given by her was her own, which was to the effect that she told Meyer to pull over to the right and to stop his car, and that Meyer drove as far to the right as it was safe to do and stopped his car. Certainly, there was no negligence in this. Mrs. Kennedy testified that there was nothing else she could have done except to jump out of the car, and that time was not afforded for her to do this.

A number of cases have declared the law to be that it was the duty of a guest to exercise care for her own safety, and that a failure to exercise such care, which contributed to her injury, or which might have resulted in averting the injury, will constitute contributory negligence and defeat a recovery of damages to compensate the injury. *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; *Graves* v. *Jewell Tea Co.,* 180 Ark. 980, 23 S. W. (2d) 972; *Ragland* v. *Snotzmeier,* 186 Ark. 778, 55 S. W. (2d) 923.

Even though the jury might have believed that Meyer had not stopped his car nor had driven it as far to the right as he should have done under the circumstances, we think there was no showing of any failure to exercise due care on the part of Mrs. Kennedy. The testimony which tends to show that she directed Meyer in driving the car, and that he was following her directions, shows also that she did all that due care required. The road was on a slight embankment, and a ditch ran along its side, and, even though Mrs. Kennedy was directing the operation of the car in which she was riding, she was under no duty of directing that the risk be incurred of driving into the ditch in order that the road might be made safe as a race track.

The judgment was against the owners of both trucks, but only the grocery company has appealed. There appears to be no error, and the judgment is affirmed.

GENTRY *v.* SMITH.

4-3988

Opinion delivered July 1, 1935.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellant.

Mehaffy & Mehaffy, for appellee.

SMITH, J. Appellee filed a complaint against U. A. Gentry, State Commissioner of Insurance, which contained the following allegations: Plaintiff operates a retail drug store. Gentry is the duly appointed and acting Commissioner of Insurance for the State of Arkansas. Joseph A. Young is doing business under the name of American Advertising Company, and sells advertising plans in various forms. The Southern National Insurance Company is a corporation organized under the laws of this State, and is duly authorized to transact an insurance business in the State, including the issuance of automobile accident policies. The advertising company has the exclusive right to use certain copyrighted plans and insurance policies designed to be used as an advertising medium and business stimulus. The advertising company has purchased from the insurance company a large number of insurance policies, which are printed on the backs of sales tickets which are issued to persons making purchases from the drug company. The policies thus printed read as follows:

"Signature of holder Date

.....

"For the premium received, the undersigned company agrees should death of the holder, if between the ages of 10 and 65, occur within 24 hours from noon (S. T.) of the date hereon from direct contact with an automobile to pay to his or her estate $200 upon proof of death and the surrender of this policy, which is not valid unless signed and dated in holder's own handwriting on date acquired. The company's liability is limited to $200 regardless of the number of policies held by any one person. (Copyrighted 1935.)

"SOUTHERN NATIONAL INSURANCE CO.
"Little Rock, Ark.

"W. H. BOYD, Secretary. L. M. SAXON, President."

The advertising company has paid the premiums to the insurance company on each of these policies, and has given the plaintiff druggist a number of them, one of

which he delivers to each customer who makes a purchase, the policies being delivered without cost to the purchaser.

The Insurance Commissioner asserts that the practice is violative of the insurance laws of the State, in that plaintiff has not obtained the certificate of authority required by law to act as an insurance agent. Plaintiff alleges that he is not engaged as an insurance agent, for the reason that the advertising company had paid the premiums on said policies before the delivery thereof to him, and he prays that the Commissioner be enjoined from interfering with this practice and from attempting to require plaintiff to procure the certificate of authority which the law requires all insurance agents to have.

The Commissioner demurred to this complaint. The demurrer was overruled, and a restraining order was issued as prayed, and the appeal is from that decree. The question for decision is whether the plaintiff druggist is acting as the agent of the insurance company.

Section 6061, Crawford & Moses' Digest, reads as follows: "Any person who shall hereafter solicit insurance or procure applications shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding; and whenever any agent of a corporation or association shall do any of the acts named in § 5978 within this State, said corporation or association shall be subject to the jurisdiction of the courts of this State by service named in § 6063, whether said corporation or association has complied with the requirements of said last-named section or not."

We think plaintiff is a soliciting agent within the meaning of this section. It is true, of course, that plaintiff is not primarily interested in the issuance of the policies. But he is interested in increasing his sales, and this is the method of accomplishing that purpose. Customers are induced to buy from him on account of the limited yet valuable protection which the policy affords.

Now, the printing of the policies on the back of the sales tickets by the insurance company and the sale and

delivery thereof by the advertising company does not complete the contract of insurance. An essential part of the transaction remains unperformed. It is essential that these printed cash tickets be issued and delivered to the persons insured, who, in the last analysis, pay and furnish the consideration which makes the transaction profitable and possible. These policies afford no insurance protection to the advertising company which pays the premiums in the first instance. The payment of premium is made with the expectation of passing on the cost thereof to some one else. The policies would be without value to the advertising company if this were not done. The transaction is futile and without result unless a policyholder is found, and it is the business of the plaintiff druggist to find that person. This is the essence of the transaction. The policies would not otherwise be issued. The business is to be solicited, and the plaintiff is the solicitor. He makes his profit in increased sales. The issuance of one policy makes possible the sale of another.

It is true no application is required for the insurance. The policies are issued without formal application, but it is true also that they must be issued. They are not issued when sold in quantities by the insurance company to the advertising company. They are only ready for issuance. They do not become effective until the insured writes his name as the party insured in the appropriate space prepared for that purpose and the date of issuance stamped thereon, to the end that the period of the policy's effectiveness may be evidenced. After issuance the policy continues in force for only twenty-four hours, and this time begins to run, not from the date of the sale by the insurance company to the advertising company, but from the time plaintiff makes a sale, upon which consideration the policy is delivered to the person insured, whose name as the insured is then written thereon.

The agency is indirect, but it exists. There is conferred upon the plaintiff, as a part of the transaction, the power to fix a contingent liability upon the insurer, and this power makes the plaintiff the soliciting agent of the insurer. If he did not have the authority to act for

the insurer, the latter would not be bound by his action in the issuance of the policy. We conclude therefore that the plaintiff druggist is a soliciting agent of the insurer, and that it was error to overrule the demurrer.

The case of *Connecticut General Life Insurance Co.* v. *Speer,* 185 Ark. 615, 48 S. W. (2d) 553, is cited and relied upon for the affirmance of the decree from which this appeal comes. In that case the insurance company issued a group or master policy of insurance to the Gulf Oil Corporation of Pennsylvania, an employer, to include employees who signed an application to be included in the group policy, and also authorized the deduction in advance of the necessary amount per month from the pay of the employee to apply on the payment of the premium for said insurance. An application or deduction blank was presented to one Williams, an employee, and was signed by him. Williams was injured during the course of his employment, and brought suit against the insurance company under the group policy. Service was had in the suit on the insurance company in the manner provided by statute for suing foreign corporations doing business in the State. The insurance company appeared for the purpose only of quashing the service of summons upon it, on the ground that it was not authorized to do business in the State, and had done none. Upon this motion being overruled, application was made to this court for a writ to prohibit the circuit court in which the suit was pending from exercising jurisdiction.

It was held, in granting the writ, that the contract—the group policy—was executed and the whole transaction had beyond the limits of the State of Arkansas, and that the insurance company could not be sued as a foreign corporation doing business in this State.

It was first sought to establish jurisdiction of the circuit court in the suit on the insurance contract by the agency of the oil corporation in taking applications for insurance from its employees; and it was also insisted that under § 6061, Crawford & Moses' Digest, above quoted, the employees of the Gulf Oil Corporation became agents of the insurance company by securing ap-

plications in the blank form to be issued to the employees of the oil corporation in the State of Arkansas.

The first contention was disposed of by saying that similar contracts of insurance under the group plan had been construed not to constitute the insured as the agent of the insurer to solicit applications for insurance from the employees of the insured, and cases were cited so holding.

The second contention was disposed of by saying that § 6061, Crawford & Moses' Digest, was borrowed from a previous statute passed in Iowa, which had been construed by the Supreme Court of that State before its enactment here, and that, in adopting the statute of that State, it would be held that the interpretation placed upon it was also adopted. We there quoted from the opinion of the Supreme Court of Iowa as follows: "'The purpose of the statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the insured. Under that provision, they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the statute, and it ought to be so interpreted as to accomplish that result.'"

We do not think that opinion is decisive of the question here raised because of the difference in the facts. This insurance was written in this State. The policies were issued and delivered, and the premiums were paid in this State. Each policy was a separate and distinct contract having no relation to any other policy of insurance, and none of them became effective as contracts of insurance until plaintiff had made a sale of merchandise and had made delivery of a sales ticket upon which the policy was printed. In the case cited there was only one policy, this being the group policy, which was written and delivered beyond the confines of the State. Here

there were as many policies as there were sales, it being provided, however, that the insured might recover on only one policy, the maximum liability for injury being limited to $200.

In the opinion in the case cited *supra*, it was said: "By the terms of the policy, the insurance company looked to the employer for the payment of the premiums. It did not make any difference to the insurance company that the oil corporation might collect a part of the premiums from its employees. The employee was insured because he made application through a contract executed for his benefit by the oil corporation with the insurance company."

In that case there was a single policy issued and delivered beyond the limits of the State. In the instant case there were many separate policies, no one of which had any relation to any other, each being a separate contract issued to persons named in the policies, all of which were issued and delivered within this State, and the plaintiff's participation in the transaction constituted him the agent of the insurer.

The decree will therefore be reversed, and the cause remanded with directions to sustain the demurrer, and for further proceedings not inconsistent with this opinion.

HOPSON *v.* WESTERN CLAY DRAINAGE DISTRICT.

4-3912

Opinion delivered July 1, 1935.

Appellants *pro se.*

J. L. Taylor, for appellee.

McHaney, J. Appellee brought this action on August 25, 1931, against a large number of tracts of land for the benefit of its subdistrict No. 5 to enforce collection of delinquent drainage assessments for the years 1928 and 1929. Included therein were certain tracts owned by appellant Taylor and certain other tracts owned by appellant Hopson. These tracts were erroneously described as being in township 20, whereas they were in township 21, but in all other respects the lands of appellants were correctly described and were properly listed opposite their respective names. Some time thereafter, the date not being shown, but before decree, each appellant signed a written waiver of publication of notice of suit, waiver of issuance and service of summons, and entered his appearance in the action. On October 8, 1931, a decree was taken against the lands of appellants and all other delinquent lands, wherein it was found that appellants and others had waived service of summons and entered their appearance, and that a large number of other persons had been served with summons; and that notice of suit had been published as required by law. No defense was made by appellants, and the land owned by them and a great many others was condemned to be sold to pay the delinquent assessments for the years aforesaid, the amount thereof set opposite each description being found to be due, for which a lien was declared and fixed in said decree. A commissioner was

appointed to make the sale, and he was directed to sell same for cash, if not paid prior to February 20, 1932, after advertising the time and place of sale in the manner and form provided by law. On June 14, 1932, the commissioner published notice that, on July 15, 1932, he would offer for sale the lands described therein, and the lands of appellants were correctly described as being in township 21. On July 13, appellants brought suit to enjoin the sale of their lands on the ground that their lands had been incorrectly described in the complaint and the decree, but correctly described in the commissioner's notice of sale. A temporary order was issued and later made permanent granting the relief prayed on June 9, 1933. On the same day appellee amended its complaint so as to show the correct description of each appellant's land and prayed judgment as in the original complaint. Appellants moved to dismiss the amended complaint and filed an answer setting up the matters and proceedings aforesaid and pleading same as a bar to the cause stated in the amended complaint, and also pleading the three-year statute of limitation. The court overruled these contentions and entered a decree condemning their land for sale for the amount found to be due and delinquent for said years.

For a reversal of the judgment against them, appellants first contend that the court erred in permitting appellee to file its amendment to the complaint on June 9, 1933, because it is claimed same was not filed in apt time, the suit having been already terminated. But the case with reference to the particular lands had not been terminated. While a decree of foreclosure had been rendered condemning certain lands to be sold, these particular lands were misdescribed, and were not sold because erroneously described in the complaint. There was no final judgment against these particular lands. Section 1237 of Crawford & Moses' Digest provides: "The plaintiff may amend his complaint without leave at any time before an answer is filed, and without prejudice to the proceedings already had," and § 1239 provides: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend

any pleadings or proceedings * * * by correcting a mistake in any other respect, or by inserting other allegations material to the case * * *." In this case no answer had been filed until after the appellee had amended its complaint, and then no answer was made as to the merits of the case. We are of the opinion that the court correctly permitted the amendment to be filed.

It is next said that the court erred in assuming jurisdiction under said amended complaint because the lands were not included in the original complaint, and that the lands were not made defendant or proceeded against in the amendment, nor was it alleged that said lands were delinquent and subject to a lien. The original complaint was a proceeding against the lands therein described against which a lien for the amount of the taxes set opposite said lands was claimed, and it was charged therein that said taxes were delinquent. The only object of the amendment was to correctly describe the lands misdescribed in the original complaint. When the complaint was so amended, the charge as to delinquency, and as to the lien related to the lands covered by the amendment.

It is next contended that the court should have sustained appellant's plea of the three-year statute of limitations as provided by act 34 of the Acts of 1921. The three-year statute began to run from the date of delinquency which was December 1, 1928. The original action was brought within three years of that date. We are of the opinion that the amendment related back to the time of the filing of the original complaint, and we are of the opinion that the plea of the three-year statute was not good, and that the court correctly so decided.

Appellants also contended that their plea of *res judicata* should have been sustained. We see no room for application of that doctrine here. There was no adjudication against the lands of appellants in the form of a decree. There was simply a mistake, probably a mutual mistake in describing appellants' lands. As stated by appellant, "all that was necessary to make the original decree valid was the correct description of the lands." On the amended complaint the court entered

another decree finding that the lands of appellants were subject to a lien for the amount of the taxes shown to be due. Appellants have nowhere, and at no time contended that said taxes are not due, and that said lands are not subject to a lien therefor.

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

SHRIGLEY *v.* PIERSON.

4-3924

Opinion delivered July 1, 1935.

Reynolds & Maze, for appellant.

G. O. Patterson, Sr., G. O. Patterson, Jr., and *R. W. Robins,* for appellee.

BUTLER, J. On November 17, 1932, Mrs. Arch Pierson, at the invitation and request of the appellant, Guy Shrigley, undertook to ride in and drive a Dodge sedan owned by him from Clarksville, Arkansas, to the city of Fayetteville, Arkansas, to take appellant's mother and father there for a visit with other members of the family. Mrs. Pierson made the journey to Fayetteville in safety, but while returning the car overturned, and she was severely injured. She brought suit against Shrigley to recover damages for this injury resulting in a verdict and judgment in her favor which, on appeal to this court, was reversed and remanded because of error in the declarations of law given to the jury. *Shrigley* v. *Pierson,*

189 Ark. 386, 72 S. W. (2d) 541. On the trial anew there was again a verdict and judgment for Mrs. Pierson. On appeal it is conceded that the case was submitted to the jury on proper instructions, but it is insisted that the verdict is unsupported by the evidence adduced, and that this is true in three particulars: first, because of failure to show that there was, in fact, any defect in the car; second, that, if there was a defect, there was no evidence to show that appellant knew of it; and, third, that, if, indeed, a defect existed of which appellant had knowledge, there was no proof that this was the proximate cause of the overturning of the car and the resulting injury to the appellee.

We consider the first two propositions and review the evidence bearing upon these questions, having in mind the settled rule that they must be viewed in the light most favorable to the appellee, giving effect to all the reasonable inferences to be drawn from the evidence in support of the verdict. The evidence on behalf of the appellee may be thus stated: the Dodge sedan was purchased by appellant in 1931, and on January 18, 1932, some repairs were made to the steering gear. In July, 1932, the car was taken to an automobile repair shop where it was examined by the shop foreman who was an automobile mechanic. He found that the steering device was badly worn and needed to be replaced by new parts. In its condition, when examined, it was the opinion of the mechanic that it was dangerous to operate. He informed appellant of its condition, and was given to understand that new parts would be supplied.

The conclusion to be drawn from all the testimony is that no repairs were made to the steering device until after the accident in November, 1932. There is no positive testimony to the effect that appellant was informed by the mechanic who examined the car in July that the car was dangerous to operate because of a defective steering gear. But the defects were described to him, and it is reasonably certain from appellant's own testimony that he was experienced in the operation of automobile, and from this experience was able to judge as to

the possible dangers incident to the operation of a car, if its steering apparatus was worn and defective. With respect to the defects, and as to appellant's knowledge thereof, there is also testimony to show that in conversation with the appellee within a short time after her injury, appellant asked her if she knew how the accident occurred, and when she told him that she was unable to properly guide the car, he answered: "I was afraid of that steering device." After the accident the car was repaired, and the mechanic who did the work found the steering gear so badly worn that it was necessary to replace it, which he did. It appears therefore that there is substantial evidence both as to the defect in the steering gear and as to appellant's knowledge thereof.

On the third contention, there is evidence that the condition of the steering gear, as found by the mechanic, was such as might cause an accident similar to the one from which appellee has suffered. There is evidence that one of the tires was punctured by a large nail, causing a "blowout." Appellee was an experienced and skillful driver, and there is evidence that, if the steering gear had been in proper condition, she could have controlled the movement of the car, notwithstanding the disturbance to its normal movement caused by the blowout. It is in evidence, however, that, as the car swerved because of the blowout, or for some other reason, when appellee undertook to guide it, she was unable to move the steering wheel, and, as she described it, the steering gear "locked."

Appellant calls our attention to the recent case of *Lewis* v. *Jackson, ante* p. 102, which is relied on to support the contention that the defect alleged and proved was not the proximate cause of the overturning of the automobile. In the case cited the negligence alleged was permitting a truck to be operated with defective brakes. It was overturned while being operated along the highway. There was no proof tending to show that the defective brakes caused or contributed to the occurrence or what, in fact, was the cause. In the instant case the evidence, viewed most favorably for the appel-

lee, is to the effect that the steering device, because of its worn condition, might slip or move from its proper position depending on road and general driving conditions, and thus cause it "to become tight and hard to control." From the testimony of the appellee, this seems to be just what happened, without which she could have regained control of the automobile and prevented its overturning. This evidence was accepted by the jury as true, and is sufficient to establish as the proximate cause of the injury the defects complained of.

It follows that the judgment of the trial court was correct, and is therefore affirmed.

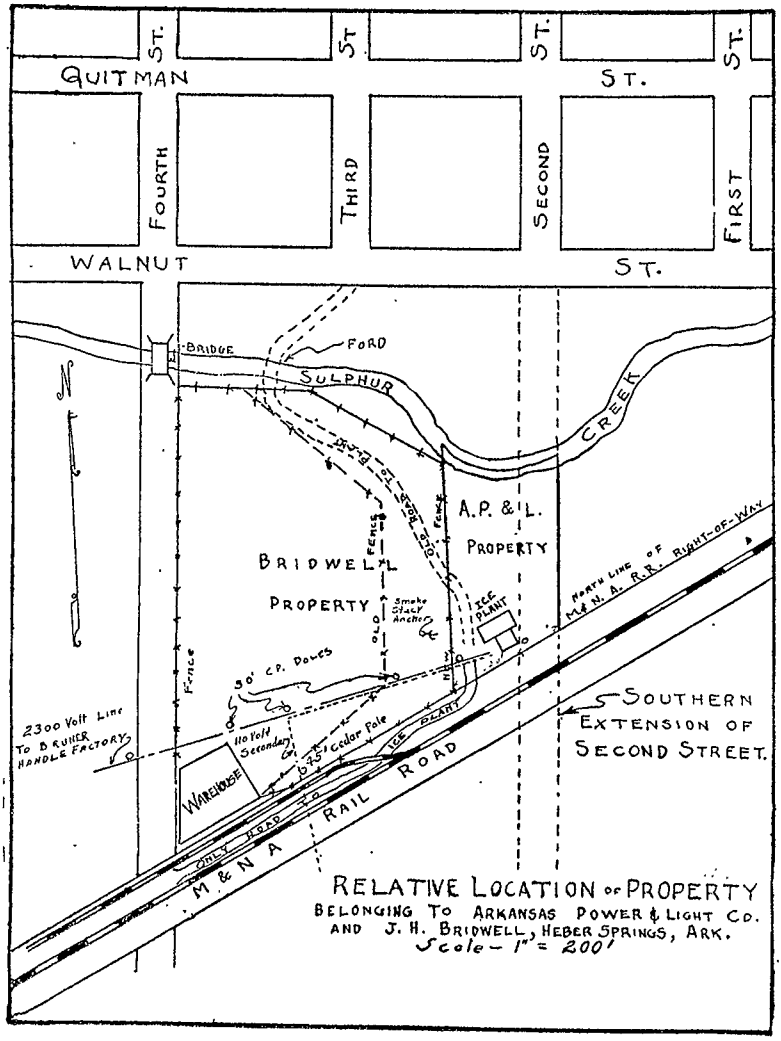
BRIDWELL *v.* ARKANSAS POWER & LIGHT COMPANY.

4-3936

Opinion delivered July 8, 1935.

George W. Reed, for appellant.
Brundidge & Neelly, for appellee.

JOHNSON, C. J. This controversy arises out of the alleged existence of an easement acquired by adverse possession across the tract of real estate designated as "Bridwell Property" on this map.


QUITMAN ST.
FOURTH ST.
THIRD ST.
SECOND ST.
FIRST ST.
WALNUT ST.
BRIDGE
FORD
SULPHUR CREEK
A.P. & L. PROPERTY
BRIDWELL PROPERTY
FENCE
ICE PLANT
Smoke Stack Anchor
50' CP. POLES
2300 Volt Line To D Ruiter Handle Factory
110 Volt Secondary
Cedar Pole
WAREHOUSE
ICE PLANT
M. & N. A. RAIL ROAD
SOUTHERN EXTENSION OF SECOND STREET.
NORTH LINE OF M & N. A. R.R. RIGHT-OF-WAY
RELATIVE LOCATION OF PROPERTY
BELONGING TO ARKANSAS POWER & LIGHT CO.
AND J. H. BRIDWELL, HEBER SPRINGS, ARK.
Scale - 1" = 200'

Appellee instituted this action against appellant in the Cleburne County Chancery Court, alleging that appellant owns the tract of land indicated on the above map as "Bridwell Property" and that appellee owns the small tract of land lying east and adjacent to appellant's tract upon which is located its ice plant; that the only road of ingress and egress from the village of Heber Springs, Arkansas, to appellee's ice plant is a road or way which passes over appellant's tract of land; that said road or way has become a public easement because of continued and adverse use by the public for more than ten years prior to the filing of this suit; that, sometime prior to the filing of the suit, appellant unlawfully and without legal right erected a fence across the public way aforesaid, and appellee prayed judgment that said road be opened for public use by mandatory injunction.

Appellant filed an answer in which he denied the adverse use of the way by the public and affirmatively alleged that the uses of the way by the public during the time alleged was by permission of the owners of the fee. Appellant also filed a cross-complaint seeking damages of unlawful uses by appellee, not only for the unlawful uses of the way, but for storage and the erection of electric light wire poles, etc.

On the issues thus joined, testimony was adduced by appellee to the effect that for some fifteen or twenty years prior to the filing of the suit the public generally had used the road or way across appellant's tract of land for ingress and egress to its ice plant, and that appellant had closed the way without lawful right. Appellant's testimony tended to show that during the period of use by the public his tract of land was unoccupied, uninclosed, and unimproved, and lay within the corporate limits of the city of Heber Springs; that the use of the way by the public was by and with the express consent of the owners of the fee, and that the way used by the public was not upon any well-established or defined route. The testimony adduced by appellant also tended to show nominal damages as prayed in his cross-complaint. The chancellor found that the way across appellant's tract of land had been used by the public as such for more than

ten years prior to the filing of the suit, and that an irrevocable easement had been thus acquired by the public therein which should of right be protected by injunctive order, and that appellant's cross-complaint should be dismissed for want of equity. A decree was accordingly entered, and this appeal comes therefrom.

The rule is well established in this State that the long continued use by the public of a way over unoccupied, uninclosed and unimproved real estate is not presumptively adverse, but on the contrary is presumed to be permissive. We so expressly decided in *Brumley* v. *State*, 83 Ark. 236, 103 S. W. 615, and there stated the rule as follows: "When the public use a road running through open and unfenced lands, without any order of the county court making it a public road and without any attempt to work it or exercise authority over it as a public highway, the presumption is that the use of the road is not adverse to the rights of the owner of the land, but by his consent. When he needs the land, he may withdraw his consent, fence the land, and exclude the public without violating the law."

The rule as thus announced was approved in effect and applied in principle in the more recent cases of *Merritt Mercantile Co.* v. *Nelms*, 168 Ark. 46, 269 S. W. 563; *Caddo Lbr. Co.* v. *Rankin*, 174 Ark. 428, 295 S. W. 52; *Boullion* v. *Constantine*, 186 Ark. 625, 54 S. W. (2d) 986. In the last case cited we restated the applicable rule as follows:

"While not universally recognized, the prevailing rule seems to be that, where the claimant has openly made continuous use of the way over occupied lands unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but where the easement enjoyed is across property that is uninclosed, it will be deemed to be by permission of the owner, and not to be adverse to his title."

The testimony under consideration reflects that the way across appellant's tract of land was used by the public as such for some twenty years, but it does not show that this use by the public was under a claim or

right or adverse to the owners of the fee. Moreover, no fact or circumstance of adverse use under a claim of right is presented by the testimony save that the use was long and continuous. Appellee's insistence is that the law presumes that long continued use by the public is adverse and under a claim of right to the owners of the fee. *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705. And subsequent cases of similar import are cited and relied upon in support of this contention, but such is not the effect of these cases. In the last case cited, we expressly held that adverse use under a claim of right was a question of fact, not a presumption, and that, since the testimony was conflicting on the question, the chancellor's finding should not be disturbed. Appellee's contention of adverse use by the public under a claim of right rests wholly and solely upon a presumption which is said to flow from long continued use, and, since there is no such presumption in the law applicable to user over unoccupied, uninclosed and unimproved real estate, it follows that the court erred in mandatorily directing the opening of the way across appellant's land. On appellant's cross-complaint but little need be said. Appellant's alleged damages rests solely upon his uncorroborated testimony, and the chancellor found that he had suffered no substantial damage by reason of appellee's alleged trespasses. The chancellor was not required to accept appellant's testimony as uncontroverted, he being an interested party in the litigation. *Poinsett Lumber Co.* v. *Troxler,* 118 Ark. 128, 175 S. W. 522; *Harris* v. *Bush,* 129 Ark. 369, 196 S. W. 471; *Scott* v. *Montgomery County Bank,* 158 Ark. 644, 250 S. W. 902; and *Solman* v. *Boyer,* 139 Ark. 236, 213 S. W. 383. We cannot say that the chancellor's finding against appellant on his cross-complaint is against the clear preponderance of the testimony.

For the error indicated the cause must be reversed, and remanded with directions to enter a decree in conformity to this opinion.

KURN *v.* FAUBUS.

4-3940

Opinion delivered July 8, 1935.

J. W. Jamison and *Warner & Warner,* for appellants.

JOHNSON, C. J. Appellee instituted this suit in the Washington County Circuit Court against appellants, as receivers of the St. Louis-San Francisco Railway Company, to compensate a personal injury received by him on March 8, 1933. The complaint, in part, alleged that:

"Plaintiff states that the said C. H. Garrison, foreman, and with full authority to direct him, and with full knowledge of his physical condition and the peril to which he would be subjected by heavy lifting, negligently and carelessly directed him to assist another employee in unloading said engine boxes or bearings from said baggage car onto the trucks at the station; that he, at the time, advised said foreman, C. H. Garrison, that he was not able to lift said boxes or bearings, but was again ordered and directed in a very harsh manner to proceed with the unloading of said boxes or bearings, and that, through fear of losing his job if he refused to obey the orders and commands of his superior, who was C. H. Garrison, he proceeded to assist in the unloading of said boxes or bearings; that in unloading the same it was necessary to lift said heavy machinery, and while attempting to lift one of said boxes or bearings he wrenched and sprained the muscles of his back in the left lumbar region,

thereby causing pyelitis and lumbar weakness, and as a result of said injury, which was caused by the negligence and carelessness of said defendants, their agents and employees, as aforesaid, he has, since said 8th day of March, 1933, been totally disabled and will be continuously, for the balance of his life, totally disabled from following any occupations; that he has, by reason of said injury, suffered great pain and will continue to suffer; that he has been, and will continue to be, under the care and treatment of a physician, and has and will be forced to expend money for doctors' bills and medicine." Damages were laid at $25,000.

Appellants answered the complaint thus filed by general denial and affirmatively pleaded assumed risk and contributory negligence in bar of recovery. Upon trial to a jury testimony was adduced in behalf of appellee to the following effect: That on March 8, 1933, appellee was in the employ of appellants at Fayetteville, Arkansas, as caretaker of a motor car and certain railway coaches, and that C. H. Garrison was his foreman; that on said date the train which arrived from Muskogee, Oklahoma, had on board two boxes containing bearings for locomotive engine drive wheels each of which weighed approximately six hundred pounds, and Garrison as foreman directed appellee and one Robinson to unload said boxes of bearings; that appellee upon being directed by Garrison to assist in the unloading of said boxes advised Garrison that he was physically unable to make such heavy exertion, and in response thereto Garrison responded: "If you can't lift them, you can roll them"; that appellee and Robinson unloaded the first box of bearings by rolling it and without accident or injury; that in unloading the second box of bearings appellee received his injury in the following manner: That it was necessary to lift or carry the second box of bearings because it was located behind a post at or near the end of the car and that appellee was seriously and permanently injured in effecting this lift.

The jury returned a verdict in favor of appellee and against appellants for a substantial sum, and a judgment was accordingly entered, from which this appeal comes.

By timely request for a peremptory instruction, which was properly reserved in its motion for a new trial, appellant contended in the lower court, and asserts here on appeal, that the testimony advanced upon trial was insufficient to support appellee's contention of actionable negligence, and we think this contention must be sustained.

There is no actionable negligence established by the testimony in this case.

The law is that where the perils of the employment are known to the master but unknown to the employee, the master has the duty of apprising the employee thereof, and a neglect by the master of such duty creates actionable negligence; but where the employee's knowledge of the perils of the employment equals or surpasses that of the master, then there is no duty upon the master to apprise the employee of something already well known to him. In the recent case of *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. (2d) 228, we stated the applicable rule as follows:

"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."

In 18 R. C. L., § 62, p. 548, the rule is tersely stated as follows:

"Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently results in injury to the employee is the foundation of the liability of the employer. 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."

Our holding in the McEachin case cited *supra* finds support in the case of *B. & O. Ry. Co.* v. *Berry,* 286 U. S. 272, 52 S. Ct. 510, wherein the court said:

"There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle, and, as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence there is no room for inference that the conductor was under a duty to warn of danger known to him and not to respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by respondent. * * * There was no evidence that respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight. * * *

"The conductor could have no knowledge of such danger, nor was he in position to gain knowledge, superior to that of other trainmen, whose duty it was to use reasonable care to ascertain, each for himself, whether in doing this work he was exposing himself to peril. * * *

"There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where he alighted or to warn him of the danger. If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

The undisputed testimony adduced in the instant case is to the effect that appellee knew his physical condition equally as well as did Garrison, even after Garrison had been apprised thereof, and appellee was the sole factor in applying his strength in the removal of the heavy box of bearings whereby he received his injury. If this were negligence, it is exclusively that of appellee's, and appellants are not responsible for the resultant in-

jury. See *M. P. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. (2d) 1047; *Crawfordsville Trust Co.* v. *Nichols,* 121 Ark. 556, 181 S. W. 904.

Since the testimony adduced by appellee, when viewed in the light most favorable to him, does not show any actionable negligence on the part of appellants which proximately produced or contributed to his injury and resultant damage, it follows that the judgment in his behalf must be reversed, and remanded for a new trial. It is so ordered.

DOBBS *v.* STATE.

Crim. 3939

Opinion delivered July 8, 1935.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellant.

Carl E. Bailey, Attorney General, *Guy E. Williams* and *Ormand B. Shaw,* Assistants, for appellee.

SMITH, J. Fannie and Louisa Orr, two sisters, elderly ladies, lived in a rural community, with their nearest neighbor about a mile away. Appellant went to their home about dark, and demanded money, and, when he was given about $160, he insisted that this was not all the money the women had. The women asked him to take the money and leave them alone, but he said dead people told no tales, and he proceeded to beat both women with a stick of stove wood. After beating Fannie Orr into insensibility, he cut her throat. He beat Louisa Orr also and attempted to cut her throat. Appellant set fire to the house, and left it burning, and it was entirely destroyed. Fannie was dead when he left. Fortunately, Louisa's throat was only lacerated and she was able to drag the body of her sister out of the house before it was consumed by the fire. The identification of appellant was complete as the perpetrator of the crime. He was tried and convicted for the murder of Fannie Orr and given a death sentence. The sufficiency of the testimony to prove the commission of the homicide is not questioned, but insanity at the time of the commission of

the crime was interposed as a defense. It is not insisted that there was any error in the instructions which submitted that question to the jury.

It is first insisted that error was committed in refusing to quash the indictment because of the presence of A. B. Cornett as a member of the grand jury which returned the indictment. The record recites the following proceedings in impaneling the grand jury: "Whereupon Frank Dobbs, who was being held to await the action of the prospective grand jury, was brought before the court, and the court asked him if there was any one of the prospective grand jurors whom he wished challenged. Whereupon the said Frank Dobbs did then and there challenge A. B. Cornett. Whereupon the court overruled the said challenge of the said A. B. Cornett by the said Frank Dobbs." It is insisted that the right to challenge the juror Cornett should have been accorded because of the bias and prejudice of the juror against appellant. This, however, is not a ground upon which the right to challenge a grand juror could be predicated. The statute upon that subject reads as follows: "Every person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection be established, the person so challenged shall be set aside." Crawford & Moses' Digest, § 3005.

In the case of *Threet* v. *State,* 110 Ark. 152, 161 S. W. 139, the defendant had been indicted while confined in jail without being afforded the opportunity to challenge the competency of any member of the grand jury. But this was held not to be erroneous when it was not made to appear that the accused had been denied the benefit of some right secured by the statute quoted. The statute conferred no right to challenge Cornett because of his bias or prejudice.

At the conclusion of the testimony on the part of the State showing the commission of the homicide by appel-

lant, testimony was offered on his behalf tending to show that he was insane. A number of non-expert witnesses were introduced, who, after stating the facts upon which their opinions were based, expressed the opinion that appellant was insane. Two physicians were called, who testified as experts in his behalf. These were Doctors R. E. Rowland and E. T. Ponder.

Dr. Rowland was asked his opinion about appellant's sanity, based upon a hypothetical question, and expressed the opinion that the facts therein stated indicated that the person inquired about was of abnormal mind. He admitted that he made no examination of appellant, and declined to say whether appellant was sane or insane.

Dr. Ponder did make a personal and physical examination of appellant of two hours' duration, and he expressed the opinion that appellant was insane. He stated that this opinion was based upon appellant's personal and family history (including the fact that two of his mother's brothers had been insane), his own examination of appellant, and the testimony which he had heard in the case. He expressed the opinion that appellant was suffering from *dementia praecox,* which is a form of insanity.

It is very earnestly insisted that error was committed in refusing to permit Professor C. C. Denney to answer the hypothetical question which had been propounded to and answered by Dr. Rowland. This witness testified that he was a graduate of Valparaiso University, and had done three years' postgraduate work in Peabody Teachers College, and had taught psychology in the State Teachers College for twenty-five years, and that the science which he taught included the subject of insanity. The court held that the witness had not been properly qualified to testify as an expert, and that ruling is assigned as error.

The witness was asked this question: "Q. Professor, in the study of your vocation and in the practice of it you are capable of forming an opinion about whether or not an individual is sane or insane if you have heard history and actions reiterated to you, are you not?" He answered the question as follows: "A. I would not like

to pass judgment unless I knew their kind of habits and the courses they have pursued. I think we would have some right to presume that I would have." Upon making this answer permission was asked to propound the hypothetical question. The answer quoted indicates that the witness was unwilling to answer, because he was unable to pass judgment unless he knew the habits of appellant and "the courses they have pursued." Had the witness possessed this information, which he admitted he did not have, he, like other witnesses who testified on behalf of appellant, should have been permitted to testify as a nonexpert, basing his opinion on these observations.

It was held, in the case of *Hankins* v. *State,* 133 Ark. 63, 201 S. W. 832, that it was error to admit the testimony of nonexpert witnesses who gave their opinion as to the sanity of the accused without stating any facts upon which they based their opinions and without showing that they were qualified to express such an opinion by stating the facts upon which the opinions were based. The converse of this rule is true. Such testimony may be admitted where the witness shows that he has had the opportunity to associate with and to observe the accused to an extent sufficient to form an opinion as to the accused's sanity. He may then state what that opinion is, the value of such testimony being, of course, a question for the jury. But this witness was not asked to give testimony of that character. He had not had this opportunity, as his answer indicated that he did not feel qualified, lacking it, to express an expert opinion.

We do not decide, however, that the testimony would have been competent had he stated that he was qualified to answer the hypothetical question. The law does not permit the witness himself to pass upon his qualifications to testify as an expert. This is a question for the court.

It is said in the brief in appellant's behalf "that expert opinion on the question of insanity based on hypothetical questions is at best but a mere guess on the part of the so-called expert." It must be confessed that there is some foundation for this criticism when we observe, as we constantly do, the contrariety of opinions

which experts express in answer to the same hypothetical question. Insanity is a most illusive subject, and none of the courts have ever permitted novices and amateurs to express opinions answering hypothetical questions. Such witnesses may only express such opinions as are based upon personal association with and observation of the person whose sanity is the subject of inquiry, and then only after they have stated the facts showing opportunity for association and observation sufficient to afford a fair and reasonable basis for the formation of the opinion.

In Smoot's Law of Insanity, page 498, it is said: "An expert witness in an insanity case is, as the name implies, a witness who has special skill and learning in the detection and treatment of mental diseases and abnormal mental conditions. But, from a practical standpoint, it is not an easy matter to determine just what amount of knowledge and experience is necessary in each particular case in order for the witness to measure up to the requirements. Whether the witness is qualified as an expert in the case in question is a matter of law for the trial judge to decide. Having the witness before him, where he can the more accurately judge such witness' fitness and qualification, the matter rests very largely within the sound discretion of the trial court, and his decision, upon appeal, will be presumed to have been proper, in the absence of a showing to the contrary. The witness' own opinion as to his own qualification has been held to be immaterial." The author then proceeds to say that out of the numerous authorities, among which there is more or less conflict, well-defined rules have been evolved to aid the trial courts in measuring the qualifications of such witnesses, and he proceeds to state three of these:

"(1) As a general rule, such witness should have a general knowledge of medicine as a practicing physician, with a general knowledge of the mind and its functions, and should have a general knowledge of the mental phenomena and the disorders which attack the mind." The author says, however, that in some jurisdictions exceptions have been made permitting persons to testify

as experts who did not possess all these qualifications but who had had experience in the care and observation of the insane.

"(2) Where the claimed mental derangement is of a common type, any regular physician in good standing, doing general practice, and who has studied the diseases of the mind along with the other diseases of the body, may testify as an expert, the extent of his learning going alone to his credibility.

"(3) Where the claimed insanity is not of the commoner type, but is of a rare, unusual, or complex nature, then the witness called as an expert should qualify by showing a reasonable amount of experience in the study and investigation or observation of the kind or class of insanity under investigation."

We conclude therefore that there was no error in refusing to permit Professor Denney to testify as an expert and to answer the hypothetical question.

It is insisted that error was committed in limiting the scope of the redirect examination of Dr. Ponder, and this assignment of error has given us more concern than any other question presented on the appeal. Some of the uncertainty arises out of the state of the record, which has not been entirely removed by a stipulation intended to clarify it. It is said in appellant's brief that during the cross-examination of Dr. Ponder by the prosecuting attorney the court stopped the cross-examination. The witness had been asked this question: "Q. You know anything about a normal man planning a robbery and then carrying it out and then hiding his act? That would not be the acts of a normal sane man?" The witness answered that this would not indicate the acts of a sane man. This question was then asked: "Q. He had reasoning power to do that?", but the witness was not permitted to answer and was excused by the court.

The stipulation amending the record recites that "Mr. Coffelt (counsel for appellant) was seeking to redirect-examine defense witness, Dr. Ponder." It is not stated what additional questions counsel wished to propound.

We think it would have been well for the court to have permitted the prosecuting attorney to continue his cross-examination, and have permitted a redirect examination of the witness by appellant's counsel; but we are unable to say that this was prejudicial error requiring the reversal of the judgment. It does not appear what questions would have been propounded, nor what answers would have been given, but it does appear that the witness had been examined at length and had been permitted to state his opinion as to appellant's sanity and to give his reasons therefor. The trial judge necessarily has a discretion as to the extent of the examination of a witness, and we think it is not shown that this discretion was abused.

It is insisted that error was committed in permitting the State to question nonexpert witnesses who were allowed to express the opinion that appellant was sane. These witnesses first stated, however, the facts upon which their opinions were based. They had, generally speaking, about the same opportunities for observation as the nonexpert witnesses who had testified that appellant was insane, and without protracting this opinion it may be said that all were qualified under the tests announced in the Hankins case, *supra.*

It is argued that error was committed in not confining the scope of the direct examination of Dr. Murphy, who testified as an expert on behalf of the State. Dr. Murphy testified that he attempted to examine appellant, who at first answered his questions but who later asked the purpose of the examination and, when told what it was, declined to answer other questions or to submit to an examination on the ground that his attorney was not present. Specific objection was made to questions relating to delusions as symptoms and evidences of certain forms and stages of insanity upon the ground that in the form of insanity with which Dr. Ponder testified appellant was afflicted, delusions and hallucinations are not the principal symptoms.

But Dr. Ponder did testify that appellant had a form of insanity known as *dementia praecox,* and it was therefore competent for Dr. Murphy to testify as to the

manifestations of that disease. In that connection he testified that the principal outstanding symptom of *dementia praecox* is a delusion. Of necessity much latitude must be allowed in the cross-examination of an expert witness. This is necessary to determine whether he is merely guessing or has a substantial scientific basis for his opinion.

It is strongly insisted that it was erroneous to permit the State to ask Dr. Murphy the following question: "Q. Would there be anything to indicate insanity where a man borrows a gun from his brother-in-law and tells him that he is going over to collect some money from a neighbor, and he borrows the gun for the purpose of protecting himself from dogs that might attack him on the way, but instead of going over to his neighbors he goes over to the home of two women who were living alone and demands money and takes from them a considerable sum, or takes from them $160, and demands more money, and after they refused to give him more money he then commits murder, sets the house afire and then leaves, or fleeing, he hides his overcoat, and also cuts the sleeve out of the coat to do away with the blood stains, and gets away and the next day he is apprehended out in the woods. After he is arrested he admits that he was present at the time the crime was committed, but that he was on the outside and his partner committed the crime, and that he claims that the reason for the blood on the coat was caused by dragging one of the women out of the house, is there anything under those circumstances that would indicate insanity?"

The objection to the question is that it left out of account the following facts which are said to be very essential and undisputed: "That as a child appellant was unlike other children. That he was never reliable in his school work, and was only able to make four grades in ten years in school, and that later in life he was never reliable in his work."

Now it is the law that hypothetical questions must contain the undisputed facts essential to the issue. *Kelley* v. *State,* 146 Ark. 509, 226 S. W. 137. But it cannot be said that the omitted facts are undisputed. Members

of his immediate family so testified, but it was not shown how long appellant had attended school during any of the ten years in which he advanced only four grades. Witnesses on behalf of the State, several of whom had known appellant all of his life, gave testimony which makes it questionable whether the omitted facts were true.

The hypothetical question propounded to Dr. Rowland recited, in substance, the facts assumed in the question propounded to Dr. Murphy. This only summarized the conduct of appellant according to the State's evidence. It will be observed that the question propounded to Dr. Murphy does not ask the witness to state his opinion as to whether appellant was sane or insane, but whether the circumstances mentioned would indicate insanity.

In the case of *Taylor* v. *McClintock,* 87 Ark. 294, 112 S. W. 405, it was said: "Hypothetical questions must fairly reflect the evidence, and, unless they do, the resultant opinion evidence is not responsive to the real facts, and can have no probative force. *Quinn* v. *Higgins,* [63 Wis. 664] 24 N. W. 482. The hypothetical case must embrace undisputed facts that are essential to the issue. In taking the opinions of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated, as established by the evidence, should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts. When a party seeks to take an opinion upon the whole or any selected part of the evidence, it is the duty of the court to so control the form of the hypothetical question that there may be no abuse of his right to take the opinion of the experts. The right may be abused by allowing the opinion to be given in such a way as to mislead the jury by concealing the real significance of the evidence, or by unduly emphasizing certain favorable or unfavorable data. On the above propositions, see 1 Gr. Ev., § 441, pp.

561, 562; *Ince* v. *State,* 77 Ark. 426, 93 S. W. 65; *St. Louis I. M. & S. Ry. Co.* v. *Hook,* 83 Ark. 584, 104 S. W. 217."

Here the prosecuting attorney propounded a question which embraced what he probably conceived to be the essential and undisputed facts. The question recites facts which the evidence tends to prove are true, but, even though they were disputed, he had the right to do so. He had the right also "to take the opinion" of the expert upon a selected part of the evidence, subject to the duty of the court to so control the form of the question as to avoid an abuse of his right to take the opinion of the expert. Counsel for appellant had the right, and appears to have exercised it, of interrogating the witness concerning the facts recited in the question, when considered in connection with other facts which the evidence tended to establish.

We conclude therefore that there was no error in permitting this question to be asked.

Upon a consideration of the whole case, there appears to be no prejudicial error requiring the reversal of the judgment, and it must therefore be affirmed. It is so ordered.

OSTER *v.* JONES.

4-3945

Opinion delivered July 8, 1935.

Mann & Mann, for appellant.

F. F. Harrelson, Winstead Johnson and *S. S. Hargraves,* for appellee.

SMITH, J. Appellee recovered judgment for $2,000 against appellant to compensate a personal injury. For the reversal of this judgment, it is insisted that the court erred in giving an instruction numbered 3 at the request of appellee and in refusing to give an instruction numbered 4 requested by appellant. It is also insisted that the verdict is excessive.

The nature of the case and the respective theories upon which it was tried will sufficiently appear from these instructions. Instruction numbered 3, given over the objection and exceptions of appellant, reads as follows: "In this case one of the defenses alleged by the defendant is that the plaintiff's injuries, if any, were caused by the negligence of the driver of the truck on which the plaintiff was riding. The jury is instructed that, if the plaintiff's injuries, if any, were caused solely by the negligence of the driver of the truck on which the plaintiff was riding, then the plaintiff cannot recover; but if, while in the exercise of ordinary care for his own safety, and without negligence on his part, the plaintiff was injured by the combined negligence of the defendant and the driver of the truck on which the plaintiff was riding, then in such event your verdict should be for the

plaintiff as against the defendant, for in such case the defendant, together with the driver of the truck on which plaintiff was riding, would be what is known as joint tort-feasors, and the defendant, as well as the driver of the truck on which plaintiff was riding, would be liable, and the plaintiff would be entitled to recover." Instruction numbered 4, which the court refused to give at appellant's request, reads as follows: "The jury is instructed that, if you find from the evidence that the car in which the plaintiff was riding, and also the car in which the defendants were riding were both on the highway and proceeding in the same direction, and that the driver of the car in which plaintiff was riding gave a signal which in common acceptation indicated to the defendant that it was the purpose of the plaintiff to turn to the left side of the highway, the defendant had the right to assume that the car in which plaintiff was riding was turning to the left, and that the right-of-way for the defendants would be left clear, and if you further find that the plaintiff or the car in which he was riding started to turn to the left, or did turn to the left, and thereafter immediately turned off to the right, and in the path or course in which the defendants were expected to drive, and that the sudden turning of the car in which plaintiff was riding to the right was the proximate cause of the plaintiff's injury, the defendants would not be liable, and your verdict should be for the defendant."

Appellee was riding in but was not driving the truck, and, as usually happens in these collision cases, the testimony is in irreconcilable conflict; the driver of each car excused himself from blame and attempted to place the responsibility upon the other.

It is argued that instruction numbered 3 is erroneous because appellee alleged that appellant was solely to blame for the collision, and did not sue the driver of the truck; and for the additional reason that it permits a recovery against appellant, even though his action was not the proximate cause of the injury.

We think there was no error in this instruction. It tells the jury very plainly that, if appellee's injuries were caused solely by the negligence of the driver of the

truck in which appellee was riding, appellee could not recover. In other words, if appellant was not guilty of negligence contributing to the injury, he was not liable; but, if there was such negligence, this would be a proximate cause. The instruction further declares the law to be that, if appellee was injured, while in the exercise of ordinary care and without negligence on his part, by the combined negligence of appellant and the driver of the trunk in which appellee was riding, a verdict should be returned against appellant. This is true because, in the event stated, both drivers would be responsible and liable for the injury which resulted from their combined negligence. It is true the truck driver was not a party to the suit, but it was not essential that he should be, as appellee had the right to sue either or both of the joint tort-feasors, as "the author of either negligent act is liable to the injured party for the damage sustained." *Missouri Pacific Rd. Co.* v. *Riley,* 185 Ark. 706, 49 S. W. (2d) 358.

Appellant testified that, as he approached the truck, he was driving about forty-five to fifty miles per hour. Witnesses for appellee placed the speed at a greater rate. Appellant testified that he could not say exactly how fast he was driving when he hit the truck, but it is his theory that his speed, whatever it may have been, was not the proximate cause of the injury, and instruction numbered 4, if given, would have so declared the law.

It is argued that the truck driver's action in indicating that he would turn off the highway on the left side, and then, without further indication of his intention, turning to the right, was the sole and proximate cause of the collision, and that the jury should have been so instructed.

The truck driver testified that he gave a signal, by extending his left arm, that he intended to leave the highway. The instruction assumes that he did this, but it, in effect, declares the law to be that, if the signal was one which, in common acceptation, indicated to appellant that it was the purpose of the truck driver to turn to the left side of the highway, the appellant had the right to proceed without reducing his speed or bringing his

car under control. This is not the law. Act 223 of the Acts of 1927, page 721, is an act entitled, "A Uniform Act regulating the operation of vehicles on highways," and § 17 thereof regulates the duties of drivers of motor vehicles in starting, stopping or turning. It reads as follows:

"Section 17. (Signals on Starting, Stopping or Turning).

"(a) 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, if any pedestrian may be affected by such movement, shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal, as required in this section plainly visible to the driver of such other vehicle, of the intention to make such movement.

"(b) The signal herein required shall be given either by means of the hand and arm in the manner herein specified, or by an approved mechanical or electrical signal device, except that, when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and the rear, the signal shall be given by a device of a type which has been approved by the department. Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to start, stop, or turn by extending the hand and arm horizontally from and beyond the left side of the vehicle."

The extension of the hand and arm horizontally from and beyond the left side of the vehicle is the statutory signal that the person giving it is about to start, stop or turn, and no other signal is required by law, and there was no testimony that we have in this State any other signal which, in common acceptation, indicates the driver's intention. Our statute requires this signal to be given, and does not require any other. That signal was given, and was observed by appellant. Due care required therefore that he should have operated his car accordingly.

It was said, in the case of *Madison Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 544, 43 S. W. (2d) 729, that: "The law of the road is that the automobile in front has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads and passageways, and the traveler behind must, in handling his car, do so in recognition of the superior right of the traveler in front."

The case of *Schlosberg* v. *Doup,* 187 Ark. 931, 63 S. W. (2d) 337, is decisive of the question that instruction numbered 4 is not a correct declaration of the law. That case is very similar to the instant case on the facts. There the driver of an automobile and the members of her family were following and overtaking an ice truck, which was traveling in the same direction but at a slower speed. The truck driver, before reaching an intersection street, held out his left hand to indicate that he would turn to the right or north. In doing so he swerved his truck somewhat to the left to miss the corner of the curb and turned to the right into the intersecting street. The driver of the car, being a resident of California, misunderstood the left-hand signal given by the truck driver, thinking it indicated a left-hand turn only, as it did under the law of her State, and turned her car slightly to the right and proceeded into the intersection, where the collision occurred. An instruction was requested in that case, which is set out in the opinion, very similar to the instruction numbered 4 requested in the instant case. It was held that the refusal to give the instruction was not error, and in so holding the duty of the driver of the approaching automobile was defined as follows: "All the witnesses agree that the truck was traveling very slowly, and that a signal warning was given that might have meant any one of four things: (a) That he would turn to the left, (2) turn to the right, (3) slow down, and (4) stop. Under such circumstances, the driver of the car behind must take notice of the signal and bring his car under control accordingly."

Instruction numbered 4 did not recognize this duty on the part of appellant, and it was therefore properly refused.

We are unable to say that the verdict is excessive. Appellee received injuries which were more painful than dangerous. He required the services of a physician, who attended him at intervals during a period of over two months. He sustained an injury in the sacro-iliac region, had quite a number of lacerations and bruises, and a traumatic injury to the hip and knee. His back was bruised, and there was a sprain over the hip bone. The injuries were described by the doctor, who stated that while they were painful they were not of a permanent character. Appellee was temporarily rendered unable to pursue his usual avocation or to do other manual labor, and the doctor thought this condition would continue for as long as ninety days after the time of the trial on account of the injuries to appellee's leg and back.

There appears to be no error, and the judgment will be affirmed. It is so ordered.

JUSTICE *v.* GREENE COUNTY.

4-3930

Opinion delivered July 8, 1935.

Partlow & Rhine, for appellant.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh,* Assistant, and *Neill Bohlinger*, for appellee.

HUMPHREYS, J. This is an appeal from a judgment condemning a right-of-way or an extension of State Highway No. 25 through six and one-half acres of land belonging to appellant adjacent to the city of Paragould in Greene County, under § 5249 of Crawford & Moses'

Digest, which reads as follows: "The county court shall have power to open new roads, to make such changes on old roads as they may deem necessary and proper, and to classify the roads and bridges in their respective counties for the purpose of this act, and when the change shall be made or any new road opened, the same shall be located on section lines as nearly as may be, taking into consideration the convenience of the public travel, and first class roads hereafter established or opened shall not be less than fifty feet wide, and an appropriate order of the county court shall be made and entered of record therefor. If the owner of the land over which any road shall hereafter be so laid out by the court shall refuse to give a right-of-way therefor, or to agree upon the damages therefor, then such owner shall have the right to present his claim to the county court, duly verified, for such damages as he may claim by reason of said road being laid out on his land; and, if he is not satisfied with the amount allowed him by the court, he shall have the right of appeal as now provided by law from judgments of the county court; provided, however, no claim shall be presented for such damages after twelve months from the date of the order laying out or changing any road; provided, further, that when such order is made and entered of record laying out or changing any road, the county court or the judge thereof shall have the right to enter upon the lands of such owner and proceed with the construction of such road. Provided further, all damages allowed under this act shall be paid out of any funds appropriated for roads and bridges, and, if none such, then to be paid out of the general revenue fund of the county."

The judgment of condemnation was rendered by the county court of said county on the 7th day of June, 1934, in which appellant was allowed one year from that date to file a claim for damages in said court. An appeal was taken from the county court, and the validity thereof attacked on the ground that the appropriations of the county for the fiscal year of 1934 for other purposes exceeded the revenues assessed by $7,605.73, leaving nothing with which to pay appellant any damages. On the

trial in the circuit court, appellant introduced proof tending to show that the revenue to be derived from all sources in the fiscal year of 1934 had been appropriated for other purposes, leaving nothing with which to pay his claim. Under this proof, the circuit court dismissed appellant's appeal, and sustained the judgment of condemnation rendered by the county court, from which is this appeal.

It is contended by appellant that the trial court erred because the condemnation judgment offered him no assurance that he would receive just compensation for the land taken and appropriated by the county for public use. The judgment amply protected him by giving him one year after taking his land to file his claim for damages. The statute under which it was taken provides that his damages may be paid out of the general revenue of the county or out of the road and bridge fund. Proof that these funds had been exhausted for the fiscal year of 1934 would and could not prevent him from ultimately collecting his damages out of these or other available funds. He was given until June 7, 1935, to file his claim, and it follows that he would have such further time as necessary to litigate and establish it. For aught that appears in this record, he has not filed a claim, much less established it. Until these two things are done, it is not necessary for the county, in arranging its budget, to include therein his unestablished claim. It may be that his betterments equaled or exceeded his damages. In other words, he may not recover a judgment for any substantial amount. It would have been impossible at the time the land was taken or judgment rendered for the court to determine the amount of damages, and set aside any particular sum and segregate it from either fund to pay his damages. In taking the right-of-way, the county pledged its good faith and credit to pay appellant for it, but not necessarily out of the revenues collected in the fiscal year of 1934. It will be time enough for the county to include in its budget the amount of damages when, and if, appellant recovers a judgment.

There is no way for the county to escape paying such judgment as appellant may recover if he files and prose-

cutes his claim, as article 2, § 22, of our Constitution reads as follows: "The right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use without just compensation therefor."

No error appearing, the judgment is affirmed.

SMITH, J., dissents; MEHAFFY and BAKER, JJ., absent and not participating.

WISEMAN *v.* INTERSTATE PUBLIC SERVICE COMPANY.

4-3878

Opinion delivered July 8, 1935.

Carl E. Bailey, Attorney General, and *Lee Miles,* for appellant.

House, Moses & Holmes and *Eugene R. Warren,* for appellee.

MCHANEY, J. Appellant brought this action against appellee, an Arkansas corporation, to recover income taxes, penalties and interest for the year 1931, alleging that it had failed and refused to file a return and pay the

tax, although it had received $180,000 net income from dividends on stock owned by it in Texas utility companies, and from a water and light plant owned and operated by it in Foreman, Arkansas, the income from the latter being alleged to be approximately $1,400. The action was instituted under the authority of "The Income Tax Act of 1929," same being act 118 of the Acts of 1929.

Appellee denied appellant's right to recover income tax on its earnings, or dividends from stock owned by it in Texas corporations. It admitted its liability for taxes on income from its water and light plant at Foreman, for which it filed a return in due time and offered to pay, but same was refused. It alleged that of a total net income from all sources of $169,693.36, all of it except approximately $1,400, consisted of dividends on stock in Texas utilities owned by it which is not taxable income in Arkansas; that, in so far as said act 118 of 1929 attempts to tax it upon its income from such source, it is unconstitutional and void.

The case was submitted to the court upon an agreed statement of facts as follows: "1. That the plaintiff is the duly appointed, qualified and acting Commissioner of Revenues for the State of Arkansas. That it is his duty to administer the Income Tax Act of 1929, or act 118 of the Acts of the General Assembly of 1929, approved March 9, 1929.

"2. Defendant is a corporation organized under the laws of the State of Arkansas, and the articles of incorporation fixed the corporation's office in the Boyle Building, in the city of Little Rock, Arkansas, and at such other places as might be named by the board of directors. Its principal business offices are at Madison, Wisconsin, and Bay City, Texas. The company transacts no business in Arkansas except the operation of a light and water plant at Foreman, Arkansas. The Arkansas representative named in the articles of incorporation was Carey W. Martin, of Little Rock, Arkansas, and the present Arkansas representative designated by the corporation is W. H. Holmes, of Little Rock, Arkansas.

"3. The Interstate Public Service Company owns stock in a number of utility concerns in Texas. It also

owns a water and light plant at Foreman, Arkansas, which is the only property it owns or operates or in which it is interested within the State of Arkansas. All of the business of the company is done through its office in Bay City, Texas, except that a local representative looks after the business of the light and water plant at Foreman, Arkansas, and forwards all receipts to Bay City, Texas. All the books and accounts and other financial transactions are now performed in Bay City, Texas, or Madison, Wisconsin.

"4. The total income from all of the properties of this company for the year 1931 was $197,975.35, and of this amount $176,000 consisted of dividends received from stock held by it in Texas utilities. These dividends were paid to this corporation at Bay City, Texas, and Madison, Wisconsin. None of said dividends and income came through Arkansas. The earnings of the Foreman, Arkansas, plant for the year 1931 amounted to $2,995.02. The net income for the defendant company for the year 1931, after deducting exemptions, including all of its holdings, was $169,693.21. The net income for the Foreman plant in 1931 was $1,313.36.

"5. Defendant has made its tax returns for the year involved, and has offered to pay income tax on its net earnings for its light and water plant at Foreman, Arkansas, and has refused to pay income tax on any other of its revenues.

"6. That, in the filing of its franchise tax report, for 1931, the defendant listed its Foreman, Arkansas, plant at a valuation of $22,227.29, and the balance of its holdings at a valuation of $422,021.60.

"7. That out of the total of net taxable income of $169,693.21, all of it was earned on stock held in utilities, and utilities owned outside of the State of Arkansas, except the net taxable income arising from the Foreman, Arkansas, plant, amounting to $1,313.36."

From the complaint, the answer and the stipulation the court found in favor of appellant for $26.27, the tax on the net income of the Foreman property, without penalty, and entered a decree accordingly. The case is here on appeal.

"The Income Tax Act of 1929" provides in § 3, subsection (b) that: "On Corporations.—Every corporation organized under the laws of this State shall pay annually an income tax with respect to carrying on or doing business equivalent to two (2%) per cent. of the entire net income of such corporation as defined herein, received by such corporation during the income year; and every foreign corporation doing business within the jurisdiction of this State shall pay annually an income tax equivalent to two (2%) per cent. of a proportion of its entire net income to be determined as hereinafter provided in this act."

Section 8 defines "Gross Income" as follows: "The words 'gross income' include gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, royalties, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income of the taxable year in which received by the taxpayer; provided, property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received, unless under the methods of accounting permitted under this act any such amounts are to be properly accounted for as of a different period."

Section 13 sets out the deductions allowable, and the difference constitutes net income on which a tax of 2 per cent. is payable. Section 20 requires corporations subject to taxation under the act to make a return under oath stating specifically the items of its gross income and the deductions and credits allowed by the act.

Under these provisions, appellee, a domestic corporation, was required to report all its income annually from

all sources, whether earned from property owned and operated in this State, or whether from dividends on stock owned by it in corporations whose properties are outside this State. Section 8 of said act so provides in defining "Gross Income." One clause specifically says: "Also from interest, rent, royalties, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." This applies to individuals and corporations. Of course the tax is based on the net income, which is determined by taking from the gross income, the allowable deductions and credits.

Under the agreed statement of facts appellee "owns stock in a number of utility concerns in Texas. It also owns a water and light plant at Foreman, Arkansas," which it operates from its Bay City, Texas, office. It is simply a holding company for the stock owned by it in the Texas corporations. We do not find from the stipulation that it does any business in Texas, except to receive its dividends on the stock owned by it, keep its books of account there, and operate its Foreman, Arkansas, plant from its Texas office. It is not stipulated that it owns or operates any of the corporations in which it owns stock in Texas, but that it simply receives its dividends therefrom, and keeps its books in Texas. It is further stipulated that $176,000 of its income out of a total gross income from all sources of $197,975.35, is from dividends on its corporate holdings. It had gross income from Foreman of $2,995.02. It is not shown from what source the difference in gross income came. We therefore conclude that appellant is not carrying on any business outside the State of Arkansas for gain or profit, except it operates the Foreman, Arkansas, plant from its Texas office.

This brings us to a discussion of appellee's contention that "The Income Tax Act of 1929" is unconstitutional, in so far as it attempts to tax its income from sources outside this State. This contention is based on the fact that act 220 of the Acts of 1931, page 695, exempts corporations organized under the laws of this State to do business outside this State, but no intra-

state business, from the payment of all income and intangible property taxes on the filing of an annual report and the payment of an annual fee of $5. Said act was approved March 26, 1931, but did not become effective until 90 days later, because of lack of an emergency clause. It is said that this is an unlawful discrimination against appellee and other domestic corporations having taxable income from sources both within and without the State, and the case of *F. S. Royster Guano Co.* v. *Commonwealth of Virginia,* 253 U. S. 412, 64 L. ed. 989, 40 Sup. Ct. Rep. 560, is cited to support its contention. There the Royster Company owned and operated a plant in Virginia and several plants in other States, and it was sought to collect an income tax from it on income derived from all sources, as here, under its act of 1916. Another act of Virginia of 1916 exempted domestic corporations doing no business within the State from the income tax. It was held by the Supreme Court of the United States, that two acts must be construed together as parts of one and the same law, and that, while the equal protection of the laws clause of the Constitution does not prevent the States from resorting to classification for legislative purposes, such classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. And the State's right to collect the tax on income outside the State was denied, the Supreme Court of Virginia being reversed, on the ground that there was an arbitrary discrimination against the Royster Company amounting to a denial to it of the equal protection of the laws within the meaning of the Fourteenth Amendment.

We, of course, assent to this doctrine, but are of the opinion that appellee is in no situation to invoke it. First, because it is engaged in no occupation for gain or profit outside of Arkansas; and, second, the discriminatory act, if it be discriminatory, No. 220 of the Acts of 1931, did not become effective until more than one-half the taxable year had elapsed, the year for which the tax is sought to be collected, and it is not shown that there are any

corporations organized under the laws of this State to do business wholly outside this State. Moreover, it may be that act 220 of 1931 is unconstitutional and may be so held in a proper case, a question we do not now decide, although appellant earnestly insists that it is.

The courts generally hold that a State has the power to tax a citizen or a domestic corporation on income either within or without the State. 61 C. J., § 2323, p. 1575; *Lawrence* v. *State Tax Com. of Miss.*, 162 Miss. 338, 137 So. 503, affirmed by Supreme Court of United States in 286 U. S. 287, 76 L. ed. 1102, 87 A. L. R. 374, 52 Supreme Court Rep. 556; *Franklin* v. *Carter*, 51 Fed. (2d) 345. We therefore conclude that appellee should have filed a return for the taxable year of 1931 embracing all its income from all sources. It is stipulated that its net income for that year is the sum of $169,693.21. Two per cent. of this amount is $3,393.86.

Appellant insists, however, that this amount should be doubled, by way of a penalty, and also an additional penalty of 1 per cent. per month for a time beginning July 15, 1932, or a total tax and penalty of $9,027.66 due. We cannot agree with appellant in this contention. No return covering the dividends from Texas companies was made because appellee was advised by learned counsel that it was not required to do so. It defended this action in good faith. The act authorizes the Commissioner to make an assessment, under certain conditions set out in subsection 10 of § 30, at not to exceed double the amount of tax found to be due, which was not done. It made what it conceived to be a correct return, and did not fraudulently conceal its other income. Under these conditions we think it would be inequitable and unjust to impose the extreme penalties provided in the act, for we conceive them to be inapplicable to the facts and circumstances of this case.

The decree will be reversed, and judgment will be entered here against appellee for the amount of the tax with interest at 6 per cent. per annum from July 15, 1932. Costs will also be adjudged against it. It is so ordered.

HOUSTON *v.* LOHMAN.

4-3938

Opinion delivered July 8, 1935.

[redacted]

John C. Sheffield and *W. G. Dinning*, for appellants.

McHANEY, J. This suit was originally brought by H. M. Houston, now deceased, against the appellee on January 31, 1933, to foreclose a deed of trust executed by appellee to secure the payment of a promissory note in the sum of $15,550, the note and deed of trust being dated March 2, 1932, due three years after date with interest from date at ten per cent., payable semi-annually. Said deed of trust contained an acceleration clause which provided that, on default in the payment of interest or taxes and assessments, and to keep the edifices insured, then the whole amount of the indebtedness might be declared due and payable. Appellee defaulted in the payment of interest, taxes and insurance, and under said clause said Houston elected to declare the whole amount of said indebtedness due and payable, and thereupon instituted this action to foreclose. Summons was issued and duly served upon appellee, but he made no defense to the action, and a decree of foreclosure was had on November 27, 1933. The property was thereafter advertised to be sold by the commissioner on February 26, 1934, but at the request of the attorney for the plaintiff, the sale at this time was abandoned, and thereafter notice was published for the time, and in the manner provided by law that sale of the property covered by the said deed of trust would be had on September 17, 1934, at which time the property was sold, and appellant became the pur-

chaser for the amount of the indebtedness, Mr. H. M. Houston having in the meantime died and appellant, as administratrix of the estate, being substituted as plaintiff in the action. Report of sale was duly made by the commissioner, which was approved and the sale confirmed on September 31, 1934, and deed executed, acknowledged and delivered to the purchaser. A receiver was appointed during the pendency of the suit to take charge of and rent the property covered by the deed of trust which included a large amount of city property and farm lands of two hundred and eighty acres.

In accordance with the directions of the court a writ of possession was issued on October 27, 1934, and on November 2, 1934, at the same term of court appellee filed a petition praying that the sale had herein be set aside, and that an order issue restraining the sheriff and his deputies from dispossessing appellee from his residence for a reasonable time, in which he alleged that he was at that time in a position to secure the necessary funds with which to pay off said indebtedness, and, if given a reasonable opportunity, can and will do so. He alleged that the value of the property so foreclosed is largely in excess of the mortgage debt, and that no harm, financial or otherwise, could or would result to appellant by a reasonable delay in these proceedings. On the same day, November 2, the chancellor, in vacation and without notice, issued an order to the sheriff restraining him from executing the writ of assistance, and restraining the purchaser from incumbering or otherwise disposing of the property purchased under the foreclosure proceeding until the further order of the Phillips Chancery Court or the chancellor thereof in vacation. This injunction order was immediately served upon appellant. On February 15, 1935, the appellee filed in the same cause a pleading which is captioned a bill of review, which the court treated, and which we would treat, as an amendment or supplement to the petition filed on November 2, 1934. It was therein alleged that the petitioner was the owner in fee simple of the property covered by the mortgage, describing it; that situated thereon are a large amount of improvements, to-wit: On a part of said property is

situated the residence of this petitioner in which he lives with his aunt, who is now 87 years old, and that said residence cost approximately $35,000, but is now of the value of $15,000 and that a home loan had been approved by the proper United States authorities on said house and premises alone in the sum of $7,500; that there is situated on a part of said property eighteen rental houses, renting for $3 per week each and of a present value of $1,000 each; that there is situated on another part of said property two handsome city buildings of brick construction, two stories in height, one of which was lately occupied by the First National Bank of Helena, and that said buildings and grounds are of the present value of approximately $15,000 and $12,500 each, respectively; that a part of said property consists of 280 acres of farm lands which are now renting for approximately $600 a year, and in normal times bring in a rental of $2,000 yearly, and are of the present value of approximately $15,000, and that other portions of said property which are not improved are valuable building sites in the city of Helena, and that the whole property in normal times is of a value exceeding $75,000. After setting out numerous allegations regarding the depression, the appointment of a receiver, his collection of all the rents and profits from said property other than the homestead, and his failure to account therefor, it was prayed that the court determine the correct amount due from petitioner, and that he be allowed a reasonable time for the payment of said sum. Thereafter on February 21, 1935, at the November term of said court, an order was entered restraining the sheriff from enforcing the writ of assistance theretofore issued so as to deprive the appellee of his homestead, and further enjoining the appellant from selling any of the property purchased under said foreclosure proceedings. Appellee was given six months from that date to redeem the property from the sale by paying the amount of money which may be found due at the time of such offer of redemption and tender of such funds are made. Appellant, not being satisfied with this order of the court, has brought the same here for review by appeal.

We think the above order of the court was correct. Section 4 of act 21 of the Acts of 1933, page 47, provides: "Before confirming a sale, the court shall ascertain whether or not, on account of economic conditions, or the circumstances attending the sale, a fair price, with reference to the intrinsic value of the property, was obtained. If it is made to appear to the court that a better price could be obtained at a resale, or if any one agrees to bid a substantially higher amount at a resale, the court shall order a resale on such terms as the court may require." It does not appear from this record that the court before confirming the sale ascertained whether a fair price, with reference to the intrinsic value of the property was obtained. While there is no evidence to show that a better price could be obtained at a resale, nor that any one had agreed to bid a substantially higher amount at a resale, the final order of the court from which this appeal comes gave petitioner fifteen days in which to make his proof, but appellant appealed from the order without waiting for the proof to be made. No response nor other pleading was filed to the petition by appellant, although served with summons thereon. The allegations of the petition stand undisputed that said property did not sell for "a fair price, with reference to the intrinsic value of the property." In *Federal Land Bank* v. *Floyd,* 187 Ark. 616, 61 S. W. (2d) 449, we held that said act 21 was not retroactive so as to impair the vested rights of the purchaser prior to the passage of the act, and that the court's power to refuse to confirm a foreclosure sale, and to order a resale must be measured by the law in force at the time of the sale, and it was further held in that case that said act 21 had no application. In *Pope* v. *Shannon Bros.,* 190 Ark. 491, 79 S. W. (2d) 278, on a petition to set aside the sale before confirmation, and to refuse to confirm same, we held that the act applied. We there said: "Therefore the court should have set the sale aside and refused confirmation on the ground of inadequacy of price alone, coupled with bad economic conditions fully set out in the pleadings on petitions filed by appellant." Here the petition to set aside the sale and confirmation were filed after the sale had been confirmed, and the

deed issued, but at the same term of court during which time the court retained control over its judgments and decrees. The final order of the court from which this appeal comes set the sale aside on condition that appellee within six months from that date should redeem by paying all the amount due at the time of redemption. We think this order was within the power of the court to make, and that it was just and equitable, and it should therefore be affirmed.

ROGERS *v.* SKOW.

4-3939

Opinion delivered July 8, 1935.

Roy Gean and *Hardin & Barton*, for appellant.

Pryor & Pryor, for appellee.

BUTLER, J. On the 2d day of August, 1932, the appellee, G. W. Skow, purchased from the appellant R. Kay Rodgers, with the consent of the Louisiana Oil Refining Corporation, a wholesale commission agency which Rodgers had with the oil corporation and certain equip-

ment used in connection therewith for an agreed price of $7,500. Of this sum $3,500 was paid in cash, and the remaining $4,000 to be paid in installments of $200 each to be evidenced by promissory notes which were duly executed on that date. At the same time and as a part of the transaction, a contract was entered into between the said Skow and the oil corporation by which Skow was constituted general agent of the corporation for the Fort Smith territory. The contract provided that it should continue for a period of twelve months unless sooner terminated. The parties to the agreement expressly reserved the right to either of them to terminate the contract upon fifteen days' written notice without assignment of cause. Skow, by the contract, undertook the performance of certain duties and agreed to devote his entire time to the business of the agency, and not to become interested in any business which might in any manner conflict with the business of the corporation.

At the same time that the notes were executed and the contract between Skow and the oil corporation was entered into, an agreement was executed as a part of the transaction by Rodgers and Skow providing "that, if at any time before all said notes shall have matured, that is, within twenty months from September 1, 1932, the Louisiana Oil Refining Corporation should cancel its agency contract or discontinue its agency with the buyer without his consent, for any reason other than his dishonesty, insubordination or his violation of any of the terms of his contract with said corporation, then it is agreed that any of said notes then unmatured but maturing thereafter shall be canceled and become void."

On the 29th day of April, 1933, Rodgers brought suit for the collection of eleven of said promissory notes which were due and unpaid, aggregating the sum of $2,200, for which amount judgment was prayed with interest. Skow answered admitting the execution of the notes, and that they were unpaid, setting up as an affirmative defense that on March 2, 1933, the oil corporation canceled the agency contract without his consent, and that, under the terms of the contract between himself and Rodgers, this action on the part of the corporation in-

validated all of said notes unmatured on that date. The provision of the contract to this effect was set out in his answer, and is the one quoted *supra*.

On the trial of the case Rodgers identified the eleven notes sued on and testified that they were executed and delivered to him by Skow, that they were past due and unpaid, that he was still the owner thereof, and that Skow admitted their execution and delivery. Skow, testifying in his own behalf, identified and introduced in evidence the contract between himself and the oil corporation, and also the contract between himself and the plaintiff, Rodgers. He offered in evidence a letter purporting to have been written to him on March 2, 1933, signed by the oil corporation, "By J. D. Flynn, Manager Arkansas Division," notifying him of the intention of the corporation to cancel his agency agreement. This letter was admitted over the objection and exception of the plaintiff Rodgers. Skow further testified that, in pursuance to the advice contained in the letter, the agency agreement was canceled without his consent, of which fact he notified Rodgers in writing on March 28, 1933, and demanded the cancellation and return of the unmatured notes.

The above was all of the evidence in the case. Each party asked a directed verdict, whereupon the jury was discharged, and the court sustained the motion of the defendant Skow and entered a judgment finding the issues in his favor.

On appeal it is insisted that the letter from the oil corporation to Skow advising him of its intention to cancel the agency contract was incompetent. We do not think so. It was competent for the purpose for which it was offered—namely, to establish the cancellation of the agency agreement. The letter was not identified as an authentic letter from the oil corporation. The identification, however, would seem not to have been difficult. The contract between the oil corporation and Skow was admitted in evidence without objection, and appears to have been signed by J. D. Flynn, the same officer of the corporation who signed the letter objected to, and, if the handwriting of the two signatures was similar, this would

have been sufficient evidence to warrant the court in finding that the letter was genuine. But the admission of the letter was not prejudicial because the cancellation of the agency agreement was proved by the uncontradicted testimony of Skow, and the letter therefore becomes immaterial.

We are of the opinion, however, that the evidence was insufficient to sustain the finding and judgment of the trial court. The execution and delivery of the notes was admitted, and the defendant, as an affirmative defense, pleaded the contract between himself and Rodgers, which provided that the unmatured notes should be canceled and be void if "the Louisiana should cancel his contract before the notes had all matured without his consent and for any other reason or cause, except his dishonesty, insubordination or his violation of any of the terms of his contract with said corporation. An examination of this pleading makes it clear that, if the above allegation be stricken from the plea, there would be no defense to the action, and therefore, the burden of proving the same would necessarily rest upon the defendant. *James* v. *Orrell,* 68 Ark. 284, 57 S. W. 931; *Henderson* v. *Emerson,* 105 Ark. 697, 151 S. W. 257; *VanHoozer* v. *Grattis,* 139 Ark. 390, 214 S. W. 44.

Counsel for the appellee erroneously contend in support of the court's action that, since the corporation did not advise Skow of the cause of the cancellation of his contract, the defendant is relieved from proving that the dismissal did not come within the exceptions mentioned in the contract between himself and Rodgers. This contention is based on the provision in the contract between the corporation and Skow which permits either party to cancel the same without giving any reason for such action. The contract involved, however, is not that between the corporation and Skow, but the one between Skow and Rodgers, and, in order to escape liability on the notes, it was Skow's duty to establish, not only that the agency contract was canceled without his consent, but also that it was not on account of dishonesty, insubordination, or violation of any of the terms of the contract on his part. It is no answer to say that this would impose upon the

defendant the burden of proving a negative. No one has charged him with any dishonesty or any breach of his contractual obligations with the oil corporation. For this reason, the presumption of law that all men are presumed to be honest has no application, and the authorities cited by appellee are not in point. It is the appellee who by his plea must rely on the fact that his discharge as agent of the corporation did not come within the exceptions named in the contract, and in order to establish this it is essential that he make negative proof. *Austin* v. *Dermott Canning Co.,* 182 Ark. 1128, 34 S. W. (2d) 773; *Hopper* v. *State,* 19 Ark. 143; 22 C. J., p. 70.

As appellee argues, it is true that no one but the oil corporation would know the particular reason influencing it to terminate the agency contract, but Skow would have known whether it was not on account of dishonesty, insubordination, or breach of the contract on his part, and, as these conditions must not have existed, if Skow is to be relieved of the payment of his notes, the burden is upon him to make proof of the nonexistence of those facts.

The judgment of the trial court must be reversed, and the cause remanded for a new trial.

[redacted]

MAYBERRY *v.* STATE.

Crim. 3949

Opinion delivered September 23, 1935.

[redacted]

Rains & Rains, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. Appellant was indicted by the grand jury of Crawford County for the crime of second degree murder, committed by the shooting and killing of one Jim Thompson. Upon a subsequent trial he was convicted of manslaughter, and appeals to this court for relief.

The first assignment of error relates to the alleged insufficiency of the testimony to support the judgment of conviction. Without discussing in detail the testimony adduced on behalf of the State, it was to the following effect: That on or about October 20, 1934, appellant, Mayberry, was assisting in scavenger work for the town of Alma, Arkansas, and that about dark of said day appellant and other laborers proceeded to the dumping ground for the purpose of unloading their wagon. The deceased was hidden in a hole situated in the dumping grounds. When appellant stopped his wagon for the purpose of unloading same, deceased crawled out of the hole where he was hidden, and appellant shot him with a shotgun. From the effects of this wound the deceased lingered a few days and died. This testimony was amply sufficient to support the verdict of the jury, and this contention is without merit.

The second assignment of error relates to the admission of an alleged dying declaration of the deceased. This alleged dying declaration was admitted under the following testimony as a predicate thereto.

"He told the prosecuting attorney and I the day before he died that they had informed him he would not get well. * * * Q. Did he make any statement as to whether he was going to die? A. He did the time before—next to the last time I was there."

Conceding without deciding that this testimony established the fact that the deceased on the day before he made his alleged dying declaration had the belief that his dissolution was imminent and impending, yet this was an insufficient predicate to admit a dying declaration

made on a subsequent date. Underhill's Criminal Evidence, fourth edition, page 383, states the applicable rule as follows: "The burden is on the one offering a dying declaration in evidence to show that such declaration was made under a sense of death, but the burden does not rest on such party to show that the decedent was rational at the time such declaration was made. A predicate laid to admit a dying declaration in evidence is not sufficient to introduce a dying declaration made on a later date unless declarant was then under belief of impending dissolution." See also *Weakley* v. *State,* 168 Ark. 1087, 273 S. W. 374.

From the authorities cited we conclude that no proper predicate was laid for the admission of the deceased's dying declaration, and that the trial court erred in admitting it in testimony.

In view of another trial we shall discuss certain instructions requested by appellant and refused by the trial court in his charge to the jury. These requested instructions read as follows:

"2. The jury are instructed that, if you believe from the evidence in this case the deceased first attempted to assault defendant with intent to kill or do him great bodily harm, the defendant was not bound to retreat, but might stand his ground, and, if need be, kill his assailant; and, if he fired the shot believing this was the intention of his assailant, that he was justified in this, though you find from the evidence that the danger was merely apparent."

"3. The court instructs the jury that a person attacked does not have to wait until the party attacking has assaulted him, but if, acting as a reasonably prudent person, the defendant believed the said Thompson was in the act of doing him great bodily harm or taking his life, he had the right to defend himself, though you may believe, at the instant, the said Thompson was not in reach of him with his club."

Appellant testified in his own behalf as follows: "My name is Earl Mayberry, I am now living at Muskogee. Last October I lived at Alma, and will be 50 years old

the 29th of this month. I was acquainted with Thompson, I sold him a mule and he worked it out, and we bought a cow together, and when we settled up there was a dollar between us, and I paid him in molasses, and we were picking cotton for Logan Gentry, I went down in Corn to get a drink, and Thompson followed me and said he was going to stomp every gut out of me, and he was too much man for me, and I refused to fight. I quit that night and went up home to work, and he quit and was sneaking up around there. On the night we had the trouble when we got out to the hole Thompson came crawling out on his hands and knees with a 2 x 4 in his hands. I throwed my gun on him and told him to beat it three times. He made one step and got straight and throwed his hand to his hip and I shot him. He had threatened my life and I was afraid of him, he was too much man for me. That night before I got to the hole, I started between sundown and dark, and Thompson was behind some brush and had a club about so long. I got about as far from here to you, and he said, 'Stop; I am going to break your neck. I have been after you for a month.' I said, 'Stop or I will fill your hide full of holes.' "

Appellant's testimony quoted above squarely presented the issues covered by his requested instructions numbered 2 and 3, and they should have been given to the jury in charge by the trial court. We cannot agree that the issues presented in these requested instructions were fully covered by the court's general charge. If the testimony on retrial is substantially the same as presented here by this record, these or instructions of similar import should be given in the court's charge.

For the error indicated, the judgment is reversed, and remanded for new trial.

WILEY *v.* STATE.

Crim. 3946

Opinion delivered September 23, 1935.

[redacted]

Partain & Agee, for appellant.

Carl E. Bailey, Attorney General, and *J. F. Koone,* Assistant, for appellee.

JOHNSON, C. J. Appellant was indicted by the grand jury of Crawford County for murder in the first degree for the killing of one John Cook. Subsequently on March 25, 1935, he was put upon trial to a petit jury of his own selection and was duly convicted of manslaughter, his punishment being assessed at five years in the State penitentiary, from which is this appeal. The contentions urged on appeal do not require a discussion of the testimony in detail; therefore a synopsis thereof is unnecessary.

Appellant's primary contention for reversal is that certain relatives of the deceased John Cook had served upon the regular panel of the petit jury during that term of the court, and especially that one Harve Fry, who was a brother-in-law of the deceased, John Cook, had so served and that such association and relations between the said relative of the deceased and the other members of the regular panel rendered all members of such regular panel disqualified to serve as jurors in appellant's trial. This contention was timely raised in the trial court, preserved in the motion for new trial and earnestly urged here as error.

Section 3152 of Crawford & Moses' Digest provides: "A challenge to the panel shall only be for substantial irregularity in selecting or summoning the jury, or in drawing the panel by the clerk." The plain language of this section of the statutes is such as to exclude prejudice of the panel as cause for challenge thereto. This section of the statutes prescribes the only causes for which a jury panel may be excused, and therefore excludes all other causes not within its terms. Moreover, the record does not reflect that appellant exhausted or even exercised any of his statutory rights of peremptory challenges to relieve against the condition complained of; therefore, under repeated opinions of this court, he is in no position to urge this contention. *Hooper* v. *State,* 187 Ark. 88, 58 S. W. (2d) 434.

Lastly appellant contends that the trial court erred in admitting in evidence the testimony of one Jewell Holmes taken in appellant's examining trial. The record reflects that Jewell Holmes appeared as a witness for the State in appellant's examining trial, and opportunity was there afforded the appellant to cross-examine her, and also that she was there duly recognized to appear in the circuit court on a subsequent date; that, when the witness failed to appear under the recognizance, a subpoena was duly issued and placed in the hands of the sheriff of the county for service. Failing to obtain service of the subpoena, an attachment was thereupon issued, and an honest effort made for its service, all of which proved futile. The officer testified in detail in reference to efforts put forward to effect service of these writs, but he was unable to locate her whereabouts. *Prima facie,* this showing warranted the trial court in admitting the testimony of Jewell Holmes taken in the examining trial. We stated the applicable rule in *Scott* v. *State,* 160 Ark. 125, 254 S. W. 341, as follows: "Where the testimony was given under oath in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon to do so, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subse-

quent suit between the parties. It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after a diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party."

This record reflects that the officials charged with the duty of serving process exercised due diligence to ascertain the whereabouts of the absent witness, and for this reason no error was committed in admitting her testimony taken at the examining trial.

No error appearing, the judgment of conviction is affirmed.

DRUMMOND *v.* STATE.

Crim. 3947

Opinion delivered September 23, 1935.

John Mayes and *Rains & Rains,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

SMITH, J. Appellant, Joe Drummond, was tried under an indictment which charged that he and Dan and Ira Drummond had stolen two hogs, the property of H. A.

Francis. He was convicted, and they were acquitted. For the reversal of the judgment sentencing appellant to a term in the penitentiary, it is insisted (1) that the testimony is insufficient to sustain the conviction; (2) that the court erred in the exclusion of certain testimony, and (3) in giving an instruction numbered 5.

The testimony establishes without question that appellant took possession of the two hogs, and it appears to be admitted that they were the property of Francis. The defense interposed was that appellant had taken possession of the hogs under the honest belief that they were his. Testimony was offered in appellant's behalf that the hogs in question were about the age of a litter of pigs owned by appellant which had strayed away from the home where appellant had formerly lived, but had later returned to this place after appellant had removed to another home. He found the pigs at his former home, and drove them to his present home, where, in conjunction with his brothers, who are codefendants, he killed one of the hogs and salted it down, and put the other in a little outhouse.

The owner's testimony as to the time and manner in which the hogs were taken up, and appellant's conduct when one of the hogs was found in his possession, support the finding that appellant knew the hogs did not belong to him. If this was true—and the testimony is sufficient to support that finding—it is unimportant whether appellant knew who the true owner was. We conclude therefore that the testimony is sufficient to sustain the conviction.

Ed Barnard, who was called as a witness for appellant, was asked this question: "Did you ever have a conversation with Joe" (appellant) "before he was arrested about some hogs?" Upon objection being made to the question by the prosecuting attorney appellant's counsel said: "I want to show that Joe came and asked him to go and look and see if they were his." The prosecuting attorney remarked: "Joe knew they were not his." The trial judge then ruled: "That would be self-serving. There is no contention about this man's hogs." Thereupon counsel for appellant stated: "The defend-

ant offers to show by the witness that this defendant made inquiry around over the country to see if anybody had lost any hogs and asked if he would come and look at the hogs—these particular hogs in the indictment."

It is unfortunate that appellant's counsel was not required to make his offer of testimony more definite. The observation of the judge, above quoted, makes it apparent that the judge was under the impression that counsel was proposing to prove a conversation between the accused and the witness concerning inquiries which appellant had made around over the country. If appellant's counsel was attempting to show—as the trial judge evidently thought he was—that appellant had told witness that he had made inquiry around over the country, the testimony was self-serving, and was inadmissible for that reason. The offer to make proof was not made in a manner to apprise the court that it was proposed to show that the witness had personal knowledge of the fact that appellant had made inquiry among the neighbors as to the loss of their hogs. Such testimony would have tended to show good faith on appellant's part; but testimony that he had so told the witness would be merely a self-serving statement. 1 Wharton's Criminal Evidence, § 505; *Butler* v. *State,* 34 Ark. 480; *Lindsey* v. *State,* 176 Ark. 398, 3 S. W. (2d) 37; *Patterson* v. *State,* 179 Ark. 309, 15 S. W. (2d) 389.

Instruction numbered 5, to which objection is made, reads as follows: "If the defendants—any one of the defendants—took, stole or carried away the property without the assistance of the other, then only one would be guilty. If they all assisted in taking of the hogs, then all would be guilty. If they took these hogs, honestly believing they were their own property, and placed in their own shop and pen or barn, honestly believing to be their own property, then they are not guilty of stealing the other man's property, even though you find it was the property of the other man."

No specific objection was made to the instruction at the time it was given, and it is now argued that it leaves out of account the question of appellant's good faith

when he took up the hogs. The instruction does not deal with that phase of the case primarily. Other instructions did, and correctly so. It has been stated that appellant and two other persons were tried jointly, and the instruction declared the law as to the conditions under which persons participating in the asportation would be guilty. However, the instruction does state that, "if they took these hogs, honestly believing they were their own property, and placed in their own shop and pen or barn, honestly believing to be their own property, then they are not guilty of stealing the other man's property, even though you find it was the property of the other man." There was no error in giving the instruction.

Upon a consideration of the whole case, we find no error, and the judgment must therefore be affirmed, and it is so ordered.

GOODNAUGH *v.* STATE.

Crim. 3948

Opinion delivered September 23, 1935.

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

Carl E. Bailey, Attorney General, and *Guy E. Williams* and *Ormand B. Shaw,* Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted of carnally knowing Gladys Kimes, a girl un-

der sixteen years of age, in Crawford County, in August, 1934, and was adjudged to serve a term of one year in the State penitentiary as a punishment for the statutory crime, from which judgment is this appeal.

The first assignment of error for a reversal of the judgment is that the evidence is insufficient to support the verdict of the jury.

Gladys Kimes testified that in August, 1934, she and her sister attended church in her neighborhood in Crawford County, and that appellant had sexual intercourse with her near Pope School House and that, at the time, she was fifteen years of age.

Dr. John M. Stewart testified that he made an examination of Gladys Kimes, which revealed that she had had sexual intercourse.

Appellant introduced witnesses tending to establish an alibi in contradiction to her testimony. The jury accepted her testimony as true and refused to accept as true the testimony of appellant's witnesses contradicting her or in support of his alibi. The conflict in testimony presented an issue for determination by the jury and not by this court on appeal. On appeal this court will not disturb the verdict of a jury if supported by any substantial evidence, and we find ample substantial evidence in the record to support the verdict and judgment. No corroboration of the testimony of Gladys Kimes was required to sustain a conviction for carnal abuse. *Wilson* v. *State,* 177 Ark. 885, 7 S. W. (2d) 969.

The second and only other assignment of error for a reversal of the judgment is the refusal of the court to allow the individual jurors to testify in support of his motion for a new trial that some of the older jurors persuaded some of the younger ones to agree to the verdict by assuring them that the court would suspend the sentence. The verdict returned is as follows:

"We, the jury, find the defendant guilty as charged and assess his punishment at one year in the State penitentiary; we also recommend a suspended sentence."

The court properly excluded the proffered testimony of the several jurors on the ground that jurors are not permitted under our statute to impeach their own ver-

dict unless the verdict was arrived at by lot. Section 3220 of Crawford & Moses' Digest is as follows:

"A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for new trial, that the verdict was made by lot."

Reference is also made to the cases of *Smith* v. *State,* 59 Ark. 140, 26 S. W. 598, and *Wallace* v. *State,* 180 Ark. 627, 22 S. W. (2d) 395.

No error appearing, the judgment is affirmed.

FERGUSON *v.* STATE.

Crim. 3951

Opinion delivered September 23, 1935.

John Owens, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

MCHANEY, J. Appellant was convicted of grand larceny, for the theft of an automobile, the property of Mr. T. A. Bell and sentenced to one year in the penitentiary. For a reversal of the judgment and sentence against him, he first contends that the court erred in permitting the witness, Clifton Atha, to testify over his objection concerning a car supposed to have been stolen by appellant in Hot Springs, Arkansas, prior to the stealing of the Bell car. The witness had been permitted to testify that an abandoned Chevrolet automobile had been found on Highway 70 about two miles west of Daisy in Pike County, which would not run because the motor was

out of condition. He was then asked this question, and gave this answer: Q. "What investigation did you make?" A. "Well, I had information it was left there and suspicioned as being a stolen car, and I made examination of the car and found some music in car that had the address of some orchestra, had street number on it, so I called the police at Hot Springs, and they said it was stolen car belonging to some man there in Hot Springs." No objections were made by appellant to that question and the answer given. The witness was then asked: "Was that car returned to its original owner?", and answered, "Yes, sir." Appellant then moved that his testimony be excluded. The court in overruling the motion made the following statement: "I understand it is a question of connecting the defendant with the automobile. It is evident that he was guilty of some other crime of the same manner. You are not trying him, gentlemen of the jury, for stealing any other automobile than Mr. Bell's. You could not convict him of that offense, and he would only be guilty of taking the Bell car." Appellant objected to this ruling of the court and excepted. This statement of the court was error calling for a reversal of the judgment. Appellant's defense was that of an alibi. He and his witnesses testified with a great deal of force that at the time the Bell car was stolen, as well as at the time of the stealing of the other automobile in Hot Springs, he was in Fort Smith, regularly employed and working for the Yaffee Iron & Metal Company and could not have been in Pike County at the time the Bell car was stolen or at the time the Hot Springs car was stolen. He testified positively that he had not been in Pike County for more than five years. It was therefore error for the court to state, as it did, that: "It is evident that he was guilty of some other crime of the same manner." And, too, the language in the concluding sentence: "You could not convict him of that offense, and he would only be guilty of taking the Bell car," might have led the jury to believe that the court thought that, since it was evident that he was guilty of stealing the other automobile, he was also guilty of taking the Bell car.

Another argument is made by appellant that the evidence is insufficient to sustain the verdict. We disagree with appellant in this contention, but we do not think it necessary or proper to review the evidence, since it might not be the same on another trial. It is sufficient to say that we find substantial evidence to support the jury's verdict, and the case would be affirmed but for the error of the trial court in making the remarks above quoted. For this error, the judgment will be reversed, and the cause remanded for a new trial.

McGonagill *v.* State.

Crim. 3941

Opinion delivered September 23, 1935.

W. B. Scott, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

Butler, J. The appellant was indicted by the grand jury for the crime of murder in the first degree for the killing of Hershel Taylor. At the trial he was convicted of murder in the second degree, and his punishment was fixed at imprisonment in the State penitentiary for a term of ten years. From the verdict and judgment thereon this appeal is prosecuted.

It is here argued by the appellant that the evidence adduced at the trial was not legally sufficient to support the verdict, and that he was prejudiced by the remarks

of the prosecuting attorney during the course of his argument. Appellant has prepared and incorporated in the transcript what purports to be "synopsis of the evidence in the above-styled cause to be used in lieu of bill of exceptions, it being too late for the court reporter to prepare bill of exceptions." It is stated in appellant's brief that the synopsis of the evidence prepared was approved by the prosecuting attorney.

In the case of *Austin* v. *State,* 183 Ark. 481, 36 S. W. (2d) 400, a similar record was presented to this court which said (referring to the record): "This cannot be considered upon appeal for two reasons: In the first place, it was not filed with the clerk within the time allowed by the court for filing a bill of exceptions. In the second place, it is still necessary that the trial judge sign the bill of exceptions in a felony case before it can be admitted as a part of the record upon appeal. *Ward* v. *State,* 135 Ark. 259, 204 S. W. 971. The trial judge did not sign what purports to be the bill of exceptions, and our review is limited to errors apparent on the face of the record." Here there was no bill of exception presented to the judge or filed with the clerk.

We have examined the indictment and find it and the judgment and sentence to be in proper form. The judgment must therefore be affirmed.

SHEPHARD *v.* HOPSON.

4-3918

Opinion delivered September 23, 1935.

E. L. Holloway, C. T. Bloodworth, C. T. Bloodworth, Jr., for appellants.

Hopson & Hopson, for appellees.

BUTLER, J. In 1923 the appellee, D. Hopson, sold a tract of land to Virgie M. Shephard. Shephard procured a loan from the New England Securities Company and paid the proceeds thereof to Hopson as a part of the purchase price for the land. He then executed a second mortgage to Hopson on the same land to secure the balance of the purchase price. The notes which this second mortgage secured were signed by Virgie M. Shephard and Mary J. Shephard, the appellants. Virgie M. and Mary J. Shephard defaulted in the payments on the first mortgage, and suit was brought by the Enosburg Falls Savings Bank, the owner of the notes secured by the first mortgage, against the Shephards. The appellee, D. Hopson, intervened, praying for judgment for the sums due him and foreclosure on his second mortgage.

At the time these suits were filed Virgie M. Shephard was absent from the State, and service was had upon him under the third subdivision of § 1144 of Crawford & Moses' Digest, which provides that service may be had by leaving a copy of the summons at the usual place of abode of defendant with some person who is a member

of his family over the age of fifteen years. Process was served in the suit of Enosburg Falls Savings Bank on August 19, 1929, and on the cross-complaint of D. Hopson on the 17th day of September following. On the 6th day of October, 1929, a default decree was rendered on the original suit, and a like decree was rendered on the 8th day of October, 1929, on the intervention and cross-complaint of D. Hopson. The land was sold and the proceeds applied to the payment of the first mortgage, and nothing was paid on the Hopson judgment.

Virgie M. Shephard inherited a small tract of land from his grandmother, who died on December 11, 1930. On December 16 of the same year Mary J. Shephard and some of her children moved on this land and have continued to reside thereon until the present time. After the death of the grandmother, Virgie M. Shephard conveyed this land to Mary J. Shephard and her children, the issue of her marriage with the said Virgie M. Shephard.

On October 6, 1932, appellee, Hopson, filed suit to revive the judgment rendered October 8, 1929, to set aside the deed executed by Virgie M. Shephard to Mary J. Shephard and her children. To this action appellants answered denying the validity of the default decree of October 8, 1929, on the ground that said judgment was procured without service of process being had upon them, and alleging, in addition, a defense to the action of D. Hopson which resulted in the aforesaid default judgment.

At the hearing of the case on the proof adduced, the court proceeded first to decide upon the ground to vacate the judgment as provided by § 6294 of C. & M. Digest and held that the summons issued on the cross-complaint of Hopson was duly served upon Virgie M. and Mary J. Shephard and that the judgment and decree rendered October 8, 1929, is a valid and binding judgment, which, from the date of its rendition, was a valid and subsisting lien on all the real property situated in the western district of Clay County, including the lands conveyed by Virgie M. Shephard to Mary J. Shephard and others sub-

sequent to the rendition of said decree, and dismissed appellants' bill of review for want of equity. The court further found that the deed made by Virgie M. Shephard to his children and their mother was voluntary and for the purpose of defrauding the appellee in the collection of his debt, and decreed that the said deed be annulled and set aside.

It is undisputed that the deed cancelled by decree of the court was voluntary, and therefore the correctness of the decision cancelling said deed depends upon the correctness of the court's finding that there was due service upon which the decree of October 8, 1929, was based. The homestead right as to the land conveyed could not have vested in the wife and children until title to same was acquired by them and actual residence thereon, which it is admitted did not occur until the latter part of the year 1930, for, if the Hopson judgment was valid, its lien immediately attached to the land on the death of Shephard's grandmother which occurred on December 11, 1930. As before stated, service was had under subdivision 3, § 1144, *supra,* and the return of the officer on said summons is as follows (omitting caption):

"On the 17th day of September, 1929, I have duly served the within writ by delivering a copy, and stating the substance thereof to Mary J. Shephard, and by leaving a copy with Mary J. Shephard for Virgie M. Shephard at his usual place of abode with a member of his family over the age of fifteen years, as I am herein commanded.

"[Signed] George A. McNeil, Sheriff,
"By J. M. Curtis, D. S."

It is contended that the process was not served at the usual place of abode of Virgie M. Shephard. In *Duval* v. *Johnson,* 39 Ark. 182, it was held that the term "usual place of abode" is synonymous with "residence." It is generally understood that one's usual place of abode or residence is where (if he is a married man) he abides with his wife and family. Therefore the house in which one's wife and children are living is presumed to be a man's "usual place of abode" within the meaning of the stat-

ute, although he may be absent at the time of service of process and such absence may have continued over a considerable period of time. Undoubtedly a man has the absolute right to change his place of abode whenever he pleases, and this is accomplished when he removes from one place with the intention of abandoning such place of abode and establishing a residence in another locality where he expects to abide without the intention of returning to the place from which he has removed. When, however, he leaves a wife and family remaining, the burden is upon him in order to show a change of abode to establish not only the actual abandonment of the first residence, but also that the removal is permanent and made with the intention of making his residence at some other place. *McGill* v. *Miller,* 183 Ark. 585, 37 S. W. (2d) 689; *Duval* v. *Johnson, supra.* That Shephard's home in Clay County was no longer his usual place of abode is based on his testimony to the effect that he had separated from his wife and permanently removed from the State. At the time the bill of review was filed, Shephard and his wife were divorced and she had married one Blevins. They testified in effect that they had separated in June of 1928 and Shephard had gone to Michigan and was not in Arkansas from that time until after the year 1929 and was not in the State of Arkansas at all during the last-named year. Shephard also testified that Hopson knew that he had separated from his wife and that he had permanently left the State. It was shown, however, by evidence which is not disputed that Shephard was actually in the town of Corning, Arkansas, and consulted with a lawyer on October 8, 1929, the day that the judgment sought to be set aside was entered. At Shephard's request a letter was written by the attorney making claim for a credit on the demand sought to be enforced by the savings bank in its suit. The attorney who wrote the letter testified that Shephard was in his office on that day, and the letter was written at his request, and this testimony is not disputed by Shephard. Mr. Curtis, the deputy sheriff, testified that when he was serving processes in these cases he talked with Mrs. Mary J. Shep-

hard; that she told him that the place at which service was made was the residence of Virgie M. Shephard, and that they were not separated. Shephard and his wife were not divorced until the fall of 1930. These circumstances dispute the testimony given by Shephard and Mary J. Shephard Blevins, raising a question of fact for the decision of the chancellor.

Mary J. Shephard Blevins testified that she was not at home on September 17, 1929, until late in the afternoon, and that she was not served with any summons for herself or that a copy of same was left with her for Virgie M. Shephard. Some of her children and others who were picking cotton at the Shephard home on that day testified that Mrs. Shephard was not there at all, and one of her daughters stated that while she was picking cotton the officer came and delivered the summons to her; that she did not deliver them to her mother upon her return or mention the fact to her. There was also testimony to the effect that Mrs. Shephard was at the home of a neighbor on that day, and at the time it was claimed that service was had upon her. It was shown that there is a close personal resemblance between Mrs. Shephard and her daughter who claimed that the service was upon her, and it is argued that the officer was mistaken, that he was only slightly acquainted with Mrs. Blevins, and was deceived by the resemblance between her and her daughter when he was serving the process. It is true that Mr. Curtis, the officer, in answer to a question regarding his acquaintance with Mary J. Shephard and the length of time he had known her, stated that he was "only slightly acquainted with her. I know her when I see her. I don't know how long I have known her." He further stated, after describing Mrs. Shephard's appearance, that he was positive that it was in fact she whom he had served; that he had personal recollection of the time and place of service, was not mistaken as to her identity, and explained to her fully the nature of the summons at the time of the service; that, instead of saying anything which would indicate that she and Virgie M. Shephard were not living together or that he had

moved from the State of Arkansas, she stated that that was Virgie's home, and that they were not separated. Mr. Curtis, within three weeks before September 17, namely August 29, had at the same place served upon Mrs. Shephard for herself and Virgie M. Shephard, her husband, a summons in the suit of Enosburg Falls Savings Bank, and there was no contention upon her part that she was not the person served on that occasion. This fact supports the testimony of Curtis as to the identity of the person served on September 17.

Whether the place of service was at the usual place of abode of Virgie M. Shephard and whether such service was had on Mary J. Shephard were questions of fact, and we cannot say that the answer of the chancellor to these questions in the affirmative was against the preponderance of the evidence.

Mr. Curtis, the deputy sheriff, testified that he delivered the summons and explained the contents thereof to Mrs. Shephard while she was in her cotton patch about two hundred feet from the house. On this testimony appellants contend that, even if the residence at which the service was had was the usual place of abode of Virgie M. Shephard and the service was had upon Mrs. Shephard, the same does not satisfy the requirements of the statute in that service was not at the usual place of abode of Virgie M. Shephard. This contention is based on the case of *Kibbe* v. *Benson,* 17 Wall. 624, 21 U. S. (law. ed.) 741, where it was held that service made 125 feet from the dwelling house and not within any of the adjoining buildings or outhouses was not sufficient service within the meaning of a statute of Illinois prescribing how service may be had in actions for the recovery of real estate, as follows: "If the premises are actually occupied, the declaration shall be served by delivering a copy thereof with the notice above prescribed to the defendant named therein, who shall be in the occupancy thereof, or leaving the same with some white person of the family, of the age of ten years or upwards, at the dwelling house of such defendant, if he be absent." The summons in that case was delivered to the father of defendant at a place

about 125 feet away from the dwelling house. The officer testified that he handed the summons to the father of defendant, who, after taking it in his hands, threw it upon the ground muttering some angry word. In commenting upon the effect of the statute, the court said the intention was to make delivery of a summons to a person and at a place as would make it likely that the person interested would receive proper notice of the nature of the summons and its delivery. Under the circumstances the court held that the service was not sufficient to be such as would reasonably carry into effect the intention of the statute. One of the familiar meanings of the preposition "at" is "near to" or "in the vicinity of." It would be unreasonable in all cases where the defendant was absent from home to require the officer serving a summons to enter the house or wait on the doorstep for some member of the family to arrive who was in the immediate vicinity. It seems sufficient if the member of the family served is in close proximity to the premises and is of suitable age and discretion so as to make it reasonable that delivery of the copy of the summons, or information thereof will be given the defendant.

Mrs. Mary J. Shephard was shown to have been about thirty-five years of age, and at the time she was served was within about two hundred feet of the house, and on the same premises. We think this is a sufficient compliance with the requirement of the statute that delivery of summons shall be at the usual place of abode of the defendant. This is the effect of the holding in *State* v. *Superior Court,* 84 Wash. 392, 146 Pac. 834, and in *Bursow* v. *Doerr,* 96 Neb. 219, 147 N. W. 474, Ann. Cas. 1916 C, 248.

From the views expressed it follows that the decree of the trial court must be affirmed. The appellee has moved in this court for an order to appoint a commissioner to sell the lands involved in this litigation. This court has no original jurisdiction on the matter requested, and the motion is overruled.

KELLY *v.* STATE.

Crim. 3943

Opinion delivered September 23, 1935.

Oscar Barnett, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

BAKER, J. Beulah Kelly was indicted by the grand jury of Cleburne County, charged as an accessory before the fact to the robbery of C. B. Chamness by J. A. Nahlan. She was tried on the 7th day of March, convicted and sentenced to three years in the penitentiary. Only three questions are raised upon this appeal.

It is contended (1) that the court erred in permitting the judgment of conviction of Jack Nahlan to be offered in evidence, (2) the court erred in giving one certain instruction to the jury, and (3) the court refused to direct a verdict of acquittal.

The matters raised upon this appeal will be treated in the order stated.

The matter argued in appellant's brief in regard to the judgment of conviction of Jack Nahlan, referred to in the indictment as J. A. Nahlan, arises out of the form of verdict returned in that case by the jury.

"We, the jury, find the defendant guilty, and fix his punishment at a term of five years in the Arkansas penitentiary."

It must be observed that this form of verdict does not show that Nahlan was convicted of robbery. The record however discloses the fact that the circuit clerk of Cleburne County was offered as a witness by the State; that he identified and offered in evidence the judgment appearing in circuit court record No. 8, at page 134, reciting the fact of the trial and conviction of Jack Nahlan for robbery.

At the time this record was offered in evidence, the objection actually made by the defendant was that the verdict was "hearsay evidence, in that it was a condensed conclusion of the twelve men composing the jury."

It must be observed from the foregoing that there was offered in evidence, not merely the verdict of the jury, but the judgment of the court rendered upon the verdict, and which, of course, included the verdict. Whatever suggestion of objection that may have thought to have been proper on account of the form of the verdict, must be conceded and be considered as purely technical and collateral. The proposition of a general verdict and its effect was discussed by us in a recent case. *Gribble* v. *State,* 189 Ark. 805, 808, 75 S. W. (2d) 660.

Whatever defect existed in the verdict, if any, did not render the judgment invalid, and the judgment, which included the verdict, was competent evidence. There was therefore no error in its admission.

The second matter urged or alleged as error is that after the jury had for a time considered the cause, it returned into court and asked for additional instructions. One instruction was then given over the objection of the appellant: "You are instructed that you should consider all of the facts and circumstances both before and after the commission of the crime of robbery in determining whether or not the defendant is guilty of the crime with which she is charged."

The particular objection made to this instruction was that the jury was directed to consider circumstances or

matters occurring after the commission of the crime. This is argued by learned counsel as inconsistent with the charge made against the appellant, that she was an accessory before the fact, and, if we understand the force of the argument, it is also urged, with some degree of reason, that the jury might have understood from this instruction that it could convict the appellant for criminal conduct, of which she might have been guilty after the robbery was committed by Nahlan. We are unwilling to say, and do not say, that there are no facts or circumstances, or even conduct, after the commission of the crime, that might not have been explanatory of conduct prior to its commission, and therefore was admissible in evidence.

No particular matter is pointed out as tending to show that any such evidence in this case might have been prejudicial. It is true that it is shown that she was arrested shortly after the crime, near the scene of its commission in Jack Nahlan's car, in which was his cap and coat, and it is also in evidence that, in answer to questions asked her, she made evasive and compromising answers.

These were the only matters, occurring after the crime, of any real import, proved in this case, as incidents of conduct of the appellant. These matters separated from other facts proved very little, but, as explanations of the conduct of Nahlan and the appellant, they were somewhat illuminating.

Pertinent facts in this case were to the effect that Cecil Chamness who ran a little store and filling station at Quitman, was robbed of $200 on the night of November 11. He recognized Jack Nahlan as one of the persons robbing him. The other man he did not know. Beulah Kelly, the appellant, here, had formerly lived near Quitman, but had been away for a long period of years until a short time before this robbery, and on the night of the 8th of November, three days prior to the robbery, she and Jack Nahlan had stopped at the filling station or store, belonging to Chamness, for a short time.

A few days before the robbery, Jack Nahlan and this appellant, riding together in the same car, took Tommie Sanders, a man about thirty years old, a nephew of the

appellant, for a short ride, and Jack Nahlan said to him, in the presence of the appellant: "I know Chamness has got some money, and we are going to get it. We have done this kind of work before and got away with it, and, if you tell it, it will be too bad for you."

Mrs. Kelly did not say a word, as disclosed by this record. She did not disclaim the intention of helping to rob Chamness. Perhaps it was not necessary that she should have done so. However, on the night of the robbery, Will Spain testified that he was living about two and a half miles from Quitman on Highway No. 25; that he saw a car pass; it was a four-door Chevrolet Sedan. It was going toward Quitman. This was about 8 or 9 o'clock. It was going at a slow gait, but in about fifteen minutes it was coming back, driven at rather a fast rate. He does not know who was in the car. He was fifteen or twenty steps from the car and could not say it was the same car he saw going toward Quitman that he saw returning. He called Chamness, however, and advised him to get on the road if he wanted to catch the people who had robbed him. Officers had become very busy in a search for the robbers, and the sheriff and posse discovered a car upon the highway, which stopped as the sheriff approached. In this car, so parked upon the highway, the appellant was found, with the cap and coat and sawed-off hacksaw, which she said belonged to Jack Nahlan. She readily admitted that the car in which she was riding was Nahlan's car. She claimed at the time that it was out of repair, and that she could not drive it. The sheriff found nothing wrong with it, took charge of the car, and placed the appellant under arrest.

Immediately following this arrest, she told the officers who asked her questions, if they wanted to know anything about the case to go to Jack; that her life had been threatened, and she wasn't going to tell it. She further said: "Go to Jack, he will tell you. If I tell it, they will kill me." She admitted that she had driven up to Quitman and had been there that night. It was also a significant fact and circumstance that just prior to the time she was arrested, but after she had stopped the car upon the highway, and as the officers' car approached, the

door of the car, occupied by the appellant, was heard to slam or close.

It was not suggested by any witness that Jack Nahlan had made a sudden escape from this car and thereby eluded the officers at this point, but it was not an unreasonable inference to be drawn from the testimony; particularly is this true when we consider that the appellant was driving his car only a short distance from the scene of the robbery, and that there was found in the car, at the time, a coat and cap belonging to Nahlan. For several days immediately prior to the robbery, Nahlan and the appellant had been frequently seen together in the immediate vicinity of Chamness' place of business at Quitman.

There were other facts offered in evidence unnecessary to set out, but these salient statements of the testimony, when considered with the appellant's half admissions and evasive answers, justified the jury's verdict.

The following quotation settles this controversy:

"The conviction of the principal is *prima facie* evidence of his guilt on the trial of an accessory before the fact of the crime, but the record of the conviction does not exclude other competent evidence of the guilt of the principal, nor does it prevent the dispute of such record collaterally on the issue of the guilt of the accessory. *State* v. *Mosley,* 31 Kan. 357; 1 Wharton, Criminal Law, p. 350. At the common law, the record of the conviction, if it had transpired, could not be dispensed with, but under the statute (§§ 1560-1, Kirby's Digest), an accessory before the fact of the crime of murder "shall be deemed in law a principal, and be punished accordingly," although he must be indicted as such accessory, and cannot be charged as a principal offender. *Hunter* v. *State,* 104 Ark. 245, 149 S. W. 99. And the common law relating to the trial and conviction of such accessory has also been changed, it now being provided that "An accessory before or after the fact may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged." Section 1566,

Kirby's Digest. *Jones* v. *State,* 108 Ark. 447, 450, 158 S. W. 132; *Tiner* v. *State,* 110 Ark. 251, 161 S. W. 195.

The third question raised upon this appeal is that the court erred in refusing to direct a verdict for the defendant. In other words, appellant insists that the testimony is insufficient to sustain the conviction. Upon this proposition it may be conceded that there is no direct or positive testimony upon which this conviction was based. The evidence is circumstantial. Most of the facts have already been stated. We feel that the facts, tending to prove the guilt of the defendant, even though they be highly circumstantial, are so connected and related that the jury was thoroughly warranted in arriving at a conclusion of the appellant's guilt. The facts established by the evidence are not disconnected and unrelated incidents that might or could have occurred under ordinary conditions without connecting appellant with the commission of this offense. When Nahlan was telling her nephew in her presence that they intended to rob Chamness, she made no protest as to any statement he made. She was, at least, lending her influence and encouragement at that particular time to the scheme or plan that had already been made according to Nahlan's statement, and she did not deny that she had been associated in former and similar schemes. She made no satisfactory explanation of her presence in the immediate community immediately after the robbery, when in possession of Nahlan's car, his cap and coat being therein as if he had, but a short time before, left them. Her lack of candor, when she would talk, though she could not reasonably have been required to do so, were inconsistent with innocence. The matter was a case for the jury, and we are unwilling to say that the decision was incorrect.

It follows therefore that judgment should be affirmed. It is so ordered.

DAVIS *v.* PHIPPS.

4-4006

Opinion delivered September 23, 1935.

[redacted]

John L. Carter, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

BAKER, J. This suit, filed by C. D. Davis, as a citizen and taxpayer, against W. E. Phipps, as Commissioner of Education, is to enjoin the issuance of bonds by the State Board of Education. The effect of the suit is such that it challenges the legality of a proposed bond issue under act No. 333, which became a law upon the 4th day of April, 1935, having remained with the Governor for twenty days after the adjournment of the General Assembly, without approval or veto.

Act No. 333, if legal, is a grant of power to the State Board of Education, by which it is authorized to sell from time to time, and in such amounts as it may deem advisable, bonds in addition to those now authorized by law, to be known as revolving loan school bonds, to mature on such basis as the State Board of Education may determine, and to make a physical pledge to secure such bonds in such form as it sees fit of any school district bonds in the State Treasury, on which loans were

made from the revolving loan fund. The State Board of Education was granted power to execute a pledge by deed of trust, and by depositing the school district bonds in any bank or other safe place designated by the State Board of Education, and to designate a trustee for said pledge or deed of trust, who should have power to sell any of said pledged bonds, should there be a default of the payment of principal or interest on the bonds authorized to be issued under § 1 of said act 333.

The State Board of Education passed a resolution on June 10, 1935, pursuant to the authority granted, to issue $20,000 of revolving loan school bonds, as authorized, of the denomination of $1,000 each, and bearing interest at the rate of not exceeding six per cent. per annum, one bond to be payable on the first day of January, beginning with the year of 1936, and one bond of $1,000 payable each year thereafter until the said $20,000 shall have been repaid. The said resolution especially provided that said bonds should be issued and executed in the name of the State Board of Education, by its chairman, attested by the seal of the State Board, and that, as security for the payment thereof, there should be pledged in form a deed of trust, to be adopted by the State Board of Education, of which the Commercial National Bank of Little Rock was made trustee, with proper provisions for the sale of the pledged bonds, given as security, for payment of principal and interest of the said revolving loan school bonds.

To this suit filed by the appellant herein seeking to enjoin the issuance of the aforesaid bonds, the defendants demurred. The demurrer upon hearing was sustained, and, plaintiff refusing to plead further, the complaint was dismissed. The appeal comes to this court challenging this action of the chancery court of Pulaski County.

It is urged upon this appeal that act 333 of the Acts of 1935 violates Amendment No. 20 to the Constitution of Arkansas. Amendment No. 20 was adopted at the general election in November, 1934, and provides as follows: "Except for the purpose of refunding the exist-

ing outstanding indebtedness of the State and for assuming and refunding valid outstanding road improvement district bonds, the State of Arkansas shall issue no bonds or other evidences of indebtedness pledging the faith and credit of the State or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the State voting on the question at a general election or a special election called for that purpose."

The resolution adopted by the State Board of Education especially provides that the revolving loan school bonds shall not pledge the faith and credit of the State of Arkansas for their payment, but they shall be payable only from the proceeds of the bonds pledged as security therefor.

It must appear, even to the casual reader, that the question raised is whether these bonds may be issued and sold, "except by and with the consent of a majority of the qualified electors of the State voting on the question at a general election, or a special election, called for that purpose," as provided in Amendment No. 20.

It must be equally apparent that the bonds could not be issued and sold except when authorized by such election as bonds issued by the State of Arkansas, if the faith and credit of the State, or any of its revenues were pledged to secure the payment thereof.

It must be seen from the foregoing statement that said bonds do not purport to be State bonds, in the sense ordinarily implied by the use of such term. They purport to be issued only as revolving loan school bonds, issued by the State Board of Education. There is an express provision of act No. 333 that the faith and credit of the State shall not be pledged.

Do these bonds, as above described, come within the inhibition of this constitutional amendment.

If the answer to this question is such that the bonds must be decided to be direct obligations of the State, and for the payment of which the State must at all events be finally bound, we would not hesitate in determining that the bonds could not be legally issued, in the face of the provisions of Amendment No. 20 aforesaid.

As stated above, they do not purport to be obligations of the State. They are issued by the State Board of Education to secure money for the revolving loan fund. There is no authority to bind the State for their payment in any respect or particular. Bonds must be paid out of the proceeds arising from the pledged securities. There is no other method or provision for the repayment of such funds as may be borrowed upon these bonds. No holder of said bonds can in good faith, at any time, legally assert any claim against the State for their payment, upon default of the security pledged therefor. They are not, in fact, State bonds.

The remaining question to be decided is one that has given us much more concern.

Amendment No. 20 provides that the State of Arkansas shall issue no bonds, or other evidences of indebtedness, pledging any of the revenues of the State, except when authorized by a majority vote of the qualified electors of the State. If the securities pledged for the payment of these bonds, which the State Board of Education desires to issue, may be deemed revenues of the State of Arkansas, then it is doubtful if such security could be legally pledged.

There should not be very much difficulty in a proper understanding and interpretation of what is meant by the language of Amendment No. 20, which prohibits the pledging of the State's revenues. Citizens of the State who have been interested in its welfare and who have attempted to keep themselves reasonably well-informed know what the evils were for which Amendment No. 20 was framed to cure. It must be a fact well recognized in State history that, at the time Amendment No. 20 was being considered by the electors of the State, the financial affairs of our Commonwealth had been well-nigh wrecked by issuance of bonds far in excess of the amount justified by the liquid resources of the State. High taxes had been imposed to raise revenues to meet these enormous obligations. It was well understood then, as it is now, that a continuation of these practices that had grown up were pyramiding debts and tapping every

source of revenue for payment thereof and could not continue without practical bankruptcy.

It was well understood, of course, that these matters do not appear from anything that may be connected with Amendment No. 20, nor is the language used therein such as to justify any such conclusion, but such conclusions as have been announced above, as are well known and recognized, may be considered in a proper interpretation of the amendment, to aid us in understanding its purposes in curing the evils then prevalent. However, in recognizing these conditions as an aid in the interpretation of the meaning of the language used, we are in no sense justified in violating the express terms or provisions of the amendment. But to follow the strict language of the amendment, without regard to the purposes of it, which are well known and recognized, would be as erroneous on the one hand in the rendition of an interpretation, as it would be to interpret wholly from recognized purposes and conditions, without regard to the language used in framing the amendment.

When we refer to the revenues of the State, we usually mean the annual or periodic yield of taxes, excises, customs, etc., which the State collects and receives into the treasury for public use, but the word "revenues" may be much broader than that, as it may include rent, yield, as of land, profit. It includes annual and periodical rent, profits, interest, or issues of any species of property, real or personal, income. The yield from taxes is one of the last meanings given in Webster's International Dictionary, yet it is the one with which we have most to do in questions such as are presented here.

It must be remembered that the bonds pledged in this case as security were bonds issued by school districts delivered to the State Board of Education as security for money obtained from the revolving loan fund. This is not, in fact, strictly a part of the State's revenues, as distinguished from school funds. It is a part of the assets belonging to this revolving loan fund, but is, for practical purposes, as distinct from the State as are school districts, or improvement districts, about

which no question is ever raised as to their individual entity, as distinguished from the State. These school districts and improvement districts are in some senses, at least, merely agencies of the State, organized under proper authority to render a certain service to particular localities.

The revolving loan fund is not confined to any individual locality, but is limited to a particular and individual purpose, designed to render a service not otherwise provided for.

If, by a strained construction, we should say that these funds in the hands of the State Board of Education are funds of the State, we can with the same parity of reasoning say that the State Board of Education, through the revolving loan fund, shall not issue any bonds, because it is only an agency of the State, and, by the same process of deduction, if we hold one agency of the State without power or authority, we may in like manner hold all other agencies of the State, as school districts and improvement districts, impotent in borrowing money or issuing bonds.

But, aside from further speculation, we may say that Amendment No. 20 prohibits bonds or instruments issued by the State itself for the security of which is pledged the State's faith and credit. A bond is a written promise to pay money, and we have said, in the foregoing discussion, that the State is not issuing these bonds, and it would not be bound for their payment. Therefore these bonds, which the State Board of Education is about to issue, are not within the prohibited class.

In the second proposition our conclusions are not without quite eminent authority to the effect that revenues mentioned in Amendment No. 20 as revenues of the State do not include the securities pledged with the State Board of Education, nor the interest derived from those securities. An imposing array of authorities showing the distinction between revenues collected by the State for its support and maintenance, and those collected by State agencies or subdivisions, could easily be cited. A few, however, should suffice.

"The word 'revenue' as used in the act has been construed by the Supreme Court to 'embrace public revenue, whether State or municipal—it embraces all taxes and assessments imposed by public authority.'" *Gunning* v. *People,* 76 Ill. App. Ct. 574.

Again in a Missouri case, it was held that a fund accumulated by a college from tuition charges and used for payment of insurance on the college buildings was no part of the State revenue, nor was insurance collected such, though the school was a State school. *State* v. *Board of Regents for Northeast Missouri State Teachers' College,* 305 Mo. 57, 264 S. W. 699.

A definition of revenue is given in the case of *Commonwealth* v. *Brown,* 91 Va. 762, 21 S. E. 357: "It is the income which a State collects and receives into its treasury, and is appropriated for the payment of its expenses."

Also in *Welch* v. *Hotchkiss,* 39 Conn. 140, 12 Am. Rep. 383, and *United States* v. *Wright,* 28 Fed. Cases, 789.

Finally, it may be suggested that the pledges contemplated by the State Board of Education are not within the forbidden class for another reason; that is, under Amendment No. 20 it would seem that pledges of revenue are forbidden only when such pledges are to secure State bonds. This seems to be in accordance with the language of Amendment No. 20.

It must follow that the chancellor's decision was correct. It is therefore affirmed.

LINK *v.* STATE.

Crim. 3960

Opinion delivered September 30, 1935.

John C. Sheffield, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. Appellant was indicted by the grand jury of Phillips County for the crime of murder in the first degree committed by the shooting and killing of one Dr. Miller, and from a manslaughter conviction upon which a five-year sentence was imposed he appeals to this court.

The State relied for a conviction upon the dying declaration of deceased, corroborated by confessions and voluntary statements of appellant to the sheriff of Phillips County. The dying declaration of the deceased was to the following effect: "I, Dr. W. F. Miller, after having been told by Dr. J. B. Ellis that I am going to die and realizing that I am going to die, I make and publish this statement as my dying statement.

"Last night a woman that was in a family way walked by and Mr. R. B. Link made an insulting remark about the lady, and that started an argument. Mr. Link and I live at the same hotel. The shooting took place this morning in the hall of the Kendall Hotel at Marvell. I walked by the door of Link's room and Link walked out and shot me. I had no weapon. I was unprepared for any fight. Mr. Link said nothing before he shot me with a pistol. I know of no reason why he would shoot me. I never threatened Mr. Link. He shot me with an automatic pistol. He fired only one shot. I make this statement as my dying statement in the presence of C. W.

Straub, F. F. Kitchens, Dr. J. B. Ellis, Mrs. O. M. Broods on this, the 30th day of March, 1935.

"Dr. W. F. Miller."

Mr. Kitchens, the sheriff of Phillips County, testified that he discussed the killing with appellant the day the crime was committed, and appellant told him that he shot Dr. Miller because he had been worrying him for some time, etc.

Appellant's first contention for reversal is that the testimony on behalf of the State was insufficient as a matter of law to support a verdict of manslaughter. The testimony above set out is amply sufficient, if believed by the jury, to support the verdict of manslaughter, and this suffices to dispose of appellant's first contention. The mere fact that the dying declaration of deceased was contradicted by other testimony affords no reason for us to interfere with the jury's verdict, as this presents only a conflict in the testimony which has been settled adversely to appellant's contention. *Blevins* v. *State,* 182 Ark. 109, 30 S. W. (2d) 851; *Arnett* v. *State,* 188 Ark. 1106, 70 S. W. (2d) 38.

Appellant next urges that the jury's verdict, to-wit: "We, the jury, find the defendant guilty of manslaughter, the penalty to be fixed by the court. [Signed] G. H. Vineyard, Foreman," is insufficient in law to support the consequent judgment entered thereon for voluntary manslaughter.

This exact contention was urged before this court in *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829, and we there disposed of the contention by saying: "The verdict did not designate the degree of manslaughter, or assess the punishment. The duty of fixing the penalty, devolved therefore upon the court. Mansf. Dig., § 2308. On conviction of murder the statute requires the degree of the offense to be found by the jury. Mansf. Dig., § 2284; *Thompson* v. *State,* 26 Ark. 323; *Ford* v. *State,* 34 *Id.* 602. It is not so as to manslaughter. It is only necessary that the court should have a certain guide to the intention of the jury. Verdicts receive a reasonable construction in order to reach the jury's meaning, and, when

that is found, they are enforced as though the intention was express. *Strawn* v. *State,* 14 Ark. 549. Viewing the verdict in this case in the light of the evidence and the court's charge, the conclusion is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution. A verdict of involuntary manslaughter would have been inappropriate to the evidence, and the jury would have been unmindful of their duty to have returned such a verdict. In the absence of an expression to the contrary, a presumption of an intention to violate a duty is not indulged against a juror more than any other officer. The evidence certainly warranted a verdict of murder in the first degree; that the jury did not intend to acquit is shown by the verdict. If it be conceded that the verdict ought not properly to have been for voluntary manslaughter, that affords no reason for indulging the presumption that the jury intended a greater wrong than they have expressed."

Viewing the verdict in the light of the testimony heretofore set out, the conclusion is irresistible that the jury intended a conviction of voluntary manslaughter.

It is unfortunate that a man of appellant's age, namely 85 years, is required to serve a term in the State penitentiary as retribution for a crime against the laws of the State, but such is the status of this record, and we have no alternative in the matter.

No error appearing, the judgment is affirmed.

McMORELLA *v.* BUCKNER STATE BANK.

4-3908

Opinion delivered June 17, 1935.

Ezra Garner, for appellant.

Joe L. Davis, for appellees.

BAKER, J. Miss Elizabeth McMorella appealed from a decree of the chancery court, foreclosing a mortgage on certain real property given to secure balance due upon a note in the sum of $2,800 with interest. The note sued upon was for $3,000, credited with $200. This note was for the aggregate amount of three former notes. The first of the three notes was for $1,076 for money borrowed from the bank for F. O. Hamm, the two others were later executed for the same purpose.

As we understand it, the following facts are disclosed: F. O. Hamm had a contract to build a highway from Waldo to Rosston. He arranged to get money from the Buckner State Bank in order to meet his payrolls as they came due from time to time. The details of the agreement made between him and the bank are immaterial, but William Owen, cashier of the bank, was made trustee, so that money borrowed from the bank was credited to his account as trustee, and he wrote checks on said account to pay Hamm's labor bills. Miss McMorella either became surety for or borrowed directly from the bank for the benefit of this fund. When this last note was made, time of payment was extended, and

the mortgage or deed of trust was given as security. The former notes fell due from time to time. They were not paid but renewed.

It appears that Hamm borrowed other money from the bank, not secured however by the signature or indorsement of Miss McMorella. Hamm was sued on the unsecured notes. Judgment was had. His teams and other property were sold, and proceeds were applied to payment of debts other than instruments here involved.

To the complaint filed by the appellees, Miss McMorella pleads (1) the lack of consideration or the failure thereof, and the consequent invalidity of the note and mortgage; (2) that her signature or indorsement on the note sued on, and the prior notes for which this was given as a renewal was induced by fraud of William Owen, the trustee and cashier of the bank.

She alleged, upon a plea of lack of consideration, that no part of the proceeds of the former notes was ever given to her or credited to her account, and that she received no benefit therefrom; and, further, that the debt was in existence at the time she executed the mortgage or deed of trust, and that there was no new consideration to uphold or support the said mortgage or deed of trust.

Upon the allegation of fraud, she alleges that Owen was the cashier of the bank, and that she signed the original notes upon his assurance and advice to her that the Highway Department would pay Hamm, and, when Hamm received the money, it would be held by him as trustee, and would be credited on Hamm's note, relieving her of responsibility therefor; that no part of the payments made by the Highway Department to Hamm on his contract was credited upon her notes, and that she was not advised of this fact for a considerable length of time after the completion of the contract by Hamm, and she had, up to a date near the time of the filing of this suit, believed that the notes had been paid according to the plan or scheme as had been explained by Mr. Owen as an inducement to her to execute the notes, the renewals thereof, and the giving of the security therefor.

It is unnecessary that we set forth with any degree of detail the evidence offered upon trial. Let it be sufficient to say that the appellant asserts that the original notes for which the note sued on is but a renewal were without consideration. If that statement were correct, it would follow, as she contends, that the renewal note is likewise unsupported by a consideration.

The first notes, however, were given to procure money for Hamm so that he might perform the contract, and the bank supplied the money for which the notes were executed. It may be true that she did not get the use of the money, but the money was, nevertheless, obtained from the bank, was the consideration for which the notes were given.

"A consideration has been defined to be 'a benefit accruing to him making the promise, or a loss or disadvantage undergone by him to whom it is made.' Ex parte *Hodges,* 24 Ark. 197; *Bell* v. *Greenwood,* 21 Ark. 249; *Johnson* v. *Walker,* 25 Ark. 196; *Brinkley Car Works & Mfg. Co.* v. *Farrell,* 72 Ark. 354, 90 S. W. 1174." The above was quoted from the case of *Phoenix Cement Sidewalk Co.* v. *Russellville W. & L. Co.,* 101 Ark. 22, 28, 140 S. W. 996. *Hays* v. *McGuirt,* 186 Ark. 702, 706, 55 S. W. (2d) 76.

It is further alleged that the mortgage given as security for payment of the note was without any consideration to support it. This renewal note extended the time of payment of the obligations it now represents. The consent of the bank to extend the time of payment of the obligation was a sufficient consideration to support the mortgage or deed of trust. The above citations support this rule. It seems to be universal.

The appellant, on the second proposition, that of the alleged fraud and promises on the part of Owen must fail for several reasons. One is, if proof of this kind were admissible, it does not prove a fraud. Whatever promises Owen may have made to her as set forth in this record, even if her statements be true, cannot avail her now as a defense.

It is unnecessary to discuss with any greater particularity the appellant's evidence offered as a defense.

This court decided practically every issue raised by the appellant in an opinion recently delivered. By changing dates, names of parties, amounts, and localities, the opinion in the case of *Richardson* v. *Merchants' Bank & Trust Co.,* 188 Ark. 1104, 69 S. W. (2d) 396, might well become the opinion in this matter. An examination of the case above cited must disclose that a large part of appellant's proof was incompetent, and her defense must fail.

The appellant pleaded the affirmative defenses of fraud and lack of consideration. The burden of proving these defenses devolved upon her. She failed to meet this burden. The decree of the chancellor is amply supported by the evidence.

Affirmed.

DOWELL *v.* STATE.

Crim. 3952

Opinion delivered September 23, 1935.

Glover & Glover, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. Appellant, Loy Dowell, was separately indicted by the grand jury of Hot Spring County for the crime of murder in the first degree for the alleged killing of Vernon, Macy, and James Ray, Jr. By consent of all parties, the indictments were consolidated for trial purposes, and subsequently he was convicted as charged in the indictments, and his punishment assessed by the jury at life imprisonment in the State Penitentiary. In obedience to the judgment of conviction, appellant was lodged in the State Penitentiary. Subsequently an appeal was perfected in this court, and we are now asked to remand him to the county jail of Hot Spring County pending his appeal which presents the first question for consideration.

Brown v. *State,* 154 Ark. 604, 243 S. W. 867, is cited and relied upon by appellant as supporting his contention in this behalf, and so it does, but must be overruled. *Brown* v. *State, supra,* either overlooks or ignores § 3418 of Crawford & Moses' Digest which provides in effect that when a judgment of conviction has been executed at the time or before the certificate of appeal is delivered to the sheriff of the county, such defendant should remain in the penitentiary pending his appeal. Appellant does

not contend that a certificate of appeal was served on the sheriff of Hot Spring County prior to his incarceration in the State Penitentiary. Therefore, under the plain mandate of the statute, he must remain in the penitentiary pending his appeal unless a bond be effected as required by law. Such is the status of appellant, and he must abide the statutory mandate. This court so expressly held in Ex parte *Lawrence,* 71 Ark. 54, 70 S. W. 470, and we now revert to its doctrine.

Appellant's principal contention for reversal on appeal is that the testimony adduced by the State is insufficient to support the conviction, and this makes it necessary to review the testimony at some length. On January 25, 1935, Vernon Ray, his wife, Macy Ray, and James Ray, Jr., his infant son, left their home in Hot Spring County to visit Rawford Ray, a brother of Vernon Ray, who resided at Dalark in Dallas County. On January 27, 1935, at about 3 o'clock P. M., Vernon Ray, his wife and child, departed from the home of Rawford Ray ostensibly to return to their home in Hot Spring County, and this was the last time either of them was seen alive. On February 19, 1935, the dead bodies of Vernon Ray and his wife and child were found in L'Eau Frais Creek in Hot Spring County some two and one-half miles from Rawford Ray's home and at a point immediately adjacent to the nearest and most practical route from Rawford Ray's home in Dallas County to the home of the deceased in Hot Spring County. All the bodies were in a high state of decomposition. Vernon Ray appeared to have been shot in the back of the head with a load of number 4 or 5 shot. James Ray, Jr., appeared to have been shot in the forehead with similar pellets. The head of the wife, Macy Ray, appeared to have been crushed by some blunt instrument. Appellant resided about three-quarters of a mile from the point where the bodies were found. A State witness, a Mr. Nix, testified that about 11 or 12 o'clock A. M., Sunday, January 27, 1935, he left his home, which is situated in that vicinity, to hunt hogs which were running at large in the bottoms of L'Eau Frais Creek, and that while returning home about 3 or 4 o'clock of that day he heard

a dog barking, a gun fired several times and human voices in the vicinity of the place where these dead bodies were subsequently discovered; that at the time of the shooting, witness was something like a quarter of a mile distant down the creek bottom; that he walked on up the creek to the point where the noise came from where he saw some person peering into the water of the creek, dressed with a corduroy cap upon his head, a brown hunting coat around his body and rubber boots and had a gun in his hands; that witness was some 35 steps distant from this party at the time and was of the opinion it was "Ole Brother Dowell" (the father of the appellant); that Loy Dowell's two dogs were with this party at the time. Subsequently to the discovery of the dead bodies, a yellow empty 16-gauge shotgun shell was found near the scene of the crime; some trees were found to have been pierced with shot; between the point where the empty shell was discovered and the trees which were pierced with shot the wadding from the shotgun shell was found which was red in color. This wadding showed that the shell contained number 4 shot. Appellant owned the only 16-gauge shotgun discoverable by the sheriff in that vicinity, and was likewise in possession of a corduroy cap, a brown hunting coat and rubber boots similar to those worn by the party seen by the witness Nix at the supposed scene of the crime. At the time of appellant's arrest his hunting coat contained yellow 16-gauge shotgun shells similar in color and identical in load and wadding with that found at the supposed scene of the crime.

The law is well settled in this State that a jury's verdict which rests solely upon speculation and conjecture will not be permitted to stand. *Jones* v. *State,* 85 Ark. 360, 108 S. W. 223; *Martin* v. *State,* 151 Ark. 365, 236 S. W. 274; *Adams* v. *State,* 173 Ark. 713, 293 S. W. 19; *Hogan* v. *State,* 170 Ark. 1143, 282 S. W. 984. On the other hand, this court, in testing the sufficiency of the testimony to support a jury's verdict, views such testimony in the light most favorable to the State. *Morgan* v. *State,* 189 Ark. 981; *Rhea* v. *State,* 104 Ark. 162, 147 S. W. 463. Moreover, circumstantial testimony is legal

and proper, and, when properly connected, furnishes a substantial basis and support for a jury's verdict. *State* v. *Jennings,* 10 Ark. 428; *Scott* v. *State,* 180 Ark. 408, 21 S. W. (2d) 186; *Taylor* v. *State,* 178 Ark. 1200, 10 S. W. (2d) 853.

The testimony adduced by the State against appellant, although circumstantial in character and not over convincing to all members of this court, is substantial and entirely sufficient to support the verdict. The mere fact that no motive for the crime was established and premeditation and deliberation were not made to affirmatively appear from the State's testimony, does not render the jury's verdict speculative. We expressly held in *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968, that the manner in which the killing was effected was a potent fact and circumstance tending to prove or disprove premeditation and deliberation. There can be no doubt that the one committing this murder did so with deliberation and premeditation. The deceased Vernon Ray was shot in the back of the head at close range; the child was also shot in the head; Macy Ray's head was crushed with some blunt instrument, and all the bodies were then thrown into the deep waters of L'Eau Frais Creek. These facts unerringly present all the earmarks of deliberation and premeditation on the part of the perpetrator of this crime.

Appellant next urges that the trial court erred in refusing his counsel the privilege of examining certain jurors on *voir dire* examination. This contention rests on the following:

Frank Carmack, a prospective juror, was asked the following question by Mr. Glover: "From what you have heard and what you have seen in the newspapers have you formed an opinion as to whether this defendant was guilty or innocent? (The juror did not understand, and the court asked this question): Q. Did you from what you read in the papers form an opinion as to whether this defendant was guilty or innocent? A. Only what I saw in the papers. If the evidence was the same and the evidence came out like that I would have an opinion. "Mr. Glover: You have that opinion now? A.

No, only what I read in the papers. Q. From what you read in the newspapers would it take evidence to remove that? Court: Mr. Glover, that question is improper. When the juror has stated that the only opinion he holds is based upon newspaper reports and current rumor and that he will lay aside that opinion and try the case as though he had never heard it spoken of, the court will not permit you to ask him if it would take testimony to remove the opinion. I want to treat you right, but you are going to have to abide by the rulings of this court, and I told you that you cannot ask that question. Mr. Glover: Save my exceptions. This man is on trial for his life, and I want to find out from this juror whether he is a fair juror, and, even though the court told me not to ask the question, I wanted to ask the question for the purpose of exercising my right or peremptory challenge. Court: The court will rule that the question was improper. Mr. Carmack, from what you read in the papers and from what you heard, did you form or express an opinion as to whether a crime was committed or not, and whether this man here committed the crime or not? A. According to the way I read it in the papers, I formed an opinion. Court: Did you form or express an opinion as to who committed the crime, and have you that opinion now? A. No, sir. Court: Have you any opinion as to whether or not this man charged here committed the crime? A. No, sir. Court: But you do have an opinion that a crime was committed by somebody? A. Yes, sir, that is all I know."

It will be noted from the proceedings quoted that the juror, Frank Carmack, expressly stated that he had no opinion based on newspaper reports in reference to the guilt or innocence of the appellant, but did have an opinion based on newspaper reports that a crime had been committed by some one. The juror was competent and qualified under previous opinions of this court, and no error is made to appear in this assignment. The quotation shows that the juror was minutely and closely questioned by the court in reference to his qualifications and no substantial right was denied appellant in this regard.

Error is also assigned in reference to the giving and refusing to give certain requested instructions. It would unduly extend this opinion to set out and discuss in detail all the instructions given and refused by the court. It must suffice to say that we have carefully read and considered all the instructions given and refused by the trial court to the jury in charge, and we are of the opinion that no error is made to appear from this contention.

Complaint is also made that the State was permitted to examine appellant on cross-examination with reference to other crimes committed by him previous to his trial. We have consistently held that, when a defendant in a criminal prosecution voluntarily becomes a witness in his own behalf, he thereby subjects himself to such cross-examination as may elicit facts or circumstances bearing upon his credibility, and the complaint here urged does not transcend this well-established rule. *Turner* v. *State,* 100 Ark. 199, 139 S. W. 1124; *Turner* v. *State,* 128 Ark. 565, 195 S. W. 5; *Smedley* v. *State,* 130 Ark. 149, 197 S. W. 275; *Kyles* v. *State,* 143 Ark. 419, 220 S. W. 458; *Pearrow* v. *State,* 146 Ark. 201, 225 S. W. 308; *Canada* v. *State,* 169 Ark. 221, 275 S. W. 327; *Curtis* v. *State,* 188 Ark. 36, 64 S. W. (2d) 86; *McGuire* v. *State,* 189 Ark. 503, 74 S. W. (2d) 215.

No error appearing, the judgment of conviction is affirmed.

GENTRY *v.* STATE.

Crim. 3937

Opinion delivered September 23, 1935.

John E. Miller and *C. E. Yingling,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

MEHAFFY, J. Appellant was indicted for murder in the first degree, and was convicted for murder in the second degree, and his punishment fixed at twenty-one years in the penitentiary. He prosecuted this appeal to reverse the judgment of the circuit court.

Homer Nuchols testified in substance that he was in Seaborn Hassell's store when the appellant shot Hassell and was standing about nine feet from Hassell. The store was lighted with electric lights; the shooting occurred between 7 and 7:30; the appellant walked in to Hassell's store and said: "Seaborn, I thought you were a man," and he said, "Mr. Gentry, I am." Mr. Gentry then pulled his pistol and started shooting, and Mr. Hassell was facing him with his hands over the counter when the first shot was fired. Witness cannot say how many shots were fired, but there were three or more; when the first shot was fired, Mr. Hassell staggered backwards, and when Mr. Gentry quit shooting, he turned and went out of the door. Witness thinks it was something like twenty minutes before the officers got there; did not hear appellant say anything as he went out of the store. Mr.

Aundry was the only person in the store at the time of the shooting. Witness had been there about ten minutes when the shooting started. He was on a seat in front of the store talking to Frank Rose, Charlie Ellis, Ellis Chrisp, Ive Turnbow and Mr. Rouse. Up to the time appellant said what he did to Hassell, there had not been anything unusual to attract attention. The first notice that witness had that there was going to be trouble was when Gentry pulled his pistol. He pulled it with his right hand, and his left side was facing witness. After the shooting, and before the officers got there, a good many people came in the store and went out.

Matt Aundry testified substantially the same as Nuchols.

Leonard Ward testified in substance that Gentry said after the shooting: "Son, I shot Seaborn Hassell," and witness asked if he killed him, and appellant said he did not know whether he did or not, but he tried to. Appellant also said: "This has been going on for quite a while, and I am just now finding it out." Witness did not ask appellant what he meant because he thought he knew.

L. M. Sowell, city marshal at Searcy, testified that after appellant's arrest, he asked if Hassell was dead, and when told that he was he said: "I done what I intended to do."

Dr. F. L. Purnell testified substantially that he was a physician practicing at Kensett; knows the appellant; that shortly before the killing he saw appellant at Kensett armed with a pistol which was sticking in the waistband of his trousers on the left-hand side.

Evelyn Gentry, daughter of appellant, testified that when appellant came home she told her father that Seaborn Hassell had taken her mother off; that her father did not say he would kill the man who took her off; that her father went down to Hassell's and in a moment or two she heard shooting. When her father came back, he told witness to call the sheriff, and appellant talked to him. Her father had only one pistol, and she did not know whether he carried it with him or not; did not know why her mother left.

Tom Taylor testified that he knew Seaborn Hassell owned a pistol six or eight months ago.

The appellant testified that he had known Seaborn Hassell over two years before he moved to Higginson, and until a short time before the killing they had been friendly. Appellant was operating a store 100 feet from Hassell's store on the same side of the street. Appellant then testified about going to Augusta, and that he was armed at that time with a 32 automatic pistol; that he had some money with him and carried the pistol with him like he had on several occasions. When he got back home that night, he did not know that his wife had left until his daughter Evelyn told him. He did not make the statement in the presence of Ellis Chrisp that he would kill the man that took his wife away from Higginson. When his little daughter told him that his wife was gone, he thought he would go down and ask Seaborn where he carried her to. He had had a conversation with Seaborn on Friday morning before the killing about what Hassell had been telling appellant's wife and causing his wife to leave him. He testified that Hassell said: "By God, I am a man and can attend to my business, and you attend to yours." He had no further conversation with Hassell until the night of the killing. He went into Hassell's store and said: "Seaborn, I thought you was a man." He had reference to the conversation he had had with Hassell before. Hassell was standing behind the counter. Witness knew that Hassell owned a pistol and knew that Hassell kept it in a drawer of the showcase at the place where he was standing and he was standing there with his arm on top of the showcase when he said what he did. Hassell started backing away and moving his hands down by the showcase, and appellant thought he was reaching for a pistol. Appellant pulled out his pistol and shot him. He did not go there to kill him, but shot him to protect himself. He testified about telling his little girl to call the sheriff and about their conversation. He did not tell Mr. Ward that he aimed to kill Seaborn Hassell, but told him he hated to have to shoot him. He did not say in the presence of Mr. Sowell that he had done what he aimed to, but said

he had done what he had to. He testified that his wife left him in January, 1934, and went to Conway and was gone about six weeks. When he came home and found his wife gone, he did not know where she had gone and went to Hassell's store to ask him where he had carried her. He was six or seven feet from Hassell when he shot him; did not know how many times he shot him; he had an idea from previous conversations and his actions that Hassell was going to try to kill him.

Thelma Hassell testifying in rebuttal: said that there were no fire-arms in the store at the time her brother was killed; he had no pistol whatsoever, and had not had for several months.

T. C. Plant, the sheriff, testified that he made an examination of the bullet holes and thinks there were three; they were a little lower down on the wall than even with the showcase, probably six or eight inches lower, and appeared to range a little downward.

Appellant's first contention is that the case should be reversed because of the action of the court in excusing juror J. M. Blaylock. When Blaylock was called as a juror he was asked the following question by appellant's attorney: "You have no such conscientious scruples against inflicting the death penalty that you couldn't return a verdict of that kind?" Answer: "If it was straight enough." This juror testified also that if the evidence convinced his mind beyond a reasonable doubt he would return a verdict of guilty, notwithstanding it would carry the death penalty. He also stated: "There couldn't be any circumstantial evidence at all, it would have to be plumb straight." This examination of Blaylock occurred while the special judge, Armitage, was presiding, and the regular judge asked Judge Armitage to dictate into the record the questions asked the juror Blaylock.

Juror W. M. Moye was also excused by the court as being disqualified. The examination of this juror was practically the same as that of Blaylock. He testified that he would go by the evidence and that he did not know whether it would take a greater weight of evidence

in a capital case than any other kind. He testified that he did not believe in capital punishment.

This court said: "At times, too, improper persons, unsuited for jurors, endeavor to worm themselves upon the jury. As the trial judge has the juror before him, he can observe his manner and bearing, can note the amount of intelligence he displays, and judge his capacity for jury service, and whether he will be influenced by the opinion he has formed, or be able to disregard it. 'In such cases,' says Chief Justice Waite, 'the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than words. That is seen below, but cannot always be spread upon the record. Care should therefore be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.' 'The finding of the trial court upon that issue,' he says, 'ought not to be set aside by a reviewing court, unless the error is manifest.' " *Hardin* v. *State*, 66 Ark. 53, 48 S. W. 904; *Sullins* v. *State*, 79 Ark. 127, 95 S. W. 159.

"Without attaching any great importance to knowledge that was in the breast of the court and not developed in the examination, we remark that the presiding judge, who has an opportunity to observe the appearance and demeanor of jurors, must of necessity be invested with a large measure of judicial discretion in passing upon their qualifications. And the erroneous rejection of one who is summoned for jury service lays no sufficient foundation for a new trial." *Maclin* v. *State*, 44 Ark. 115.

"A large measure of jurisdictional discretion must be allowed the trial court in passing upon the qualification of jurors and ascertaining the state of mind of the jurors under examination affecting their competency." *Maroney* v. *State*, 177 Ark. 355, 6 S. W. (2d) 299; *Jackson* v. *State*, 103 Ark. 21, 145 S. W. 559.

Under our law and procedure, in the trial of questions of fact the jury's finding is conclusive where based on substantial evidence. One reason is that the jury sees the witnesses and is able to judge by their manner of testifying and their demeanor on the stand the weight of their testimony better than the appellate court. The

same reason applies to the examination of jurors by the judge. He sees the juror, hears his testimony, observes his demeanor, and is better able to judge of his competency than this court, and he has large discretion, and, unless it is manifest that there is an abuse of discretion, this court will not reverse the finding of the trial court.

It is next contended by the appellant that the court erred in holding that juror G. L. Lofton was not disqualified. This juror stated that he had served upon a jury in the circuit court of White County within the past two years, but he expressly stated that it was not on the regular jury, but that he was called in a special case. Appellant contends that, under the plain provisions of act 135 of the Acts of 1931, as construed by this court, the juror Lofton was disqualified and should have been excused. The act provides that no citizen shall be eligible to serve on either grand or petit jury oftener than one regular term of the circuit court every two years. This juror had not served on the jury at any regular term within two years. He was therefore not disqualified to serve.

The appellant, however, calls attention to the case of *Beavers* v. *State,* 187 Ark. 722, 61 S. W. (2d) 1113. The opinion in that case states: "Each of these three citizens had served on the petit and grand juries of their county within two years." The court also said in the above case that it was thought by the trial court that the act above copied made jurors ineligible to serve on the regular panel if they had served on the regular panel in the circuit court within less than two years, but that it did not render them ineligible to serve as special jurors. We said that this act applied to special jurors as well as members of the regular panel. That is, if a juror has served on the regular panel within two years, he cannot serve either as a member of the regular panel or as a special juror. The act does not prohibit or make ineligible a juror unless he had served on the regular panel within two years.

Appellant also calls attention to *Hampton* v. *State,* 187 Ark. 869, 63 S. W. (2d) 277. In that case the court said: "It is not service as a special juror which dis-

qualifies. The person rendered ineligible under the act of 1931 is one who has served on a grand or petit jury during the regular term of court."

This court decided this question after the decisions in the two cases referred to by appellant, and the court said: "Again, it is insisted that the trial court erred in holding Charles Pumphrey a competent juror to serve on this case. This contention arose under the following circumstances: Charles Pumphrey admitted on examination as a prospective juror that he had served as a juror at a murder trial in the same court within 60 days last past. Services as a special juror within two years does not disqualify a juror to serve on the regular panel. This question was decided adversely to appellant's contention in the case of *Hampton* v. *State,* 187 Ark. 869, 63 S. W. (2d) 277." *Banks* v. *State,* 187 Ark. 962, 63 S. W. (2d) 518.

It will be observed that this court has passed on this question, and has held that serving as special juror does not disqualify one from serving within two years. If one has served on the regular panel within two years, he is then ineligible to serve either as a special juror or on the regular panel.

Appellant next contends that the court erred in giving instruction No. 1, which is as follows:

"You are instructed that words which even amount to abuse and which are violent in their nature cannot justify an assault; and if you find from the testimony in this case that the defendant provoked the deceased by word or act to use violent or abusive language towards him for the purpose of bringing on a difficulty, and that when the deceased used such words that the defendant did assault the deceased and continued in his hostile demonstrations towards the deceased, and voluntarily pursued him and finally slew him in the combat voluntarily brought on by the defendant, even though the deceased fought a mutual fight with the defendant, until the defendant struck the blow that caused the death of the deceased."

Appellant calls attention to the case of *Lomax* v. *State,* 165 Ark. 386, 264 S. W. 823. The court in that

case said that there was no evidence upon which to predicate the instruction. The appellant himself testified in this case that, before the time of the killing, he had a conversation with Hassell about what the deceased had been telling his wife and causing trouble, and that deceased said to him: "By God, I am a man and can attend to my business, and you attend to yours." And when he went to Hassell's store at the time of the killing the first thing appellant said, according to his own testimony, was: "Seaborn, I thought you was a man." There was some other testimony about Hassell taking Gentry's wife away, and we therefore do not think that the instruction was prejudicial. Certainly the difficulty at the time of the killing was brought on by the appellant, at least according to all of the witnesses except the appellant himself.

We have carefully considered all the instructions given by the court, and, when considered as a whole, which must be done, we do not think that the jury could have been misled or that the appellant was in any way prejudiced by the court's giving this instruction.

Appellant next contends for reversal because of the argument made by the prosecuting attorney. The prosecuting attorney stated: "Gentlemen of the jury, you see this vast throng of people here; they are not here out of idle curiosity to witness this trial; they are here through a feeling of insecurity and because of the rumbling all over this county that men fear their security and the security of their homes."

The record does show that the prosecuting attorney in his closing argument made the following remarks: "Why are all these people here? They came here to see if the law can be enforced; and I want to know and they want to know if property can be stolen and no explanation offered and a man go scot free." The court in commenting on the remark set out above, said: "The remarks were but the expression of the opinion of the prosecuting attorney. They were not calculated to influence a jury of sensible men to disregard the oath they had taken to try the cause according to the law and the evidence and a true verdict render." *Blackshare* v. *State*,

94 Ark. 548, 128 S. W. 549; *Crow* v. *State,* 190 Ark. 222, 79 S. W. (2d) 73.

The appellant in this case objected to the remarks of the prosecuting attorney, and his objection was at the time overruled, but, after the argument of counsel for both sides, the court instructed the jury as follows:

"Gentlemen of the jury, this morning in the argument of counsel for the State, in the closing argument of Mr. Brundidge, certain remarks were made that the defendant excepted to, about the crowd being here, and that they were here, not out of curiosity, and about the rumbling over the county, and so on, the court instructs you not to consider that. All you are to consider is the evidence in the case and the law as given to you by the court."

In the first place, under the authority of the case of *Blackshare* v. *State, supra,* there was no error in the court's permitting the argument for the State, but, if it had been improper argument, the jury was told by the court in an instruction that they were to consider the evidence in the case and the law as given to them by the court, and instructed them specifically not to consider the argument made by the State's attorney.

There was ample evidence to justify the verdict. We find no reversible error, and the judgment is affirmed.

CARRAWAY *v.* PHIPPS.

4-3949

Opinion delivered September 30, 1935.

W. A. Jackson, for appellant.

O. C. Blackford, for appellee.

JOHNSON, C. J. This action was instituted by appellee, Phipps, against appellants, Carraway and Harrell, in a justice of the peace court in Lawrence County, where the trial resulted in a judgment in favor of appellee. Appellants prosecuted an appeal to the circuit court of said county, where the trial resulted in another judgment adverse to appellants, and this appeal is prosecuted for relief therefrom, which must be denied. The suit is predicated upon a laborer's contract of hire entered into by appellee with appellant, Carraway, on April 21, 1934. This contract in effect was that appellee would assist Carraway in making his crop in 1934, for which services Carraway agreed to give appellee one 500-pound bale of lint cotton. Appellee performed his contract of hire with Carraway, but Carraway was unable to deliver the bale of cotton as agreed because on February 19, 1934, Carraway executed and delivered to appellant, Harrell, a mortgage upon the entire crop to be produced in the year 1934, which was immediately filed of record, and when the crop was gathered the mortgagee took possession of the entire crop, including the bale of cotton claimed by appellee which was sold and the proceeds converted. The testimony is not in material conflict, and presents only the question of law, is a crop mortgage which is prior in point of time superior to a laborer's lien as created by the statutes of this State?

In *Watson* v. *May,* 62 Ark. 435, 35 S. W. 1108, we expressly held that, under what is now § 6848 of Crawford & Moses' Digest, a laborer's lien created thereby was superior and paramount to a mortgage filed prior in point of time. This opinion was written in application to facts which accrued prior to act March 11, 1895, p. 39, therefore this latter act was not construed or discussed in the opinion. Appellant's contention on this appeal is that what is now § 6848 of Crawford & Moses' Digest and which is a part of the act of 1868 was im-

pliedly repealed by what is now § 6864 or a section of act March 11, 1895, and for this reason *Watson* v. *May, supra,* has no controlling effect upon the facts presented in this record. Was § 6848 repealed by § 6864?

Repeals by implication are not favored, and exist only where there is an invincible repugnancy. *Baker* v. *Hill,* 180 Ark. 387, 21 S. W. (2d) 867; *Massey* v. *State,* 168 Ark. 174, 269 S. W. 567; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; *State* v. *White,* 170 Ark. 880, 281 S. W. 678.

From a careful comparison of the language of the two sections, it is apparent there is no invincible repugnancy or conflict between them.

Section 6848 gives an absolute lien to laborers under contract upon the product of their labor, whereas § 6864 gives a lien to laborers upon "any object, thing, material or property, etc." In other words, § 6848 gives an absolute lien upon the product of labor and § 6864 extends such lien so as to give a lien upon all objects, property and other things already in existence but which are worked upon or improved by such labor. This court many years ago announced the rule that statutory liens, which came into existence coeval with inception of production are superior and paramount to contractual liens, although such contractual liens were created prior in point of time. See *Myer* v. *Bloom,* 37 Ark. 43; *Roth* v. *Williams,* 45 Ark. 447; *Buck* v. *Lee,* 36 Ark. 525. Although the cases last cited and referred to apply only to statutory liens of landlords, they state sound principles of law, and we know of no good reason to deny their application to the facts of this record. The circuit court's views, conforming to these here expressed, should be approved, and the judgment is therefore affirmed.

BOONE COUNTY *v.* SKINNER-KENNEDY STATIONERY COMPANY.

4-3951

Opinion delivered September 30, 1935.

Robert B. Gaston, for appellant.

J. M. Shinn, for appellee.

SMITH, J. Appellee filed a claim against Boone County on February 14, 1930, which does not appear to have been passed upon until January 4, 1932, at which time it was disallowed by the county court. An indorsement on the claim indicates that this action of the county court was taken "On account of no funds." The claim was for supplies furnished the county in the years 1925 to 1930, inclusive. On appeal to the circuit court the claim was allowed in full.

It is now insisted that, so much of the claim as covered supplies furnished during the years 1925 and 1926, was barred by the statute of limitations at the time it was filed. "That the statute of limitations runs in favor of counties against their ordinary indebtedness is the rule in this State." *Crudup* v. *Ramsey,* 54 Ark. 168, 15 S. W. 458.

In answer to this insistence, it is said that the record fails to disclose that the county pleaded the statute of limitations at the trial from which this appeal comes. But it is to be remembered that there were no pleadings in this case except the statement of the account itself. No pleadings were required on the part of the county, and none were filed. It appears, from the face of the account itself, that the statute had run against the items sold to the county during the years 1925 and 1926. It was not a running account; there were no credits whatever on it.

It was held in the early case of *McGehee* v. *Blackwell,* 28 Ark. 27, that, if the complaint shows on its face that the action is barred, the defense of limitations may be set up either by demurrer or answer; but, if the complaint shows on its face that the cause of action is not barred, when in fact it is barred, the defense can be made only by way of answer. That practice has been reaffirmed and followed in all such cases which have since arisen.

It is uniformly held that the defense of the statute of limitations is waived unless pleaded, and that limitations must be pleaded by demurrer or answer. *Shirey* v. *Clark,* 72 Ark. 539, 81 S. W. 1057.

But, as has been said, there were no written pleadings in this case, and none were required, and our attention is now called to the account which forms the basis of the action, from the face of which it appears that a portion thereof is barred by the statute of limitations.

We hold therefore that so much of the account as covers items furnished to the county during the years 1925 and 1926 is barred by the statute of limitations, and that there can be no recovery except for the items furnished thereafter.

It is insisted on behalf of the county that there can be no recovery for any part of the account, for the reason that it was not made to appear that the account could be paid without exceeding the revenues of the county in the respective years during which the items were furnished. Our attention is called to the judgment of the county court, which disallowed the account in its entirety "On account of no funds," but on the appeal to the cir-

cuit court the cause was tried *de novo,* and the defense that the account could not be paid without violating the 10th Amendment to the Constitution was an affirmative defense, to sustain which no testimony was offered. The finding of the county court, even though sustained by the testimony, that the account was not paid through lack of funds, would not defeat the allowance of the claim if it were otherwise proper to allow it. The 10th Amendment does not require that the counties pay in cash. They may make valid contracts, even though they have no cash. The inhibition of the amendment is against incurring obligations in a fiscal year in excess of the revenues of that year. A county may therefore incur obligations which cannot be paid in cash, because the county has no cash in its treasury, provided the total obligations incurred are not in excess of total revenues received in that fiscal year. *Miller* v. *State use Woodruff County,* 176 Ark. 889, 1 S. W. (2d) 998.

The judgment of the circuit court will therefore be affirmed except as to the items furnished during the years 1925 and 1926, which appear from the face of the account itself to be barred. As thus modified, the judgment will be affirmed. It is so ordered.

McHaney and Butler, JJ., dissent from the modification.

Jones *v.* State.

Crim. 3957

Opinion delivered September 30, 1935.

Dewey Glass, W. N. Ivie and *Charles W. Ivie,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

HUMPHREYS, J. Appellant, Silas Jones, was indicted in the circuit court of Madison County for murder in the first degree for shooting and killing Earl Petree near the town of St. Paul in said county. He was tried in said court upon the charge on the 19th day of April, 1935, which resulted in a conviction for manslaughter, and, as a punishment for the crime, was adjudged to serve a term of five years in the State penitentiary, from which is this appeal.

The first assignment of error argued for a reversal of the judgment is that the court instructed the jury upon the law of murder in the first and second degrees without any substantial evidence upon which to base the instructions, and this instruction, being abstract, resulted in prejudice to appellant's rights. There is no merit in this contention. Appellant admitted the killing on the trial of the cause, and claimed that he had to in necessary self-defense. Appellant shot deceased through the body and head with a seven-shot .22 cal. pistol on the highway leading to St. Paul while deceased was hauling a load of ties into town. Bad feeling existed between appellant and deceased. They had had several quarrels and altercations covering a period of several months prior to the killing. Some time in the morning before the killing early in the afternoon, appellant armed himself with the loaded pistol and went to St. Paul as he stated for the purpose of getting some groceries for his uncle. He remained in town

until noon or a little after and during the time refused to go swimming with some friends who requested him to do so, stating to them he had some unfinished business to attend to. Near noon, he got his groceries and put them in John Burnett's wagon to take to his uncle. Burnett stopped to water his team, and, while doing so, appellant passed him saying he would walk on up the road. After Burnett had driven a considerable distance, appellant came back and met him and told him he was compelled to kill a man up the road. He did not say whom he had killed or make any further explanation to Burnett. Appellant turned and walked along by the wagon as far as the hill or mountain but, before reaching the place where deceased was lying, he left the wagon and road and hastily went up the hill into the woods. Burnett drove on and did not stop to view the body. After Burnett passed the body and had driven two or three hundred yards, appellant came off the mountain to the road and got in the wagon, and, after Burnett had driven about two miles, they were overtaken by officers and searched. The officers required them to hold up their hands during the search, and, when he started to search appellant, he, appellant, admitted having a .22 cal. pistol, saying he had shot the deceased with it, and did not intend to fight the law or anything.

William Langley testified that he was one-fourth of a mile south of where the killing occurred when the shots were fired, three in number, and, looking in that direction, saw a man run toward a team headed west and stop it. After doing so, the man proceeded west until he met a wagon going east but turned and followed the wagon, and before reaching the scene of the tragedy turned up the mountain and came down the mountain some two or three hundred yards east and got in the wagon.

Alvin Holiday testified that he was in a field about one-eighth of a mile from where the killing occurred, and that his attention was attracted by the firing of three shots; that he observed appellant stop a team that was headed west, and then go on himself toward St. Paul until he met a wagon going east; that he turned and followed

the wagon for a few minutes, and then took up the hill through the woods.

Certain witnesses were permitted, over the objection of appellant, to testify that they made a search of the place where the deceased was shot a week after the occurrence and found a bullet which was produced buried a small distance in the ground where deceased's head rested after being shot.

The ball that passed through appellant's head entered his forehead and came out through the back of his head.

The record reflects that deceased was unarmed at the time he was shot.

The testimony detailed above was sufficient from which a reasonable inference might be drawn that appellant killed deceased with malice aforethought, premeditation and deliberation, so the court was warranted in instructing the jury as to the law of murder in both the first and second degrees as well as manslaughter.

The next assignment of error argued for a reversal of the judgment is that the court refused to give appellant's requested instruction relative to the character of circumstantial evidence necessary to warrant a conviction. The requested instruction is as follows:

"The court instructs the jury that circumstantial evidence is legal evidence, and that one may be convicted upon circumstantial evidence as well as direct proof. Where the State relies upon circumstantial evidence alone for a conviction, as in this case, it is not enough that the circumstances point to, and are consistent with, the defendant's guilt; but they must point to his guilt in such a way that they cannot reasonably be true in the ordinary nature of things, and the defendant be innocent."

The instruction was incorrect and properly refused because the State did not rely upon circumstantial evidence alone for a conviction. The requested instruction was abstract in this particular, and the court did not err in refusing to give it.

The next assignment of error argued for a reversal of the judgment is that the court erred in refusing to give his requested instruction No. 1 to the effect that, before a confession of one charged with crime is admissible in evidence against him, it must appear that it was voluntarily made without anybody holding out any hope of reward or leniency or fear of punishment for not doing so. Appellant not only made a confession when arrested that he killed the deceased, but in the trial admitted the killing and testified to all the facts relative thereto that were contained in his confession. The record reflects without dispute that the confession was voluntarily made. The court required the officer to whom the confession was made to state the same in its entirety before the testimony was closed, so there is no merit in appellant's argument that at first the court did not require the officer to testify to the confession in its entirety.

The next and last assignment of error argued for a reversal of the judgment is that the court erred in the admission of testimony to the effect that one week after the killing a bullet was found in the ground where deceased's head rested when discovered after he was killed. Appellant's pistol with which he killed the deceased had been introduced in evidence in the condition it was when the officer took it from him. The cartridges were removed from the pistol and also introduced in evidence. It is argued that, because it was not positively shown that it was the bullet that had been fired from appellant's pistol, it was improper to admit it in evidence. The place it was found, the kind and character of the bullet, and the pistol itself being present, made it possible for the jury by comparison to determine whether the bullet had been fired from appellant's pistol, and was competent testimony for that purpose. The mere fact that the bullet had been found a week after the killing did not render its introduction inadmissible. This fact was a circumstance for the jury to consider in weighing the evidence. The parties who found it testified to having done so, and the manner and kind of search they made for it. It became a question for the jury to say under

these circumstances whether it had been fired by appellant through the head of deceased or whether it had been deposited in the ground after the killing by some interested party.

No error appearing, the judgment is affirmed.

[redacted]

BUTCHER *v.* MARTIN.

4-3953

Opinion delivered September 30, 1935.

[redacted]

G. W. Botts, for appellant.

Peyton Moncrief, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Arkansas County to recover damages in the sum of $309.36, growing out of the sale and purchase of six oxen, and recovered judgment for $130, from which is this appeal.

Evidence was introduced in the trial of the cause to the jury pro and con upon the issue of whether appellant misrepresented the facts to appellee regarding the condition of the cattle and whether appellant concealed the fact from appellee that the cattle were under quarantine at the time and could not be moved.

The record reflects without dispute that on account of high water, appellant brought the oxen out of Desha County, an infected district, to a point near Gillett in Arkansas County, which was a free county or one not infected; that O. J. Hall, an employee of the Government Bureau for the Eradication of Ticks, upon their arrival, procured a warrant against appellant for a violation of the law in transporting the cattle from Desha

County to Arkansas County and procured his conviction for doing so; that appellant was fined $50 for the offense, and that the cattle were placed in quarantine and that appellant was ordered not to move them except back to Desha County by the same route he had brought them into Arkansas County; that, while they were in quarantine, the cattle were sprayed twice by O. P. Hall or his employees; that Hall gave appellant permission to sell the cattle but restricted their removal except back to Desha County; that apparently the cattle were sound and in good condition.

Appellant sold them on the night of June 29, 1928, to appellee for $490 and received a check in payment for them, which was cashed the following morning. Appellee brought the cattle from the pasture or place at which they were in quarantine to Gillett for shipment to the St. Louis market, and put them in the stock pen when they arrived in Gillett at 11 o'clock, A. M. O. P. Hall, the government agent, ordered appellee to return them to the pasture where he got them and refused to allow him to ship them; whereupon appellee attempted to stop the payment of the check and, failing to do so, attempted to bring the cattle back and get his money, but appellant refused to receive them and appellee put them in the pasture, where two of them died within two days and a third later on. In the fall, he drove the other three back to Dumas in Desha County, and shipped them from that point to the market and sold them.

Appellee testified that he purchased the cattle from appellant for immediate shipment by rail from Gillett to the market, and was not told by either O. P. Hall or appellant that the cattle were in quarantine and could not be moved except south into Desha County, and that the first he knew of the condition of the cattle was when Hall forbade him at the stock pen to ship them, and required him to place them back in quarantine.

Both Hall and appellant testified that they told appellee before he bought them that the cattle were in quarantine, and could not be moved except back to Desha County by the same route they had been brought into Arkansas County.

Based on this conflict in the evidence, the court submitted, under a correct instruction, the issue to the jury of whether appellee was deceived and defrauded, or whether he knew at the time of the purchase the cattle were in quarantine and could not be shipped out to the market from Gillett.

The jury found the issue against appellant.

Appellant contends for a reversal of the judgment on the ground that in the sale of chattels, where there is no express or implied warranty, the rule of *caveat emptor* applies. The cases cited by appellant in support of this general rule have no application in the instant case, because the issue submitted to the jury was one of deceit and fraud.

No error appearing, the judgment is affirmed.

RUSSWURM *v.* HELENA.

Crim. 3961

Opinion delivered September 30, 1935.

Jo M. Walker, for appellants.

C. L. Polk, Jr., for appellee.

MEHAFFY, J. This is the third appeal in this case. The decision on the first appeal is *Helena* v. *Russwurm,* 188 Ark. 968, 68 S. W. (2d) 1009, and the opinion on the second appeal is *Helena* v. *Russwurm,* 190 Ark. 601, 79 S. W. (2d) 993.

When the case was here on first appeal, it was decided that the ordinance involved in the suit had not been repealed by subsequent ordinances, and that the effective ordinance of the city of Helena imposed upon

all persons practicing the professions of physicians and surgeons or dentists an annual occupation tax of $50.

When the case was here on second appeal, this court stated in effect that the provision of the Constitution with respect to uniformity applies only to property tax, and has no reference to the taxation of privileges, and that the only restriction which the law imposes upon the exercise of the power is that there shall not be a discrimination between persons in like circumstances, and pursuing the same class of occupation. The court further said: "But the question presented to us is that of power, and not that of expediency. The fact that the tax in the city of Helena exceeded that imposed upon similar occupations in other cities even larger is not one which will control our determination of its validity."

The court also quoted with approval the following: "It has therefore been held that the only limitation on license taxation seems to be that it must not be so unreasonable as to show a purpose to prohibit a business which is not in itself injurious to public health or morals. * * * Whether a license tax is prohibitory is primarily a legislative question."

There is no additional evidence in the case tending to show that the ordinance was discriminatory. We do not deem it necessary to restate the facts, and the former decisions are the law of this case. *Postal Tel. & Cable Co.* v. *White,* 190 Ark. 365; *Bankers' Reserve Life Co.* v. *Harper,* 188 Ark. 81, 64 S. W. (2d) 327; *Dodd* v. *Gower,* 188 Ark. 958, 68 S. W. (2d) 463; *Amer. Ry. Express Co.* v. *Cole,* 185 Ark. 532, 48 S. W. (2d) 223; *Milsap* v. *Holland,* 186 Ark. 895, 56 S. W. (2d) 578; *Ark. Bapt. College* v. *Dodge,* 189 Ark. 592, 74 S. W. (2d) 645.

The facts and the law as declared by this court will be found in the decisions on the former appeals referred to above.

This case is controlled by the decisions in the former appeals, and must therefore be affirmed.

PULASKI COUNTY *v.* CAPLE.

4-3958

Opinion delivered September 30, 1935.

[redacted]

Trieber & Lasley, for appellant.

Donham & Fulk, for appellees.

MEHAFFY, J. Appellee Charles E. Caple, deputy county clerk, filed his claim in the county court of Pulaski County for $245 which he alleged was the balance due him on his salary as deputy county clerk from January 1, 1934, to August 31, 1934.

E. L. Tipton, appellee, filed his claim in the county court for the sum of $200, alleging that this was the balance due him on his salary as deputy sheriff. Both claims were disallowed by the county court and appeals prosecuted to the circuit court. The cases were consolidated and tried together, and the circuit court found in favor of appellees, allowing their claims for balance of salaries, and the case is here on appeal.

The following stipulation was filed by the parties:

"It is agreed between the parties that the emoluments of the county clerk's office is more than sufficient to pay the salaries and expenses of the office as provided by act 275 of the Acts of 1933; it is also agreed that the emoluments of the sheriff's office for the year 1934

is more than sufficient to pay the salaries and expense of the office as provided by act 275 of the Acts of 1933.

"It is further stipulated and agreed that there were no more deputies and clerks employed in either the county clerk's office or the sheriff and collector's office than the maximum number permitted by act 275 of the Acts of 1933 as listed in said act.

"The county admits that the claimant Caple acted as deputy county clerk, and performed the duties as such, and that the claimant Tipton acted as deputy sheriff and performed the duties as such, but will not admit that either was legally appointed."

The appellees claim the right to salaries under the provisions of act 275 of the Acts of 1933. The title of that act is "An Act to Provide More Efficient County Government, to Fix the Salaries of Various County Officers, and for Other Purposes."

Section 2 of said act provides: "The salaries of the following officers, together with the number of the deputies, employees and assistants they may appoint except as otherwise herein provided, and the salaries thereof, are as follows:" Then follows the list of the officers, deputies and their salaries. Under the provisions of that act Caple's salary was fixed at $2,400 and Tipton's salary was fixed at $1,680.

Section 4 of the above act reads as follows: "None of the deputies, assistants or employees provided for in this act shall be appointed or employed by any county officer or be allowed or paid any salary until and unless the levying court of the respective county shall have made appropriations to pay their respective salaries."

It is contended by the appellant that under § 4 the quorum court had the right to make the appropriation for the number of deputies it thought necessary and to make the appropriation for salaries of the deputies, and had a right to fix the salaries at a sum less than that fixed by the act of the Legislature, and that since the appellees have received the amounts fixed by the quorum court, appellees are not entitled to any additional sum.

The appellees contend that § 4 of the act is unconstitutional; that under the Constitution the Legislature

must fix the number of deputies and the amount to be paid each, and that it cannot delegate to the quorum court the right to fix the number of deputies or the amounts to be paid them.

The claim of appellee Caple is for $245, the difference between the $1,600, the statutory salary for eight months of 1934, and the sum of $1,355, the amount actually paid him.

The claim of appellee Tipton is for $200, the difference between $1,120, the statutory salary for eight months of 1934, and the sum of $920, the amount actually paid him.

Appellants state: "It is not necessary in this case to undertake to make a complete and detailed abstract of the testimony because the court made findings of fact covering all the facts in the case, and no exceptions were taken to these findings by either party. Therefore for the purposes of this appeal, the findings of the court are conclusive and sufficient." The findings of fact by the court are as follows:

"1. The court finds that the record of the minutes of the meeting of the Pulaski County Quorum Court held in January, 1934, for the purpose of making appropriations for general county purposes of Pulaski County shows that the appropriation for the maintenance and operation of the county clerk's office of said county for the year of 1934 was itemized as follows: Salaries $16,500, postage $350, stationery and supplies $200, equipment $6,000, total $23,050.

"2. The court finds that the record of the minutes of the meeting of the Pulaski County Quorum Court held in January, 1934, for the purpose of making appropriations for general county purposes of Pulaski County shows that the appropriation for the maintenance and operation of the sheriff and collector's office of said county for the year of 1934 was itemized as follows: $44,000 salaries special, $2,000, postage $1,500, equipment $1,000, miscellaneous stationery and printing $300, telephone and telegraph and return of prisoners $2,500, cars and repairs $5,000, total $56,300.

"3. The court finds that at its meeting in November, 1934, the Pulaski County Quorum Court entered an order itemizing the appropriation made at its meeting in January, 1934, for the maintenance and operation of the county clerk's office of said county for the year 1934 as follows: Salary of county clerk $4,000, salary of one chief deputy $2,400, four deputies each $1,800, one deputy $1,740, one deputy for eight months at $145 per month $1,160, postage $350, stationery and supplies $200, equipment $6,000, total $23,650.

"4. The court finds that at its meeting in November, 1934, the Pulaski County Quorum Court entered an order itemizing the appropriation made at its meeting in January, 1934, for the maintenance and operation of the sheriff and collector's office of said county for the year of 1934 as follows: Sheriff's salary $5,000, two chief deputies, at $2,700 each, $5,400, one stenographer $1,200, one jailer $1,440, two assistant jailers at $1,200 each $2,400, six deputy collectors at $1,680 each $10,080, three deputies for two months at $140 each per month $840, one execution deputy $1,680, nine deputy sheriffs at $1,680 each $15,120, one deputy sheriff for six months at $140 per month $840, salaries of extra help $2,000, postage $1,500, equipment $1,000, miscellaneous stationery and supplies $300, telephone, telegraph and returning prisoners $2,500, automobile expense and repairs $4,140, total $55,440.

"5. The court finds that the clerk of Pulaski County, prior to the meeting of the quorum court in January, 1934, for the purpose of making appropriations for the maintenance and operation of the several officers of the county, had employed the number of deputies at the salaries provided for the office of the county clerk of said county by § 2 of act 275 of the General Assembly of the State of Arkansas for the year 1933.

"6. The court finds that the sheriff and collector of Pulaski County, prior to the meeting of the quorum court in January, 1934, for the purpose of making appropriations for the maintenance and operation of the several offices of the county, had employed the number of deputies at the salaries provided for the office of sheriff

and collector of said county by § 2 of act 275 of the General Assembly of the State of Arkansas for the year 1933.

"7. After the meeting of the quorum court in January, 1934, the county clerk did not discharge any of the deputies theretofore employed by him and permitted under said § 2 of said act 275, but proportionately reduced the salaries of all of said deputies so employed by him so as to bring the aggregate of said salaries within the total amount appropriated by the quorum court as salaries for his said office, exclusive of his own salary, and said number of deputies so continued drew the salary from the county as thus reduced.

"8. After the meeting of the quorum court in January, 1934, the sheriff and collector did not discharge any of the deputies theretofore employed by him and permitted under said § 2 of said act 275, but proportionately reduced the salaries of all of said deputies so employed by him so as to bring the aggregate of said salaries within the total amount appropriated by the quorum court as salaries for his said office, exclusive of his own salary, and said number of deputies so continued drew the salary from the county as thus reduced."

The court then made the following declarations of law:

"1. The court declares as a matter of law that § 4 of act 275 of the Acts of the General Assembly of 1933 is unconstitutional because the Legislature by said § 4 undertook to delegate to the quorum courts of the several counties to which said act applies the authority to fix the number of deputies in the county clerk's office and the sheriff and collector's office.

"2. The court declares as a matter of law that, under § 4, article 16 of the Constitution of 1874, the Legislature must fix the number, and the salaries, of all deputies and employees in the county clerk's office and in the sheriff and collector's office of Pulaski County, and cannot delegate the authority to fix either the salaries or the number of, deputies and employees in either of said offices, to the quorum court of said county.

"3. The court declares as a matter of law that under § 4, article 16, of the Constitution of 1874, the

Legislature cannot fix the maximum number of deputies and employees, nor the maximum salaries thereof, employed by the county clerk or the sheriff and collector of Pulaski County, and then delegate to the quorum court the power to fix the actual number of deputies or employees to be employed by said clerk or by the sheriff and collector."

The only question involved in this case is the constitutionality of § 4 of the above act. If that section is valid, no clerk or sheriff in Pulaski County, or any other county coming under the provisions of said act could employ any deputy, assistant or employee, or allow or pay any salary unless the levying court had made an appropriation. In other words, unless the quorum court makes an appropriation, neither the sheriff nor the clerk is permitted to employ or pay any deputy, assistant or employee.

Section 4 of article 16 of the Constitution of the State of Arkansas reads as follows:

"The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law."

The Constitution provides that the Legislature, and not the quorum court, shall fix the number of deputies and their salaries. The appellant contends that the section of the Constitution above quoted does not prohibit the Legislature from delegating to the quorum court the power to fix the number of deputies and to fix their compensation. Appellant admits, however, that there is dictum found in the case *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, which is apparently in conflict with the theories advanced by appellant, but it contends that, when the opinion in the Nixon case is read in full, it is apparent that it was not the intention of the court in that case to hold that a sheriff or county clerk on a fee basis could not appoint a deputy.

We think when the whole case is read there can be no question but what it holds that the Legislature, and not the quorum court or any other body, has authority to fix the number of deputies and their compensation.

The court said in the Nixon case: "The power to fix the salaries and fees of all officers in the State and the number of their clerks and employees and their salaries is a function which, within the limits of the Constitution, is lodged in the supreme law-making power of the State—the Legislature. * * * The General Assembly cannot delegate this legislative power to any individual officer or board."

The case of *Nixon* v. *Allen, supra,* was followed in the case of *Cone* v. *Garner,* 175 Ark. 860, 3 S. W. (2nd) 1.

The Tennessee court has said: "As to the delegation of authority to fix the salary of clerks of special courts, referred to in the last paragraph of § 4 of the act under review, in our opinion the Legislature could not delegate the power to fix the salary of a county officer or of a regular clerk of any of the courts; hence this provision is invalid." *Hunter* v. *Hamilton County,* 152 Tenn. 258, 277 S. W. 71.

"The provision giving the county commissioners power to fix the salaries of the officers according to the fancy of the board of commissioners, which may vary in each of the 52 counties of the State, destroys that uniformity which is contemplated by the Constitution, and is in direct violation of those provisions of the Constitution requiring the compensation of county officers to be fixed by law; and as this provision cannot be eliminated without destroying the purposes of the act, the entire act must fail as unconstitutional and void." *State ex rel. Attorney General* v. *Spencer,* 31 Fla. 211, 87 So. 634.

We know of no authority, and none has been called to our attention, which holds that the Legislature may delegate the authority to fix the number of deputies or their compensations, where it is required that they be fixed by law.

"The compensations for official services are not fixed upon any mere principle of a *quantum meruit,* but upon the judgment and consideration of the Legislature as a

just medium for the services which the officer may be called upon to perform." Throop on Public Offices, § 500.

Public officers' compensation is fixed by law, and no contract or agreement made to receive less or more is binding. Mechem on Public Officers, page 249.

Act 275 is a complete act without § 4, and, this being true, the fact that § 4 is void does not affect the remainder of the act. We therefore hold that § 4 of act 275 is unconstitutional and void, but that this does not affect the validity of the other provisions of the act.

This court has many times held that where the unconstitutional portion of an act was severable, where there was a complete act without it, the fact that one section or one portion of it violated the Constitution did not necessarily make invalid the entire act. *Nixon* v. *Allen, supra; Cone* v. *Garner, supra.*

We find no error, and the judgment is affirmed.

BURKS *v.* CANTLEY.

4-3934

Opinion delivered September 30, 1935.

Kenneth Raynor and *Frank Berry*, for appellant.

W. E. Rhea, G. B. Segraves, Jr., and *G. B. Segraves,* for appellee.

McHANEY, J. In April, 1923, the St. Louis Joint Stock Land Bank loaned J. W. Walker and his wife, Selena J. Walker, the sum of $13,500 secured by a mortgage on two hundred and fifteen acres of farm land and payable in sixty-six semi-annual installments. There was an acceleration clause in the mortgage which provided

for the maturity of the whole debt in the event certain of the installments became delinquent. A foreclosure suit was filed on April 2, 1932, three installments being delinquent at the time, and, J. W. Walker having died, his widow and heirs-at-law, of whom there were six, were made parties defendant. At that time there remained due and unpaid the sum of $13,401.27. A decree was entered November 22, 1932, foreclosing said mortgage. Appellant was at that time a minor, but was represented by a guardian *ad litem* previously appointed by the court, and who on September 19 had filed an answer denying all the material allegations of the complaint. A previous decree had been rendered on September 19 and noted on the judge's docket but had not been entered, and a motion was made by appellee to set that decree aside because the judge's docket did not show the appointment of an attorney *ad litem*. Said decree was set aside, and the same guardian *ad litem* was reappointed, and an answer was filed by him on November 22, 1932, and at the same time he waived time for trial. Service was had on the widow and all the heirs-at-law, all of whom were of age except appellant, and all of whom except appellant made default. The case was submitted to the court on the complaint with its exhibits, summons showing service on all defendants, the report of the attorney *ad litem* and answer of the guardian *ad litem*, and the oral testimony of Mr. A. F. Barham, and appellee was decreed a first lien on the land for $13,866.48, with interest from September 19, 1932, at 8 per cent. The decree was approved by counsel representing all parties, and the lands were advertised and sold by the commissioner on January 28, 1933, for the sum of $12,510, appellee becoming the purchaser at such sale, which was approved and confirmed on February 20, 1933. The St. Louis Joint Stock Land Bank in the meantime became insolvent, and appellee was appointed receiver thereof. Appellant being a minor at that time has brought the case to this court for review by appeal within six months after becoming of age, under the provisions of § 2140, Crawford & Moses' Digest.

Appellant's first contention for a reversal of the judgment is that the chancery court was not in session on November 22, 1932, and that the decree is therefore void. The record, as originally prepared and presented to this court, appears to sustain this contention, but an amendment to the transcript has been brought up which shows that appellant is wrong. Said court was in regular session on September 19, 1932, and on that day it adjourned until November 22, 1932. The clerk omitted the adjourning order but the record has been corrected by *nunc pro tunc* order, which shows that the court was regularly adjourned from September 19 until November 22, and that said court was properly in session on November 22, which date was not in conflict with the regular terms fixed by law in other counties of said court.

It is next contended that the guardian *ad litem* had no power to waive the time for trial, and that the decree of foreclosure was prematurely entered. We do not think there is any merit in this contention. The guardian *ad litem* filed an answer denying all the material allegations of the complaint. It was not contended then and it is not suggested now that appellant has any defense to the cause of action. We held in *Sisk* v. *Becker Roofing Co.,* 183 Ark. 101, 34 S. W. (2d) 1078, that, under the provisions of § 1, of act No. 37, Acts of 1929, it was not necessary to wait ninety days after the issues are joined in a chancery case to have a trial as provided in § 1288, Crawford & Moses' Digest. That act provides: "That in all actions now pending or hereafter brought, upon application of any party, after issues joined, the court or chancellor in vacation may, on notice to opposing counsel or guardian *ad litem,* set the action for trial, or if the court finds that the proof has then been completed it may try the action on any earlier date." And as we said in *Sisk* v. *Becker Roofing Co., supra*: "The act under consideration was passed for the purpose of eliminating delay, and making it possible for either party to get a trial without waiting ninety days after issue joined." Appellee could have served notice upon the guardian *ad litem* and had the case set for trial on the day it was tried. This being true, we see no good reason why the guardian

ad litem could not consent to a trial. As we said in *Frazier* v. *Frazier,* 137 Ark. 57, 207 S. W. 215: "It is the duty of the court to protect the interests of the infants, and see to it that their rights are not bargained away by those who represent them. Of course this does not prevent them from assenting to such arrangements as are formal merely and which are only done to facilitate the decision of the case." The guardian *ad litem* agreed only that the case might be tried, and not that the decree that was rendered might be rendered. His agreement was one that facilitated the decision of the case. In *Stuart* v. *Barron,* 148 Ark. 380, 230 S. W. 569, it was held that, under § 2190, Crawford & Moses' Digest, the attorneys of record in an equity case may agree that the case be submitted and a decree rendered in vacation even though minors are involved. If, as was held in said case, a guardian *ad litem* may consent that the case be submitted and a decree rendered in vacation, it would seem to follow necessarily that the guardian *ad litem* could agree that the case be submitted, and a decree rendered at a time when the court is in session. Since no substantial right of the infant has been invaded or bargained away by the agreement of the attorney *ad litem* that the case might be submitted and a decree rendered on November 22, appellant's contention cannot be sustained.

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

STATE EX REL. RICHARDSON *v.* MACK.

4-3961

Opinion delivered September 30, 1935.

Roy Richardson and *Howard Hasting,* for appellant.
Fred M. Pickens, for appellee.

McHaney, J. Appellant brought this action for mandamus against appellee as county judge of Jackson County to compel the appellee to make an order under § 2082, Crawford & Moses' Digest, providing for the working of county convicts upon roads, bridges, and other public improvements of the county. Appellee responded denying that appellant was entitled to the writ because the sections of the statute relied on were not mandatory upon him as county judge, but directory merely; that the matter of working the county convicts on the county roads, etc., is a matter resting within his discretion as county judge and not subject to be controlled by mandamus; that § 28, art. 7, of the Constitution vested in him as county judge exclusive and original jurisdiction in all matters relating to county roads, bridges, etc., and that the Legislature had no authority under the Constitution to invade the prerogative of the county court, and that the petition seeks to violate said section of the Constitution. The court sustained appellee's response and denied the petition.

In so holding we think the learned trial court was correct. Section 2081, Crawford & Moses' Digest, relates to the employment of county convict labor, and provides that, in case the county court or the judge is unable to make a contract with any person in the county for the work of its prisoners, as provided in § 2060, "the court or judge thereof may contract for the work of its prisoners with some person in some other county of the State according to the provisions of this act; and if the county court or judge thereof be unable to make a satisfactory contract with some person of some other county, then the county court or judge thereof may order the prisoners to be worked on the public roads," etc. Section 2082 provides: "In the event that the county court or judge there-

of shall order the prisoners to be worked on the roads," etc., as provided in the preceding section, he shall do certain things therein set out, and the last clause in that section reads as follows: "And in case no contract as provided in §§ 2060 and 2081 is made by the county court or judge thereof prior to the second Monday of January of any year, then the said court or judge thereof must make the order, as provided in § 2081 for working the prisoners on the public roads, bridges, levees and other public improvements of the county." It is appellant's contention that, because of the use of the word "must" in the sentence last quoted, the county judge thereof is mandatorily bound to do so. This is the only place where the statute appears to attempt to make it imperative for a county court or judge to make the order to work the county prisoners on the roads, etc., of the county, and we are constrained to believe that the Legislature did not so intend it. We are further constrained to this view by the language used in § 28 of art. 7 of the Constitution, which confers exclusive original jurisdiction on county courts in all matters relating to county roads, bridges, ferries, etc., "and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." We do not hold that said § 2082 is in violation of the Constitution because courts do not hold statutes to be unconstitutional where any reasonable construction may be resorted to in order to save the statute from unconstitutionality. *Standard Oil Co. of Louisiana* v. *Brodie,* 153 Ark. 114, 239 S. W. 753; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

Since the language of the statutes under consideration several times left it to the discretion of the county court as to what disposition he would make of the county convicts, we must hold that the language quoted in § 2082 is directory merely and not mandatory. It is true that the quorum court of Jackson County made an appropriation in the sum of $2,000 to pay the expenses of working the county convicts on the roads, etc., but this could not have the effect of taking away the jurisdiction of the county court in such matters. It follows from what

we have said that the judgment must be affirmed. It is so ordered.

BEITH *v.* MCKENZIE.

4-3947

Opinion delivered September 30, 1935.

W. G. Dinning, for appellants.

Jo M. Walker, for appellees.

BUTLER, J. Section 7408 of Crawford & Moses' Digest provides: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, when any payment is made on any such existing indebtedness before the same is barred by the statute of limitation, such payment shall not operate to revive said debts

or to extend the operations of the statute of limitation, with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

For reversal of this case the appellants invoke the application of the above statute under the following state of facts. In 1923 B. D. Schrantz borrowed from Belle H. McKenzie the sum of $1,600 evidenced by his promissory note for said sum with interest due on August 18, 1925. To secure this indebtedness, Schrantz executed a mortgage on a tract of land situated in Phillips County containing approximately 110 acres. Payments of the interest were made from time to time and a part of the principal, the last payment being made on December 19, 1930, but none of the payments were indorsed on the margin of the record of the mortgage as provided in the section above quoted. On November 29, 1932, Schrantz and his wife, by quitclaim deed of that date, conveyed the property described in the mortgage to appellant, R. P. Beith, for the sum of $200. Previous to that time the land had forfeited for the nonpayment of taxes for the year 1929, and in due time was conveyed to the State of Arkansas by reason of said forfeiture. Subsequent to the date of his deed from Schrantz and wife Beith acquired, by proper conveyances, the title acquired by the State by reason of the aforesaid forfeiture. Mrs. McKenzie brought suit to foreclose, naming the mortgagees and appellants, R. P. Beith and Quinn B. Beith, as defendants, appellants being at that time in the possession of the property. The mortgagees made no defense, but the appellants answered, and by way of defense to the action set up the facts heretofore stated and pleaded the statute in bar of appellee's suit.

The case was submitted to the trial court under evidence which, stated most strongly in favor of the appellees, tended to show that at the time Beith purchased

from Schrantz he had full knowledge that the debt secured by the mortgage had not been paid, and that a balance of approximately $800 was still due Mrs. McKenzie. With this information Beith had his attorney examine the record of the mortgage and found that there were no indorsements on the margin of any payments having been made thereon, and he then made the purchase from Schrantz.

Appellee insists that Beith was not a third party within the meaning of the statute; first, because the quitclaim deed put him on notice of all imperfections in the vendor's title; and, second, because the consideration paid was so out of proportion to the value of the land as would make the conveyance in effect a voluntary one and bring the case within the rule announced in *Leonhard* v. *Flood,* 68 Ark. 162, 56 S. W. 781, and *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, which is that a conveyance of mortgaged property by the mortgagor with a fraudulent intent of defeating the mortgage and without actual and *bona fide* consideration would not relieve the property of the lien of a valid mortgage, although unrecorded.

It is true that a quitclaim deed serves to put the purchaser on notice of the infirmities in his grantor's title, but it is a substantive mode of conveyance and transfers title to the grantee as effectively as a deed with full covenant of warranty. *Bagley* v. *Fletcher,* 44 Ark. 153. The constructive notice arising by grant by quitclaim deed can have no higher effect than actual notice. This court has held in a number of cases that a third party acquiring an interest in real estate on which there is an outstanding mortgage may invoke the benefit of the statute, notwithstanding he may have actual knowledge of the existence of the mortgage. The cases so holding are cited in *McKinley* v. *Black,* 157 Ark. 280, 247 S. W. 1046. In that case the court held that "third parties," as used in the statute, necessarily means "strangers to the mortgage." This definition appears to have been the one adopted by the court in a number of cases, and therefore appellant, Beith, was a third party within the meaning of the statute.

The rule announced in *Leonhard* v. *Flood* and *Morgan* v. *Kendrick, supra,* can have no application to the instant case for the reason that it was shown that there was a substantial decrease in the value of the mortgaged lands, although the amount of such decrease is not satisfactorily shown, and that the conveyance was not voluntary or made by the mortgagor with the fraudulent intent of defeating the rights of the mortgagee. While the price paid Schrantz was far below the probable value of the land, yet in the state of the title it could not be said to be grossly inadequate (even if that would tend to show that the conveyance might have been voluntary) because of the fact that by the forfeiture to the State other sums had to be expended to acquire the State's interest and perfect title in appellants.

It appears that appellant used his superior knowledge to work an advantage to himself and a consequent injury to the mortgagee, who, by reason of her forbearance and ignorance of the law, has lost the security for her debt. We do not commend the actions of appellant as worthy of emulation, but unfortunately the law as written, which we have no power to alter, protects the title he has acquired and vests it in him free of the lien of the mortgage, which, as disclosed by the record, was apparently barred by the statute of limitation.

It follows from the views expressed that the judgment of the trial court must be reversed, and the cause remanded with directions to sustain the plea of appellants, and deny foreclosure of the mortgage.

GOWAN *v.* ROBINSON.

4-3962

Opinion delivered September 30, 1935.

States & Boothe, for appellant.

Frierson & Frierson, for appellees.

BUTLER, J. On the 15th day of November, 1929, two notes were executed to the appellant, Mrs. M. J. Gowan, in the sums of $900 each. One of these notes was signed by J. H. Hawthorne, B. G. Gibson and Mabel Robinson, which note is referred to in the argument as "Note No. 1." The other note was signed by J. H. Hawthorne and B. G. Gibson and is referred to in the argument as "Note No. 2." Both notes were due and payable on or before one year after date. Prior to December 30, 1930, a number of payments were made to Mrs. Gowan all of which were credited upon Note No. 2. On the date last named a Mr. Dickson, as agent for Mrs. Gowan, presented both notes to J. H. Hawthorne at his office, demanding payment thereof. Miss Robinson was, and had been, employed as the private secretary of J. H. Hawthorne for a number of years, and was familiar with his business. A payment was made on the notes of $490.43, and a note given by B. G. Gibson to J. H. Hawthorne at an agreed value of $97.90 was accepted, making a total payment of $588.33. The agent placed a sufficient amount of this payment on note No. 2 as would pay it in full, the remainder, amounting to $72, being credited on note No. 1. After this J. H. Hawthorne and B. G. Gib-

son died. Note No. 1 was presented to the executrix of the estate of Hawthorne and was allowed in the balance due of $875.09. Suit was filed against the executrix and Miss Mabel Robinson by Mrs. M. J. Gowan seeking to recover judgment against the estate of J. H. Hawthorne and Miss Robinson.

No defense was made by the executrix, and Miss Robinson defended on the ground that the payment of $490.43 was made by her from her personal funds and intended by her to be applied to the note on which her signature appeared; that the same had been applied on another note upon which she was not obligated, contrary to her wishes and instruction.

A jury was waived and the case heard by the court sitting as a jury. The court found, upon conflicting testimony, that Miss Robinson signed the note on which her name appeared as an accommodation maker; that both Hawthorne and Gibson have since died, and that neither of the two notes given by them, the one sued on and the one executed by Hawthorne and Gibson only, had been presented as a claim against the estate of Gibson; that the note sued on was presented as a claim against the estate of Hawthorne. The court further found that at the request of Hawthorne, Miss Robinson paid from her personal funds the sum of $490.43, intending to have the payment applied on the note upon which her name appeared; that this payment was made with the knowledge of all the parties that the same was from her individual funds, and that it was to be applied to the note sued on; that on December 30, 1930, J. H. Hawthorne had paid $72 which, together with the payment of $490.43 and subsequent payments thereto left an amount due by Miss Robinson on the note sued on in the sum of $211.39. Judgment was entered against Miss Robinson for said sum and against the estate of J. H. Hawthorne in the sum of $884.90, it being adjudged that the estate was not entitled to the credit of the $490.43 item paid by Miss Robinson.

The evidence relating to the circumstances under which the payment of December 30, 1930, was made and the application of this sum to the payment of the note

is in conflict. Miss Robinson stated in substance that the two notes aggregating the sum of $1,800 were the personal obligation of Mr. Hawthorne and Mr. Gibson; that she received none of the proceeds of the notes and only placed her signature to the note upon which suit was brought as an accommodation to these gentlemen. She testified that she had no knowledge of payments made on the notes or how applied prior to December 30, 1930; that she was at the office of Mr. Hawthorne but not present in the room where demand upon Mr. Hawthorne was made by the agent for payment; that Mr. Hawthorne came to the room occupied by her and told her that Mr. Dickson was demanding that the note be paid, and asked if she had sufficient money to take care of it. She inquired the amount necessary to pay the balance due and gave her personal check on her savings account for the sum of $490.43 to be paid on the note which she had signed; that the note which was marked paid was placed in the files, but she did not learn that the payment she had made had not been applied to the note she had signed until afterward and at a time when the agent had gone away. Just when and how she ascertained the misapplication of her payment is not disclosed, but it appears that she made no complaint until after the death of Mr. Hawthorne when the note was presented to her and payment demanded. Then she inquired why her payment had not been applied to the note she had signed.

Testimony was given by Mr. Dickson to the effect that Miss Robinson was present when he made demand on Mr. Hawthorne; that the payment of $490.43 was not paid by check but that Miss Robinson went out and got the cash; that Hawthorne directed him to apply this payment on the note upon which he and Gibson were the only signers; that he did this and marked the note paid, and that Hawthorne delivered the same to Miss Robinson and told her what to do with it. He stated further that he applied all payments made on the notes according to the instructions of Mr. Hawthorne, and that practically all dealings with respect to the notes were between him and Mr. Hawthorne.

For reversal of the case, appellant insists that it is error to permit Miss Robinson to state that she signed the note sued on only as an accommodation-maker as her liability was fixed as joint-maker, and that the fact that she signed as an accommodation would not affect her liability. This evidence was not offered to change her liability, but as a circumstance tending to show why she made the payment by her personal check. This testimony was not incompetent for the purposes for which it was introduced and considered by the trial court, and tended to indicate Miss Robinson's intention of the application she desired to be made of the money she paid.

It is next insisted that, as the testimony of Dickson is undisputed to the effect that Hawthorne directed him to apply the payments of November 30, 1930, to the joint note of himself and Gibson, the application so made cannot be subsequently changed under the rule that where a debtor makes payment of a sum of money to one to whom he owes distinct debts, the credit shall be applied to the debt which he selects, and that the application by the debtor must be made before or at the time of payment. *Lazarus* v. *Friedheim*, 51 Ark. 371, 11 S. W. 518; *Briggs* v. *Steele,* 91 Ark. 458, 121 S. W. 754. This is the general rule, but is not one of universal application, being subject to a well-recognized exception, namely, that where several debtors are jointly indebted to a creditor on a given obligation and money is advanced by one with the knowledge of the creditor for the purpose of having such payment applied as a credit on the debt for which he is liable, his co-debtors cannot direct its application to the payment of a debt of their own on which the debtor advancing the money is not liable. *Farris* v. *Morrison,* 66 Ark. 318, 50 S. W. 693; *Harrison* v. *First National Bank,* 117 Ark. 260, 174 S. W. 553; *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53.

There is substantial evidence to support the finding of fact made by the court, namely, that Miss Robinson advanced the $490.43 with the intention that it be applied to the payment of the note sued on, and that this payment was made under circumstances which imputed to the payee knowledge of such intention. In *Jordan* v. *Bank*

of Morrilton, supra, the bank lent money to one Turner, with the understanding that a certain part of it should be applied to the payment of the debt of Turner to Jordan secured by a mortgage. Instead of applying the payment to that debt, Jordan applied it to the payment of a different debt due him by Turner. The court said: "If Jordan had notice that the bank had lent the money upon the understanding that a part of it should be applied towards the payment of his mortgage debt, he could not apply it to the payment of his unsecured debt, as against the bank, even with the consent of Turner. In this connection it may be stated that notice of facts and circumstances which would put a man of ordinary intelligence on inquiry is equivalent to knowledge of all the facts that a reasonably diligent inquiry would disclose. In other words, where a person has sufficient information to put him on inquiry, he shall be deemed to know what the inquiry would disclose."

In the case at bar the facts, as found by the trial court on substantial evidence, were that all parties knew that Miss Robinson had not in fact received any of the proceeds of the note on which she was a maker, and that when demand for its payment was made the agent of the payee received her personal check for $490.43. These were circumstances which would impute notice to the agent of the payee of the purpose for which the check was given and the application of it to a debt for which she was not obligated even with the direction of Hawthorne was unauthorized. Her money should have been applied to the payment of her own obligation.

The appellant insists, moreover, that Miss Robinson knew that her check was not applied as a credit to the note which she had signed, that she made no complaint until after both Gibson and Hawthorne had died, and that by her silence "appellant has been injured to the extent that both co-makers of note No. 2 have died, and the time for filing claims against the estate of B. G. Gibson has expired, and thus one source of payment eliminated." In support of this contention, the rule stated in 48 C. J. 654, is invoked which provides that "the debtor is estopped from questioning the application made by

the creditor wherein he receives an account or receipt applying payment in a certain way and fails to object" (§ 105). The evidence is by no means conclusive as to when Miss Robinson first became aware that her check was applied to the payment of the note on which Hawthorne and Gibson only were the makers. A note was placed in the files in Hawthorne's office, but there is nothing in the evidence to show when Miss Robinson first discovered that this was not the note she had signed. There is nothing in the evidence to justify the inference that any injury has resulted to the appellant by reason of the silence of Miss Robinson. Mr. Gibson was the brother of appellant, and his note to Hawthorne for $250 given to Dickson, the agent of appellant, on November 30, 1930, was not paid and no effort was made to probate this note against Gibson's estate or any showing made that the note signed by him and Hawthorne could have been collected from him during his life-time or from his estate after his death. The appellant has the same right against the estate of Hawthorne that she had prior to the time of payment, and the trial court actually gave her judgment for the full amount of the balance due on the two notes against the estate. In fact, there is no evidence to show that the position of the payee has been altered or prejudiced in any way by reason of the silence of Miss Robinson.

The appellant contends in the last place that, should it be decided that note No. 1 be credited with the payment of the $490.43, the item of $72, credit on the note December 30, 1930, ought to be stricken therefrom because that item was a part of the $490.43 and to allow both would be giving Miss Robinson credit twice. We do not think the evidence justifies the conclusion that the $72 credit was a part of the $490.43 check given by Miss Robinson, but rather that it was derived from the supposed value of the Gibson note which was accepted by the agent in part payment. In any event, that credit was placed upon note No. 1 by the payee's agent, and it sufficiently appears that the agreed value of the Gibson note was more than sufficient to justify the credit of $72. The

testimony of Mr. Dickson, the agent of the payee, as to the amount of the payment received on November 30, 1930, is vague, and in our opinion there is some evidence to support the conclusion reached by the trial court as to this particular item.

On a consideration of the whole case, we conclude that the judgment of the trial court should be, and is therefore affirmed.

BAKER, J., disqualified and not participating.

CARLLEY *v.* STATE.

Crim. 3956

Opinion delivered September 30, 1935.

Lee & Moore, J. F. Holtzendorff, Jas. H. Lawhorn, Jr., and *Trimble, Trimble & McCrary,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

BAKER, J. The appellant, Graham Carlley, was charged with murder in the first degree for the killing of Melton Sparks at Hazen, Arkansas. He was indicted March 5, 1934, and on March 7 change of venue was had to the circuit court of Monroe County. Upon trial appellant was convicted of voluntary manslaughter and sentenced to seven years in the penitentiary, and from the judgment of conviction comes this appeal.

In our view of this case it is unnecessary that we set out the material facts in detail, but it does become necessary to discuss one matter upon which the appellant relies for a reversal.

According to the testimony, appellant killed Melton Sparks upon the streets in Hazen, Arkansas, about 9:00 o'clock at night. Carlley shot Sparks, killing him almost instantly, then walked down the street a short distance, surrendered to the town marshal, and about two hours later was delivered to the sheriff at Des Arc. Carlley had talked with the officers transporting him to Des Arc, to the effect that, if an inquest were held that night in regard to the killing of Sparks, he desired to be present. No doubt he thought it highly important to himself that he be there. The officers had agreed with him, but the sheriff conceived it to be his duty to place the prisoner in jail, and, as between the sheriff and the prisoner, appellant here, a sharp altercation arose, resulting in a fight, wherein the sheriff knocked Carlley down with a chair, and, as the two struggled with each other, Carlley cut the coat and other clothing of the sheriff. This controversy was sharp and furious for a time, and, upon the trial of Carlley for the murder of Sparks, the sheriff, H. B. Eddins, was called as a witness and testified about this fight.

Over the objections of the appellant, the sheriff was permitted to testify in detail to all of the matters that occurred in the fight between him and his prisoner, and was permitted to exhibit the coat, cut and slit with the defendant's knife.

At that time the defendant had offered no proof or suggestion as to his character or reputation, and there was no basis or foundation of any kind, justifying the intrusion of this testimony.

Other witnesses testified about this trouble, one of them being Gene Shanks, the deputy sheriff, and another being Andy Rounsell, the town marshal at Hazen, and who had transported Carlley as his prisoner and delivered him to the sheriff. There grew out of this testimony a sharp controversy as to the cause, origin,

and extent of the trouble. During the testimony of the several witnesses, objections were constantly urged against the intrusion of this testimony, and were constantly overruled by the court.

The court, in the final ruling upon this testimony, instructed the jury that the testimony might be considered for the purpose of showing the frame of mind the appellant was in, if any, after the killing of Sparks, and whether or not he attempted to escape from the officers after his arrest.

The record in this case discloses that the altercation between the sheriff and his prisoner was hardly second in importance to the trial upon the main charge of murder in the first degree.

Without regard to the merits of the controversy, as between the sheriff and his prisoner, this matter should not have been injected into the trial. We are unable to see, or understand, how any testimony in regard to this unfortunate event could in any way explain to the jury the state of mind of the prisoner, whether before or after the killing. It certainly could not aid the jury to hear of this second fight, wholly disconnected from the murder charge, in determining the guilt or innocence of the defendant.

It is urged, on behalf of the State, that this evidence, even though improper, could not be deemed prejudicial, when considered in the light of the result of the trial; the insistence being that this testimony, at least, might have been considered by the jury to determine a question of malice, and that, since the defendant was acquitted of murder in the first and second degree, it is apparent that the testimony did not result to the prejudice of the defendant.

With this theory we cannot agree. The defendant was relying, in this case, upon the law of self-defense for an acquittal. It is unnecessary that we express any opinion as to the merits of the case, the effect of the testimony on behalf of the State as tending to prove murder, or the effect of the testimony offered by the defendant in his own defense. He was entitled to have his case fairly and dispassionately submitted to a jury.

It is argued with some show of reason that this testimony, as delivered by the sheriff, the high executive official of the county, probably put into the minds of the jurors a feeling or impression that the defendant was a boisterous, troublesome, violent and bloodthirsty man, who, after the homicide in the town of Hazen, was attempting to kill the sheriff who had him in custody, and in his violent rage slashed and cut the clothing of the sheriff in many places.

We are unable to see how the jury could disregard the effect of this testimony, when once it was presented to them, and we do not think that the defendant should have been called upon, in the trial of his murder case, to defend also against another charge, calculated seriously to impair that presumption of innocence that attends his case throughout the trial, or until the fact of guilt is established by some competent testimony. We must take judicial notice of the fact that many competent of being good jurors, peace-loving citizens of the State, cannot hear with patience and consideration this kind of testimony, and not be affected by it adversely to the interests of the defendant, and particularly is this true when this testimony is permitted to go to the jury with the approval of the trial court, over the urgent objections of defendant's counsel.

We do not disapprove the doctrine laid down in *Coulter* v. *State,* 100 Ark. 561, 140 S. W. 719. The State relies upon this as authority to sustain the conviction. The facts in the two cases are so different we cannot agree with that theory. We cannot say these matters did not tend to discredit the defendant. His efforts to establish self-defense may have been thwarted by this other altercation, or his punishment may have been increased thereby. We cannot say, but if so there was error. If improper testimony tends to disparage the effect of appellant's theory and evidence offered in his behalf, it was prejudicial. *Ware* v. *State,* 91 Ark. 561, 121 S. W. 927.

It cannot well be reasoned that the evidence offered, over the objection of the defendant, was not prejudicial, quoting from a recent opinion we find: "But it is also

settled that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. *Brock* v. *State,* 171 Ark. 282, 284 S. W. 10; *Moon* v. *State,* 161 Ark. 234, 255 S. W. 871; *Elder* v. *State,* 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220." *Williams* v. *State,* 183 Ark. 870, 872, 39 S. W. (2d) 295.

Proof by the State of other offenses wholly disconnected from the one upon trial was improper.

The judgment of Monroe Circuit Court is therefore reversed, and the cause is remanded for a new trial.

STATE EX REL. SMITH *v.* SMITH.

4-4017

Opinion delivered September 30, 1935.

Carl E. Bailey, Attorney General, and *Brewer & Cracraft,* for appellant.

W. L. Ward, Burke & Burke and *Mann & Mann,* for appellees.

BAKER, J. This is an appeal from a judgment of the Lee Circuit Court. The complaint in this lawsuit was filed by Griffin Smith, as State Comptroller and ex officio

director of county audits, v. Zoll C. Smith, tax collector of Lee County, charging that he had collected certain sums of money for the account of Lee County, belonging to the county road fund, per capita road tax and poll tax, and money belonging to certain drainage districts named in the complaint, and that as collector he had rendered his annual report to the county court of Lee County, wherein he had charged himself with the sums in this suit sued for, and that on August 27, 1930, the county court of Lee County examined the said collector's settlement and approved and confirmed the same, and that thereafter these accounts were examined and audited by the State Auditor and found correct; that Zoll Smith had failed to make payments to the county treasurer of Lee County, and the districts; that copies of the audit were filed with the circuit judge and county judge as required by law, and that the said Zoll C. Smith and surety have failed to pay the same over to the treasurer, though demand has been made therefor; that no suit had been filed by the prosecuting attorney of the district, or the Attorney General, and that Griffin Smith, the State Comptroller and ex officio director of county audits, brings said suit in his official capacity, and prays judgment for the use and benefit of Lee County, and the various drainage districts, in the approximate amount of $28,000.

To this complaint a demurrer was filed, which was sustained by the trial court, and, the plaintiff refusing to plead further, the complaint was dismissed.

The demurrer raises two questions.

The first question is to the effect that the complaint does not state facts sufficient to constitute a cause of action against the defendants. No argument is necessary to show this contention has no merit.

The second matter of the demurrer is to the effect that Griffin Smith has not the power or capacity, or authority, to file and maintain this suit.

The only real question for our consideration on this appeal is the second matter raised upon the demurrer.

Preparatory, however, to a discussion of power and authority of the State Comptroller to file and maintain

this suit, it may be said in the beginning that the Attornew General, shortly after the filing of this suit, by the comptroller, filed a pleading ratifying and confirming the action of the State Comptroller, and that special counsel was employed to aid the prosecution.

Many propositions are discussed upon this appeal, and it will perhaps not be necessary that we discuss or decide all of the different matters presented. It is essential, however, that we determine the power of the State Comptroller, or his authority, to file and maintain a suit of this kind. It is urged very strongly that the matters in Lee County are purely local, and incidental; that the people are satisfied with conditions as they exist; they have re-elected the appellee to the office of collector; that the taxpayers, the county officers, and improvement districts, the ones affected by the alleged shortage, or failure to pay over the money to the county treasury, have failed and refused to file suits therefor, and, that on account thereof, the State Comptroller should not be permitted to maintain this action.

But the matter of political expediency is not conclusive, nor do we think it a proposition of purely local concern, with which the State could of right have nothing to do.

It is true suits may be filed in the interest of the taxpayers of the State by some citizen and taxpayer interested in the enforcement of laws, but it is not, in every instance, that altruistic taxpayers or officers are willing to incur the liability for costs, or assume the trouble and worry necessary to maintain such suits. It might happen, in many instances, under such conditions, that serious losses would follow a neglect to prosecute such causes.

Under and by authority of act 146 of the Acts of 1933, the Comptroller was authorized to file and maintain this suit and suits of similar nature. The title of act 146 is "An Act to Facilitate the Recovery on the Bonds of Officials in This State, and for Other Purposes." One of the provisions of said act is that: "It shall be the duty of the State Comptroller and ex officio director of

county audits to give notice and make proof of loss to, and demand payment of the surety or sureties on any bond executed by any officer, the affairs of whose office said State Comptroller and ex officio director of county audits is now or may hereafter be directed or authorized by law to check or audit, of any shortage or other liability of said officer for which said surety or sureties may in any wise be liable."

The said act also provides that the State Comptroller and ex officio director of county audits shall, after giving the notice, making the proof and demand aforesaid, certify said shortage or other liability to the Attorney General or prosecuting attorney of the circuit in which said officer resides. Upon the receipt of such certificate it shall be the duty of the Attorney General or prosecuting attorney immediately to take the necessary legal action to recover from said officer and the surety or sureties the amount of said shortage or liability, but that, upon the failure or refusal of the Attorney General, or prosecuting attorney, to file such suit, the State Comptroller and ex officio director of county audits, shall have authority himself to sue to recover such shortage or liability. There is also a provision, whereby special counsel may be employed.

It is argued that the State Comptroller shall not have the authority to file or maintain the suit until there is a failure or refusal on the part of the Attorney General or prosecuting attorney to file the suit; that it is a condition precedent to the right to maintain the suit that such failure or refusal must take place before that power can be exercised by plaintiff in this suit. If we knew of any reason to declare these provisions of act 146 as mandatory, we should not hesitate to do so. While we do not think it is proper to ignore a statute, or its provisions, yet where no substantial right is lost by reason of the failure to comply implicitly with the terms of the statute, where no substantial prejudice results on account of such neglect, we cannot see that it would be proper to sacrifice substantive rights without substantial reason therefor.

This case differs materially and essentially from the case of *State ex rel. Attorney General* v. *Standard Oil Company of Louisiana,* 179 Ark. 280, 16 S. W. (2d) 581. In that case this court said: "The power of the State to maintain suits such as the one at bar being purely statutory, the method and procedure prescribed by the statute must be followed as a condition precedent to its rights to maintain such action, as judgment and discretion are involved, and must be exercised by those on whom the law has placed the power and authority to act."

From the above quotation, it will be observed that this court had no hesitancy in holding that the Tax Commission, or Tax Commissioner, on account of knowledge and acquaintanceship with the facts, had the power, under the statute, to authorize and direct the filing and maintenance of a suit by the State, on relation of the Attorney General.

An analysis of that case and a comparison of it with the instant case will show that in the case at bar the power of investigation, and the right of discretion and determination of what it was proper to do, was in the office of the State Comptroller, the ex officio director of county audits. That office was the repository of facts and information necessary to be had to determine the propriety of the filing and the maintenance of suits.

The State Comptroller having exercised the power and authority granted under act 146, and sought a recovery of a shortage or liability, and the Attorney General having joined in the prosecution of this suit, we fail to see how any prejudice may have resulted to the appellees by reason thereof.

We do not say that any or every provision of act 146 should not have been complied with, but we do say that, since there was no prejudice, no violation of any right of any defendant, the court erred in sustaining the demurrer, particularly after the Attorney General had approved and ratified the proceeding and made himself a party to the prosecution of this cause.

In this case the State Comptroller occupies the same relative position to the prosecution of the suit that the

Tax Commissioner did in the case of *State ex rel. Attorney General* v. *Standard Oil Company of Louisiana, supra.*

The writer cannot assert with positive certainty that in every State in the Union suits of this kind may be brought by the State for the use and benefit of counties, municipalities, or improvement districts, but it is now recognized by the legal profession everywhere that suits may be maintained by and in the name of the State, for the use and benefit of State agencies, or municipalities, or taxpayers, to recover any shortage or liability and to require it to be paid into the proper depository or treasury.

Act 146 of the Acts of 1933, making it the duty of the State Comptroller and ex officio director of county audits to file suits of this class, indicates a certain degree of progress. It places a responsibility upon one in position to require and obtain information, to use that information for the public good and benefit, and does not leave the right to file and maintain a suit merely with some one who might perchance discover such shortage or liability. The creation by the statute of a proper agent to begin and maintain proper litigation cures the defect that arises out of the time-honored adage: "That what is everybody's business is nobody's business."

The provision of act 146 aforesaid requiring notice to be given to the prosecuting attorney, or to the Attorney General, is not necessarily mandatory, and particularly is this true under the rule announced by the early case of *Neal* v. *Burrow,* 34 Ark. 491, wherein this court quoted with approval from Cooley's Const. Lim., page 93. Reference is also made to the case of *Phillips* v. *State,* 162 Ark. 541, 258 S. W. 403, for a discussion of a distinction as between mandatory or directory provisions of statutes.

Under the doctrine as announced in the foregoing case, we are impelled to say that, since failure to comply strictly with that requirement of act 146 to certify the fact of a shortage or liability to the Attorney General or prosecuting attorney, has not resulted in any violation of

the rights of the appellees, or prejudiced their position in the matter of the trial, such provisions must be declared merely directory and not strictly mandatory. Moreover, since the Attorney General has made himself a party to this proceeding and did so shortly after the filing of the suit, and in the absence of any showing that during the interval in which he was not a party prejudice of any kind resulted to the appellees, we would hesitate to approve the strictly technical action of dismissing the proceedings. In other words, we are willing to say that the filing and maintenance of this suit, under the facts appearing in this record, is in substantial compliance with act 146 of 1933.

It is also urged that since the audit and discovery of the shortage substantial payments have been made. This may be true. Such pleading and argument, however, concedes the propriety of the prosecution of this suit, and whatever payments may have been made, of course, will be duly credited by the trial court.

From the foregoing it must be said that the court erred in sustaining the demurrer and in dismissing plaintiff's action.

The cause is therefore reversed and remanded, with directions to the trial court to overrule the demurrer, permit the defendant to answer, and to proceed with an orderly trial of the cause.

MATHIS *v.* MAGERS.

4-3950

Opinion delivered October 7, 1935.

Wils Davis, Virgil Greene and *W. W. Hughes,* for appellants.

Harrison, Smith & Taylor, for appellees.

JOHNSON, C. J. This suit was instituted by appellee against appellants, a copartnership, doing business as Mathis Bus Line, in the Mississippi Circuit Court to compensate an alleged injury suffered by appellee in a collision between his automobile and appellants' passenger bus while traversing public highway number 18 on April 28, 1933. The trial resulted in favor of appellee and a consequent judgment in the sum of $3,000, from which this appeal comes.

The testimony on behalf of appellee, when viewed in the light most favorable to him, shows that on April 28, 1933, he was driving his automobile going from Blytheville to Dell and was driving at a moderate rate of speed when appellants' passenger bus, which was being driven in the opposite direction, ran into appellee's car and demolished it and inflicted upon appellee very serious and permanent injuries. Appellants do not contend that the jury's finding of liability is not supported by substantial testimony; therefore, on this phase of the case, little need be said. Appellants do contend, however, very earnestly that the jury's award of $3,000 is grossly excessive, and to dispose of this contention it is necessary to detail the testimony on this phase of the case at some length. Appellee testified that by the collision he was rendered unconscious; that when consciousness returned he was bleeding profusely and was very sick; that a big gash was cut upon his head just over the eyes; that his nose was mashed, some of his teeth knocked out, and that he was suffering severely from pains in his back and hips; that because of said injuries he was confined at his home

until May 3, 1933, when he entered a hospital at Blytheville; that during the interim appellee suffered severe pains in his back, hips and chest. Subsequently appellee entered Campbell's Hospital at Memphis, Tenn., where X-ray examinations were effected, and on or about July 6 he was put into a Bradsford Frame and remained therein for 21 days with weights suspended to his legs, during which time he suffered severely. Appellee further testified that prior to his alleged injuries he slept well at night without sedatives but since receipt of his injuries he has been required constantly to use sedatives to induce sleep and rest. Appellee has expended $1,005.95 for hospital fees, doctor bills and medicine.

Dr. J. L. Tidwell testified that he treated appellee subsequent to his injury in the car collision, and that in his opinion he is permanently injured. Dr. J. S. Speed, of the Campbell Hospital of Memphis, testified that appellee is suffering from hypertrophic and traumatic spondylitis, and that an operation is necessary to relieve him. Other testimony was heard, but the above suffices to show the trend of it.

The rule is well settled in this State that, if the verdict of a jury is supported by substantial testimony, it will not be disturbed on appeal. *Hayward* v. *Rowland,* 184 Ark. 766, 43 S. W. (2d) 737; *Halliburton* v. *Cannon,* 160 Ark. 428, 254 S. W. 687; *Mitchell* v. *Williams,* 162 Ark. 36, 257 S. W. 369.

It would be an infraction of the rule just stated for us to interfere with this verdict under the facts heretofore recited. The testimony is amply sufficient to support a verdict for $3,000, and no error is made to appear from this assignment.

Next appellants urge that the trial court erred in giving to the jury in charge appellee's requested instruction number 4 as follows: "Contributory negligence is the doing of something or the failure to do something, by the injured party, that a person of ordinary care, caution, and prudence would or would not have done, under the same circumstances and conditions, and, except for which, taken in connection with the negligence of the defendant, if any, the injury complained of

would not have occurred." No specific objection was made to this instruction in the trial court, and the error now complained of by appellant—that the instruction is misleading and confusing—could and would in all probability have been corrected by the trial court had his attention been directed thereto. This is made manifest because the trial court gave to the jury in charge and at appellant's request the following charges: "If you find that the plaintiff was negligently driving his car at such a high and reckless rate of speed on the highway at the time, taking into consideration all of the surroundings, facts and circumstances, that he did not have his car under such control that he could stop the same, and avoid injuring or colliding with any object that he might reasonably anticipate upon the highway, and that by reason of this fact the injury complained of was the result of his own contributory negligence, then it would be your duty to return a verdict for the defendant." And also by modifying appellant's requested instruction number 3 and giving it to the jury in charge as follows: "You are instructed that it was the duty of the plaintiff to do all in his power to avoid the collision with the defendant, notwithstanding the fact that the bus was on the left-hand side of the road or on the same side of the road on which he was traveling, and if you find, in the exercise of ordinary and reasonable care, that he could have stopped his car and avoided the collision and that he failed to do so, then he would be guilty of contributory negligence, and your verdict would be for the defendant."

The giving by the trial court of the last-quoted instructions demonstrates that the complained of error in instruction number 4 was merely an oversight of the trial court. Such error must be brought to the trial court's attention by specific objection, and will not be reviewed otherwise. *Tennyson* v. *Keef,* 172 Ark. 877, 291 S. W. 426; *Keith* v. *Drainage District,* 183 Ark. 384, 36 S. W. (2d) 59.

No error appearing, the judgment is affirmed.

BALDWIN *v.* WATERS.

4-3968

Opinion delivered October 7, 1935.

Thos. B. Pryor, Daggett & Daggett and *John L. Daggett*, for appellants.

Giles Dearing, for appellees.

HUMPHREYS, J. This is an appeal from judgments for $1,250 against appellant in favor of Easter Waters and her daughter and for $125 in favor of Sol Meyers, which judgments were rendered in the circuit court of

Cross County, growing out of a collision between appellant's train and a team and wagon which was driven by Emmett Waters, which occurred at a point where a public road crossed the railroad track, known as "Killough Crossing," east of the city limits of Wynne. The railroad track was located on a fill or high embankment running east and west for a considerable distance. The highway ran across the embankment at right angles and over rather steep approaches running north and south from the road level up to and over the railroad embankment. A short freight train owned by appellant, while traveling west on the railroad track on December 29, 1933, ran over Emmett Waters, the husband of Easter Waters and father of Betty Waters, and the team he was driving, killing Emmett Waters and one of the mules, which belonged to Sol Meyers. The wagon was heavily loaded with baled hay, upon which Emmett was seated and driving the team slowly across the track when the collision occurred. He had come up the south approach onto the track, and was struck by the train before the mules could entirely cross the track.

Emmett Waters was a negro sharecrop farmer, about forty-seven years of age when killed, and usually cultivated ten acres of land, raising each year four or five bales of cotton and was a sober, industrious man. He and his wife had been married for seven years and until the last two years of his life had lived continuously together. They had two children. The first child died. The second child, one of the appellees, was nearly three years old when Waters was killed. During the last two years of his life, Waters and his wife were separated, but he frequently visited his wife and child and made small contributions of money to them. He also furnished them with groceries. About a month or so before he was killed, he and his wife had made arrangements to live together again.

Upon the conclusion of the testimony, the court submitted the cause to the jury as to whether appellant was liable in damages upon issues joined as follows: First, for its alleged failure to give the statutory signals; and, second, for its alleged failure to exercise ordinary care

and due diligence after having discovered the perilous position of the deceased to prevent the collision.

It is first contended by appellant that the undisputed evidence showed that the deceased was guilty of contributory negligence, and that for this reason the judgment in favor of Sol Meyers for the loss of his mule must be reversed and his cause dismissed.

According to the testimony of the witnesses introduced by appellees, the deceased was driving a team and wagon loaded heavily with hay from the south up the approach to the railroad track, devoting his entire time and attention to his team. They did not see him look to the east to ascertain whether a train was coming from that direction nor stop and listen for its approach. They said that, while approaching the track, one of his mules stumbled and fell to his knees, and that he was holding a tight line as if to assist the mule in getting up and to hold them to the right side of the road, which was narrow, so as not to run into any one he might meet coming from the north over the dump or embankment. This conduct on the part of deceased tends to show that he was guilty of contributory negligence, and, as the rule of comparative negligence applies to persons only who are injured or killed by the operation of railroads, the judgment for killing his mule must be reversed, and his cause dismissed. *Missouri Pacific Railroad Company* v. *Johnson,* 167 Ark. 464, 268 S. W. 31.

The judgment cannot be affirmed under the doctrine of discovered peril, as appellee's own testimony shows that when Waters and his team were first seen by the servants of appellant, he was twenty or more feet from the track approaching it very slowly up hill in a heavily loaded wagon, and at the time there was nothing to indicate that he would not stop his team before he reached the track. He did drive upon the track in front of the train, but, at the time he did so, the train was too close to him to stop and prevent the injury.

Appellant also contends that the judgment for $1,250 in favor of Easter and Betty Waters must be reversed because the evidence is insufficient to show that it failed to give the statutory signals required to be given as it

approached said public crossing. It is argued that the required signals were given. The statute requiring signals to be given is as follows:

"A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street and be kept ringing or whistling until it shall have crossed said road or street * * *; and the corporation also shall be liable for all damages which shall be sustained by any person by reason of such neglect."

There was a sharp conflict in the testimony as to whether the signals were given in accordance with the statute as appellant's train reached the crossing, and the finding of the jury that they were not given cannot be disturbed on appeal by this court.

The determination of whether the failure to give the signals was the proximate cause of the injury was also a question of fact to be determined by the jury. The jury may have concluded, and reasonably so, that, had the signals been given, the deceased would have heard and heeded the warning and stopped instead of driving his team upon the track in front of the moving train. The fact that the deceased was himself guilty of contributory negligence did not prevent the jury from finding that the failure to give the signals was the proximate cause of the injury.

The doctrine of comparative negligence was applicable, and the jury were correctly instructed relative thereto in the following language:

"If you find from the evidence that the said Emmett Waters was in fact guilty of contributory negligence, still such contributory negligence on his part will not prevent a recovery herein, unless you find that his contributory negligence was equal to or greater than the negligence of the defendants. But if you should find that the defendant was guilty of negligence, and that the intestate was also guilty of contributory negligence, and that the contributory negligence on the part of the intestate was less than the degree of negligence of the defendant, then

your verdict should be for the plaintiff; but you should diminish the amount of the damages in proportion to the amount of such contributory negligence of the deceased."

From what has already been said, it is unnecessary to discuss the question of discovered peril argued pro and con in the briefs of learned attorneys.

Appellant also contends that there is no substantial evidence in the record on which to base a finding for any particular amount of damages, and that therefore a finding of $1,250 was necessarily the result of speculation, conjecture, prejudice, and sympathy. We cannot agree in this contention. The modest amount of the judgment itself indicates that prejudice and sympathy were not the moving causes of the verdict. Had they been the basis for the verdict, the jury would have fixed a much larger amount than $1,250 for the death of a man. Neither can we agree that the verdict was the result of speculation and conjecture. Waters was in good health, able-bodied, industrious, sober, and, until the temporary separation from his wife, had expended practically all his earnings on his family and very little on himself. During the temporary separation, he had made small money contributions to them and had furnished them groceries. Before his death, he and his wife had made arrangements to live together in the future. He cultivated ten acres of land as a usual thing, and made four or five bales of cotton a year, and worked for others when he could find work to do. He had quite a long expectancy, and his girl child was hardly three years of age when he was killed. The duty rested upon him to maintain this child. Certainly the present value of such support and services as he might render them during his expectancy would amount to at least $1,250. The temporary separation of these negroes should not materially diminish the amount his wife, Easter, ought to recover, and their separation could not possibly affect the child's rights. In the case of *Sipple* v. *Gas Light Company,* 125 Mo. App. 81, 102 S. W. 608, a judgment in favor of a child for $2,000, whose parents were divorced and the custody of the child awarded to its mother, was sustained on the ground that the child's

rights were not impaired by a divorce decree between its parents.

The judgment is affirmed as to Easter and Betty Waters, and reversed and dismissed as to Sol Meyers.

FIRST NATIONAL BANK *v.* MYERS.

4-3975

Opinion delivered October 7, 1935.

John W. Goolsby and *James B. McDonough,* for appellant.

Karl Greenhaw and *Geo. W. Johnson,* for appellees.

MEHAFFY, J. On January 27, 1934, the appellees began this suit against the Jim Fork Coal Company, a cor-

poration engaged in the business of mining coal in Sebastian County, Arkansas. Their cause of action was for labor performed in the mine of the mining company.

The law provides that any person or persons working in any mine of the State of Arkansas or in any quarries, either stone or marble, shall have a lien on the output of any such mine or quarries and the lien shall attach to all the machinery, tools and implements. Section 7293, Crawford & Moses' Digest.

Thereafter an amendment was filed on February 1, 1934, making E. J. Darnell a party plaintiff.

On February 3, 1934, the Jim Fork Coal Company filed answer agreeing to the appointment of a receiver, although it claimed it was not insolvent. On February 3 a receiver was appointed, and on February 8, 1934, the receiver filed his report. The receiver reported that the value of the development of said mine was $11,451; that the personal property was of the value of $36,307; the lease was not appraised; the indebtedness of the coal company at that time was $25,404.29. According to the receiver's report, the value of the mining company's property, in addition to the value of the lease, was $22,-353.71 in excess of its indebtedness. The receiver stated in his report that the mine was developed to such a point that it might be easily operated with a profit, and asked permission to issue receiver's certificates for the sum of $1,000.

On April 4, 1934, a motion to require a sale of the receivership property was filed, and it was stated that the mine had not been operated. On April 12 the receiver filed a response to the motion to require sale, alleging that he would not be able to operate the mine, and that the expense of maintaining the property was excessive, and it should be disposed of at the earliest opportunity; that he attempted to sell or lease the property and had been unable to do so; that there were two outstanding mortgages on the property past due; that, in order to dispose of the property, it was necessary that the First National Bank and others be made parties.

On March 14, 1934, the receiver reported that it appeared impossible to operate the mine; that it was cost-

ing about $40 a day to preserve the property, and that the receiver had contracted an indebtedness of approximately $1,465 for labor, repairs and power.

Interventions were filed by numerous parties, among others the Southwestern Gas & Electric Company. It claimed that the mining company owed it $4,686.18 for electric energies used prior to the receivership.

On April 23, 1934, the appellant filed an intervention alleging that the mining company was indebted to it, the indebtedness being evidenced by a note and mortgage dated September 14, 1929; that the original indebtedness was $2,500 but that $1,000 had been paid, leaving an indebtedness of $1,500 and interest. The note was due June 1, 1933, and bore interest at the rate of 10 per cent. per annum from maturity until paid. The intervener, First National Bank, prayed that, if a sale of the property was made, all the properties embraced in its mortgage be segregated and sold separately and the proceeds of the sale held by the court in trust for the mortgagee and that funds derived from such sale be applied on its mortgage debt of $1,500 and interest.

There were two efforts made to sell the property at public sale, and thereafter an order was made to sell at private sale, and the property was sold at private sale, and the property included in the mortgage to the First National Bank was sold for the sum of $1,566.40. The entire property sold for $2,292.35.

We deem it unnecessary to set out the interventions of the different parties, because the only question involved on this appeal is whether the expenses of the receiver constitute a lien superior to the mortgage lien of the First National Bank.

The regular chancellor certified his disqualification, and the Honorable George W. Dodd was elected special chancellor to try the case.

The first error alleged as ground for reversal is that, after the decree was rendered, the term of court ended and another term begun before the decree on May 12, and that the chancellor was without power to change his former decree. There is no merit in this contention. The first decree simply held that the bank, the mortgagee, had

a lien on all the property included in its mortgage that was superior to the lien of all persons interested in the suit. The persons interested at that time were the laborers and other creditors, and the court found that the bank's lien was superior to their lien, and the chancellor reserved the question now before the court.

The other question presented for our consideration is whether the bank's lien is superior to the lien for receivership expenses. It is argued by the appellee that these expenses were necessarily incurred to protect the property of the mining company; that the bank, through its officers, knew all about it; that the receiver was cashier of the bank, and that John Conroy was a stockholder and director in the bank; that they acquiesced in the proceedings, hoping that it would be beneficial to them. Conroy was superintendent and manager of the Jim Fork Coal Company, and was acting for the coal company, and not for the bank.

A bank is not bound by the acts of its cashier which are not within the apparent authority of the cashier, and which it has neither authorized nor ratified. The acts of the cashier in accepting the receivership of the mining company was not within the apparent authority, and this record does not show that the bank either authorized or ratified these acts of the cashier. 7 C. J. 551.

Whatever the cashier did with reference to the mining company was in no way connected with the bank, but was a matter in which he was personally interested. 7 C. J. 552.

In discussing the authority of the cashier of a bank, the Missouri court said: "The law will not permit an agent's private interests to come between himself and his principal. Its actual presence always disables the agent from binding his principal." *Lee* v. *Smith,* 84 Mo. 304, 54 Am. Rep. 101.

"A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests and deals with the corporation as a private individual and in no way represents it in the transaction." *Buffalo County Nat. Bank* v. *Sharpe,* 40 Neb. 123, 58 N. W. 734.

In 7 C. J. 557, is the following statement: "This rule is founded on the familiar rule of the law of agency which forbids that an agent shall act for himself and for his principal in one and the same transaction. It is founded on sound consideration of public policy and the recognized inability of any person to faithfully serve two masters at the same time. Consequently, when the cashier issued these drafts, he did so without authority, and his conduct is to be viewed in no more favorable light than that of any other person who, without authority, appropriates the property of another to his own use."

This action was begun against the mining company by laborers, and there is no evidence that the bank had any knowledge of it. The plaintiffs in the case asked for the appointment of a receiver, alleging the insolvency of the mining company. The mining company filed answer denying its insolvency, but agreed to the appointment of a receiver. Mr. Savage, who was cashier of the bank, was appointed receiver and acted as such. This was on February 3, 1934. There is no evidence that the bank had any knowledge of it, and there is no evidence that the cashier himself knew anything about it until he was appointed. This was no part of his duties as cashier of the bank, and this act alone would not bind the bank.

Appellee calls attention to 23 R. C. L. 76, but immediately following the statement quoted by appellee is the following: "But the duty to preserve the property by no means includes the right to create debts for other purposes."

Appellees also call attention to 23 R. C. L. 86 with reference to receiver's certificates. The power of the chancery court to authorize the receiver to issue certificates which shall become paramount liens grows out of its duty to protect and preserve the property. There was no occasion or no reason to protect and preserve the property of the bank because the property was ample to secure the debt to the bank, and the bank was protected by its mortgage.

Section 7393 of Crawford & Moses' Digest is 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 bank had the legal right to the possession of this property, and there is this provision in the mortgage: "The mortgagor hereby agrees to the following conditions which are made part of this mortgage: 1. The mortgagor shall, until default herein, keep the actual possession and control of said property, including the increase of all female property, and shall keep the same in good condition."

The mortgage was past due, default had been made, and the bank had the right to the possession of the property, and it had the legal title thereto.

So far as this record shows, the first thing the bank did with reference to this suit was to file an intervention and ask for the foreclosure of its mortgage. It asked that the property included in the mortgage be segregated and sold separately and the proceeds of the sale applied on the mortgage debt.

When the receiver was appointed, he made an inventory, and apparently all parties that knew anything about it believed that it would be to the best interest of the creditors to operate the mine. They soon, however, found out that this could not be done. The appointment of a receiver and the operation of the mine was not for the protection of the bank's debt, because it had a mortgage on the property of sufficient value to pay its debt. The mortgage was past due, default had been made, and under the law the bank had the right, when this suit was brought, to take possession of the property and sell it and apply the proceeds of the sale to the satisfaction of its debt.

Since it was thought that the operation of the mine might be beneficial to other creditors and would not in any way prevent the bank from collecting its debt, the bank probably would have agreed to the operation. If it had, this would not bind it to pay expenses of the receiver to preserve and protect the property of the other creditors. Not only was there no reason for a receiver, in order to protect the property of the bank, but practically all the property included in the bank's mortgage was of

such a character that the furnishing of electricity by the electric company would not in any way benefit the bank or have the effect of protecting or preserving its property. Its property consisted largely of property outside the mine. There were seven mules, six sets of harness, one mine tipple, one screen shaker, and numbers of other articles that were in no way protected or benefited.

Appellee calls attention to the case of *Buster* v. *Mann*, 69 Ark. 23, 62 S. W. 588. The property involved there was a sawmill, and was mortgaged to secure a debt. In that case the only property involved was that included in the mortgage, and the mortgagee had consented to the appointment of a receiver and the operation of the mill. The court said: "Under these circumstances, we think the debts of the receiver should be paid out of the assets in the hands of the receiver before anything is paid on the debt of Mann, Moon & Co. In reaching this conclusion we by no means approve of the order authorizing the operation of this mill. Courts are not required to operate sawmills, and the disastrous consequences that resulted from the operation of this mill by the receiver illustrates the evil and danger of such a proceeding. But the order was doubtless made because no one objected, and the creditor that consented has no right to complain at the expense necessarily entailed."

It was held that the expenses of the receiver took precedence over the mortgage debt in that case, but the entire property was mortgaged and the mortgagee consented to the operation of the mill by the receiver.

In the instant case there was a great deal of property in addition to that described in the mortgage, and there is no evidence that the bank consented to the operation of the mine by the receiver. Moreover, in the instant case the mortgage was past due, and the bank had the legal right at any time to take possession of the property.

The next case to which appellee calls attention is *German National Bank* v. *Young,* 114 Ark. 370, 169 S. W. 1178. That case has no application.

Appellee also calls attention to *Crow* v. *Rogers,* 181 Ark. 633, 26 S. W. (2d) 1112, and *Rogers* v. *Ownby,* 190

Ark. 1144, 83 S. W. (2d) 818. The question here was not involved in either of those cases, and not discussed.

Under the law the bank's mortgage lien was superior to that of the electric company and all others. The bank was entitled to foreclose its mortgage, and is entitled to the proceeds of the sale of the property included in its mortgage. The bank, however, spent some money protecting its property, and this is a proper charge against the bank. It expended $173.25 for removing property, $61.80 mule feed and $25 paid Hefley for services in effecting a private sale. These sums the bank is liable for.

The decree of the chancery court is reversed, and the cause is remanded with directions to pay the bank the amount of its judgment less the above amounts necessarily expended in protecting its property.

It is so ordered.

SMITH *v.* ARKANSAS POWER & LIGHT COMPANY.

4-3955

Opinion delivered October 7, 1935.

Pace & Davis and *Buzbee, Harrison, Buzbee & Wright,* for appellant.

House, Moses & Holmes and *Eugene R. Warren,* for appellee.

SMITH, J. In September, 1930, appellant was employed by House-Bond Hardware Company, of Memphis, Tennessee, as a traveling salesman in this and other States. At the time mentioned, and while so employed, he drove in his automobile into the city of Pine Bluff during a hard rain. He drove over a wide and well-paved street, down the center of which ran a street car track over which appellee operated electrically-driven street cars. There is no dispute but that there was ample room on each side of the street car track for the easy and safe travel of automobiles. Appellant's automobile collided on this street with one of appellee's street cars. The track where the collision occurred was perfectly straight for several hundred feet, and there was nothing to prevent appellant from seeing the approaching street car, on which the headlight was burning, nor was there anything

to prevent the motorman on the street car from seeing appellant. Indeed, each admits seeing the other as they approached from opposite directions.

The suit for damages resulting from this collision, from which this appeal comes, was tried on appellant's behalf upon the theory that the wheels upon the left-hand side of his automobile became fastened in a rut between the street car track and the adjacent street pavement, and, while plaintiff was thus fastened, the street car ran into him and demolished his automobile and inflicted upon him injuries of a serious and permanent character. Instructions were given at plaintiff's request declaring the law of discovered peril. It was the theory of the defendant street car company that there was no case of discovered peril; that the plaintiff drove upon the street car tracks in such a manner that it was impossible for the motorman to stop the car in time to prevent the collision. The testimony is in irreconcilable conflict; but there was sufficient testimony to support either theory.

A suit was brought in the Clark Circuit Court in December, 1932, and, when the case was called for trial, the defendant street car company raised the point that the plaintiff had been paid some compensation for his injuries under the Workmen's Compensation Law of Tennessee (chapter 43, Code of Tennessee, 1932, §§ 6851 *et seq.*), and that the compensation thus paid under that act operates to assign the cause of action to plaintiff's employer to the extent of such payments. It was therefore prayed that the plaintiff's employer and the insurance company which had insured the employer against the liability as required by the compensation act be made parties. Section 6895 of the Tennessee act provides, in part, that: "Every employer under and affected by this chapter shall insure and keep insured his liability hereunder in some person or persons, association, organization, or corporation authorized to transact the business of workmen's compensation insurance in this State, * * *."

The Clark Circuit Court sustained the motion, whereupon the plaintiff took a nonsuit, and in December, 1933, commenced a new suit in the White Circuit Court. The complaint filed in this last case did not make the em-

ployer and its insurer parties. When the case was called for trial in the White Circuit Court the motion which had been filed and sustained in the Clark Circuit Court was renewed. The White Circuit Court sustained the motion and directed that the employer and its insurers be made parties. This proceeding was had before the trial of the case began. The plaintiff thereafter immediately filed interventions by both the employer and its insurer, disclaiming any pecuniary interest in the cause other than that existing by virtue of the Tennessee Workmen's Compensation Law. The intervention filed by the employer recites that: "It has heretofore authorized and does hereby authorize the plaintiff, Harold V. Smith, to prosecute, in so far as the interests of House-Bond Hardware Company may be involved, the above-styled suit in his own name, and it hereby adopts the complaint and the proceedings of the plaintiff, Harold V. Smith, in this cause, and, to the end that there may not be any apparent defect of parties, plaintiff in this cause does hereby ask leave of court to be named as a party plaintiff herein." The insurance company filed a similar pleading, but, before they were filed, plaintiff excepted to the ruling of the court requiring them to be made parties and to disclose their interest in the litigation. The acquiescence of the employer and the insurer to the prosecution of the suit had not been made to appear until these pleadings were filed.

The trial resulted in a verdict and judgment for the plaintiff for the sum of $5,000, from which the plaintiff has appealed, upon the ground that error in the trial of the cause resulted in the return of a verdict which the undisputed testimony shows to be grossly inadequate to compensate the damage which the undisputed evidence shows was sustained by the plaintiff.

The defendant resists the reversal of the judgment from which this appeal comes upon the ground that plaintiff recovered damages in a very substantial amount. It is insisted that a judgment for damages will only be reversed for inadequacy where nominal damages were awarded, and will not be reversed for inadequacy where substantial damages were awarded. The following cases

are cited and discussed by opposing counsel: *Dunbar* v. *Cowger*, 68 Ark. 444, 59 S. W. 951; *Carroll* v. *Texarkana Gas & Electric Co.*, 102 Ark. 137, 143 S. W. 586; *Bothe* v. *Morris*, 103 Ark. 370, 146 S. W. 1184; *Martin* v. *Kraemer*, 172 Ark. 397, 288 S. W. 903; *Krummen Motor Bus & Taxi Co.* v. *Mechanics' Lumber Co.*, 175 Ark. 750, 300 S. W. 389; *Fulbright* v. *Phipps*, 176 Ark. 356, 3 S. W. (2d) 49; *Kimbrough* v. *Johnson*, 182 Ark. 522, 32 S. W. (2d) 154; *Powers* v. *Wood Parts Corporation*, 184 Ark. 1032, 44 S. W. (2d) 324.

In the case of *Fulbright* v. *Phipps*, *supra*, it was said: "We have held that where a jury found, under conflicting testimony, that a plaintiff was entitled to recover damages, and the undisputed testimony showed the damages were substantial, the judgment for nominal damages only was an error, to correct which this court would reverse the judgment. This is true, however, because a judgment for nominal damages is, in effect, a refusal to assess damages. [Citing cases.] Here the verdict and judgment was not for a nominal sum, but was for a very substantial amount, to-wit, the sum of $5,000. There was therefore no refusal to render judgment for more than a nominal amount."

In the case from which we have just quoted, the testimony was to the effect that the plaintiff was entitled to recover $10,000, if entitled to recover anything at all, but the jury returned a verdict for only one-half that amount. It was insisted that the verdict did not comport with either theory of the case and should be reversed for that reason. We recognized the fact, however, that verdicts of juries must necessarily result from a reconciliation of the views of individual jurors which are often conflicting, and, if the jury system is to be employed as a practical method of settling finally disputed questions of fact, appellate courts, in reviewing the verdicts, can only determine whether the testimony is legally sufficient to support the verdict returned. If the testimony is legally sufficient to support the verdict, it is unimportant that the verdict is not in harmony with either theory upon which the case was tried. We therefore affirmed the judgment in this Fulbright case, from which we have just

quoted, rendered upon the inconsistent verdict returned in that case, and in so doing said: "It is true that the verdict is not consistent, but this is not ground for us to reverse the judgment, as it is supported by very substantial and sufficient testimony."

The case of *Kimbrough* v. *Johnson, supra,* was one in which the plaintiff sued for $5,000 damages to compensate injuries sustained by falling into a hole which the defendant's employees were alleged to have negligently left open. There was a verdict and judgment for the plaintiff in the sum of $114.04, which the plaintiff asked us to reverse for its inadequacy. The trial court refused to charge the jury at the request of the plaintiff that it was the defendant's duty under the law to fill the hole. We there said that "If the court had instructed the jury that it was appellee's duty under the law to fill the hole, a greater amount might have been awarded appellant for his injuries." We reversed the judgment for the refusal of the court to declare the law in regard to defendant's neglect of duty. Two members of the court dissented from the judgment of reversal on the ground that the failure to properly instruct the jury was not prejudicial, for the reason that appellant had recovered a judgment for substantial damages.

The rule to be deduced from these cases appears to be this: When the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a judgment will be reversed which awards only nominal damages, because a judgment for nominal damages is, in effect, a refusal to assess damages. When substantial damages are awarded, a judgment will not be reversed because of inadequacy, if there be no other error than that committed by the jury in measuring the damages. But a judgment even for substantial damages will be reversed where the undisputed testimony shows the damages to be inadequate, if error of a substantial and prejudicial nature was committed at the trial of the case. This is upon the theory, as was said in the Kimbrough case, *supra,* that but for such error damages might have been properly assessed.

Now, as has been said, the testimony is sharply conflicting as to whether the street car company is liable in any sum, and a verdict might have been returned in its favor upon the ground that its motorman was guilty of no negligence, and also upon the ground that the plaintiff's injury was the result of his own negligence. But, if liable at all, the undisputed testimony shows the verdict to be grossly inadequate. The plaintiff was unconscious for five weeks after his injury, and was confined in the hospital for over two years, and is even yet under treatment. His injuries, physical and mental, have totally disabled him. His hospital bill totaled $2,907.25. He was earning $3,000 a year in excess of his expenses, with reasonable prospects for promotion. Plaintiff's actual pecuniary loss was therefore much more than $5,000, without taking into account any compensation for the pain suffered.

Yet, notwithstanding these facts, we would not, under the authority of the cases above cited, reverse the judgment for its inadequacy of compensation if the record contained no prejudicial error except that of assessing the damages, inasmuch as substantial damages were awarded. But, if there was other error of a material and prejudicial nature, the judgment must be reversed, notwithstanding the award of substantial, and not nominal, damages. Was there such error?

Appellant insists that the action of the trial court in requiring his employer and the insurance company to be made parties was such an error. But it is unnecessary to decide that question, for the reason presently stated.

It is true, of course, as appellant insists, that, as he was injured in this State, his right to recover compensation for those injuries and the amount thereof must be determined by the laws of this State, uninfluenced by the compensation laws of the State in which plaintiff was employed. *Standard Pipe Line Co.* v. *Burnett,* 188 Ark. 491, 66 S. W. (2d) 637; *Standard Oil Co. of La.* v. *Richerson,* 188 Ark. 882, 67 S. W. (2d) 1003; *Logan* v. *Missouri Valley Bridge & Iron Co.,* 157 Ark. 528, 249 S. W. 21.

But it was shown by the plaintiff's own testimony that he had received benefits under § 6865 of the Workmen's Compensation Law of Tennessee, which reads as follows: "Whenever any injury for which compensation is payable under this chapter shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation or proceed at law against such other person to recover damages, or proceed against both the employer and such other person, but he shall not be entitled to collect from both; and, if compensation is awarded under this chapter, the employer, having paid the compensation or having become liable therefor, may collect, in his own name or in the name of the injured employee in a suit brought for the purpose, from the other person against whom legal liability for damages exists, the indemnity paid or payable to the injured employee."

Section 6895 of this act requires all employers affected by the provisions of the act to insure and keep insured his liability thereunder with some insurer authorized to transact the business of workmen's compensation insurance in that State.

Opposing counsel have cited and reviewed the Tennessee cases which have construed this statute, one of the most recent being that of *Keen* v. *Allison,* 166 Tenn. 218, 60 S. W. (2d) 158, where it was said: "This section of the Code has been considered in several cases, and it is well settled that an employee who receives workman's compensation for an accident contributed to or brought about by the negligence of the third party, upon collecting such compensation, loses his right, in his own behalf, to sue such third party for damages. This right of action against the third party passes to the employer by statutory subrogation. This is undoubtedly the rule when the employee collects compensation from his employer without reservation or exception of the right of action against the third party, or without waiver of the right of subrogation by the employer. (Citing cases.)"

But whether the effect of this statute is to make plaintiff's employer and the insurer either proper or

necessary parties need not now be determined, because the case of *Keen* v. *Allison, supra,* makes it clear that the employer may waive any right of subrogation or authority to sue which this act confers, and the employer has waived that right in this case and has been joined as a party plaintiff, as has the insurer also, in order that there may be no defect of parties. So that upon the remand of the cause this question will be unimportant, for the reason that the employer and the insurance company have passed out of the case by waiving any rights they may have acquired under the Workmen's Compensation Law by virtue of payments to plaintiff under the provisions of that act.

There was an error, however, for which the judgment must be reversed under the rule stated. As has been said, the plaintiff sought to recover upon the theory of discovered peril, and instructions were given at the plaintiff's request which declared the law applicable to that issue. But the instructions given at the request of defendant eliminated that issue. For instance, instruction 9 given at the defendant's request reads as follows: "If you find that the plaintiff was guilty of negligence in attempting to drive upon the street car track in front of the street car approaching on said track and that his negligence brought about his injury or damage, then he cannot recover in this case, although you may find that the motorman on the street car failed to stop the car within time to avoid the collision."

Instruction numbered 16 given at defendant's request also eliminated that issue. It reads as follows: "The court instructs the jury that the plaintiff cannot recover if the collision was caused by the negligence of the plaintiff himself. The court further instructs you that if you find that the plaintiff was in any manner at fault or that the plaintiff committed any act which was a contributing cause to the accident, then the plaintiff cannot recover. In other words, the court tells you that, if this accident was caused by any negligent act of the plaintiff, he cannot recover, or if the accident was caused by the combined negligence of the plaintiff and the motorman, then plaintiff cannot recover."

It was error to thus eliminate the question of discovered peril, as there was sufficient testimony to warrant the submission of that issue, and but for this error the jury might more adequately have compensated the damage if there was liability therefor.

For the error of withdrawing the question of discovered peril, as was done in instructions 9 and 16, the judgment must be reversed, and it is so ordered, and the cause will be remanded for a new trial.

HESS *v.* ARNOLD.

4-3964

Opinion delivered October 7, 1935.

Donham & Fulk, for appellants.

J. H. Lookadoo and *Lyle Brown,* for appellee.

McHANEY, J. Appellant Hess is a truck driver in the employ of appellant Dillaha. On September 14, 1934, while driving a Dillaha beer truck north on highway 67 about a mile and a half south of Arkadelphia, in Clark County, and at a time when he was passing another truck going in the same direction, owned and operated by appellee, an accident occurred caused by the two trucks coming in contact which resulted in the overturning of appellee's truck and in severe and painful injuries to

appellee and considerable damage to his truck. This action was brought to recover damages therefor. It was appellee's contention that, while driving north on said highway, on the right-hand side, a foot or more to the right of the black stripe down the center thereof, at a moderate rate of speed, and while exercising due care for his own safety, the Dillaha truck, driven by Hess, undertook to pass him and carelessly and negligently and, as he thought, intentionally drove his truck so close to appellee's as to collide with it and to crowd him off the highway, so that his car was overturned, causing the damages complained of. A trial resulted in a verdict and judgment in appellee's favor against both appellants in the sum of $5,000 for personal injuries and $150 for damages to the truck.

For a reversal of the judgment against them, appellants argue two assignments of error: First, that the court erred in refusing their requested instruction No. 4; and, second, that the verdict is excessive.

Requested instruction No. 4 reads as follows: "You are instructed that, if you find from the evidence in this case that the plaintiff failed to drive his truck upon the right-hand side of the highway, and that it was not impracticable to travel upon the right-hand side of the highway at the place where it is alleged that the plaintiff was pushed off the highway by the truck driven by the defendant, W. D. Hess, that this is *prima facie* evidence of negligence on his part and casts the burden upon the plaintiff to prove that he was exercising ordinary care, notwithstanding the violation of this law. If you further find from the evidence in this case that the plaintiff failed to drive upon the right-hand side of the highway, and that it was practicable to drive on the right-hand side of the highway at the place where he alleged that he was pushed off the highway by the truck driven by the defendant, W. D. Hess, and has failed to prove that he was exercising ordinary care, notwithstanding the violation of this law, and that the violation of the law caused or contributed in any manner to his injury, or the damage to his truck, if any, then you must find for the defendant."

For the purpose of this opinion, we assume, without deciding, that said requested instruction is a correct declaration of the law. It does not follow, however, that the case must be reversed because the court refused to give it. Other instructions were given both on behalf of appellants and appellee which covered the subject-matter of requested instruction No. 4. For instance, in instruction No. 1, given at the request of appellee, one of the conditions upon which he was permitted to recover was that the jury must find from a preponderance of the evidence that he was well on his right side of the highway and that he was guilty of no negligence contributing in any way to his injury. In instruction No. 2, given at the request of appellants, the jury was clearly told that appellee could not recover if he turned his truck to the left across the center line of the highway causing it to come in contact with the Dillaha truck, because this would be contributory negligence on his part. Also in instruction No. 5, given at appellants' request, the court told the jury that if appellee "failed to give way to the right to allow the defendant, W. D. Hess, to pass him, this is *prima facie* evidence of negligence and casts the burden upon the plaintiff to prove that he was exercising ordinary care, while failing to give way to the right, and that such failure, if any, caused or contributed in any manner to his injury or the damage to his truck, if any," they should find for appellants. It will be seen that these instructions given fully and fairly submitted the question to the jury as to whose fault it was that the accident occurred. If the appellee was driving his truck on the right-hand side and negligently turned over to the left and came in contact with the Dillaha truck, or if he were driving too far to the left and failed to give way to the right so that the Dillaha truck could pass, and that either of these things caused or contributed to the injuries, the jury were told that appellee could not recover. It appears to us that these instructions cover all the ground mentioned in requested instruction No. 4, and that no error was committed therefore in refusing to give it. The court is not required to multiply instructions covering the same subject-matter.

As to the question of the excessiveness of the verdict for personal injuries, the evidence is not in dispute. Appellee and his physician were the only witnesses who testified to the nature and extent of his injuries. Appellants introduced two witnesses who testified concerning the activities in which appellee was engaged following the accident. The evidence of appellee and his physician shows that he was "pretty badly bunged up," that he was brought to the hospital shortly after the accident bleeding from several cuts about the face and scalp and a two or three-inch cut above one eye; that he had suffered a slight concussion of the brain which had apparently cleared up, and had received an ugly wound in his abdomen that went through the skin and into the superficial parts; that his neck and shoulders were bruised, and that he could not at the time of the trial turn his head to the left. While the physician declined to say that Mr. Arnold had suffered permanent injuries, he did say he would always have reminders of the accident. It is true that appellee did not spend much time at the hospital, but left shortly after his injuries were patched up, and that he continued to conduct his business, although with some pain and discomfort. We have carefully examined all of the evidence relating to the injuries appellee received, and, while we are of the opinion that ample compensation has been awarded, we are unwilling to substitute our judgment for that of the jury. No question appears to be raised concerning the excessiveness of the verdict for damages to the truck, but the testimony appears to fully warrant the amount thereof.

No error appearing, the judgment must be affirmed.

RCA VICTOR COMPANY, INC., *v.* DAUGHERTY.

4-3967

Opinion delivered October 7, 1935.

Moore & Burke and *G. D. Walker,* for appellant.

W. G. Dinning, for appellee.

BAKER, J. The appellee, Evelyn W. Daugherty, was the owner of a picture show house in West Helena, and R. L. Brooks, her brother-in-law, who was managing her affairs there, entered into a contract with A. A. Hughes, representing the R. C. A. Victor Company, Inc., for the lease of motion picture sound producing equipment for use in the said theatre. This theatre equipment was already in place in the building at the time the contract was made.

There is a sharp dispute between testimony offered in behalf of appellant, and that offered in behalf of the appellee about the contract, but all parties agree upon certain facts.

Appellee was to pay $100 in cash, and to pay $17.50 per week, which payments appellant claims were to continue over a period of 156 weeks, but the appellee contended that they were to continue for 104 weeks.

A. A. Hughes, agent for the appellant, had authority to prepare a contract, secure the signature of his customer, and forward the same for approval or acceptance to the main office of the appellant company. In this case Hughes and Brooks each say that the contract was agreed upon in Brooks' office, in the presence, however, of one or two other persons; that, after they had agreed upon terms, conditions, etc., Brooks called the appellee, Mrs. Daugherty, at Memphis, and advised her of the fact that they had agreed upon a contract, and that it would be presented to her by Hughes for her signature, and requesting her to sign same when presented. A short time thereafter, perhaps on the same day, Hughes presented the contract to Mrs. Daugherty at Memphis, who, together with her husband, went with Hughes to a notary public, before whom she signed and acknowledged the

same. The $100 payment had already been collected from Brooks.

The evidence is not wholly undisputed that Mrs. Daugherty signed the contract without personal investigation, and at the same time signed a note presented to her by Hughes, and these papers were sent to the appellant company for approval.

Shortly after the execution of the contract, appellee was in default and admits that she continued in default until the time of the institution of this suit.

In fact, two suits were brought, but these were later consolidated and tried together. The first suit was a suit in replevin to recover the theatre equipment involved, and the second was to recover the balance alleged to be due upon the note.

If, in consideration of this case, we confine ourselves strictly to the written pleadings, a situation somewhat confusing arises. In defense of the suit, Mrs. Daugherty pleaded that the defendant company, by its agent, Hughes, fraudulently changed the contract after it had been agreed upon as between Brooks and Hughes, and before it was presented to her at Memphis, Tennessee, so that, upon its execution by her, it appeared upon its face to be a contract binding her to make payment for 156 weeks, or three years, instead of 104 weeks, or two years. She alleged that, by reason of said fraudulent conduct in so changing the contract after Brooks had telephoned her to sign the instrument that would be presented by Hughes, the said contract, as sued upon, was void and not binding upon her. She did not, however, offer to rescind the contract, or to return the property delivered to her on account thereof, but on the other hand she executed a retaining bond, in the replevin suit, to hold and keep in her custody the property. Her answer or pleadings in both of the suits were substantially to the same effect.

After the consolidation of the two causes, in fact, at the time of the submission to the jury, the trial court, by an announcement, simplified the issues. This announcement was made without objection to any part thereof.

The announcement is as follows: "*The court:* It is agreed on the part of the plaintiff that if the verdict of

the jury should be for $1,720, and if the judgment is paid within ten days, the defendant will be permitted to keep the machine for a period of ten years from the date of the contract; and it is agreed on the part of the defendant, if the verdict goes for the amount of either $810 or $1,720, that the plaintiff will be entitled to the machine unless said judgment is paid within ten days, and an instruction to the jury on the possession of the machine is waived, and the court may make the order in accordance with the verdict of the jury."

The jury, by its verdict, found for the appellee, that is to say, the verdict is in accordance with her contention, fixing the amount of the debt at $810. The appellant claims that the amount of the indebtedness was $1,720. The appeal is to settle this controversy.

From the foregoing it will be observed that only one question was submitted for determination, that is, should the jury return a verdict for $810 or for $1,720, in favor of the plaintiff. The question of the right of possession of the theatre equipment was not submitted to the jury.

This proceeding under this announcement of the court, the parties consenting thereto, or at least not objecting, not only simplified the issues or controversies, as between the parties, but waived many of the propositions urged and briefed on this appeal.

There is a vigorous presentation made to us that the defendant's pleadings do not justify the submission to the jury of the matter of appellant's contention that she was owing only $810; that she has not sued, by way of recoupment or offset, on account of the loss alleged to have been occasioned by reason of the change in the contract, as pleaded by her.

In addition to the foregoing matter, as above set out, in regard to the announcement of the issues, and the acceptance thereof by the parties, it can well be argued that, testimony having been offered by the appellee developing her theory without objection, her pleadings will be deemed to have been amended to conform thereto. *Britton* v. *Meriwether,* 166 Ark. 414, 265 S. W. 364; *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44; *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. (2d) 553.

The appellee was not required to rescind the contract upon the discovery of fraud. She had the right, if she desired to do so, to wait until suit was filed to collect the money appellant claimed was due and owing, and then to recoup for such losses as may have been sustained by her on account of the deceit and fraud. This is in accordance with an opinion written by Chief Justice HART, in the case of *Held* v. *Mansur,* 181 Ark. 876, 28 S. W. (2d) 704.

Authority for this proceeding may be found in some of the earlier cases. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546. We discussed this proposition in a recent case, *Smith* v. *Leeper,* 189 Ark. 1051, 1055, 75 S. W. (2d) 1012.

No doubt, the trial court had these matters in mind at the time the above and foregoing announcements were made upon the trial of this case.

The simplified issues were properly submitted for the jury's determination upon correct instructions. The jury settled these disputed questions of fact. The verdict was supported by the evidence.

The question presented here is not what we might have done upon the trial of the cause, but what the jury did upon evidence sufficient to support its verdict.

From the foregoing, it must be seen that interesting matters in regard to pleadings and instructions, relating to fraud and deceit, must pass out of the case.

All controversies having been determined by settlement of the one real issue in favor of the appellee, the judgment is affirmed.

HOLLAND *v.* WAIT.

4-3879

Opinion delivered October 14, 1935.

Oscar H. Winn, for appellants.

C. C. Wait, for appellees.

JOHNSON, C. J. On April 30, 1924, in a cause then and there pending the chancery court of Pope County made and entered the following decree: "It is therefore considered, ordered, adjudged and decreed by the court that the said C. C. Wait, commissioner of this court, who now has in his hands $128.37, is ordered, authorized and directed to pay to R. B. Holland the sum of $42.79; to T. Holland or his rightfully appointed and duly qualified guardian the sum of $42.79, and to Tollie Holland or his duly qualified and lawfully appointed guardian the sum of $42.79, and that said commissioner be credited with said amounts when same has been paid."

On June 3, 1932, R. B. Holland, Tee Holland and Tollie Holland, appellants here, filed their motion for summary judgment against C. C. Wait, the commissioner referred to in the order aforesaid, alleging that they are the distributees designated in said order of April 30, 1924, and that no part of said distributees' share or shares has

been paid them or either of them, and prayed judgment for the sums due. On October 25, 1932, C. C. Wait, commissioner, filed his answer or response to appellants' motion wherein he denied any liability and especially pleaded that Will Kesler, plaintiff, and Robert Bailey, his attorney in the original action had never paid to him as commissioner or into the registry of the court the amount of the bid for the lands partitioned in the original action, and that they should be made parties defendant, to the end that it may be ascertained whether the distributive shares mentioned in the order of April 30, 1924, had been paid by them to the designated distributees. By proper order Kesler and Bailey were made parties as prayed. Subsequently, appellants amended their motion for summary judgment by praying for interest and certain penalties, and conceding that R. B. Holland had been paid his distributive share.

On September 4, 1934, Robert Bailey appeared in said cause and responded to the motions therein filed, whereupon the following order was entered: "Now on this September 4, 1934, comes Robert Bailey and states: That for the purpose of keeping down litigation but not admitting any liability but especially denying liability, he has paid the sum of $25 to R. B. Holland, Tee Holland and Tollie Holland and Oscar H. Winn in full settlement of any and all claims of any of said heirs or their attorneys. It is therefore considered, ordered, adjudged and decreed by the court that the motion for summary proceedings be dismissed with prejudice," from which this appeal comes.

On February 25, 1935, appellants filed their joint motion to vacate the last-mentioned order of dismissal, and as grounds therefor alleged fraud in its procurement. On submission of the motion to vacate, the affidavit of R. B. Holland, one of the distributees in the order of April 30, 1924, and one of the parties designated in the order of September 4, was submitted in evidence and in support thereof, in which the affiant swore that Robert Bailey did not pay to him $25 in settlement of the claims of his co-appellants or any part thereof. Without further proof being submitted by either of the parties,

the chancellor entered the following order, "Now on this day comes on for hearing 'motion to set aside order of the court made on September 4, 1934,' come the interveners, Tollie Holland, Tee Holland, by their solicitor O. H. Winn, and come defendants to said motion, C. C. Wait and Robert Bailey, in person; the court, being well and sufficiently advised, doth overrule said motion, to which ruling of the court the interveners except and pray for an appeal to the Supreme Court of Arkansas, which is by the court granted," and from this order an appeal was duly prayed and granted.

On March 1, 1935, and within six months from the rendition of the order of September 4, 1934, an appeal was duly granted by the clerk of this court.

Subdivision 4 of § 6290 of Crawford & Moses' Digest provides that judgments may be vacated or modified by the courts in which they are rendered for "fraud practiced by the successful party in the obtaining of the judgment or order." We have held, however, that the alleged fraud must consist in the procurement of the judgment. (*Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566), and the fraud must be perpetrated upon the court in the rendition of the judgment (*H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308), and it must also appear that there is a valid defense to the judgment, *Chambliss* v. *Reppy,* 54 Ark. 539, 16 S. W. 571; *Holman* v. *Lowrance,* 102 Ark. 252, 144 S. W. 190.

The response of Robert Bailey as shown by the order of September 4, 1934, was nothing more nor less than an appearance to the cross-complaint filed against him by C. C. Wait, commissioner, and, a special plea of full payment and satisfaction of the demands set forth in appellants' motion. This special plea did not warrant the court in disposing of appellants' motion summarily and without proof in support of it. Appellees did not respond to appellants' motion to vacate and submitted no proof to refute that offered by appellants; therefore we must consider the affidavit of R. B. Holland as *prima facie* true. If it be true, as stated by R. B. Holland in his affidavit, that Robert Bailey did not pay to the Hollands and their attorney of record the sum of $25 as repre-

sented by Bailey to the chancery court, this would be such fraud in the procurement of the judgment as to warrant the court in vacating it, provided there is a valid defense to the action. There can be no question but that the distributees in the order of April 30, 1924, were entitled to the sums of money therein designated unless these sums had been paid or otherwise satisfied. There is no valid defense offered to appellants' motion for summary judgment other than that Robert Bailey paid to appellants $25 in settlement thereof. If this be true, appellants' demands were extinguished; if not, appellants are entitled to judgment for the sums due.

For the reason stated, the cause is reversed and remanded, with directions to proceed not inconsistent with this opinion.

DEMOCRAT PRINTING & LITHOGRAPHING CO. *v.* CRAWFORD COUNTY.

4-3979

Opinion delivered October 14, 1935.

R. S. Wilson, for appellant.

Batchelor & Batchelor, for appellee.

JOHNSON, C. J. In 1932, appellant, Democrat Printing & Lithographing Company, furnished necessary supplies to Crawford County in the aggregate sum of $245.40 and simultaneously filed claims therefor. On January 1, 1934, these claims were disallowed by the county court of

Crawford County because in excess of revenues. An appeal was duly prosecuted to the circuit court, where the case was submitted upon an agreed state of facts to the effect that the supplies furnished by appellant to Crawford County in 1932 were necessary for the operation of the county's business and aggregate the total sum claimed; that the total revenues of Crawford County for the year 1932 were $450 in excess of all allowances or expenditures, and that this sum was carried forward into the revenues of said county for the year 1933; that the total revenue receipt of Crawford County for 1933 including the balance carried forward from 1932 was $89.12 in excess of all expenditures, and that this sum was carried forward into the revenues of Crawford County for 1934. The circuit court determined that these claims were in excess of revenues and entered judgment disallowing same from which this appeal comes.

In *Skinner & Kennedy Stationery Co.* v. *Crawford County,* 190 Ark. 883, the facts were that in 1931 the stationery company furnished to Crawford County necessary supplies for the operation of its business in the total sum of $402.77 and simultaneously filed claims with the county court therefor. These claims were not passed upon by the county court until January 22, 1934, when they were disallowed. The opinion reflects that Crawford County had a balance unexpended and carried forward into the general revenues of 1932 of the sum of $126.08; that at the end of the years 1932 and 1933 there remained unexpended balances which were carried into the general revenues in the subsequent years sums in excess of the unexpended balance of 1931, and we there held that the claims should be allowed in the sum of the unexpended balance of 1931 or for the sum of $126.08. The gist of this opinion is that the status of the revenues of the county against which claims may be allowed is reckoned on the date of allowance or disallowance by the county court and not the date or dates on which the claims were filed.

The claims under consideration were filed in the county court of Crawford County in 1932, but were not acted upon by the county court until January 1, 1934.

The unexpended balance of revenues of 1932 which were carried into the general revenues of 1933 was $450, and the net unexpended balance of revenues for 1933 carried forward into the revenues of 1934 was $89.12. Appellant's insistence is that its claims were filed in 1932, and should be allowed in full because the unexpended revenues for that year were in excess of its claims. Appellee now contends that appellant's claims should be restricted to the unexpended balance of 1933 or $89.12 which sum was carried into the revenues of 1934. We think appellee's contention is the correct one. By inaction appellant permitted the unexpended balance of 1932 to be reduced by lawful expenditures to the sum of $89.12 during the year 1933, and this was the only sum unexpended and available with which to pay appellant's claims on January 1, 1934, when they were adjudicated. This is the logical effect of our holding in the Skinner & Kennedy case, *supra,* and we adhere to its doctrine.

The judgment will be reversed and remanded to the circuit court with directions to enter judgment in favor of appellant against Crawford County for the sum of $89.12 and such other necessary orders to carry it into effect.

WICKLIFF *v.* WICKLIFF.

4-3959

Opinion delivered October 14, 1935.

C. Floyd Huff, Jr., for appellant.

A. D. Shelton, for appellee.

SMITH, J. Appellee was granted a divorce from appellant, who insists on this appeal therefrom that it should be reversed: (a) because appellee had not resided in the State two months before filing suit, and (b) because the allegation of desertion as ground for a divorce is not sustained by the testimony.

The depositions taken in the case show that appellee became a resident of the State on December 21, 1933, and filed suit for divorce on February 19, 1934. He had not therefore been a resident of this State for two months before filing suit, as required by act 71 of the 1931 session of the General Assembly. Acts 1931, page 201.

The complaint alleges numerous indignities and various acts of misconduct which no self-respecting man would endure.

On March 7, 1934, appellant filed a motion for an allowance of suit money and maintenance. On April 10, 1934, she filed an answer denying all the allegations of the complaint, and renewed her motion for an allowance for support and maintenance.

On June 7, 1934, appellee filed an amendment to his complaint, in which he charged desertion alleged to have been committed as follows:

"That for a long period of time prior to the first day of September, 1926, when he left the defendant, the defendant cursed, abused and threatened him, and for days at a time remained in a state of intoxication; that she remained away from home at nights, and made trips into the State of Florida and elsewhere for the purpose of being with other men; that, by reason of the conduct of the defendant aforesaid, he was driven from his home;

that under the circumstances it was unsafe, unwise and highly improper and impossible to remain with the defendant; and that the defendant, by reason of her conduct, is guilty of willful desertion without reasonable cause for the space of more than one year."

On the following day appellant filed an answer to the amended complaint, in which she denied all the allegations of that pleading.

It appears, as has been said, that the suit was prematurely brought. But the amendment to the complaint was filed at a time when the plaintiff had resided in this State for a sufficient length of time to sue for a divorce. This amendment alleged a new cause of action, and, as was said in the case of *Wood* v. *Wood*, 59 Ark. 441, 27 S. W. 641, the filing of an amendment setting up an entirely separate and distinct cause of divorce, and the answer of the defendant thereto, were equivalent to, and not distinguishable from, the bringing of a new suit, and the defendant, by answering, entered her appearance, and waived summons, and the same result was reached as would have been accomplished had a new and original complaint been filed with service of process thereon.

As it appears, from the face of the pleadings and from the depositions as well, that more than five years had elapsed since the separation of the parties, no divorce can be granted because of the indignities and misconduct as such which induced the separation, unless this misconduct is tantamount to desertion.

The statute requires proof that the cause of divorce occurred or existed within five years next before the commencement of the suit. Section 3505, Crawford & Moses' Digest. But desertion is a continuing cause of divorce, and "exists," within the meaning of the statute, as long as the desertion continues. *Mullenband* v. *Mullenband*, 137 Ark. 505, 208 S. W. 801.

Desertion is ordinarily committed by the spouse who leaves the home where the marital relation has existed. But this is not always true, nor is it necessarily so. At § 64, vol. 1, Nelson on Divorce and Separation, p. 104, it is said: "The general rule is that where one party is guilty of a cause for divorce the injured party is justi-

fied in leaving the home, and after such separation has continued for the statutory period the injured party may obtain a divorce for desertion. If the conduct of the guilty party did not constitute a cause for divorce, neither party is entitled to a decree. The injured party was absent without justifiable cause, while the guilty party is precluded from obtaining a divorce for a separation caused by his own misconduct."

In 19 C. J., chapter Divorce, §§ 116-117, p. 61, it is said: "The spouse who by his or her act intentionally brings the cohabitation to an end is guilty of desertion. Hence where a spouse intentionally brings the cohabitation to an end by misconduct which renders the continuance of the marital relations so unbearable that the other leaves the family home, the former, and not the latter, is the deserter."

Among the numerous cases cited in the note to the text just quoted is our own case of *Rigsby* v. *Rigsby,* 82 Ark. 278, 101 S. W. 727. In that case the husband's mistreatment of his minor stepdaughter caused his wife, the child's mother, to leave his home. Mr. Justice RIDDICK, speaking for the court, there said: "As her departure was caused by his unreasonable conduct, and as he has never expressed any regret or invited or tried in any way to induce his wife to return, the courts, after the expiration of a reasonable time, are justified in treating his conduct as in law an abandonment of her."

See also 1 Bishop, Marriage and Divorce, § 1710.

So here while the five-year statute, above referred to, bars the action based upon the indignities as such, because the suit was not brought for more than five years after their commission, yet they were such acts as constituted a cause for divorce and rendered the continuance of the marital relation so unbearable that the husband was compelled to leave the family home, in which case the wife, and not himself, was the deserter. The court was therefore justified in finding that the wife was the deserter, and, as this is a continuing cause of divorce, it was not barred by the five-year statute.

The decree of the court awarding a divorce is therefore affirmed.

FORT SMITH BUILDING & LOAN ASSOCIATION *v.* HIGHT.

4-3984

Opinion delivered October 14, 1935.

Joseph R. Brown and *Cravens, Cravens & Friedman,* for appellants.

G. Byron Dobbs, for appellees.

HUMPHREYS, J. This case and the appeal and cross-appeal from the decree rendered therein by the chancery court of Sebastian County, Fort Smith District, involves the title to a certain part of lots 5 and 6 in block 634, Neville Addition, which property was sold under two executions issued and levied to collect two deficiency judgments in separate foreclosure proceedings in said court.

In one of the foreclosure proceedings, the Peoples Building & Loan Association was plaintiff and I. L. Hight *et al.* were defendants. In that proceeding a deficiency judgment was rendered against I. L. Hight and others.

In the other foreclosure proceeding the Fort Smith Building & Loan Association was plaintiff and I. L. Hight, H. I. Aday *et al.* were defendants. In that proceeding, a deficiency judgment was rendered against I. L. Hight, H. I. Aday and others.

The deficiency judgment obtained by the Peoples Building & Loan Association was prior in time to that obtained by the Fort Smith Building & Loan Association and was a superior lien against the lands of the respective judgment debtors situated in said county.

The property described above belonged to I. L. Hight at the time the deficiency judgments were rendered against him.

On April 16, 1930, the Fort Smith Building & Loan Association caused an execution to be issued, and the sheriff levied same upon said property, and on June 14, 1930, sold the property under the execution to H. I. Aday for $400, who received a sheriff's deed thereto without paying any amount to either the sheriff or the Fort Smith Building & Loan Association.

Thereafter, on September 19, 1930, the Fort Smith Building & Loan Association purchased the deficiency judgment of the Peoples Building & Loan Association from it for the sum of $472 and took a written assignment thereof, which was immediately recorded.

After the rendition of the deficiency judgments against I. L. Hight in favor of said association and before the execution sale, he conveyed said real estate to his sister, Lucy Woodruff, who in turn conveyed same to Wynema Hight, his daughter, who is the appellee in this case.

On December 11, 1930, H. I. Aday sold said property to Wynema Hight for $432 in cash and executed a quitclaim deed to her for it and paid the amount he received therefor to the Fort Smith Building & Loan Association. She went into immediate possession thereof and expended $111 in repairing it and remained in possession thereof until ousted by H. I. Aday.

In September, 1931, the Fort Smith Building & Loan Association, as assignee of the deficiency judgment of the Peoples Building & Loan Association, caused an execution to be issued and levied upon said property, and at the execution sale H. I. Aday became the purchaser and received a sheriff's deed thereto. He then took possession of the property and rented it until the court in this

proceeding quieted the title in Wynema Hight and decreed the possession thereof to her.

I. L. Hight brought an independent suit in said court to set aside the personal judgment of date January 9, 1929, procured against him by the Peoples Building & Loan Association in its foreclosure suit against him and others, on the alleged ground that when the mortgaged property was conveyed to him by the original mortgagor, he did not assume and agree to pay the mortgage indebtedness. The suit of Hight was consolidated with this proceeding, and they were tried together by the chancellor.

On the hearing of the consolidated cases, the chancery court quieted the title to the property sold under the execution sales in appellee Wynema Hight, and dismissed Hight's complaint for the want of equity.

An appeal has been duly prosecuted to this court by the Fort Smith Building & Loan Association and H. I. Aday, and a cross-appeal has been taken by I. L. Hight.

The record reflects that I. L. Hight was personally served in the foreclosure suit brought by the Peoples Building & Loan Association, in which it was alleged that he purchased the mortgaged property from the mortgagor and as a part of the consideration therefor assumed and agreed to pay the mortgage indebtedness. He failed to answer and made default in that case. The decree in the foreclosure suit recites that the cause was heard on documentary and oral evidence. There is no evidence to show that the personal judgment against him was procured through fraud practiced by any one upon the court, so the judgment of the chancery court dismissing his complaint must be affirmed.

On the other branch of the case, after a very careful reading of the testimony, we are unable to say that the finding of the chancellor, in effect, that, in the purchase of the property at the first execution sale, H. I. Aday represented and acted for the Fort Smith Building & Loan Association, is contrary to the preponderance of the evidence. H. I. Aday was allowed to purchase and procure a sheriff's deed thereto under the first execution without paying a penny to the sheriff or the Fort Smith

Building & Loan Association and without any entry being made on the books of said association concerning the transaction. When he sold it to appellee, he immediately turned the amount he received therefor over to the Fort Smith Building & Loan Association. On its face, this looks as if Aday was holding the title thereto for the association, and that the association was the equitable owner thereof. The explanation of Aday and the secretary of the association is very unsatisfactory and not in accordance with ordinary business transactions. The chancellor has found in effect that Aday was a trustee for the Fort Smith Building & Loan Association, and, in view of all the circumstances leading up to and surrounding the transaction, we do not regard his finding as contrary to the preponderance of the evidence.

This being true, it follows that the deficiency judgment lien the Fort Smith Building & Loan Association procured from the Peoples Building & Loan Association merged in the title it procured at its first execution sale and passed to appellee under her quitclaim deed from Aday, the trustee or agent of the Fort Smith Building & Loan Association.

The judgment in favor of appellee is therefore affirmed.

STEVENSON *v.* PHILLIPS.

4-3969

Opinion delivered October 14, 1935.

Brewer & Cracraft, for appellants.

A. M. Coates, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants in the circuit court of Phillips County to compensate the estate of appellee's deceased husband for injuries received by falling from a ladder resting upon a pole that broke while he was attaching a wire thereto.

Appellants and their contractors, Terry & Quast, were engaged in levee construction along the Mississippi River near Helena, and their crews were running both day and night. The night work necessitated the maintenance of a light system. This system was extended as the work progressed. The poles used in the lighting system were cut from the banks of the river as needed. The posts were willow, twenty feet long and six inches in diameter at the butt end. When the line was extended, the posts were either taken up, carried forward, and reset, or else new ones were cut out of the willow brakes next to the river. The contractors, themselves, sometimes worked along with the men extending the line, and at other times it was extended by ordinary laborers, including the deceased. The deceased was a drainage engineer and drew a much larger salary than that of day laborers and performed many duties as the work progressed, including the extension of the electric light line. According to the weight of the testimony, he was the general foreman in charge of the work and in charge of extending the electric light line at the time he was injured, but there was some testimony tending to show that he worked as a co-employee with the other laborers engaged in the construction of the levee as well as the electric light line. On the afternoon of the accident, in January, 1933, the deceased, working for appellant, undertook to move the set-up for the night force to a new point, and, to assist him in the work, Terry & Quast, who

were equally interested in the lights being ready, sent two men to help him. One of these men set up a pole, and thereafter a ladder was set up against the pole which was held in place by two employees of Terry & Quast while deceased climbed the ladder to attach the wire. After he had ascended the ladder to about ten or twelve feet from the ground, the pole broke on account of being rotten, thereby turning the ladder in such a way as to cause deceased to fall to the ground on stumps, resulting in severe and painful injuries. He remained in a local hospital for a short time and afterwards moved to Franklin County, Georgia, and committed suicide in June, 1933, before he recovered from the injuries. The pole that broke was one that had been used on the job by deceased and others from thirty to sixty days for the erection of the electric light line, and was brought forward by one of the workmen and set in place by some of those engaged in the work.

The negligence alleged for recovery was a failure on the part of appellants to inspect the poles before using them in the construction of the electric light line.

Appellants filed an answer denying that any duty rested upon them to make an inspection of the poles before being used to ascertain whether they were defective. Other defenses were also interposed by appellants such as contributory negligence and assumption of the risk by the deceased.

Upon the conclusion of the testimony, appellants requested a directed verdict in their favor, which was refused, whereupon the court submitted the questions involved to the jury, which resulted in a verdict and consequent judgment for $2,500 against appellants, from which is this appeal. According to the undisputed evidence, the poles were simple appliances, being only six inches in diameter at the butt and twenty feet long, which could be carried by one man and which were cut when needed as the work progressed from the willow brakes by the ordinary laborers engaged in the work. No separate system of inspection of these poles was employed so that the laborers might rely thereon in using them. The deceased was a drainage engineer familiar with the work

in which he was engaged and with the character and kind of poles being used, and, to say the least of it, had knowledge equal to his employers concerning them and the use to which they were being put. Considering the character and kind of poles and the purpose for which they were being used, no legal duty rested upon appellants to make a separate inspection of each pole before being used to ascertain whether it was safe to set and use it. It was such a simple appliance that any ordinary laborer might determine for himself, in the exercise of ordinary care for his own safety, whether it was fit to use.

This court said in the case of *McEachin* v. *Yarborough,* 189 Ark. 434: "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." Citing 18 R. C. L., p. 548, and *Arkansas Smokeless Coal Company* v. *Pippins,* 92 Ark. 138, 122 S. W. 113, 19 Ann. Cas. 861.

The rule announced in the McEachin case, *supra,* is applicable in the instant case, for certainly it can be said that, according to the undisputed evidence, appellants had no superior knowledge to that of the deceased as to the kind of pole being used and the purpose for which being used and the condition in which it was at the time. The deceased knew no system of inspection of these poles was in use upon which he had a right to rely. As stated above, the pole was a simple appliance, and it was easy for deceased to have examined same with reference to its condition and safety and, under the circumstances, he should have done so. The court erred in not peremptorily instructing a verdict for appellants; hence the judgment is reversed, and the cause is dismissed.

LEWIS *v.* KEATING.

4-3973

Opinion delivered October 14, 1935.

Mark B. Grimes and *W. J. Dungan,* for appellant.

Ross Mathis, for appellee.

MEHAFFY, J. On April 24, 1913, John Shearer of Woodruff County, Arkansas, made his will. The second paragraph of the will reads as follows:

"2nd. I give my wife, Daisy Shearer, all my personal property that I may own at the time of my death of every kind, character and description whatsoever."

In the third paragraph of the will the Mercantile Trust Company of Little Rock, Arkansas, its successors or assigns, was given in fee simple forever all the lands except the Taylor place, in trust for the use and purposes set forth in the will. Then the uses, purposes and duties of the trustee were set forth.

Section F of paragraph three reads as follows:

"I do not wish the land devised to the trustee to be sold unless in the judgment of the trustee it would be to the advantage of the beneficiaries to make such sale for the purpose of reinvestment or unless the trustee should find it necessary to sell a portion of the land in order to complete the proper education of my grandchildren hereinabove provided. But, in case the trustee

should at any time deem it best for the interest of the beneficiaries, it may sell and convey all or any portion of the land devised to it for the purpose of reinvestment either in lands or other property. Or, in case it shall be found that three-fifths of the income of the land so devised is not sufficient to complete the education of my grandchildren as above provided, the trustee may sell such portion of the land as is necessary to accomplish that purpose. But, if any portion of the land shall be sold for the purpose of educating the children, this shall not diminish the income payable to my daughter, but the two-fifths of the income payable to her shall be collected upon the basis of the property received by the trustee without regard to its diminution by such sales.

"In the event my wife should resent this will and elect to take her dower under the laws of the State, then all property of every kind, character and description I may own at the time of my death, which is not included in the dower assigned to her, shall be included in the devise to the Mercantile Trust Company, as trustee to be held and disposed of by it for the benefit of my daughter and her children upon the terms and conditions hereinabove set out.

"I hereby nominate and appoint the Mercantile Trust Co., of Little Rock, Arkansas, as executor of this, my last will and testament."

The Mercantile Trust Company declined to act as trustee, and an administrator was appointed. R. Bruce Keating, the husband of Mrs. Ruth Keating, was appointed trustee.

It will be observed that § F above quoted provides that the lands shall not be sold unless the trustee should find it necessary to sell a portion of the land in order to complete the proper education of the testator's grandchildren.

The trustee was expressly authorized to sell such portion of the land as was necessary to complete the education of the minors. The principal object of the testator was to provide for his daughter and grandchildren. The trustee might have sold the property that he did sell without applying to the chancery court for an order.

He had the authority to make the sale under the will. He did, however, file a petition in the chancery court stating the facts which made it necessary to sell some of the property, and the court made an order directing the sale, and thereafter the chancery court approved the sale and the terms of the sale. The property was sold for $1,500 payable in monthly payments of $30 each. Notes were given for the purchase price. The property was sold to R. H. Evans, and a vendor's lien was retained to secure the payment of the notes.

Thereafter the trustee borrowed $800 from Lester Lewis, the appellant, executing his note therefor and pledging the Evans notes as security for the payment of his note. Evans did not pay the notes as they matured, and Lewis brought a suit to foreclose the lien on the land.

This suit was begun on May 8, 1933. On August 21, 1933, Lewis filed an amendment to his complaint. On November 23, 1933, the appellees filed an intervention asking that the original decree rendered at the September term, 1933, be vacated and set aside. This was the decree in the case of Lester Lewis *v.* R. Bruce Keating, trustee *et al.* They also asked that the sale by the trustee to Evans be set aside and the title to said property be declared in the trustee subject to the rights of the interveners. They asked that, if the agreement to convey said property to Evans is declared valid by the court, the interveners recover from Lester Lewis the sum of $289.80 paid Lewis upon the note executed by the trustee, and that the interveners be given judgment for $1,050 against Evans, and that a lien be declared on the property sold for the amount found due, and that said property be sold.

The lower court upheld the sale to Evans, but held that the trustee had no power to pledge the Evans notes for the money borrowed from Lewis, and also decreed that Lewis should pay back the $289.80 that he had received. In upholding the sale of the land, the court also held that Ruth Keating had a dower interest in the land, and that out of the proceeds of the sale the said Ruth Keating should be paid for her dower interest, and the remainder of the proceeds should be paid to the trustee.

The court held in its final decree that the trustee, without authority, pledged 44 of the Evans notes to Lester Lewis as security for the payment of the $800 note, improperly executed by Keating, as trustee. The court also held that the decree in the case of Lester Lewis against Keating and Evans should be vacated and set aside because the proper parties were not before the court. The court also held that the trustee had no authority to execute a note for $800, and had no authority to pledge the Evans notes to secure the payment of the $800 note.

A receiver had been appointed and had collected $60 for rent, and the court ordered that the receiver pay to the trustee $45 and retain $15 for his services.

Appellee urges that the will of John Shearer clearly created a spendthrift trust in favor of Mrs. Ruth Keating. That question is not involved on this appeal. The only question here is whether the trustee had the right to pledge the lien notes of Evans for the payment of the $800 note.

In construing a will the intention of the testator must be ascertained from the language of the will itself if possible, and, if not in contravention of some established rule of law or public policy, it must be given effect. The will expressly provides that the land devised to the trustee shall not be sold unless in the judgment of the trustee it would be to the advantage of the beneficiaries or unless the trustee should find it necessary to sell a portion of the land to complete the proper education of the testator's grandchildren. The testator had a right to provide for the sale of land if, in the judgment of the trustee, it was necessary.

Appellee, however, says that the petition filed by the trustee and the orders of the court were purely *ex parte.* The trustee, in fact, was endeavoring to carry out the provisions of the will. There is no provision in the will any where in conflict with this clause of the will providing that the trustee, if in his judgment it is proper to do so, shall sell the lands for the purposes mentioned in the will, that is, the education of the minor children, and, of course,

a portion of it must be applied to the payment of Ruth Keating.

It is not contended by appellee that the provision of the will above referred to does not authorize the trustee to sell the property. The power vested in the trustee by the will is plain and unambiguous. The right to sell by the trustee, if in his judgment it becomes necessary, cannot be doubted, and the testator had the right to make this provision. The sale was made in accordance with the terms of the will, made for the purposes mentioned in the will, but, instead of selling for cash, the trustee sold the land for $1,500 and accepted the notes of $30 each, payable monthly. These notes were given as the purchase price of the land, and the trustee had a right to use these notes for the purpose of educating the minors. He might have sold them for cash, or borrowed money and pledged the notes to secure the payment of the borrowed money. The trustee would, of course, have to use this money just as he would have had to use the money if the sale had been for cash.

Appellee calls attention to the case of *Heiseman* v. *Lowenstein,* 113 Ark. 404, 169 S. W. 224. The court in that case said: "We now come to the question as to whether a power of sale includes a power to mortgage. There is some conflict in the authorities on this question, but we believe that the better reasoning, if not the weight of authority, is to the effect that a mere power of sale does not include the power to mortgage."

In the instant case the property of the testator was not mortgaged, but was sold as provided in the will, and the notes which were received for the lands used for the purpose of securing money to carry out the intention of the testator.

In the will construed in the above case, there was no provision like the provision in the Shearer will. While the power to sell might not include the power to mortgage, yet under the terms of the will the trustee had all the implied powers necessary to carry out the provisions of the will with reference to securing the education of the minors. The will provided for the sale.

"If a settlor has directed the trustee to reach a certain end, he must be deemed to have intended that the trustee use the ordinary and natural means for obtaining that result. The court reads such a desire into the trust instrument, not because the court is adding something to the trustee's authority for the sake of bringing about a result which it thinks would be just, but for the reason that chancery believes that the settlor actually wished the trustee to have such power, although he did not in so many words grant the authority. * * * Where a trustee conforms with the provisions of the trust in their true spirit and meaning, he has authority 'to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions and are reasonable and proper means for making them effectual.' " Bogert on Trusts and Trustees, vol. 3, p. 1734.

The sale having been made under the terms of the will and approved by the chancery court, the proceeds of the sale should of course be used for the purposes mentioned in the will, and manifestly, if Evans did not pay the notes as they matured, the trustee had the right to foreclose the lien to get the money to educate the minors, and, of course, he would have to pay to Ruth Keating her part of the money.

In construing wills, the intention of the testator must be ascertained and must govern. This intention is gathered from the language of the will itself, and, when the will is thus construed, it is manifest that the intention of the testator was to provide for his daughter and grandchildren, and, in order to do this, authorized the sale of property and the use of the proceeds for educating the minors. After the sale had been made, it was not a mortgage of the testator's property to pledge the notes for money to carry out the purpose of the testator.

Of course, the trustee should be required to exercise the utmost good faith and use the money as directed in the will. The court has the power to require him to do this. The sale being valid, and, securing money with the lien notes being proper, Lewis should be permitted to foreclose his lien and collect the money and apply so much of it as is necessary to the payment of the $800.

The decree of the chancery court will be reversed and remanded with directions to grant Lewis a decree foreclosing the lien retained in the notes, and requiring the trustee to use the money borrowed for the purpose of educating the minors, and paying to Ruth Keating the portion of it belonging to her under the terms of the will.

It is so ordered.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* ROBINSON.

4-3987

Opinion delivered October 14, 1935.

W. A. Utley and *Carmichael & Hendricks,* for appellant.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

MEHAFFY, J. Mrs. Fearney Robinson, on September 4, 1934, took passage on the bus of the appellant at Crow's Station in Saline County, Arkansas, and paid her fare to Benton. The bus stopped at appellant's station for passengers to alight. In attempting to alight appellee alleges that, without any negligence on her part, she caught her shoe on a badly torn and worn upward projecting piece of metal stripping which had been tacked to the floor of said bus at its door, where passengers alight from same, and as a result she alleges she was caused to fall through the door and against the steps and onto and against the concrete curbing and pavement, and that she was painfully and permanently injured thereby. She alleged that appellant failed to furnish safe transportation and failed to provide a safe place to alight, and that the appellant caused and allowed said metal stripping to be and remain on the floor of said bus in a dangerous, torn and worn upward projecting position; that appellant failed to warn appellee of the dangerous condition which it knew, or by the exercise of ordinary care could have known; that on the same day, a short time after her injury, she was in bed in a stupor suffering and under the influence of drugs and medicine, and without any warning or information, and through trickery and deceit, a claim agent of defendant obtained a release from her. She alleged damages in the sum of $3,000.

The appellant answered, denying that it was guilty of any negligence, and denying all the material allegations in appellee's complaint. It also alleged that, if appellee was injured, it was due to her own negligence and carelessness. It alleged that its agent in good faith and without prejudice, paid the full amount that appellee demanded, and that said payment discharged any and all claims for injury.

There was a trial, verdict and judgment in favor of appellee for $2,500. The case is here on appeal.

It is first contended by the appellant that the appellee was guilty of contributory negligence, which bars her recovery; that the proximate cause of her injuries was her own negligence.

The evidence shows that appellee was a passenger, and, when she undertook to alight from the bus, she fell and received the injuries she complains of. There is a conflict in the evidence as to the condition of the metal strip. All of the witnesses, however, admit that the strip was somewhat loose. The evidence on the part of the appellant shows that the bus was inspected daily, and that the inspectors found nothing wrong with the metal strip or any part of the bus where appellee alighted. The evidence shows that there were handholds that passengers might take hold of in alighting or boarding the bus.

We do not deem it necessary to set out the testimony in detail because there is a sharp conflict, and the questions of negligence and contributory negligence were properly submitted to the jury.

It was the duty of appellee, of course, to exercise reasonable care for her own safety, and, if she did not do this and was injured because of her own negligence, she would not be entitled to recover. Whether she was guilty of negligence, and whether appellant was guilty of negligence, were both questions of fact, and the evidence is in conflict, and it was therefore a question for the jury to determine whether she was guilty of negligence and whether the appellant was guilty of negligence. The jury's finding on these questions, if supported by substantial evidence, will not be disturbed by this court.

Appellant calls attention to the case of *Little Rock & Ft. Smith Ry. Co.* v. *Cavenesse,* 48 Ark. 106, 2 S. W. 505. That case merely holds that it is the duty of the carrier to provide a safe and convenient means for entrance to and departure from their trains, and that passengers must exercise ordinary care in taking care of themselves.

In the instant case the court instructed the jury that, if the plaintiff failed to exercise ordinary care to use the

appliances furnished by the carrier, and such failure to use ordinary care caused or contributed to cause the injuries of which the plaintiff complained, then she could not recover. They were also told in another instruction, given at the request of the appellant, that contributory negligence is such negligence or want of care as contributed or helped to cause the injuries complained of, and, if they found the injuries would not have occurred if plaintiff had used ordinary care for her own safety, and they found that she did not exercise such ordinary care, they would find for the defendant. It thus appears that the question of appellant's negligence and of appellee's contributory negligence were submitted to the jury on proper instructions requested by the appellant.

The next case to which attention is called by the appellant is *St. Louis, I. M. & S. Ry. Co.* v. *Forbes,* 63 Ark. 427, 39 S. W. 63. In that case the party injured was not a passenger, but was injured in stepping from the carrier's freight house onto a platform. There were no steps, he had just entered through the door, and stepped out onto the platform, and, as he did so, fell. The court said: "According to his own statement, if it be conceded that the appellant was guilty of negligence in failing to provide steps to the door, he was guilty of contributory negligence and is not entitled to recover."

That is because he had entered the freight house through this door immediately before the injury, and was bound to know there were no steps there, and stepped out with a box in front of him and fell. The court held that he was guilty of contributory negligence because he knew all about the entrance and knew there were no steps there.

Appellant next calls attention to the case of *St. Louis, I. M. & S. Ry. Co.* v. *Greene,* 85 Ark. 117, 107 S. W. 168, 142 L. R. A. (N. S.) 1148. The court said in that case: "Appellee was attended by two friends who could reasonably be expected to assist her with her child if any assistance was needed. There was a smooth cinder platform on a level with the rails and a stool upon which to mount to the first step. The train stopped at the usual

place. Under the circumstances, there was no duty devolving upon appellant to assist appellee in entering the train." In that case there was no complaint about any defect in the equipment, but the appellee complained only of the conduct of the brakeman in assisting her to get on the train.

The next case referred to by appellant is where the passenger was emerging backward and not looking where she was stepping.

It is next contended by the appellant that it did not owe the appellee the highest degree of care because the bus was standing still. This court said: "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." The court held that the instruction was more favorable than the appellant was entitled to; that 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. *Ark. P. & L. Co.* v. *Hughes,* 189 Ark. 1015, 76 S. W. 53; *Prescott & N. W. Rd. Co.* v. *Thomas,* 114 Ark. 56, 167 S. W. 486; *Beach* v. *Eureka Traction Co.,* 135 Ark. 542, 203 S. W. 834.

We do not think there was any error in the instructions on the degree of care, and that the rules applicable to common carriers govern in operating busses carrying passengers. It is true there are many statutes regulating railroads that do not apply to busses and other common carriers, but the law with reference to the duty of common carriers to passengers is the same as to all common carriers.

It is next contended by the appellant that the court erred in permitting the hypothetical question to be asked and answered. We do not think there was any error committed by the court in permitting the hypothetical question to be asked and answered. The question states with sufficient accuracy and detail the facts which the evidence

tended to show about the injury and condition of appellee. Hypothetical questions must fairly reflect the evidence, but such questions do not necessarily embrace disputed facts that are essential to the issue, and it was said in the case of *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405: "In taking the opinion of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated as established by the evidence should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts. When a party seeks to take an opinion upon the whole or any selected part of the evidence, it is the duty of the court to so control the form of the hypothetical question that there may be no abuse of his right to take the opinion of the experts."

The rule announced in the Taylor case has been followed since that time.

We do not set out the instructions, but we have carefully considered them, and have reached the conclusion that there was no error in giving or refusing to give instructions.

On the day that appellee was injured, defendant's claim agent went to her home and gave her a check for $65, and she signed a release. The evidence shows that immediately after she was injured the bus driver called Dr. Gann and he gave her chloroform. Appellee says that she did not know what she was signing and would not have settled until she knew something about the extent of her injuries. The evidence shows that she was severely injured and suffering at the time the release was signed, and the check was for only $65.

"A nominal or grossly inadequate consideration for a release will be given serious consideration as affecting the question of fraud in its procurement. When due weight is given to other surrounding conditions, and there is evidence that the consideration is inadequate,

it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and, if grossly inadequate, it alone is sufficient to carry the question of fraud or undue influence to the jury, and where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence on the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper writing on the ground of fraud. And therefore, on the question of fraud *vel non* in inducing an employee to accept benefits from a relief department in release of the master's liability for negligent injuries, his situation, conduct and surroundings at the time, as well as the amount received, may be considered." 23 R. C. L. 395.

"There cannot be a release of a cause of action for personal injuries without unequivocal acts showing expressly or by necessary implication an intention to release. Generally, the construction of the release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances, construed with reference to the amount of consideration paid and the language of the release itself. The amount of consideration paid should have considerable force in determining whether the release was simply paying the releasor for loss of time or some other specific element of damage, or whether it indicated payment of a substantial sum in consideration of which the releasee secured himself against all further developments and the releasor assumed the risk thereof." 23 R. C. L. 397; *Chicago, R. I. & P. Ry. Co.* v. *Matthews,* 185 Ark. 724, 49 S. W. (2d) 392.

The evidence is sufficient to support the verdict, and the judgment is affirmed.

HALL *v.* WALKER.

4-3989

Opinion delivered October 14, 1935.

Gladish & Young, for appellant.

Holland & Barham, for appellee.

McHANEY, J. This is an action in replevin brought by appellant against appellee to recover some second-hand machinery. It originated in the municipal court of Blytheville on December 12, 1934, where appellant failed to recover. He appealed it to the circuit court with like result, and the case is now here by appeal, and the same result must follow. The facts are as follows: In the fall of 1927, appellant leased three acres of land, adjacent to Osceola, from Mrs. Jessie Driver for a period of three years, and placed certain machinery thereon for the purpose of operating a sawmill, at an annual rental of $100 per year. After occupying the property three or four months, the lease was terminated early in January, 1928, by mutual consent, appellant paying Mrs. Driver $150 to be released therefrom. At that time, or shortly thereafter, a large portion of the sawmill machinery was removed from the land. The machinery involved in this litigation, consisting of two second-hand planers and a cut-off saw frame, was not removed but was left on the property belonging to Mrs. Driver, although she repeatedly requested him to move same. It remained undisturbed until in the summer of 1933, when she sold same to

appellee for a price, as she remembers, of $25, but as appellee says only $15. Both she and appellee considered the property practically valueless except for junk. The circuit court held that appellant could not recover the property because the proof showed that he had abandoned same and that he was barred by limitations.

As was said in *Hughes* v. *Cordell,* 174 Ark. 757, 296 S. W. 735: "The first question presented is one of fact as to whether there had been an actual abandonment of the lease in controversy. As to whether or not there has been an abandonment as a matter of fact, in any given case, is largely a question of intent to be determined, to be sure, by the conduct of the party charged with the abandonment." In other words, this question is one of fact. The case was tried before the circuit court sitting as a jury, and if there is any substantial evidence to support the judgment it must be affirmed just the same as if tried by a jury. The evidence shows, as above stated, that the lease was canceled early in January, 1928. Appellant admits that he had no agreement with Mrs. Driver by which he was permitted to leave the property on the leased premises, and he further admits that Mrs. Driver requested him to move the property from her premises, which he failed to do for more than five years, and only when he discovered that it had been removed and was in the possession of appellee did he take any action regarding same. This is substantial evidence to support the court's finding that appellant had abandoned the property. This being true, the judgment must be sustained, and it becomes unnecessary to discuss the question of the statute of limitations.

No error appearing, the judgment must be affirmed.

HOGAN *v.* STATE.

Crim. 3954

Opinion delivered October 14, 1935.

Paul E. Gutensohn and *George W. Dodd*, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams*, Assistant, for appellee.

McHANEY, J. Appellant was tried and convicted of the crime of rape, committed on a ten-year-old girl, and sentenced to death by electrocution. Inasmuch as the sufficiency of the evidence to support the verdict and judgment against him is not brought into question, and the details thereof are so revolting, we deem it unnecessary to set out the facts as given in evidence, for it would serve no useful purpose so to do. Suffice it to say that the evidence overwhelmingly supports the verdict of the jury, and the judgment of the court based thereon.

Several assignments of error are urged for a reversal of the judgment and sentence against appellant, but we do not think it necessary to discuss them all. One of the alleged errors so urged for our consideration relates to the action of the trial court in excluding the public from the courtroom for about ten minutes during the examination of the little girl who was the victim of appellant's fiendish passions. This assignment is based upon article 6 of the amendments to the Constitution of the United States, and a like provision contained in article 2, § 10, of the Constitution of this State, both of which provide: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial."

The trial began on April 15th, and on that date the prosecuting witness had been put upon the stand to testify on behalf of the State against appellant. She made a very unsatisfactory witness. After the State had closed its case and appellant had testified in his own behalf on said date, court adjourned to the following morning, at which time the prosecuting attorney requested the court for permission to recall the little girl for further examination, and for an order to clear the court room while she testified. Whereupon the court made the following statement: "The court will grant the request of the prosecuting attorney because it was apparent to the court that the prosecuting witness was frightened and embarrassed at the time she was called upon to testify yesterday; that there was a very large crowd in the courtroom at the time; and at this time the courtroom will be cleared of every person in here except the jury for ten minutes." Appellant objected to the exclusion of the public from the courtroom on the ground that he was entitled to a public trial under the above constitutional provisions, and that the order of the court clearing the courtroom was an invasion of his constitutional right to a public trial. This objection was overruled, and an exception was taken. The prosecuting witness was then recalled and further examined, and gave very damaging testimony against appellant. We cannot agree that he was deprived of a public trial within the meaning of said constitutional provisions. It was ap-

parent to the court and to every one else in the courtroom, and is apparent to us from a reading of her testimony given on the previous day, that she was terribly frightened and embarrassed to have to go upon the witness stand in the presence of a courtroom crowded with people and give testimony that must have been embarrassing and humiliating to her in a high degree. Under this situation she failed to give testimony which the court felt she could give if the embarrassment of the large audience in the courtroom were removed.

In 16 C. J., page 807, § 2052, it is said that it is within the discretion of the court to clear the courtroom where the court feels that it is necessary to do so "to secure the administration of justice, and to facilitate the proper conduct of the trial, as where the courtroom is crowded to such an extent as to interfere with the orderly administration of justice. It has also been held under some constitutional or statutory provisions, that in cases where the evidence is of a peculiarly indecent and vulgar character, the court may, in the interest of public morality and decency, exclude from the courtroom all persons except the jurors, witnesses, and others connected with the case, although there are decisions to the contrary."

In *State* v. *Damm,* (South Dakota), 252 N. W. 7, the defendant was charged with second degree rape committed upon his foster daughter, thirteen years old. She was a witness against him and, after being examined by the State for some time, she commenced to cry, and it was apparent that she was greatly embarrassed and emotionally disturbed. Upon motion of the State's attorney, the court cleared the courtroom during the remainder of her testimony, and this was assigned as error on appeal. The court in overruling the assignment said: "How far, for how long, and to what extent the public may be excluded from a trial of a criminal case without infringing upon the constitutional right of the defendant is a matter of some conflict in the authorities. Cf. Cooley's Constitutional Limitations, (8th Ed.) p. 647; *State* v. *Callahan,* (1907) 100 Minn. 63, 110 N. W. 342; *Reagan* v. *U. S.,* (1913) 202 F. 488, 120 C. C. A. 627, 44 L. R. A.

(N. S.) 583; *Moore* v. *State,* (1921) 151 Ga. 648, 108 S. E. 47; *State* v. *Saale,* (1925) 308 Mo. 573, 274 S. W. 393; *State* v. *Bonza,* (1928) 72 Utah 177, 269 Pac., p. 480. In the instant case, it is to be observed that appellant made no request to have any specific person or persons or his friends exempted from the effect of the exclusion order. The order was effective only during the testimony of the prosecutrix. In view of the nature of the case and the age of the prosecutrix, her embarrassment and disturbance are readily understandable. Under all of the circumstances here appearing, we do not think the court abused its discretion or committed prejudicial error by its ruling, or deprived appellant of a public trial within the meaning of the constitutional provisions."

There are a number of cases on the subject, and the authorities are divided on the question now presented. We think it would be a work of supererogation to undertake a review of them. So far as the diligence of counsel discloses or as we have been able to find, this court has never decided the question. We are of the opinion, however, that the South Dakota court in *State* v. *Damm, supra,* correctly held that the court room might be cleared for a short period of time in the interest of justice, and that such matter rests in the sound discretion of the trial court. We therefore hold in this case that the trial court did not abuse its discretion.

Another assignment of error urged for a reversal of the judgment is that the prosecuting witness was not a competent witness. On this question but little need be said in view of the disposition we make of this case on another assignment of error. Without reviewing the questions asked and answers given by her touching on her competency as a witness, we hold, after a careful consideration thereof, that she was a competent witness and that the court did not err in permitting her to testify on being recalled, over appellant's objections.

Another assignment of error relied upon relates to a statement of the prosecuting attorney in retorting to a statement made by counsel for appellant when the latter was making his closing argument to the jury. The record reflects that there are two bills of exceptions relating to

this matter, one being that approved by the court and the other a bystanders' bill. During the closing argument of one of counsel for appellant, he stated to the jury that the prosecuting attorney wanted to burn the defendant for political effect, so that he could tell the people that he had burned a man. The prosecuting attorney objected to this argument, and the objection was sustained by the court. Later the same counsel stated in effect that the prosecuting attorney wanted to have his Roman holiday; that he wanted to inflict the death penalty on appellant, so that he could tell the people that he had burned a man. Thereupon, the prosecuting attorney arose to his feet and objected to the remark, and, in the presence of the jury, exclaimed: "You know that is not true; you know that in yonder you offered to plead guilty, and the court would not accept your plea." That is the statement made as reflected by the court's bill. According to the bystanders' bill, the statement of the prosecuting attorney was as follows: "Mr. Gutensohn, (counsel for appellant) you know that is not so, and you know that in yonder (pointing to the judge's chamber) you tried to plead the defendant guilty and take life, and the court would not accept your plea." Counsel for appellant objected to the statement of the prosecuting attorney, which objection was sustained by the court with this statement: "The statement of the prosecuting attorney will be withdrawn from the consideration of the jury, and you will not consider it in passing upon the guilt or innocence of the defendant, and you will try this case only according to the law and evidence as presented here." The statement of the prosecuting attorney referred to this: At the conclusion of the testimony, both sides having rested, counsel for appellant asked for a conference with the court and the prosecuting attorney in the judge's chambers. This request was granted by the court, and, upon retiring to the judge's chambers, counsel for appellant stated that appellant desired to plead guilty if the court would give him a sentence of life imprisonment. The court and the prosecuting attorney agreed to accept appellant's plea of guilty and assess

his punishment at life imprisonment. Whereupon, the following transpired:

"Hogan: I would like to say another thing. The Court: You may say anything you want to. Hogan: My mother testified this morning that I was not right, and I am not right; my mind was tested in Little Rock. The Court: I cannot accept your plea. Hogan: No, that is all right. The Court: I cannot accept your plea of guilty at this time, and we will proceed with the trial."

It is insisted by appellant that the statement of the prosecuting attorney is erroneous and highly prejudicial. The State defends on the ground that, even though the statement was erroneous, it was an error invited by the statements of counsel for appellant, and, if not invited, that any prejudicial effect was removed by the remarks of the court in sustaining appellant's objection thereto. We cannot agree with the State in either defense of the remarks made. The statement of the prosecuting attorney, whether the one shown by the court's bill or the one in the bystanders' bill, was a statement of a material fact not in evidence and not competent to be proved, and was bound to be prejudicial. It was in the nature of an offer to compromise, and it is well settled that offers to compromise even in civil cases cannot be shown on a trial of the case. The statement of counsel for appellant was merely an expression of an opinion on his part as to the reason why the prosecuting attorney was seeking vigorously the infliction of the death penalty upon appellant. It was improper argument, and the trial court so held and sustained an objection thereto. Even so, it did not justify the prosecuting attorney in retorting that the appellant had offered to plead guilty in yonder, pointing to the judge's chambers, and that the court refused to accept his plea. Neither can we agree that the statement of the court in withdrawing the remark from the consideration of the jury removed the prejudicial effect thereof. As said by Judge Mulkey in *Quinn* v. *People,* 123 Ill. 333 [15 N. W. 52], quoted by Judge Wood in *German-American Insurance Company* v. *Harper,* 70 Ark. 305, 67 S. W. 755: "As well might one attempt to brush off with

the hand a stain of ink from a piece of white linen" as to remove from the minds of the jury the impression that must have been created by the remarks of the prosecuting attorney. In *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946, we said: "This court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party, unless the trial court by its ruling has removed the prejudice. *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70; *Hayes* v. *State,* 169 Ark. 1173, 278 S. W. 15; *Sanders* v. *State,* 175 Ark. 61, 296 S. W. 70. But this court does not reverse for a mere expression of opinion of counsel in their argument before juries, unless so flagrant as to arouse passion and prejudice, made for the purpose and necessarily having that effect."

It does not necessarily follow, however, that, because this error was committed, the case must be reversed and remanded for a new trial. We think the error may be cured by accepting his plea of guilty and reducing his punishment to life imprisonment, which the trial court would have done but for his insistence that he was "not right in his mind," although he assured the court that it would be all right to do so. The question of his sanity was submitted to the jury, and by its verdict he has been found to be sane.

Other errors are assigned and argued in the briefs which we have examined and find without merit. We deem it unnecessary to discuss them.

The sentence will be reduced from death to life imprisonment, and the judgment as thus modified will be affirmed. It is so ordered.

PARRISH *v.* PARRISH.

4-3990

Opinion delivered October 14, 1935.

V. D. Willis, for appellants.

Shouse & Walker, for appellee.

BUTLER, J. The appellant, J. W. Parrish, and the appellee, Fannie B. Parrish, became husband and wife a number of years prior to 1928. Their married life was spent on appellant's farm until the year last named. Four children were born to the union, three of whom were living in 1928. In order that these children have a high school education, it became necessary to send them away to school. Mrs. Parrish moved with them to a town where there was a good high school, a house was rented, and she lived there with the children, keeping house during the four years they were at school. Subsequent to this, Mrs. Parrish brought suit against J. W. Parrish, alleging that he had abandoned her; that she had no separate property of her own, and praying for separate maintenance, suit money and attorney's fees. J. W. Parrish answered, denying the allegations of the complaint, and, by way of cross-complaint, alleging desertion and praying for a divorce. Thereafter, Mrs. Parrish filed an amendment to her complaint, alleging that subsequent to the filing of her complaint, a few days before the date set for the hearing of the cause, J. W. Parrish and his

father, L. W. Parrish, conspiring together for the purpose of defrauding her and hindering and delaying her in the collection of such sums of money as may be due her by J. W. Parrish, negotiated and effected a mortgage conveyance. By this conveyance, J. W. Parrish conveyed to his father all of his personal property. Renewing the prayer of her original complaint, Mrs. Parrish asked that said mortgage conveyance be set aside.

On September 5, 1934, the court heard the cause on the original complaint, answer and cross-complaint. The court found that the plaintiff, Fannie Parrish, was not entitled to a division of the property, but should be allowed a reasonable monthly sum to be paid by defendant for her support, which sum was fixed at $25 a month; that she be allowed the sum of $15 as attorney's fee, together with the costs of the suit which had accrued, and denied the prayer of defendant's cross-complaint for divorce. On October 10, 1934, Mrs. Parrish filed a pleading in which she represented that the defendant had failed to comply with the orders of the court with respect to the sums adjudged due her for support and attorney's fee, whereupon a citation was issued directing the defendant to appear and show cause why he should not be adjudged in contempt. Defendant responded to the citation, setting up his inability to make the payments adjudged, and that his failure to pay the same was not a willful disobedience of the orders of the court.

On December 5, 1934, the cause came on for hearing on the contempt proceedings and also upon the issues raised by the amendment to the complaint and the answer of defendant thereto. On this branch of the case the cause was submitted on the testimony of J. W. Parrish in open court, the original and amended complaint, answer of the defendant, J. W. Parrish, to the original complaint, answer of J. W. Parrish and L. W. Parrish to the amended complaint, the depositions of J. W. Parrish, Sam Parrish, Frank Andrews, J. S. Chaney and L. W. Parrish and Emma Taylor, the testimony of Mrs. Fannie Parrish, and the testimony taken on the submission of the case for separate maintenance and the cross-com-

plaint of J. W. Parrish. The hearing resulted in the decree of September 5, 1934, the court finding that, after plaintiff had filed her cause of action against the defendant, "said defendant executed a chattel mortgage to the defendant, L. W. Parrish, by which he conveyed all of his personal property (description set out), * * * that said conveyance was made for the purpose of cheating, hindering and delaying the demands and claims of plaintiff in this action with knowledge on the part of each defendant that this action was pending in this court, and that the same should be set aside and said properties subjected to execution for the satisfaction of plaintiff's demands herein." A decree was entered in accordance with the findings of fact, from which is this appeal. L. W. Parrish having died pending the appeal, the cause as to him was revived and the appeal prosecuted in the name of his widow and heirs at law.

The action on the contempt proceedings was passed for thirty days and is not involved in this appeal.

It is first contended that the issues raised by the amendment to the original complaint were concluded by the decree of the trial court rendered September 5, 1934. That decree was merely on the issues raised by the original complaint and cross-complaint of defendant, J. W. Parrish, and did not attempt to settle the issue raised by the amended complaint relating to the mortgage of J. W. to L. W. Parrish. The cause of action stated in the amendment to the original complaint was wholly distinct from that in the original complaint and from that in defendant's cross-complaint. The question of the mortgage conveyance was not disposed of or referred to in the decree of September 5, 1934, and stood continued as a matter of course without the necessity of a formal order. 13 C. J. 129, § 13; *Moreland* v. *Pelham,* 7 Ark. 338; *Stone* v. *Robinson,* 9 Ark. 469; *Carley* v. *Barnes,* 11 Ark. 291.

It is next contended that the finding that the mortgage was executed for the purpose of cheating, hindering and delaying appellee in the collection of the sums awarded to her was not supported by the evidence. Sec-

tion 4874, Crawford & Moses' Digest, provides: "Every conveyance * * * made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, etc., * * * as against creditors * * * shall be void."

It is the contention of J. W. Parrish that the conveyance to his father was *bona fide* and made to secure a valid and pre-existing indebtedness. It appears from his testimony, however, that the primary purpose was to prevent his wife from collecting the sums awarded her by the trial court. L. W. Parrish admitted that he knew of the differences which had arisen between his son and his wife, and also knew that she had instituted an action for separate maintenance. Conveyances between near relatives are looked upon with suspicion, and, while not of themselves sufficient to establish fraud, they may furnish evidence sufficient to justify a court in setting them aside, where there are other suspicious attendant circumstances. *Dyer* v. *Taylor,* 50 Ark. 314, 7 S. W. 258; *Simon* v. *Reynolds-Davis Grocery Co.,* 108 Ark. 164, 156 S. W. 1015.

From an examination of the decree from which this appeal comes it will be observed that the case was submitted on the testimony of a number of witnesses, among whom were Sam Parrish, Frank Andrews, J. S. Chaney and Mrs. Fannie B. Parrish. The appellant has failed to abstract the testimony of any of the witnesses except that of J. W. Parrish and L. W. Parrish. It is a rule of practice, early announced and consistently adhered to, that, where evidence heard by the trial court is not abstracted, it will be presumed in this court on appeal that the finding of the trial court was sustained by sufficient evidence. *Savage* v. *Lichlyter,* 59 Ark. 1, 26 S. W. 12; *Rural Single School District* v. *Lake City Special School District,* 144 Ark. 362, 222 S. W. 716; *Wilkerson* v. *Fudge,* 176 Ark. 11, 1 S. W. (2d) 801. Under this rule we must presume that there was evidence sufficient to sustain the finding and decree of the trial court, which is therefore affirmed.

BALDWIN *v.* SIMPSON.

4-3974

Opinion delivered October 14, 1935.

R. E. Wiley, Henry Donham and *Wm. P. Bowen,* for appellants.

Paul H. Callaway and *Joseph Callaway,* for appellee.

BUTLER, J. The appellee, Jennie Simpson, filed her original complaint in the Clark Chancery Court on July 10, 1934, alleging that she was the owner of a certain lot in the town of Gurdon on which she had lived for more than forty years; that while she was owner of the same the Missouri Pacific Railroad Company erected and placed in operation a coal chute, the operation of which had greatly decreased the value of her property because great clouds of coal dust and cinders were blown thereon. She prayed that the operation of said chute be permanently enjoined, and that she recover for damages already sustained.

To this complaint a demurrer was filed which was overruled. Thereupon, an answer was filed denying the material allegations of the complaint and alleging that said coal chute was completed and placed in operation on May 29, 1928, and had since been continually operated each day; that said structure was permanent, and the damage inflicted was an original damage on the completion of the coal chute and that plaintiff's cause of action for damages was barred by the statute of limitation, which was pleaded as a defense to such action.

On January 1, 1935, an amendment to the complaint was filed by which plaintiff alleged that during the month of April, 1933, at other times since then, and from time to time when appellant was loading locomotive tenders from the coal chute and unloading coal, and when the wind was blowing from the chute toward her home, her house and furniture became covered with dust, smoke and cinders from the coal chute, and that the damage complained of was not the construction of the coal chute but the recurring damage to her property since April, 1933.

The chancery court transferred the cause to the circuit court without objection, and thereafter an answer to the amendment to the complaint was filed, denying the material allegations thereof, interposing a plea of the statute of limitation, and setting up all the other defenses of the original answer. The cause was tried in the circuit court, and resulted in a verdict and judgment for the plaintiff, from which comes this appeal.

The coal chute, operation of which is alleged to have caused the damage complained of in this case, is the identical structure involved in the case of *Mo. Pac. Rd. Co.* v. *Davis,* 186 Ark. 401, 53 S. W. (2d) 851, damages for the operation of which were there sought to be recovered. In that case the court said: "If it (the coal chute) had been negligently constructed or negligently operated and such negligence caused injury to appellees' property, they would be entitled to recover, no matter when the coal chute was erected, but the structure is such that damage would necessarily result and also the certainty, nature and extent of the damage could be reasonably estimated and ascertained, and the damage was therefore original. In such cases there can be but a single recovery, and the statute of limitations against such cause of action is set in motion upon the completion of the construction."

Appellee's house is situated from seventy-five to one hundred feet from the coal chute. The chute is a tall structure, the top bin being about eighty-five feet above the ground, and the evidence is undisputed, as in the Davis case, that there was no negligence in the construc-

tion or operation of the coal chute. It occurs to us that as soon as the chute began to be operated, damage to the appellee would occur, although the effects from such operation and the resultant damage to appellee might not have been immediately apparent, and that this case is ruled by *Mo. Pac. Rd. Co.* v. *Davis, supra.*

Appellee attempts to distinguish the Davis case from the case at bar on the theory that damage to her property was not sustained until the removal of a garage which stood between her property and the coal chute, which was within three years before the filing of her complaint. The evidence is undisputed that the railroad company had nothing to do with the erection or removal of the garage. This is substantially the contention made and overruled.

In the case of *Board of Directors, etc.,* v. *Barton,* 92 Ark. 406, 123 S. W. 382, where the facts were that a levee was constructed in the year 1899 as a solid embankment across certain water courses completely obstructing the passage of water, and, at the time of the trial of the case, had been continuously maintained in the same condition as when built. The damage complained of did not occur until the year 1906. When the levee was first constructed and until the year 1906 the waters which were impounded gradually increased in volume each year, covering more and more land. During the years 1906 and '07, the waters first encroached upon plaintiff's lands, rendering a large portion thereof unfit for cultivation. Action to recover damages was instituted. It was alleged that damage was not at first apparent and did not become so until the spring of 1906. A plea of the three-year statute of limitation was interposed as a defense to plaintiff's action. In sustaining the plea, the court said: "Whatever damage accrued to adjoining lands was done then, for the construction of the embankment necessarily caused injury to all lands drained by those streams and bayous, though the exact amount of damage to crops from year to year could not with certainty be then determined. But the injury to the lands was a permanent one, and the damages were original, and compensation should have been sought in one action

brought within the period of limitation. The action was barred."

From the doctrine of the Barton case, *supra,* it would seem in the instant case that, although damage did not occur to the appellee within three years before the filing of her suit, that, as the coal chute was a permanent structure from the operation of which damage would necessarily flow, her cause of action accrued in 1928 and was barred by the statute of limitation when her suit was filed.

It follows that the judgment of the trial court is reversed, and the cause dismissed.

SIMPSON *v.* LITTLE ROCK NORTH HEIGHTS WATER DISTRICT NO. 18.

4-4123

Opinion delivered October 14, 1935.

Sam Rorex, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

BAKER, J. The Little Rock North Heights Water District No. 18 desired to refund its indebtedness under act No. 192 of the Acts of 1935, and, among other things preparatory thereto, it entered into a contract with

C. W. Simpson, whereby he surrendered two certain bonds he held, Nos. 68 and 69, and agreed to receive other bonds of a new issue in lieu thereof. The improvement district, on account of delinquencies in the payment of assessments, was in default, and was preparing to issue new bonds, under said act 192, refunding the unpaid portion of its indebtedness, the said new bonds to draw interest at 1 per cent. for the first five years, 1½ per cent. for the second five years, 2 per cent. for the third five years, and 2½ per cent. for the fourth five years, and 3 per cent. thereafter until paid. The contract made with Simpson was highly advantageous to the district in the saving of interest.

Before the new bonds had been exchanged for the old ones, Simpson came to the conclusion that the new bonds, so to be issued under act 192, would not be secured by lien on the real property as were the old bonds. He believed that, upon issue of the new bonds, the holder thereof would have to look to act 192 to determine the intent or purpose of the district, and since the said act did not expressly provide for a continuance of the lien of the pledge of assessed benefits, or of the deed of trust, covering the water plant, made when the first bonds were issued, that the new bonds would be taken in settlement of the first bonds, and necessarily be without the security of any kind, because the act did not provide for the continuance thereof for the new obligations. He, on account of that, decided that he preferred to have his bonds returned, rather than to accept the new bonds. These bonds had been delivered to the Metropolitan Trust Company to be held until the new bonds could be prepared and delivered.

Simpson made demand upon the Metropolitan Trust Company for the return of his bonds. Upon this demand, made by Simpson, the said Trust Company informed the Little Rock North Heights Water District No. 18 of the fact that this demand had been made, and asked for instructions from the district. The district refused to accede to these demands, because it said that Simpson might put the said bonds upon the market and prevent the refunding of the old issue, much to the detri-

ment of the district. The Metropolitan Trust Company, to save itself from damage or loss, by reason of these adverse contentions, between the parties filed in the chancery court of Pulaski County, an intervention, interpleading the said Simpson and district, and praying the court to require the parties to present and submit their respective contentions to the jurisdiction of the said court. The interplea stated all of the facts, and the respective parties, by their pleadings, admitted the same as stated by the intervention.

The chancery court, by its decree, held that Simpson was bound by the contract whereby he had delivered the bonds for reissue; that the original security, the pledge of assessments, and deed of trust, would, by operation of law, be security for the new bonds to be issued; provided also that if a majority of the bondholders desired, a new deed of trust and a new pledge of assessments might be entered into by the improvement district.

From this decree of the chancery court, C. W. Simpson has appealed. Upon this appeal he urges that said act 192 of the Acts of 1935 makes no provision for any security of the refunding bonds, but that it only provides that the district may fund, or refund, the old bonds and execute and deliver the new or refunding bonds in exchange for the old, and that parties to the transaction, in the transfer or exchange of the bonds, would be bound by the provisions of the said act, and that their rights would be no greater than expressly or specifically granted by the act.

Appellant cites authorities that apparently sustain the position that he has taken, but, unfortunately for the contention that he makes in that respect, the authorities cited are from other jurisdictions, and they appear to be not in conformity with the decisions of our own court, and, we think, perhaps against the great weight of authority.

In reply to the contention made by appellant, we suggest that the pledge of assessments made by the improvement district, and deed of trust whereby the physical properties of the district are mortgaged, are not essentially different from the ordinary mortgage. Many

mortgages provide that the notes secured thereby may be renewed from time to time, but that the mortgage will secure not only the notes described in the face of it, but all renewals thereof. Also we find that many notes so secured by mortgages make reference to the particular mortgage securing the same. These references, however, of the note to the mortgage, or of the mortgage to the note, are not necessary to the validity of the lien, or to its continuity as to any renewals. Such references, however, make the proof that might otherwise be required unnecessary.

This court held in *Oliphint* v. *Eckerley,* 36 Ark. 69, that, in the absence of an agreement, or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof. In other words, instead of there being a presumption of payment or settlement of the original indebtedness by the execution of the renewal note, and thereby a release of the security, the presumption is that, upon the execution of the new note or bond, the same security is available for its payment. 41 C. J. 468; 19 R. C. L. 450, 451.

It might be suggested that ordinarily in the issuance of bonds by an improvement district, or any other legal entity, reference is made to the statute or authority, authorizing such issue, and it is perhaps not amiss to suggest that in the issuance of the refunding bonds, by this improvement district, reference would probably be made, as authority for the new issue, to act 192 of the Acts of 1935. If such reference be made, then it must be apparent to any one that any issue of bonds authorized thereby is nothing more than a new obligation for the same debt, and under the authorities above mentioned, necessarily would carry the same security.

It has been suggested, and we think with sound propriety, that the respective acts authorizing the refunding of the old indebtedness by implication must necessarily be said to provide for the security of the new obligations. These new obligations would be without practical value ordinarily, unless there is security for their payment, and, since we do not impute to the Legislature a desire to do a vain thing, we have no hesitancy in saying that

in this provision for the refunding of the old bond issues the power is implied to do whatever is necessary to be done to make effective and valid the new issue of bonds to be substituted for the old ones.

The court did not err therefore in providing that, if a majority of the bondholders desired to have a new pledge executed by the improvement district, and a new mortgage or deed of trust upon its physical properties, that same should be done. We are in accord, however, with views of the trial court, that such new pledge, or mortgage, is not necessary, but that it may be executed as a matter of expediency, or confirmation, if deemed advisable.

Whatever powers or authorities are essential to effect the exercise of the grant of power to reissue or refund the bonds must be implied. 59 C. J. 972; *Atkinson* v. *Pine Bluff*, 190 Ark. 65, 76 S. W. (2d) 982.

In the last cited case the court said: "In granting authority to construct sewers, power is impliedly granted to adopt the means appropriate and reasonably adapted to carry into effect the authority expressly given."

It perhaps may not be amiss to suggest that this court is committed to the theory that new obligations may be issued for the old, without an express grant of authority or power, and particularly when there is no increase in the amount of indebtedness, or interest, where the obligation is not otherwise onerous or illegal. *Talkington* v. *Turnbow*, 190 Ark. 1138, 83 S. W. (2d) 71; *Alphin* v. *Tatum*, 189 Ark. 862, 75 S. W. (2d) 377.

The decree of the chancery court therefore is affirmed.

ROBISON *v.* STATE.

Crim. 3963

Opinion delivered October 21, 1935.

Roy Gean, for appellant.

Carl E. Bailey, Attorney General, and *J. F. Koone*, Assistant, for appellee.

SMITH, J. Appellant was tried and convicted under an indictment which charged that on March 23, 1935, he had received a number of articles of merchandise, which were named and valued in the indictment, knowing that they had been stolen. It was alleged that the stolen property was owned by John and Joe C. Bonds, who were partners doing business as Bonds Grocery Company. For the reversal of this judgment, it is insisted (1) that the testimony is insufficient to support the verdict; (2) that the court erred in admitting certain testimony and in the exclusion of certain other testimony, and (3) in refusing to give an instruction numbered 9 requested by appellant.

The testimony on the part of the State was to the following effect: The store of the Bonds Grocery Company was broken into during the night of March 22, and a quantity of merchandise was stolen. A warrant was issued directing the search of appellant's store, and Joe Bonds accompanied the officers there to participate in the search. He testified that he was awakened by the night watchman about 5 or 6 A. M. on the morning of March 23; that when he went to the store of appellant, Robison, with the officers who had the search warrant he found Mr. and Mrs. Robison there. He saw four boxes

of candy, which Mrs. Robison stated, in the presence of her husband, had been purchased from Mr. Peet, the night man. He testified that this candy had been taken from his store. He recognized it by the kind and quantity of candy in one of the boxes, and he stated to the Robisons: "Well, I think you got all of it from around my show case," and appellant, Robison, answered, "I don't want anything but mine." He testified that four cans of Royal baking powder had been stolen from his store. He saw four cans of this baking powder in appellant's store. It cost 16 2/3 cents a can wholesale. Appellant was retailing it at 10 cents per can. Appellant, Robison, stated to the officers that he had bought that morning about daylight a lot of groceries from one of the Pritchetts, but did not know which one. He had bought altogether two lots of merchandise, each of which had been delivered in a big Buick car. He had paid $25 for the lot delivered on the morning of March 23 and $20 for the previous lot. He did not give his vendor a list of merchandise to be delivered, but did tell him what he could use.

John Bonds testified that he learned of the burglary about 3 A. M. on the morning of March 23. He saw the Pritchett boys bring to Mr. Hoffman's garage a Buick car which had been stolen out of the garage that night. There were no lights on the car, although it was dark. He saw the property which the officers had recovered under the search warrant. It was all of the kind and character which had been stolen from him.

Witness Bateman testified that early on the morning of the 23d he saw two men in a Buick car. He saw some sacks of sugar and a 48-pound can of lard in the car.

The deputy sheriffs who served the search warrant testified that they told appellant they had a warrant to search the place and wanted the stuff Pritchett had brought there. Appellant's face turned red and he said: "Yes, I will get it for you." Appellant would take the articles off the shelf as the officers read them off the list, remarking: "I got this off him." They testified that appellant said: "I bought it off of two fellows that came just before day." They testified that appellant said that he did not give these boys or fellows specific orders for

goods, but he gave them a list of the stuff he handled and had a market for. The Bonds testified positively that certain stolen merchandise found in appellant's store belonged to them.

Appellant testified that he bought the merchandise from the driver of a Ford truck; that other merchants bought similar merchandise in the same manner, and that he bought it because it was cheaper than the prices of the wholesalers, and that he did not know the property was stolen.

The chief insistence for the reversal of the judgment of conviction is that the testimony does not sufficiently show that the goods had been stolen which were found in appellant's store which he had purchased on the morning of the 23d, and that, if so, it was not shown that they had been stolen from the Bonds Grocery Company as alleged in the indictment.

The circumstances of this transaction as hereinabove briefly outlined lead irresistibly to the conclusion that the merchandise was stolen, and that appellant must have known that this was true. The sale in bulk, out of a sedan car, before day, without an invoice, by an irresponsible and unknown person, at a price admitted to be less than that of the wholesalers, is certainly sufficient to apprise a man of ordinary intelligence that a thief was attempting to dispose of his loot.

Now, if the goods were stolen, and appellant knew this to be the case when he received the goods, it is immaterial that he may not have known from whom they had been stolen, and the State was not required to prove that appellant had this knowledge when the goods came into his possession.

But it was necessary to prove that the goods were stolen, and the name of the owner was therefore alleged in the indictment. This was one of the material allegations of the indictment. The Bonds identified positively some of the stolen property as belonging to them, and they testified that the remainder of the stolen property was of similar brands of merchandise, and, if the testimony sufficiently shows that any of the stolen property belonged to the Bonds, it is a fair inference that the re-

mainder was also theirs, and there is no question about the sufficiency of the proof of value.

The testimony was certainly sufficient to warrant the submission of these questions to the jury, and is sufficient also to sustain the verdict which was returned by the jury.

The court refused to give an instruction numbered 9, requested by appellant, which reads: "You are instructed that it is a material element of this offense that the property alleged to have been stolen be identified as the property of the person mentioned in the indictment as being the owner thereof." This instruction is the law, and might well have been given, but there was no error in refusing to give it, as it was fully covered by an instruction given by the court which charged the jury that, before the defendant could be convicted, it must be found, beyond a reasonable doubt, that the property had been stolen from the alleged owner; that the defendant received said property after the same had been stolen, and that at the time defendant received said property, if he did receive it, he knew the same had been stolen.

Of course, as has been said, if the testimony supports the finding that these essential facts were proved, it would be unimportant that the defendant may not have known who the owner of the stolen property was.

Testimony was offered, over appellant's objection, by one of the officers who served the search warrant that he had found a list of groceries in an abandoned automobile. The connection of appellant with this list was not made to appear, and the testimony should have been excluded for this reason. But we think it could not have been prejudicial.

Appellant offered to prove by his wife that she had purchased the four boxes of candy which Joe Bonds found and identified as having been taken from his store; but she was not permitted to testify. This was not error. The applicable rule of evidence is § 3125, Crawford & Moses' Digest, which reads as follows: "In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either;" otherwise they are incompetent to testify for or against each

other. *Woodward* v. *State,* 84 Ark. 119, 104 S. W. 1109; *Lighter* v. *State,* 157 Ark. 261, 247 S. W. 1065; *Conley* v. *State,* 176 Ark. 654, 3 S. W. (2d) 980.

The real and important question in the case is the one of fact whether the property alleged to have been stolen was the property of the Bonds Grocery Company, as alleged in the indictment. As above stated, we think the testimony is sufficient to show that it was, and the judgment must therefore be affirmed, and it is so ordered.

SULLIVAN *v.* SMITH.

4-3994

Opinion delivered October 21, 1935.

C. T. Carpenter, for appellant.

Arthur L. Adams, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in the circuit court of Poinsett County of the 17th day of December, 1934, setting aside a judgment for $5,000 rendered against appellee herein in favor of appellant herein at the former term of said court for injuries received by him in the operation of an automobile while in her employment and while engaged in the performance of his duties of an employee and granting her a new trial in the original suit.

In taking this appeal, appellant herein failed to file a stipulation on his part to the effect that if the order of the circuit court be affirmed, judgment absolute shall be rendered by this court against him. A part of the second subdivision of § 2129 of Crawford & Moses' Digest reads as follows:

"But no appeal to the Supreme Court from an order granting a new trial, in a case made or bill of exceptions shall be effectual for any purpose, unless the notice of appeal contains an assent on the part of appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant."

The order setting aside the original judgment and granting appellee a new trial cannot be appealed from unless the appellant assents that, if the order be affirmed, judgment absolute shall be rendered against him. No such assent appears in this appeal. A compliance with this statute is a jurisdictional requirement and a failure to comply with it, necessarily works a dismissal of the appeal. *Cormack* v. *Missouri State Life Insurance Company,* 186 Ark. 998, 57 S. W. (2d) 403, and cases cited therein.

The appeal is dismissed, the effect of which is to leave the original case pending in the circuit court for a new trial.

CLARK *v.* CLARK.

4-4002

Opinion delivered October 21, 1935.

John W. Nance, for appellants, Ashley Clark *et ux.*

Duty & Duty, John Mayes and *Bernal Seamster,* for appellee, W. T. Clark.

HUMPHREYS, J. The appellants in this case are the father and mother of appellee, who has also prosecuted a cross-appeal. About the year 1908, appellee, who was a young man living with them in the home owned by them near Goshen in Washington County, known as the Mayes place, went to California, to work in the oil fields. After arriving in California he obtained employment at a wage of $6 a day with room and board. His mother wrote him that the Slaughter property near their home was for sale at a bargain, and that his father wanted to buy it but did not have the money to do so. At that time appellants owed a considerable sum on the Mayes place. Appellee, who was a young unmarried man, wrote his mother to tell his father to buy the Slaughter farm and that he would help pay for it. The property was purchased mostly on credit for $3,000. Appellants moved upon it, and, according to the testimony of Mrs. Ashley Clark, her son sent them from time to time $2,200, which was applied on the payment of the purchase money. The balance of the purchase money or $800 was paid by them out of the proceeds from the two farms. Although appellee testified that he sent enough money to them to pay the entire consideration, his mother produced a record

which she had kept of all remittances, and they totaled $2,200. When the full consideration of $3,000 and interest had been paid to Slaughter in 1913, Ashley Clark took a deed to the Slaughter tract of 155 acres to himself, which he handed to his wife, Mrs. Ashley Clark, for safe-keeping and never recorded same nor informed appellee to whom the deed was made. Appellants continued to reside upon the place until appellee returned from the World War and purchased another farm from Ellery Clark. He had continued to work and save his money until he enlisted as a soldier. After returning from the war he procured employment in the oil fields of Oklahoma at $18 per day and, during that time, Ashley Clark, his father, purchased the Ellery Clark farm near Goshen for him, agreeing to pay therefor the sum of $16,000. Appellee paid $9,800 of the indebtedness and appellants paid $1,200 out of the proceeds which had been received from the Slaughter and Mayes farms and appellee and his father executed a note to Ellery Clark for $5,000, evidencing the balance of the purchase money. The deed to the Ellery Clark farm was taken in the name of appellee and handed to Mrs. Ashley Clark, who put same with the deed to the Slaughter farm, and it was never recorded. Appellants then moved to the Ellery Clark farm and operated these farms, never keeping or rendering any account to appellee. Appellee then moved to California and procured work in the oil fields at $18 a day. The $5,000 note representing the balance due on the Ellery Clark farm was paid in part by proceeds from all the farms, which were looked after and operated by appellants. About two-thirds of the amount was paid by appellee in remittances from California. Appellee returned to Goshen in the fall of 1922 and having married moved upon the Slaughter farm without attorning to appellants for the proceeds derived therefrom. When he returned, cattle were sold off the Ellery Clark farm for $480, which was received by appellee. Some time in the summer of 1923, appellee went back to California and did not return until 1930, at which time he took charge of both the Slaughter and Ellery Clark farms and all the personal property and operated and received all the

proceeds therefrom. During his absence, appellants bought another small farm adjoining the Slaughter farm, where they moved after appellee's return from California. Ashley Clark, from 1923 until 1930, had operated the farms without keeping any account of what was purchased and sold and without accounting to appellee in any manner. In the meantime, he had accumulated four or five thousand dollars and deposited same in a Fayetteville bank in his own name. After taking charge of both the Slaughter and Ellery Clark farms and all the personal property, a large part of which appellee had purchased, Mrs. Ashley Clark handed appellee the deed to the Ellery Clark farm, and, when asked about the deed to the Slaughter farm, she replied that she had it, but that appellee's father did not want her to deliver that deed to him. Shortly thereafter the money deposited in the Fayetteville bank came up for discussion, and two checks, one for $500 and one for $1,000 were given to appellee by his father, Ashley Clark, and the amount of $1,500 was transferred from Ashley Clark's deposit account to the individual deposit account of appellee. When appellee began to check on his personal account, payment of the checks was refused, and when he inquired into the matter, the bank informed him that his father had requested it to transfer the money back to his own account, which it had done. When appellee requested his father, Ashley Clark, to explain why he had stopped payment on the checks, he told him that $1,500 was too much money for him to have and handed him a check for $1,000. This check was cashed and used by appellee. Ashley Clark testified that he loaned appellee the $1,000 and appellee testified that it was not a loan but a gift to him. Nothing more was said or done about the matter until this suit was instituted by appellee to have the title to the Slaughter farm vested in him and for an accounting of the rents and profits which his father had derived from it.

Appellants interposed the defenses that appellee had made a gift to them of a part of the money which they used to purchase the Slaughter farm, and, if not a gift,

they had acquired title thereto by more than seven years' adverse possession.

The chancery court rendered a decree vesting twenty-two-thirtieths interest in the Slaughter farm in appellee and eight-thirtieths in appellants. He did this on the theory that appellee had not made a gift to his father in money of the $2,200 he remitted to them to buy the farm, and that the law raised a resulting trust in the real estate in favor of appellee to the extent his money was used in the purchase thereof and also rendered a judgment against appellee for the $1,000 he received from his father upon his return from California. Both parties have appealed from the decree in so far as the decree is adverse to the claims of each.

The court correctly found that the $2,200 was not a gift by appellee to appellants. It is undisputed that the mother kept a record of each remittance made to them covering a period of three or four years. Had these remittances been intended as gifts, it was not necessary to have kept a book record of them; whereas, if they had been sent to pay for all or a part of the farm, a record of them would be a natural thing to keep. Again, it is also undisputed that the proceeds derived from the Slaughter farm were used in payment of part of the purchase price of the Ellery Clark farm, conceded to be the property of appellee. Again, it is admitted that the possession of the Slaughter farm was turned over to appellee when he returned in both 1922 and 1930 without any claim to it whatever by appellants. These acts on the part of appellants are wholly inconsistent with the claim that the property was a gift to them by appellee.

It is quite apparent that the remittances were not loans by appellee to appellants. In fact, no such claim was made by them. Not being a gift or loan, the only other construction that can be placed upon the acts and conduct of the parties is that appellee's money was used by his father, Ashley Clark, together with a part of his own in the purchase of the Slaughter farm, and the title was taken in the father's name for the benefit of both of them. The general rule laid down in 39 Cyc. 142, is, that "where the purchase price for lands belongs to a

son or daughter of the purchaser, and the purchaser takes title thereto in his own name, a resulting trust arises, in the absence of circumstances showing a contrary intent, in favor of such son and daughter, and where the payment of a child's funds is only a part of the consideration, a resulting trust *pro tanto* arises in his favor, provided it is for some definite aliquot part of the whole consideration." This rule is particularly applicable to the facts and circumstances in the instant case. The fact that appellants moved onto and resided on the Slaughter farm for a long period of time and paid the taxes thereon does not prevent the application of the rule, for their possession and payment of taxes is reasonably attributable to their habit of looking after and managing their son's business affairs in his absence from the State. They did or said nothing to any one indicating that they were holding and occupying the Slaughter farm adversely to appellee. They did not even record the deed that the world might know that the legal title was in them. In fact the appellee never saw the deed until it was introduced in evidence in this case.

Appellants contend that they have acquired title by seven years' adverse possession. The statute of limitations does not bar a trust unless the circumstances raise a presumption of the extinguishment of the trust or unless there has been an open denial or repudiation of the trust. Neither is shown by the evidence in this case. Appellee's right has not been cut off by the statute of limitations or laches.

Appellants also contend that the court erred in refusing to adjust equities in the personal property. We think not, for according to the evidence all the personal property was willingly delivered to appellee by appellants when he returned in 1930. Even if it had not been turned over to him upon his return, the weight of the evidence is to the effect that it all belonged to him.

Appellee contends that the court erred in giving appellants a judgment against him for the $1,000 his father let him have in 1930 when he returned from California. His contention is that it was a gift to him by his father, but we are unable to say under the conflicting

evidence that the finding of the chancellor is against a clear preponderance of the evidence.

No error appearing, the decree is affirmed.

CORAL GABLES *v.* MARKS.

4-4003

Opinion delivered October 21, 1935.

Joseph R. Brown, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

MEHAFFY, J. This case was, by agreement, tried before the circuit judge sitting as a jury. The appellant requested findings of law and fact by the court, which requests the court refused. At the request of the appellee, the following findings of law and fact were made by the court:

"1. The court found defendant agreed to buy lot 6, block 104, Riviera Addition to Coral Gables, Florida, August 1, 1925, for $4,275. He paid $1,068 and gave his note evidencing the balance of $3,206.25, payable in monthly installments of $89.06; last installment due September 1, 1928, the maturity date of the note.

"2. Defendant paid twelve installments on said note amounting to $1,068.72.

"3. The purchase contract provided the property would be conveyed to defendant in fee simple upon payment of the purchase price.

"4. Said note and contract were assigned by the vendor to Burcham Harding, September 25, 1925, and the same day vendor gave Harding a mortgage on said lot, as well as other properties. Said note and contract were reassigned to the present plaintiff in 1929.

"5. Said Harding assigned the mortgage upon said property to Coral Gables Properties, Inc., and said mortgage had not been released according to the evidence.

"6. Coral Gables Corporation, vendor, ceased to exist in 1929, and plaintiff, Coral Gables, Inc., was organized that year. Defendant's note and contract were assigned to plaintiff in 1929, but the mortgage given to Harding was not assigned to plaintiff, but to Coral Gables Properties, Inc.

"7. When vendor contracted to sell property to defendant and took his note, it had no title to the property, but an option from the Rellim Investment Company for a sum satisfactory to said company. Later plaintiff secured a similar option from said Rellim Investment Company, giving it the option held by the vendor.

"8. Rellim Investment Company owned said lot when defendant executed his note and contract with Coral Gables Corporation, and continued to own same until December 9, 1931, when it conveyed same to the York Corporation, and the York Corporation had title to said lot until it conveyed same to plaintiff, March 1, 1932.

"9. Coral Gables Properties, Inc., holds a mortgage on said property given by vendor to Burcham Harding and assigned by Harding to it, which mortgage under the testimony has not been satisfied.

"10. Neither the vendor nor the plaintiff owned the said property when the note and contract with the defendant were made, and title was not acquired to the said property until March 1, 1932, long after maturity of said note, which property has ever since been subject to the above-mentioned mortgage.

"11. Plaintiff filed a suit in this court against defendant on March 23, 1931, and did not tender a deed nor

allege it was able to deliver good title to plaintiff. March 23, 1931, defendant filed answer in said action, setting up defenses raised in the present action, and in said answer defendant rescinded said contract because of plaintiff's breach. October, 1931, plaintiff took a nonsuit without prejudice.

"12. Before maturity of said note defendant learned the vendor had no title to the property and had not paid for improvements under the contract and was insolvent, and he ceased paying installment for said reasons.

"13. Under the contract vendor was to pave the streets and construct sidewalks and install water main and electric feed wires, similar to such improvements in similar improved sections of Coral Gables.

"14. That neither vendor nor plaintiff made or paid for said improvements under the contract."

There was evidence to sustain the findings of fact by the court. The court also found that the appellant violated the terms of the contract of purchase, and appellee rescinded the contract, and, under the facts found, appellant could not recover, and judgment was entered for the appellee.

Appellant says the issues are definitely defined. It submits its position is that of a holder in due course of the note in controversy, and therefore defenses urged by the appellee are cut off. Appellant says, however, even if appellee took said note with equities, all requisites of the purchase contract have been complied with, and the appellant should have judgment against the appellee.

A holder in due course, as defined by the Negotiable Instrument Law, is "one who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was a fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Crawford & Moses' Digest, § 7818.

It is earnestly contended by the appellant that the uncontroverted proof shows that appellant is a holder in due course of the note sued on, and is not subject to the equities which may exist between the maker and the original payee.

We do not agree with appellant in this contention. We think there was substantial evidence to sustain the court's finding that appellant was not a holder in due course, and the finding of a court, when sitting as a jury, has the same force and effect that a jury's verdict would have, and, if there is any substantial evidence to sustain it, it will not be disturbed by this court.

Appellant calls attention to the case of *Miami Bond & Mortgage Co.* v. *Bell,* 101 Fla. 1291, 133 So. 547, and the *Sumpter County State Bank* v. *Hays,* 68 Fla. 173, 67 So. 109, and says that the first of these cases is not in point.

The court, however, in the Bell case, recognized the rule that where a contract for the sale of land and the covenant of vendee to pay the purchase price and the covenant of vendor to convey are dependent, and both covenants are to be performed at the same time, the tender of a deed is a condition precedent to an action at law to recover the total purchase price.

Appellant also contends that the case of *Sumpter County State Bank* v. *Hays,* 68 Fla. 173, 67 So. 109, is not in point. The court in that case held in effect that where an indorsee takes a negotiable note with knowledge of an executory contract that is the sole consideration for the note, such indorsee is not a holder in due course within the meaning of the negotiable instrument statute.

In the instant case there were involved three separate corporations. The first made the contract with the appellee, but all of the parties who became interested subsequently, knew all about the facts. They were bound to know the facts from the contract and notes itself.

The negotiable instrument statute, among other things, provides that a holder in due course is one who becomes a holder of it before it is overdue and without notice that it had previously been dishonored, if such was the fact, and he must also have taken the note in

good faith and for value, and he must have had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The facts in the instant case show that at the time the note was negotiated to the appellant, it had notice of the infirmity; it knew that the vendor had not complied with the contract; it knew that the vendor did not have title and could not convey.

The Florida court also said: "When an agreement of the vendor to convey a good title and of the purchaser to pay the purchase price are dependent, the purchaser will not be compelled to pay out his own money 'in strict performance of his covenants' when the vendor cannot or will not perform on his part 'material acts which are to be concurrently done, and which are not merely subordinate or incidental, but go to the entire consideration which supports the promise' of the purchaser to pay. * * * In such case, the duty devolves upon the vendor to offer, and at the same time be able to convey, a good title to enable him or those standing in his place to maintain an action against the purchaser for the purchase money." *Harper* v. *Bronson,* 104 Fla. 75, 139 So. 203.

In the instant case, in the original suit to collect the note, no tender of deed was made, and the appellant took a nonsuit. In the present suit the appellant offered to convey, but according to the evidence it could not convey. The court, in its finding of facts, stated in paragraph 10: "Neither the vendor nor the plaintiff owned the said property when the note and contract with defendant were made, and title was not acquired to the said property until March 1, 1932, long after maturity of said note, which property has ever since been subject to the above-mentioned mortgage."

Appellant calls attention to the case of *Jockmus* v. *Claussen & Knight, Inc.*, 47 Fed. (2d) 766. The court there held that one might become a holder in due course unless there has been a breach of the contract to the knowledge of the purchaser.

In the instant case we think the proof clearly shows, and the court so found, that there had been a breach of the contract to the knowledge of the purchaser.

Appellant contends that, in addition to its rights as a holder in due course, the contract which formed the consideration of the note has been complied with. The undisputed proof shows that the property is mortgaged, and that the appellant could not convey a marketable title.

We hold that under the evidence in this case the appellant was not a holder in due course; that it knew all about the infirmities; and knew about the breach of the contract by the vendor; and it is unnecessary to discuss the other questions raised by the parties.

The judgment of the circuit court is affirmed.

WILSON *v.* MASON.

4-4004

Opinion delivered October 21, 1935.

Henry B. Whitley, for appellant.

Hawkins & Keith, for appellee.

McHANEY, J. Appellants have failed to properly abstract the record in this case. There is no sufficient abstract of the complaint, the testimony nor the decree as required by Rule IX, so as to give this court an intelligent idea of the merits of the controversy. On this

account the decree would have to be affirmed for this reason alone, but for the fact that appellee has supplied same. However, the case must be affirmed on its merits. The questions involved are principally ones of fact.

It appears that on November 3, 1931, appellants had executed and delivered to appellee a mortgage on the land in controversy to secure an indebtedness due said appellee. It further appears that on the 5th day of November, 1932, appellants executed and delivered to appellee their warranty deed conveying said lands to him. Appellee entered into possession of all that part of said land lying south of the highway and rented to appellants for the year 1933 that part of the land described in said deed lying north of the public highway, on a basis of one-fourth of the cotton and one-third of the corn and other produce. In the latter part of November, 1933, appellants filed a suit against appellee in the Columbia Chancery Court in which they claimed that said warranty deed was intended by them to be a mortgage. This suit was dismissed by appellants without a trial. The present action was instituted by appellee on July 3, 1934, seeking to have said deed construed, and, if found to be a mortgage, to have same foreclosed. The chancery court held that said deed was an absolute conveyance of the title to the property, and not a mortgage, from which appellants have appealed.

The evidence shows there was a prior mortgage on said land in favor of the Federal Land Bank which appellee assumed and agreed to pay, and the indebtedness of appellants to him was cancelled. Since said transaction appellee has made several payments to the Federal Land Bank including nearly $900 in school warrants which were turned over to the agent of said bank to be collected and applied on the debt as they matured and has also paid the taxes on said land and collected the rents from appellants.

Appellants first say that their demurrer to the complaint should have been sustained. While this is a suit seeking a construction of a deed absolute in form, it was brought to foreclose the mortgage in the event the court found such deed to be a mortgage. It was somewhat in

the nature of a suit to quiet title.The court had jurisdiction of the subject-matter and of the parties, and the demurrer was properly overruled. It is contended that it is a suit for the possession of the property, or an action in the nature of ejectment, cognizable at law. But appellee was in the possession of said land, being in the actual possession of the part south of the road and the constructive possession of that part north of the road through appellants as tenants. Moreover, appellants filed a cross-bill setting up equitable grounds for relief, that is, that said deed was intended to be a mortgage to secure a debt, and that the debt had been paid, and that appellee is actually indebted to them, for which amount they prayed judgment. This action on the part of appellants conferred jurisdiction on the chancery court, even though the action as originally brought was one properly cognizable at law. *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742; *Morris* v. *Cobb,* 147 Ark. 184, 227 S. W. 23. In the latter case, it was held, quoting a headnote, that: "When a defendant files a cross-bill, setting up equitable grounds for relief to a complaint in a suit in equity which should have been brought at law, the case should proceed in equity."

Appellants next contend that the instrument involved was not a deed, although such in form, but was intended as a mortgage, and should be held to be so. This court has many times held that, where a deed is absolute in form, the burden is upon him who claims that it is a mortgage to prove that it is such by evidence that is clear, unequivocal, satisfactory and convincing. *Edwards* v. *Bond,* 105 Ark. 314, 151 S. W. 281; *Bolden* v. *Grayson,* 167 Ark. 180, 226 S. W. 975; *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663; *Deloney* v. *Dillard,* 183 Ark. 1053, 40 S. W. (2d) 772. As said in the last-mentioned case, quoting a headnote: "The law presumes that a deed absolute on its face is what it appears to be, and the burden is on the one claiming it to be a mortgage to overcome this presumption by clear, unequivocal and convincing evidence."

Without reviewing the testimony in detail regarding this question, we agree with the trial court that

appellants have not met the requirements of the rule above stated. While Mr. Wilson and some of his relatives testified that the deed was intended as a mortgage, this is disputed by appellee and his witnesses and by some very cogent facts and circumstances, and we are of the opinion that the court correctly decided the question. At least, we cannot say that the court's decision is contrary to the preponderance of the testimony.

The decree is accordingly affirmed.

KIBLER *v.* PARKER.

4-3998

Opinion delivered October 21, 1935.

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

Arthur L. Adams, for appellees.

McHANEY, J. This is an action for specific performance. Appellees procured from appellants, Kibler and wife, an option for lease for a filling station site, near the State line, between Missouri and Arkansas, in Greene County, on Highway No. 25. The option was in writing, acknowledged and recorded. It recites that Dallas Kibler is the owner of a strip of ground containing 79 acres, more or less, located in Greene County, Arkansas, through which State Highway No. 25 passes. After describing the land the option agreement reads as follows:

"In consideration of one dollar, receipt of which is hereby acknowledged, and other valuable consideration, I hereby transfer to Olan Parker and Marcus Feitz, a strip of land 200 feet wide on either side of said Highway 25 on all my land fronting this highway beginning at west entrance to bridge spanning the St. Francis River and running west from said bridge entrance. This transfer or option is given with the understanding that Olan Parker and Marcus Feitz, want to use a part or all of this ground for the erection of a service station, and I hereby agree that I, Dallas Kibler, will sign a lease agreement at any time within 120 days upon demand of said Olan Parker and Marcus Feitz to lease the land above set out for a period of one year at an annual rental of $300 a year," with renewal options for a period of 25 years. This option was dated December 17, 1934. In January, 1935, and within the 120 days option period, appellees presented a lease to Kibler and wife for their signature and acknowledgment, reading in part as follows: "We hereby rent, demise, lease and let unto the said Olan Parker and Marcus Feitz for a period of one year beginning this date, strips of land 200 feet wide on each side of said Arkansas State Highway No. 25, being one strip of land 200 feet wide on the north side and one strip of land 200 feet wide in the south side of Arkansas State Highway No. 25, each strip beginning at the extreme edge or limit of my said described land, first above described nearest to or bounded by the State boundary line, between the States of Missouri and Arkansas, and extending along and bordering State Highway No. 25 westward on each side of said highway through the entire tract of my land hereinabove described." Said lease contained proper clause relating to the payment of monthly rentals and options for renewals and extensions of the lease for the 25-year period originally mentioned in the option agreement. Appellants Kibler and wife refused to sign said lease on the ground that it gave to appellees a lease on both sides of said highway whereas the option agreement provided for a lease only on one side of the highway, to be selected by appellees. This suit was instituted to compel them to execute said lease,

and to reform the option agreement in the event the court found it ambiguous. Appellant Westbrooke was made a party to the action for the reason that on the 8th day of January, 1935, appellant Dallas Kibler had executed to him as attorney an option on 200 feet of land in width on that side of highway No. 25 above mentioned, beginning at the west end of the bridge and approach thereto, crossing St. Francis River, thence running west to the western boundary of his land above described opposite that selected by Olan Parker and Marcus Feitz under an option given to them * * * under a contract dated December 17, 1934, and recorded in Mortgage Record 67 at page 570, in the office of the circuit clerk and recorder of Greene County, Arkansas.

A trial of the case resulted in a decree in appellees' favor for specific performance requiring appellants, Kibler and wife, to execute a lease conveying to appellees strips of land on each side of highway 25 as above set out on a consideration of payment by them of an annual rental of $300. The decree also enjoined appellants from proceeding further under the Westbrooke option and canceled same. The case is here on appeal.

For a reversal of this decree, appellants contend that the option to appellees covers one or the other side of the highway and not both.

Webster's New International Dictionary, 2nd Edition, Unabridged, 1935, defines the word "either" as follows:

"1. Each of two; the one and the other; as, danger on either side,:—sometimes, esp. formerly, of more than two, for each, each one; also formerly with plurals, for both.

"2. One or the other (of two alternatives); as take either road."

We agree with the trial court that the use of the word "either" in the option agreement to appellees was used in the sense of both, and such use is not uncommon. As said in *Chidester* v. *Springfield, etc., R. Co.,* 59 Ill. 87: "The word 'either' is sometimes used in the sense of one or the other of several things, and sometimes in the sense of one and the other. Its use in the last sense is

not infrequent, thus it is common to say on either hand, on either side, meaning thereby on each hand or side." For instance, in this case Mr. Kibler owned the land on either side of highway No. 25. When we consider the purpose for which appellees desired to lease this land, that is for filling station purposes, within the permissible distance of the Missouri-Arkansas line, so as to compete with Missouri prices of gasoline, under our statute which permits such sale at the rate of taxes prevailing in such State, it would seem certain they would want to shut off any competition in such distance by leasing both sides of the road. Of course, they had no intention of putting a filling station on both sides of the road, but it is certain that they would not want any one else to build a competing station so close to them. Moreover, the testimony of the witnesses, Martin, Cox, Herringer and Jacobs, all disinterested witnesses, in addition to the testimony of appellees, is to the effect that both Mr. and Mrs. Kibler admitted that they at all times understood that their option to appellees covered both sides of the highway, and that they had so informed Mr. Westbrooke and his client, Long, for whom Westbrooke negotiated the second option in his own name. The testimony is undisputed that it took Messrs. Westbrooke and Long a considerable period of time to convince Mr. Kibler that he had leased only one side of the road to appellees, and that he was not then convinced until he, in company with them, went to submit the matter to his attorney to get his opinion as to whether he had leased both sides of the road. His attorney was not in, but he consulted another who gave an opinion to the effect that he had leased only one side of the road. It was then and then only that Mr. Kibler executed the second option covering the side of the road not selected by appellees, and Mrs. Kibler did not sign this option. The proof further shows that $25 per month or $300 per year is a fair rental value for both sides of the road and that Judge Pillow had, prior thereto, taken an option on both sides of the road from Mr. Kibler, which he failed to exercise, at $10 per month. When we consider all the facts and circumstances in evidence, together with the written option, we are of the opinion

that the court correctly found that the option to lease covered both sides of the road, and that the Kiblers should be compelled to convey both sides, and that the lease to Westbrooke for Long was therefore correctly canceled. There is no question of innocent purchaser in this case, as contended by appellants, for not only did Messrs. Westbrooke and Long have actual knowledge of the lease, saw it of record, but, according to several witnesses, were informed by both Mr. and Mrs. Kibler that they had leased to appellees both sides of the road.

Affirmed.

BRUNER IVORY HANDLE COMPANY *v.* WEST.

4-3997

Opinion delivered October 21, 1935.

McRae & Tompkins, for appellant.

W. S. Atkins and *Ned Stewart*, for appellee.

BUTLER, J. Appellee brought this action to recover damages for injury sustained by him while in the employ of the appellant company. The negligence alleged was the failure to furnish a safe place for plaintiff to work, in that a warped board was placed in the platform on which he was engaged in work, and which, because of its warped condition, was raised above the level of the floor, causing him to stumble against it and fall, resulting in the injury for which damage is sought. The answer denied the material allegations of the complaint and, as affirmative defenses, pleaded assumed risk and contributory negligence. The trial resulted in a verdict and judgment in favor of plaintiff in the sum of $5,000, to reverse which this appeal is prosecuted.

The grounds of error argued by appellant are (1) that the undisputed evidence shows as a matter of law that the appellee assumed the risk, and that the trial court, in instructing on the question of assumed risk, erred in refusing to give instructions Nos. 3 and 6 requested by the appellant, but offered to amend these instructions by adding certain words thereto. The effect of these instructions as requested was to tell the jury that, although the defendant (appellant) negligently placed a warped board in the platform, yet, if the defective board was raised above the level of the floor to a degree to make it apparent and obvious to a person of

ordinary intelligence, plaintiff (appellee) assumed the risk arising therefrom, which would prevent his recovery. The amendment offered by the court in one instruction was to add, after the expression, "ordinary intelligence," the words, "engaged in the particular task in which the plaintiff was engaged at the time of the alleged injury." To the other instruction the amendment offered was to insert, as a qualification to the word "obvious" the words, "to the plaintiff, or if you further find that the said plank should have been plainly visible and obvious to the said plaintiff in the exercise of due care for his own safety." These instructions, as offered to be amended by the court, would have in effect declared the law to be that the appellee would be deemed to have assumed the risk occasioned by the negligent act of the appellant if the same was so obvious as to be at once apparent to a person of ordinary intelligence when engaged in the particular task appellee was performing at the time of his injury, or if said negligent act of appellant was visible and obvious to appellee or the defect plainly visible to appellee in the exercise of due care for his own safety. The question of the assumption of risk and the error as to the instructions of the court on that defense will be considered together.

The appellant operates a handle factory at Hope, Arkansas, where it manufactures handles of various descriptions. Appellee West was 39 years of age and had worked at the factory for 12 years. He was a grader's assistant or helper, and his duties were to assist the grader, and to carry or truck the handles to and from the dry kiln and warehouse. Little buggies or trucks were furnished for this purpose, and the employees could either truck the handles or carry them in their arms just as they saw fit. In going to and from the dry kiln, appellee would pass over a wooden platform about ten or twelve feet in width, and constructed of planks two inches thick and eight inches wide, laid crosswise on joists or stringers. On the day appellee was injured while performing his work he fell to the platform, sustaining a painful and permanent injury.

The evidence relating to the reason for appellee's fall, and the circumstances surrounding him at the time adduced in his behalf, and which was accepted by the jury as true, may be briefly stated as follows: On the morning of the injury, appellee was wheeling a buggy of handles when one of the wheels broke through a plank near the outer edge of the platform. The assistant superintendent was nearby and witnessed the accident. The handles had fallen from the truck and were lying on the platform. The assistant superintendent directed appellee to leave the handles alone saying that he would attend to getting them up. He also said he would have the platform repaired and called a negro for the purpose of putting in a new plank. Appellee then went back to the warehouse where he was engaged in some duties for a time, and while there heard sounds which indicated to him that a new plank was being inserted. While the new plank was being put in, appellee did certain work in the dry kiln, and then came around another way, picked up a bunch of handles placing them on his shoulder, and started from the warehouse to the dry kiln across the platform. He was carrying upon his shoulder forty-five handles which weighed something like two pounds each. In returning along the platform he took a course near its edge opposite to that where the hole had been previously made, being uncertain as to whether or not it had been repaired. He was glancing in that direction to see if this had been done, and, when he reached the point opposite to where the hole had been, and to the place where the new plank had been inserted, he struck his foot against it and fell heavily to the floor. He then observed that the new plank was warped, obtruding from 3 to 3½ inches above the level of the platform—that it had been nailed with a twenty penny nail which did not hold because the supports to which it was nailed were old and rotten.

A number of witnesses, employees of appellant company, testified that the platform was uncovered, and that a board sticking up from 3 to 3½ inches above the level of the floor would be plainly visible and discoverable at a glance. On the cross-examination of appellee, it de-

veloped that he had used the platform for a number of years while in appellant's employ, crossing it on an average of from 15 to 20 times a day in the performance of his work; that he did not see the elevated board before he stumped his toe against it, and that was the first time he had been across the platform since the new plank had been inserted. He was asked: "Did you look before you stumped your toe on it?" "Were you looking where you were going?" and "You did not look where you were going on account of the handles being in your way?" and was also questioned as to whether he looked before he crossed the plank. To these questions he answered in substance that he couldn't tell for sure where he was going on account of the handles he was carrying on his shoulder; that he had not ascertained how well the hole had been fixed and was "shunting" to the left until he could see how it looked; that he didn't look so close, but looked the best he could with the handles on his shoulder which obscured his vision, all the time trying to "shunt" the hole to the right not knowing how well it was fixed.

It is insisted from this evidence that the defective plank was so obvious and plainly discernible that knowledge thereof and the attendant danger must be imputed to the appellee as a matter of law creating an assumption of risk on his part and barring recovery. In support of this contention we are cited by appellant to many of our cases beginning with the case of *Davis* v. *Railway,* 53 Ark. 117, 13 S. W. 801, continuing down to decisions of a late date. To review these cases would unduly extend this opinion and could serve no useful purpose, as the principles relating to the doctrine of assumed risk stated in those cases are well settled in this State and by the great weight of authority in other jurisdictions. They deal with various phases of the doctrine; and on that relating to the assumption of risk by the servant for the negligent act of the master, and approve in varying language the rule stated in Bailey on Personal Injuries, 2d ed., § 408, cited by appellant: "Where it appears from the undisputed evidence that the defects or dangers are open and obvious and such as under the circumstances ought

to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law." We find no conflict in the authorities as to this rule. The difficulty lies in its application, for it is apparent that the peculiar circumstances of each case must control, and that no one case is authority for its application in another. Under one set of circumstances an open and obvious defect ought to have been known and comprehended by the employee, while under different circumstances it would be a question whether or not such defects should have been known and appreciated by the employee injured by reason thereof. "While, however, open and obvious perils may not be made the foundation for a recovery for injuries sustained by reason thereof, it must appear in order to defeat the employee's action that the danger was in fact obvious to one in his situation." 18 R. C. L. 643, § 137.

"An employee of ordinary intelligence, experienced in the line of his duty, and not working under the immediate direction of a superior, assumes the risk of dangers incident to conditions produced through the negligence of his employer which are obvious and imminent and which he necessarily must have known and appreciated in the exercise of ordinary care for his own safety in the performance of his duties." *Francis* v. *Ark. Milling Co.,* 153 Ark. 236, 239 S. W. 1067.

In *St. Louis San Francisco Ry. Co.* v. *Blevins,* 160 Ark. 362, 262 S. W. 654, the court, in holding that assumption of risk of an obvious defect was a question under the circumstances of that case for the jury, adopted the language used by the Supreme Court of the United States relating to obvious defects and consequent dangers holding that the servant is not to be deemed to have assumed the risk unless these were "so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other."

Again, this court, in *Missouri Pac. Ry. Co.* v. *Harville,* 185 Ark. 47, 46 S. W. (2d) 17, said: "On the question of assumed risk, we cannot say as a matter of law that appellee assumed the risk. We think it was a question to be submitted to the jury, which the court did un-

der instructions that are not complained of. It is well settled that under the Federal Employers' Liability Act a servant is not deemed to have assumed the risk of the negligence of the master or that of a fellow-servant unless the consequent danger is so open and obvious that an ordinarily careful and prudent person in his situation would have observed the one and appreciated the other."

It might be thought that the two cases last cited would be authority only in cases arising under the Federal Employers' Liability Act; but not so. That act did not change the common-law doctrine of assumption of risk, and cases arising under that act are controlled by the same rule as other cases wherein that doctrine is involved. Under the evidence in the case at bar, we cannot say that the minds of all reasonable men would agree that the appellee was negligent in failing to discover and guard against the danger of the defective plank, because, from the nature of his duties and the attendant circumstances which might have served to distract his attention to other objects, it cannot be said as a matter of law that the appellee is barred from recovery because of the assumption of risk. As is said in the case of *Choctaw, O. & G. R. Co.* v. *Jones,* 77 Ark. 367, 92 S. W. 244, "As plaintiff was busily engaged in work which required his attention, we think it was open for the jury to say that he did not know of or fully appreciate the danger, and that therefore he did not, by continuing at work, assume the risk of injury to which he was exposed by the carelessness of the foreman." See also *E. L. Bruce* v. *Leake,* 176 Ark. 705, 3 S. W. (2d) 988.

It will be seen from the authorities cited that the instructions requested by the appellant did not fully declare the law, and the amendments offered by the court were proper and necessary to submit the case to the jury under the rules announced *supra.*

It is also urged by the appellant that the trial court erred in admitting in evidence a conversation had between the appellee and the assistant superintendent relative to the latter's promise to have the hole repaired. This objection is based on the theory that the promise to repair was not alleged in the complaint. On the same

ground appellant objected to a part of one of the instructions given on behalf of appellee which referred to the alleged promise to repair the hole in the platform. This evidence was merely a part of the narrative leading to and explaining appellee's actions, and, while immaterial, was not prejudicial; so with the instruction. While the language of the instruction relating to the promise of the superintendent to repair was unnecessary, it could not have been prejudicial because it clearly appears from the instruction that the only issue of negligence presented was that of the insertion of the warped plank.

It is insisted in the last place that the verdict is excessive. The evidence is ample to sustain the amount of the award. It is to the effect that prior to the injury appellee was in good health with a life expectancy of more than 28 years earning $2.75 per day; that he suffered great pain as the result of his fall so that it was necessary for him to take sedatives in order to sleep; that he continues to suffer though many months have elapsed, and that he will probably suffer pain in the future; that he is a man who had earned his living as a common laborer; that the fall injured his knee so badly that it is necessary that he have a special brace; that the condition of his knee is, as described by one of the physicians, "wobbly and unstable—it would flop the knee back and forth, from side to side"; that this was caused by rupture of the ligaments of the knee, and the injury, in the opinion of this doctor, was permanent.

Objection was made to a question propounded to a witness by appellee's attorney during the trial relating to a proposed settlement between the appellant and appellee whereupon the attorney withdrew the question and apologized to the court. From the amount of damages awarded by the verdict, which to us appear moderate in view of the injury sustained, it is apparent that no prejudice resulted from the question. It also might be said that this matter was not presented to the trial court in the motion for a new trial.

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

ARKANSAS MORTGAGE & SECURITIES COMPANY *v.* STREET IMPROVEMENT DISTRICT NO. 419.

4-4137

Opinion delivered October 21, 1935.

E. B. Dillon and *W. R. Morrow,* for appellants.

S. S. Jefferies, for appellee.

BAKER, J. This suit was filed in the chancery court of Pulaski County by Street Improvement District No. 419 against certain delinquent lands and W. B. Worthen Company, as trustee under pledge of Street Improvement District No. 419. In addition to the fact that certain lands had become delinquent by failure to pay assessments or installments due, plaintiff pleaded that the authority for the suit was contained in act 112 of the Acts of 1933, and that each and every requirement and provision of said act had been fully and completely complied with.

The plaintiff pleaded that, as to the W. B. Worthen Company, trustee, in the amounts set opposite the described tracts of land, under the heading "Tax," there was no computation of interest during the period of time elapsing from the date the assessment fell due and the

date the delinquent list was certified by the city collector to the chancery clerk; that it was impractical and unnecessary to compute interest for the period of time set out, and that it was the judgment of the commissioners of said district that there would be ample funds to pay all bonds outstanding, with interest thereon, by adding interest from date of bonds to the maturity date of each annual installment, without computing said interest to actual date of collection. Prayer was for judgment against the property with the penalty of twenty per cent., all costs of action, including a reasonable attorney's fee; that the lien of the amounts be foreclosed, and, if not paid, a commissioner be appointed by the court to sell the property, and in addition that the W. B. Worthen Company, as trustee, be forever precluded and prohibited from maintaining any action against Street Improvement District No. 419, or against any agent or attorney of the district, for failure to collect interest on each installment of assessments against the property described, from date of maturity thereof to the date of the actual collection of the installments.

In response to this suit, Arkansas Mortgage & Securities Company, one of the delinquent taxpayers, filed a demurrer pleading specially that there was no provision contained in act No. 112 of the Acts of the General Assembly of the State of Arkansas for the year 1933, for the collection of interest upon the annual tax installments; that the language used in said act No. 112 in reference to a charge of interest upon annual installments due as part security for refunding bonds was too indefinite, uncertain and ungrammatical to convey an idea to an intelligent mind; and, second, that, at the time of the actual execution and delivery of the refunding bonds for Street Improvement District No. 419, said act No. 112, by the authority of which refunding bonds were issued and this suit was instituted, had been repealed by implication by the passage and approval of acts 129, 252 and 278 of the Acts of the General Assembly of the State of Arkansas, for the year 1933; that, in accordance therewith, there should be no interest charged, and that the penalty should be three per cent. instead of twenty per

cent.; that the complaint should be dismissed for want of equity, etc.

The W. B. Worthen Company filed a general demurrer in which it stated that the complaint, as to it, does not state facts sufficient to constitute a cause of action.

On September 4, 1935, the chancery court overruled each of the aforesaid demurrers, and, the said parties refusing to plead further, rendered a decree, wherein the W. B. Worthen Company, as trustee, under the pledge of Street Improvement District No. 419, was forever precluded and prohibited from maintaining an action against Street Improvement District No. 419, or any agent or attorney for said district, on account of failure to collect interest on each installment of the assessment against any and all of the property delinquent in the said improvement district, for the year of 1934, from the date the installment fell due, March 1, 1934, to the date of the actual collection of said installment.

This appeal, by Arkansas Mortgage & Securities Company, and W. B. Worthen Company, challenges the correctness of this decree.

Without reference to specific dates, let it be said that the present bonds of the improvement district are an issue refunding the original or first bonds, as provided under and by act 112 of the Acts of 1933. The original bonds therefore were in existence prior to the passage of act 112, act 129, act 252, and act 278 of the Acts of 1933. Act 112 was modified and changed in many particulars by acts 129, 252 and 278, passed subsequent to the passage of act 112 and is in conflict therewith in many respects, if said last three mentioned acts are valid.

Counsel for appellants therefore argue rather vigorously that, since the refunding bonds were issued subsequent to the passage of these several acts, to whatever extent these acts are in conflict with act 112, they have repealed or modified said act 112, and that therefore any provision or authority as contained or set forth in act 112, providing for interest or penalty, was repealed and modified by the later acts. The views we hereinafter

express make it unnecessary that we analyze and set forth these changes.

If this contention had been made prior to April 1, 1935, it would have probably been looked upon with some degree of favor. On that date, however, an opinion rendered by Mr. Justice CARDOZO, speaking for the United States Supreme Court, decided the main questions raised here upon this appeal adversely to the contentions made by appellant.

Pretermitting a general discussion of that decision, it may be said that the Supreme Court of the United States held that the three acts Nos. 129, 252 and 278, of the Acts of 1933, taken together as a system or plan, governing or affecting improvement districts, were void as impairing the obligation of existing contracts.

W. B. Worthen Co. v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 97 A. L. R. 905.

The refunding bonds issued by this improvement district were new acknowledgments of an old debt or obligation, fixing new periods or times of payment of the bonds, but these new bonds did not in any respect destroy or impair rights or remedies of the bondholders, and these bondholders who accepted the new bonds were then, and are now, entitled to the same protection from an impairment of the obligation of their contract as were the bondholders in the case above cited.

Appellants argue in their brief that it has not yet been held that act 129, as separate and distinct from acts 252 and 278, was invalid, and that the same statement is true as to each of the other two acts, but only in so far as the said three acts form a plan or system may they be considered as invalid because of the fact they violate the contract clause of the United States Constitution.

In the face of the foregoing opinion by the United States Supreme Court, we fail to see that any advantage could be gained by an attempt to defend any or all of the acts separately from the effect of the decision. No one of them can be discussed intelligently, nor effect be given to it, without due and full consideration of each of the others, and no one of them can be said to relate to

the bond issue under discussion, and the other two be ignored.

The Worthen case therefore becomes and is the rule of decision by which we must determine the present controversy.

We must therefore hold that, as to these refunding bonds, acts 129, 252 and 278 are invalid and do not impair the obligations thereof.

It is also argued, in support of the demurrers filed, that the commissioners of the district, and the district, must make annual collections of all interest that accrues. We do not agree with this contention. It has been pointed out that in a large number of improvement districts, principally drainage districts, interest was deferred until it became necessary to collect the same in order to meet the obligations as contracted, without exceeding assessed benefits, and it is insisted that act 112, which provides that interest shall be collected upon each annual installment, is contrary to that theory, but, notwithstanding that fact, and notwithstanding the further fact that the collection of interest may not be necessary to meet the maturing obligations, the district and its commissioners have no discretion, but must at all events make the annual collections. It is shown that interest is included in the amount of annual installments of assessments to the maturity date thereof, and that thereafter interest would have to be computed to date of payment, which would necessarily be annoying, burdensome, somewhat expensive, and cause unreasonable delay. If it were necessary, however, to make these collections, in order to have funds to pay maturities, as they arise, the district and its commissioners would have to take such steps as might be necessary to enforce payment of this accruing interest. When there will be sufficient funds to meet maturing obligations, such collections are unnecessary, and the severance of the pound of flesh is not called for. Stated differently, we think that, upon the issue of these bonds under act 112 aforesaid, there is authority to collect interest. The power is granted to the commissioners and to the district to enforce the payment thereof, but it is not a mandatory duty or obligation so to do,

until the necessity arises therefor. The commissioners in their sound discretion may save this bit of interest to the taxpayers and will not be required to make collection thereof, except it be made manifest that by the failure to make such collections a default is imminent.

Therefore in a proper case, the court may prevent an abuse of that discretion.

Since such a condition does not prevail, the decree of the chancery court is correct.

Affirmed.

TURNBOW *v.* TALKINGTON.

4-4145

Opinion delivered October 28, 1935.

John G. Rye, V. N. Carter and *John L. Carter,* for appellant.

Joe D. Shepherd, Robert Bailey and *J. B. Ward,* for appellees.

SMITH, J. This suit was brought by appellees, the owners of real property and citizens and taxpayers of Pope County, against appellants, the county judge and county treasurer, respectively, of said county, to enjoin them from refunding or extending the maturities of the bonds of said county theretofore issued under Amendment No. 17 of the Constitution of the State of Arkansas.

An answer was filed, exhibiting the records of the county court relating to the original bond issue and the subsequent orders for the refunding of these bonds, together with a statement of the assessed valuations of the county and the revenues derived from the taxes levied thereon. It was alleged in the answer of appellants that these figures show the necessity for refunding, and the answer concludes with the following summary of the county's fiscal condition in relation to these bonds: "As their further answer, defendants aver that for the year 1934 the county levied three mills on the dollar, as reflected by the tax books of said county; that the assessed valuation of the taxable property of said county for said year is $4,344,000; that the estimated income for the year 1935 is $10,946.88 (allowing for delinquencies as reflected by an average over the past three years); that the amount due September 1, 1935, including past-due interest and principal, is $18,400; that if the full five mills were levied under the present conditions it would produce an insufficient amount to meet the September 1, 1935, requirement; and that in any event and under all circumstances there will remain a deficit, with no way to meet said deficit even if the five mills were available."

The county's officials stood on this answer without offering to plead further after a demurrer thereto had been sustained. The question for decision is therefore

whether, under the facts alleged in the answer, the authority existed to refund the bonds.

The same parties appear here as in the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. (2d) 71. The citizen and taxpayer in that case sought to enjoin the refunding of bonds issued by Pope County under the authority of Amendment No. 10. This amendment authorized counties, cities and incorporated towns to issue bonds to pay indebtedness outstanding at the time of its adoption. The same citizen and taxpayer seeks to enjoin the refunding of bonds issued under the authority of Amendment No. 17, which authorized counties to issue bonds for the construction of courthouses and jails.

In the former appeal we upheld the authority of the county to refund its bonds issued under Amendment No. 10. We there held that it is the general rule that the power conferred on counties to issue bonds in the first instance includes the power to refund them, provided that the refunding bonds do not increase the amount of the outstanding bonds or the rate of interest. In that case the validity of act 102 of the Acts of 1935 was attacked, but it was held to be valid legislation.

This act is entitled "An Act to Permit Counties to Refund Bonded Indebtedness of the Counties, Including Funding Bonds and Bonds Issued for the Building of Court Houses and Jails, and for Other Purposes."

A portion of § 1 of this act reads as follows: "Provided, that no county shall refund its outstanding bonded indebtedness or accrued interest or extend the maturities thereof as herein authorized, so long as the taxes collected from the millage tax heretofore authorized to be levied for that purpose shall be sufficient to pay such indebtedness as same matures."

It was held in the former case that this prohibition has no application where the amount collected from the millage tax is insufficient to pay the original bonds as they mature.

The orders of the county court which are exhibited with the pleadings are to the following effect: The county "issued its serial county courthouse and jail bonds dated April 1, 1931, numbered from one (1) to one

hundred forty-eight (148), both inclusive, due serially on September 1 of the years 1932 to 1961, both inclusive, bearing interest at the rate of five per centum (5%) per annum." To pay these bonds and the interest thereon the quorum court levied taxes at the following rates: For 1931, 1½ mills; for 1932, 2 mills; for 1933 and 1934, 3 mills. It appears that four of these bonds of $1,000 each have been paid by the county, and the refunding order provides that the remaining 144 bonds, of $1,000 each, shall be refunded with bonds for the same amounts and bearing the same rate of interest maturing serially from 1940 to 1967.

Three questions were presented by the pleadings for the decision of the court below, according to the brief of appellee:

First: "That the levying court having made a levy of one and one-half mills to be continued over a period of years, and the county court having entered its order in accordance with such levy, to the effect that same should be extended upon the tax books from year to year, and that bonds were sold, and the original levy was made, pledged for the payment thereof, that the levying court was not authorized to increase such levy at a subsequent term."

Second: "That a proposal to refund such bonds and create a new and different form of obligation would have to be submitted to the qualified electors for their approval in order to give the county court jurisdiction to act."

Third: "That the county court would not have authority, under the provisions of act No. 102, of the Acts of 1935, to refund the outstanding indebtedness in any event, unless it should definitely appear that collection from the millage tax authorized to be levied for that purpose shall be insufficient to pay such outstanding bonds as they mature."

Considering collectively these objections to the order and judgment of the county court here questioned, it may be said: The authority to issue the bonds was derived from the vote of the electors of the county at the election which the amendment required to be held to determine whether there should be a bond issue to build

a courthouse or a jail, or both. It was not contemplated that the electors should vote for the levy of any particular rate of taxation. On the contrary, the amendment provides that: "If a majority voting in such election vote for such building or buildings, as the case may be, and for tax, then the levying court at any regular, special or adjourned term thereafter held may levy, in addition to all other taxes now authorized by law, to be levied against all taxable property in the county, a special building tax not exceeding one-half of one per cent. on the dollar of the assessed valuation of such property to pay for such improvements, or to provide a sinking fund for such purpose, which levy, when once made, shall continue and be in force from year to year, and extended on the tax books and collected until sufficient funds are collected to pay off and discharge the cost of such improvement, or any bonds or notes and interest thereon, sold to raise money for the payment of such improvement."

This does not contemplate that the levying court shall in all cases levy a tax of five mills. The inhibition is that it shall not exceed that rate. The court must levy a sufficient rate to meet the maturities, provided the rate shall never exceed five mills. Until this limitation has been reached a discretion abides in the levying court. Building costs as well as assessed valuations may differ widely in the various counties which avail themselves of the provisions of the amendment. The levying courts are therefore given a discretion as to the rate to be levied, subject, however, to the limitation that it shall be sufficient to pay off and discharge the cost of such improvement, provided that in no event shall the rate exceed five mills.

We conclude therefore that a second election was not required to confer authority to change this rate if that action has become necessary. Nor do we think there has been any violation of the portion of act 102 of the Acts of 1935 above quoted.

As was pointed out in the opinion in the case of *Talkington* v. *Turnbow, supra,* this act confers express authority to refund, but this action is not permitted, under the proviso above quoted, "so long as the taxes

collected from the millage tax heretofore authorized to be levied for that purpose shall be sufficient to pay such indebtedness as same matures." We think the phrase, "heretofore authorized to be levied," refers, not to the election or amendment authorizing the tax, but to the action of the quorum court in levying a particular rate. The bonds may not be refunded so long as the taxes collected from this rate are sufficient to pay the indebtedness as the same matures. But the converse of the proposition is also true. They may be refunded if the taxes so collected are insufficient. Here it is alleged, and the demurrer concedes the answer to be true, that the taxes being collected are insufficient for this purpose, and "that in any event and under all circumstances there will remain a deficit with no way to meet said deficit even if the five mills were available."

Under these facts the county court should not be restrained from refunding the bonds, and the decree of the court will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

AGEY *v.* PEDERSON.

4-3937

Opinion delivered October 28, 1935.

A. L. Burford and *B. E. Carter,* for appellant.

Shaver, Shaver & Williams, for appellees.

HUMPHREYS, J. This suit was brought by appellant against appellees in the circuit court of Miller County to recover $1,197.63 for the use of an oil well drill for

23 days at $50 per day, $26.13 for swab rubbers, and $21.50 for a joint of drill pipe.

Appellees filed an answer admitting that they owed appellant for the last two items and $275 for the use of the drill for 5½ days at $50 per day, but denied that they owed the balance claimed for the use of the drill and tendered the amount admitted to be due appellant, or $322.63, in full of their indebtedness to appellant.

The issue joined was whether appellees, under the lease or the rental contract for the use of the drill, owed appellant for 23 days or for 5½ days.

This issue was submitted to the jury under the instruction of the court that the written lease or rental contract was ambiguous, and that, should they find from the preponderance of the evidence that appellant was to receive $50 per day for every day appellees kept the drill, then they should render a verdict for $1,197.63 in favor of appellant, but, should they find appellees were to pay $50 per day for the days they actually used the drill, then they should render a verdict in favor of appellants for $322.63.

The jury found that under the lease appellees were to pay $50 per day for the days they actually used the drill, which was 5½ days, and rendered a verdict in favor of appellant for $322.63, including the items of $26.13 for swab rubbers and $21.50 for the joint of drill pipe, and, from the judgment rendered in accordance with the verdict, an appeal has been duly prosecuted to this court.

The record reflects that appellant had drilled a well for appellees and found no oil, at which time a dispute arose between them as to the amount appellees owed appellant. On the 5th day of June an agreement was reached between them as to the amount then due and the price to be paid for the use of the drill to complete the well and make a test of the lower Trinity formations. The amount agreed upon was paid by appellees to appellant and the following instrument of writing was executed:

"6-5-33.

"Received of Fred Pederson and-or Duluth Arkansas Oil Company two thousand, six hundred twelve and

84-100th dollars ($2,612.84-100) in full payment for all work and contract to date on Garland City well located on Price farm. Also agree to lease above rig for $50 per day to above parties to complete said well and make test of lower Trinity formations. When this Price well is completed, this and all agreements to date are terminated.

"Agey Drilling Company,
"By W. M. Agey."

Testimony was introduced by appellant tending to show that the intention of the parties was that appellees should pay appellant $50 per day for every day they kept the drill. It was undisputed that they kept the drill 23 days.

Testimony was introduced by appellees tending to show that the intention of the parties was that appellee should pay appellant $50 per day for the days they actually used the drill in completing the well.

At the conclusion of the testimony appellant requested the court to instruct the jury that the meaning of the contract between the parties is that the defendants should pay the plaintiff $50 per day for each day that the defendants kept the rig in their possession.

This instruction was peremptory in effect and was refused by the court, and it is contended that the court committed reversible error in refusing to give the instruction. The rule of law is that where a written contract is ambiguous in whole or in part, the meaning thereof should be left to the jury. *Jones* v. *Lewis,* 89 Ark. 368, 117 S. W. 561; *Yale Automobile Company* v. *Walker,* 145 Ark. 344, 224 S. W. 632; *Wisconsin & Arkansas Lumber Company* v. *Fitzhugh,* 151 Ark. 81, 235 S. W. 1001.

The lower court's construction of the instant contract was that it is ambiguous in that it failed to state whether appellees should pay $50 per day for each day they kept the drilling rig or $50 per day for the days they actually used the outfit in completing the well. This ambiguity existed in the writing, and the court correctly submitted to the jury the question of the meaning of the language employed in this particular.

No error appearing, the judgment is affirmed.

SHARPP *v.* STODGHILL.

4-3971

Opinion delivered October 28, 1935.

J. R. Parker, for appellant.
J. T. Cheairs, for appellees.

MEHAFFY, J. The land in controversy consists of 80 acres which formerly belonged to appellees but was forfeited for taxes, a portion of it in 1920, another portion of it in 1922, and another portion in 1923.

It appears from the evidence that the appellees moved away from this land when it was sold for taxes. They took up their residence in close proximity to the land. They did not pay any improvement taxes or other taxes, and exercised no control and manifested no interest in the land for more than 12 years. They did not make any claim until appellant had secured his donation deed from the State. During that 12 years they did not cultivate the land and made no effort to collect rent from those who did cultivate it. The land was in a drainage district and a levee district.

The drainage and levee districts each brought suits. The lands were condemned in each case, sold under a decree of the chancery court, and the districts became the purchasers. The land was sold for levee taxes for the years 1922 and 1923 and for drainage taxes in 1923 and 1924. Thereafter the appellees purchased the land in controversy from the levee district and the drainage district.

Appellees allege in their complaint that they are entitled to recover under their original deed and also under the deeds from the improvement districts. There was a divorce suit in the Ashley Chancery Court between appellant and his wife, and the court held that this particular tract of land should be sold and one-half of the proceeds paid to Mrs. Mattie Sharpp, the wife of J. L. Sharpp.

The chancery court held that the appellees had abandoned the real estate involved and had no rights under their original ownership, but held that, after having abandoned it, they purchased from the improvement districts, and their deeds acquired after their abandonment was a superior title. It is agreed that the forfeiture for taxes and sale to the State are void. The forfeiture for taxes being void, the State did not acquire title, and the only interest the State had was a paramount lien for its taxes. If the appellees had not abandoned

the property, their purchase from the improvement districts would simply have been a redemption, because, as long as they owned the property, it was their duty to pay the taxes and assessments.

It is earnestly contended by the appellant that there is no such thing as abandonment of real property under the laws of this State. They cite *Carmical* v. *Ark. Lbr. Co.*, 105 Ark. 663, 152 S. W. 286, and quote from that opinion as follows:

"At common-law, the title to real property is not lost by abandonment unless the abandonment is accompanied by circumstances of estoppel and limitations, and this without regard to the formality of abandonment, if it was short of a legal deed of conveyance."

This is the rule established by the decisions of this court, and, unless the abandonment is shown by the evidence to have been accompanied by circumstances of estoppel and limitations, there would be no abandonment.

The circumstances are, as shown by the evidence, that, after the sale to the State for taxes, the appellees moved from this property to other property in the community, did not occupy nor cultivate any portion of it for more than 12 years, and did not collect or attempt to collect rent from others who did occupy it.

"It has been supposed that title to land could be lost by abandonment on the part of the owner; but, with the possible exception to be mentioned hereafter, no legal title to corporeal real property can be lost or destroyed by any act of abandonment on the part of the owner. * * * To constitute the abandonment by the real owner thereof, there must be a concurrence of the act of leaving the premises vacant so that they may be appropriated by the next occupant, and the intention of not returning." 3 Thompson on Real Property, p. 565.

We think the circumstances and evidence in this case conclusively show the concurrence of the act of leaving the premises vacant, and the intention of not returning. They permitted others to occupy and cultivate the land for years without attempting to collect rent.

The abandonment of real property does not confer title on the next occupant or any other person, but it disentitles the person who has abandoned it to reclaim it.

It is insisted, however, by appellant that, since appellees alleged in their complaint and insisted that they were entitled to recover under their original ownership, they could not recover under the title acquired later.

The appellees insisted that they had a right both under their original deeds and under the deeds recently acquired. Of course, this could not be true, for the reason that, if they had any rights under the original deeds, they could not have under the deeds from the improvement districts, because, if appellees owned the land, their purchase from the improvement districts would have been merely redemption, and would have given them no title, because they would have already had title. But the fact that appellees thought they could recover under each of the deeds did not prevent them from recovering under a title which was valid.

"The general rule as to election of remedies is that where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts of the case and of his rights, makes a deliberate choice of one, then he is bound by his election and is estopped from again electing or resorting to the other remedy, although the judgment obtained in the first action fails to afford relief to the party making the election.

"Election is to be distinguished from mistake in remedy. The pursuit of a remedy which one supposes he possesses, but which in fact has no existence, is not an election between remedies, but a mistake as to the available remedy, and will not prevent a subsequent recourse to whatever remedial right was originally available. This rule applies whether the mistake be of law or fact; but if a party persists in his erroneous course after the disclosure of his true remedy, he may be held bound thereby." 5 Standard Encyclopedia Procedure, pp. 80 *et seq.; State* v. *Bank of Commerce of Grand Island,* 61 Neb. 22, 84 N. W. 406; *Turner* v. *Grimes,* 75 Neb. 412, 106 N. W. 465; *Stone* v. *Snell,* 86 Neb. 581, 125 N. W. 1108.

Since it is agreed that the sale to the State was void, it had no title to the land, but merely a lien for taxes, and any one who purchased from the improvement districts would hold subject to the State's superior lien for taxes. Therefore the deed from the State to Sharpp on May 7, 1930, was void, and Sharpp acquired no title to said land through said deed.

Sharpp, however, put valuable improvements on the land and paid $10 in acquiring the donation deed, and $21.65 for redeeming from tax sales, making a total of $756.65. However, the appellees were entitled to the rent after they acquired title from the improvement districts. The evidence shows, and the court found, that $350 was a reasonable rent for the one year, and therefore deducted the $350 from the $756.65, leaving the balance due Sharpp $406.65.

The chancery court correctly held that Sharpp, occupying the land under color of title, was entitled to be paid and entitled to have a lien declared on the land to secure the payment of the amount found due him. The amount due on the land owned by T. V. Stodghill is $291.99. The amount of the lien on the land owned by Jettie Stodghill is $114.66. *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. (2d) 1003.

The appellees prosecuted a cross-appeal and contend that rents should be charged against Sharpp for the years 1930 to 1935, inclusive, and that Sharpp should have no lien on the parcels of land on which no improvements were made. The appellees were only entitled to rents after they acquired title from the improvement districts, and it appears that the entire 80-acre tract was purchased by Sharpp, and the chancellor correctly gave him a lien on the 80 acres.

The decree of the chancery court is affirmed.

BUTLER, J. (dissenting). The appellee, T. V. Stodghill, brought suit in the court below to cancel a tax deed executed by the State to appellant, J. Lee Sharpp. The appellee alleged, and it is not denied, that he acquired title to a certain part of the lands conveyed from the Southeast Arkansas Levee District and that said district had acquired title by virtue of a purchase at a sale made

by the commissioner of the Chicot Chancery Court on the 20th day of December, 1924. Appellee further alleged said district had purchased the same at a sale made under order of the said court which was confirmed and deed executed on April 1, 1929; also appellant claimed title by purchase from the Eudora Western Drainage District. Appellant alleged that said drainage district had purchased at a sale made under order of the chancery court the report of which had been confirmed and a deed made on January 27, 1930. In addition to this, appellant also claimed title by deeds from some of the original owners.

The answer of Sharpp, the appellant, alleged title in him by virtue of a donation deed executed and delivered to him by the State of Arkansas on May 7, 1930, and that he was at that time, and has been since, in the open, notorious, peaceable and adverse possession of the lands, claiming to be the owner thereof under said deed. He expressly pleaded the two-year statute of limitation in support of his title and in bar of the title asserted by appellee.

The facts in the case are that the sale was made to the State for delinquent taxes, and that such sale was void because of certain irregularities. It also appears that appellee, Stodghill, was the owner of the lands at the time of the forfeiture to the State. He had previously mortgaged the lands and afterward abandoned them without paying the mortgage debt. The lands were located within the two districts named above and were sold for levee and improvement taxes and purchased by the said districts and conveyed to him on the dates above mentioned.

In upholding the title acquired by the appellee from the levee and drainage districts, the learned chancellor, in stating the position of appellant (the defendant in the court below) said: "Defendant defends upon the ground of laches; also upon the seven-year statute of limitation, and the two-year limitation statute under § 6947 of Crawford & Moses' Digest." The remainder of the findings and decree of the chancellor wholly ignore this defense, as does also the majority of this court in affirming the decree of the trial court.

Section 6947 of the Digest, among other provisions, fixes the limitation of actions against those who hold lands under donation deeds from the State at two years. It is settled by the decisions of this court that possession of lands for the statutory period works an investiture of title and divests the title to the lands so held from all others. It is also well settled that the maxim, "*nullum tempus occurrit regi*" applies only to the sovereign itself and not to public corporations or other such governmental agencies. As to these the statute operates as against an individual. *Fort Smith* v. *McKibbin,* 41 Ark. 45; *Helena* v. *Horner,* 58 Ark. 151, 23 S. W. 966; *Book* v. *Polk,* 81 Ark. 244, 98 S. W. 1049; *Tarleton Drainage District* v. *American Investment Company,* 186 Ark. 20, 52 S. W. (2d) 738.

Section 6947, *supra,* has been held to apply in favor of those holding lands under a deed from the Commissioner of State Lands and under donation deeds executed by said Commissioner. *Sims* v. *Cumby,* 53 Ark. 418, 14 S. W. 623; *Helena* v. *Horner, supra.* It has also been decided in a long line of cases by this court that possession under a tax title maintained continuously, openly and adversely for two years prior to the bringing of a suit is sufficient to vest title, though the tax title was void in the beginning. *Woolfork* v. *Buckner,* 60 Ark. 163, 29 S. W. 372; *Dickinson* v. *Hardy,* 79 Ark. 364, 96 S. W. 355; *Johnson* v. *Elder,* 92 Ark. 30, 121 S. W. 1066; *Black* v. *Brown,* 129 Ark. 270, 195 S. W. 673.

It indubitably appears that appellant had been in the continuous adverse possession of the lands involved under his donation deed from the State for more than two years between the dates when the levee and drainage districts purchased the same at the sale made by order of the Chicot Chancery Court for delinquent levee and drainage taxes and conveyed them to appellee. Therefore, the title of said districts had become barred and divested before they conveyed the same to appellee, the date of the drainage district's deed to the appellee being November 29, 1933, and that of the levee district December 16, 1933. These deeds to the appellee could not affect

the title of appellant, for before these dates his title had vested by operation of the statute of limitation and neither the original owner nor the levee and drainage districts had any title to convey to the appellee.

For the reasons stated, I respectfully dissent from the opinion of the majority, and am authorized to say that Mr. Justice BAKER concurs in the views here expressed.

JENKINS *v.* STATE.

Cr. 3940

Opinion delivered September 23, 1935.

Sam E. Montgomery, Robt. L. Rogers, II, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

MCHANEY, J. Appellant was convicted of the crime of robbery and sentenced to three years in the penitentiary.

For a reversal of the judgment against him, appellant first says there is no evidence of force or intimidation. In this he is in error, for John Rutkowski, the night

watchman at the American Legion Club in North Little Rock, from whom the property was taken, testified that appellant grabbed and held him while a companion, referred to by appellant as Red, robbed him of six slot machines containing from $30 to $90, and a pistol worth $20. Robbery is defined by statute, § 2410, Crawford & Moses' Digest, as "the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender." This testimony was sufficient to establish a felonious and violent taking by force. While Rutkowski testified that he was not put in fear and therefore not intimidated, it was not essential that both force and intimidation be employed by the robbers. This court has held that it is sufficient in an indictment for robbery to allege that the taking was done by violence, without alleging intimidation. *Clary* v. *State,* 33 Ark. 561. It was there further held that: "The words of the definition of robbery are in the alternative 'violence or putting in fear,' and it appears that if the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery." The definition referred to in the above quotation is the common-law definition of robbery, but the statute makes no material change, simply substituting the word "intimidation" for the words "putting in fear."

Appellant's defense was that the property was taken with Rutkowski's consent, and therefore no robbery was committed. He so testified and said that his companion purchased the slot machines by previous arrangement. This was a disputed question of fact which the jury has settled against him.

It is also argued that, since the indictment alleged the felonious and violent taking against the will of Rutkowski by putting him in fear, and since the proof showed he was not put in fear, this constituted a fatal variance. What we have heretofore said disposes of this argument. The proof is sufficient to support a finding that the taking was felonious and violent, which implies force.

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

HOBBS *v.* LENON.

4-3923

Opinion delivered September 23, 1935.

Horace Chamberlin, for appellants.

John A. Sherrill and *Cockrill, Armistead & Rector,* for appellees.

JAMES D. SHAVER, Special Justice. This is an action in ejectment by appellants against appellees in the Pulaski Circuit Court to recover certain real estate situated in Pulaski County, Arkansas. Both parties deraign title from a common source. This cause was heard by the trial court upon demurrer by defendants to plaintiffs' complaint and amendments thereto, and the various exhibits attached and made part thereof. Defendants' demurrer was sustained, and, plaintiffs refusing to plead further, judgment was rendered for defendants from which is this appeal.

The history of the devolution of said title is substantially as follows:

James B. Keatts, who was the owner of the land involved, on September 1, 1837, mortgaged the same to the Real Estate Bank of Arkansas to secure his bond to said bank for the sum of $20,500, given for 205 shares of stock in said bank. This bond was made due and payable October 26, 1861. In January, 1861, the Legislature passed act No. 112, approved January 16, 1861, to take effect October 26, 1861. This act gave authority to the State of Arkansas to institute suit in the Pulaski County Chancery Court to foreclose mortgages given to the Real Estate Bank then held by the State of Arkansas. Said act provided the procedure to be followed in the prosecution of said suits. On November 25, 1867, the State brought suit in the Pulaski County Chancery Court under said act to foreclose the Keatts mortgage.

The act expressly provided that the suit should be against the specific lands covered by the mortgage, and that no person should be made defendant, and that constructive service should be obtained by publication of notice to all persons to appear and make known to the court any claim or interest they might have in or to said lands. James B. Keatts appeared before said court and demurred to the bill filed by the State, which demurrer was overruled by the court. Thereafter neither Keatts nor any other person made any claim to said land during the pendency of said suit.

The mortgagor, James B. Keatts, died July 7, 1873, testate, and by the terms of his will the land involved was devised to his niece, Helen Hobbs, for life with remainder over to her surviving children. It is under said will that plaintiffs claim title as the surviving children of Helen Hobbs, who deceased October 10, 1934. On April 25, 1879, a final decree was rendered in the State's foreclosure suit wherein it was decreed that there was due on said bond the sum of $18,005.14, plus 6 per cent. interest thereon from October 1, 1870, and said land was condemned and ordered sold in satisfaction of said indebtedness. Sale was fixed by the court to be had September 15, 1879. Sale was had on said date, the State bidding $26,444 therefor. Sale was approved September 17, 1879. On August 7, 1880, the State, by its deed of that date, conveyed this land to George H. Meade for the sum of $11,856. Appellees claim title by subsequent conveyances of George Meade's grantees.

On September 20, 1874, Helen Hobbs executed her deed of trust to George Dodge, as trustee, for George H. Meade, including this land and other lands, to secure to George H. Meade a debt of $3,763.35, and on September 12, 1878, George Dodge, as such trustee, sold to George H. Meade, under the terms of the deed of trust, all the lands therein included. Afterwards, in an action of ejectment brought by George H. Meade against Helen Hobbs, the court in said action cancelled said trustee's deed and held it void and of no effect. Afterwards, under a compromise agreement between George H. Meade and Helen Hobbs, she executed to him, on December 12,

1882, her deed to the land involved and delivered possession thereof to him, which he and his successors in title have held ever since. George H. Meade died testate, and his will was probated August 31, 1890. By the terms of said will, the land involved was devised to his sister, Kate A. Meade, Mrs. Harriet S. Newton and Mrs. H. W. Meade, his mother. By a chain of conveyances from these devisees and their subsequent grantees, all the title George H. Meade had in and to said land passed to appellees.

It is contended on the part of appellants that, under the terms of the James B. Keatts will, Helen Hobbs became the life tenant of said land, and her children became the contingent remaindermen, and that appellants, as such remaindermen, had no right of entry until the termination of the life tenancy of Helen Hobbs. That the life tenant and those holding under her as such should be treated and held accountable as involuntary constructive trustees, and, while so holding, could not purchase the outstanding title to said land and thereby deprive the remaindermen of all rights and title to the land; that such an acquisition of the title by the holder of the life tenancy would be a violation of such trust relation, and that such acquisition by the holder of the life tenancy should be treated as a redemption for the benefit of the remaindermen. This contention is predicated upon the assumption that Helen Hobbs acquired a life estate in the mortgaged land under the terms of the James B. Keatts will, and that her life estate continued until her death, and that she conveyed her life estate to George H. Meade and that George H. Meade, while holding as such life tenant, purchased said land from the State of Arkansas, and that he and those claiming under him, including appellees, have held said lands continuously as such life tenants until the death of Helen Hobbs, October 10, 1934, at which time all rights of appellees as such holders of the life estate of Helen Hobbs ceased.

It is further contended by appellants that the foreclosure decree in favor of the State is void because the

Pulaski County Chancery Court was without jurisdiction; this upon the ground, first, that the act of January 16, 1861, was unconstitutional in that the Legislature had no power to enact said statute; second, that James B. Keatts, the mortgagor, died prior to the rendition of said decree, and that said cause was not revived in the name of the legatees, and for that reason the court had no jurisdiction to render said decree or approve said sale. The attack made upon said foreclosure decree and the proceedings had therein is a collateral attack.

It has been the long and well-settled rule in this State that where the record shows that a court of superior jurisdiction has jurisdiction of the subject-matter and of the person, such judgment or decree cannot be attacked collaterally, but only by some direct proceeding in the court rendering the judgment or decree, or under the provision of § 6290 of Crawford & Moses' Digest. In the case of *Lambie* v. *W. T. Rawleigh Company,* 178 Ark. 1019, 14 S. W. (2d) 245, we said: "If the judgment or decree is void upon the face of the record itself, it may be attacked collaterally; but, if its invalidity is not apparent on the face of the record, it cannot be attacked collaterally. Again in the recent case of *Turley* v. *Owen,* 188 Ark. 1069, 69 S. W. (2d) 882, in which the authorities were reviewed as to the right of collateral attack upon judgments and decrees, we there reaffirmed the rule announced in the Lambie case, *supra.* The above rule is so firmly established in this State, we do not deem it necessary to cite the numerous decisions of the court approving the rule.

In the State's foreclosure suit against the mortgaged land, the only subject-matter there involved was the specific mortgaged land and the application of the land to the payment of the debt secured thereby, an action strictly *in rem.* The Pulaski County Chancery Court was, by the act of January 16, 1861, vested with jurisdiction of suits for that purpose. The mortgaged land was made the subject-matter involved. No person could be made defendant. Constructive service by publication was the only service required or contemplated by the

act. The record here shows the provisions of the act were followed in said proceedings giving the chancery court jurisdiction over the mortgaged land. And, having acquired jurisdicition of the subject-matter, its decree therefore would not be subject to collateral attack.

It is equally well settled that judgments and decrees entered upon constructive service by publication will be given the same favorable presumption as judgments and decrees upon personal service. *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836; *Price* v. *Guinn,* 114 Ark. 551, 170 S. W. 247; *State ex rel. Attorney General* v. *Wilson,* 181 Ark. 690, 27 S. W. (2d) 106, as was held by us in the Turley case, *supra,* that the rigor of the rule is not modified or impaired because the proceeding was one *in rem* and not *in personam.*

As a further reason why the foreclosure proceedings and decree in the case of the State against the mortgaged land rendered in the Pulaski County Chancery Court, April 25, 1879, should not be disturbed is: That in 1872, the case of *McCreary* v. *State,* 27 Ark. 425, was before this court, in which the validity and constitutionality of the act of January 16, 1861, was directly called in question in a foreclosure proceeding of a similar mortgage then held by the State. Elaborate briefs were filed by both appellants and appellees, and, upon a thorough consideration of the validity of the act, the court sustained the same generally. In the opinion rendered, the court held (we quote from the first headnote): "The act of the Legislature of January 16, 1861, entitled 'An act to aid the foreclosure of the stock mortgages, given to secure the stock subscription to the Real Estate Bank of the State of Arkansas,' was intended to furnish a remedy different from that which existed when the obligations were entered into, and, although it changed the remedy affecting the enforcement of existing obligations by abridging the pleadings, simplifying the issues and regulating the mode and manner of the proceeding, yet it did not impair the obligation of contracts, or infringe upon the existing rights of the parties, and is in none of its provisions or requirements unconstitutional." This

decision has stood for more than fifty years without modification or change. Doubtless, many persons throughout the State have acquired property, the title to which is based upon the faith and credit of said decision. Some twenty years after the decision in the McCreary case was rendered, a similar case was again before this court: *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600. In this case the validity of the act of January 16, 1861, was again called in question. MANSFIELD, J., speaking for the court said: "The suit was brought and prosecuted in the manner provided by the act of 1861. The constitutionality of that statute was questioned generally in *McCreary* v. *State,* 27 Ark. 425, and it was there held to be a valid enactment. The proceeding it authorized is *in rem,* and the jurisdiction it exercised under it, and the process by which that jurisdiction is acquired, have been upheld so often by this court in similar cases that it is sufficient now to cite the decisions in which they have been sustained," citing *St. Louis, etc., Ry.* v. *State,* 47 Ark. 323, 1 S. W. 556; *Williams* v. *Ewing,* 31 Ark. 229; *Williamson* v. *Mimms,* 49 Ark. 336, 5 S. W. 320; *McCarter* v. *Neil,* 50 Ark. 188, 6 S. W. 731; *Doyle* v. *Martin,* 55 Ark. 37, 17 S. W. 346; *Gregory* v. *Bartlett,* 55 Ark. 33, 17 S. W. 344; *McLain* v. *Duncan,* 57 Ark. 49, 20 S. W. 597; *Scott* v. *Pleasants,* 21 Ark. 364; *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S. W. 762; *Worthen* v. *Ratcliffe,* 42 Ark. 330. See also *Parks* v. *Overman,* 18 How. 137; *Pennoyer* v. *Neff,* 95 U. S. 727; *Boswell's Lessee* v. *Otis,* 9 How. 384."

Furthermore, it is the long established rule or doctrine of this court that cases like the McCreary and Duke cases, *supra,* where the construction of the Constitution or statutes involve rights and titles to property, such decisions become and have the force of rules of property; and where persons have acquired property upon the faith and credit of such decisions and especially after the lapse of many years, such decisions and the rights acquired thereunder should not be disturbed. *Newton Heirs* v. *State Bank,* 22 Ark. 19; *Taliaferro* v. *Burnett,* 47 Ark. 350, 1 S. W. 702; *Apel* v. *Kelsey,* 52 Ark. 341, 12 S. W. 703; *Townsend* v. *Martin,* 55 Ark. 192, 17 S. W. 875; *Cooper* v. *Freeman Lbr. Co.,* 61 Ark. 42, 31 S. W. 981; *Pitcock* v.

State, 91 Ark. 539, 121 S. W. 742; *Burel* v. *Grand Lodge I. O. O. F.,* 163 Ark. 131, 259 S. W. 369. In the Townsend case, *supra,* C. J. COCKRILL said: "It is a familiar rule of courts that it is more important that such questions should be finally settled than how settled." In the Pitcock case, 91 Ark. 539, C. J. MCCULLOCH said: "A decree which becomes a rule of property should not be reversed whether right or wrong." In the Burel case, 163 Ark. 131, 259 S. W. 369, C. J. MCCULLOCH said: "Where a decree has become a rule of property, it will not be disturbed, even if the court were otherwise disposed to do so." We are of the opinion that the decisions in the McCreary and Duke cases, *supra,* have become rules of property and should not be disturbed.

As we have determined that the State's foreclosure decree is not subject to collateral attack, and that said decree is valid and binding, what then is there upon which to predicate any trust relation between appellants and appellees? It is fundamental that heirs and devisees take only such rights as the intestate or testator had in the property at the time of his decease. The debts of the deceased must be paid before the distributees, be they heirs or legatees, receive anything. The rights of heirs or distributees can never be greater or rise above the rights of the intestate or testator. In the case of *Planters' Mutual Insurance Association* v. *Harris,* 96 Ark. 222, 131 S. W. 947, we held that one's property at his death becomes charged with the payment of all his debts. And a testator cannot by will relieve the land or other property from liability for his debts. The property devised to appellants stood charged with the specific debt of James B. Keatts, which was superior to the rights of the devisees. All of the land so devised to Helen Hobbs and these appellants was taken by judicial process by a court clothed with jurisdiction by statute so to do, and by final decree it caused the same to be sold in satisfaction of said specific debt, that, upon a sale under said decree of all the title that the testator, James B. Keatts, had in said land (the State being the purchaser), the entire and full title thereto pass to and become vested in the State of Arkansas. The devisees' rights under the will

were conditional and prospective, depending upon the rights of the specific lienor to have the entire devised land applied to the payment of the debt so charged against it by appellants' testator. When such resulted under the foreclosure decree and sale, there was nothing left for the devisees, and all their rights were completely cut off and terminated, as much so as if the life tenancy had terminated upon the death of the life tenant. Therefore after the foreclosure decree and sale thereunder to the State in September, 1879, the life estate of Helen Hobbs in and to said land ceased and was thereby terminated. Any conveyance of said life estate by Helen Hobbs theretofore made, by deed of trust or otherwise, would not be binding or effective after the expiration of the life estate. And all rights of such transferees would fail upon the termination of the life estate. After the termination of the life estate, George H. Meade, under his deed of trust from Helen Hobbs, held no legal claim against the land and could sustain no right thereto by reason of said deed of trust. There was a complete failure of title by reason of the fact that the very title conveyed by the trust deed had terminated, and there was nothing for the trustee to take under the deed of trust. The deed Helen Hobbs executed to George H. Meade, December 12, 1882, was some three years after her life estate had terminated. Therefore George H. Meade took nothing thereby as she had no title to convey. We find nothing in the record here to justify the assumption that George H. Meade and his successors in title have all these years held said lands as tenants for life from Helen Hobbs, and as such holders are liable to appellants as involuntary trustees. With this contention we cannot agree; the same is denied and overruled.

It is further contended by appellants that the sale to the State is void for the reason said foreclosure suit was not revived in the names of the legatees under the will, and that they have never had a day in court. We cannot agree with appellants in this contention. The suit by the State was an action *in rem* to condemn and subject the specific mortgaged land to the payment of the mortgage debt. The act specifically prohibited any

person being made a party defendant, not even the mortgagor. The style of the suit should be the State against the particular land, nor should there be any change in the style, nor any abatement or suspension of the suit or change in the proceedings on account of the death, marriages, infancies, arrivals of age, or other incidents affecting persons interested in the lands or claiming them; but the suit should go on to consideration, hearing and decree, without the delays and revivors that grow out of the change of parties to suits in chancery under the common practice.

Under the provisions of this act the mortgagor was not a necessary party to the suit. The act prohibited any person being made defendant. It was a suit against the land. There being no person a defendant, there could not well be revivors to succeed a person not a defendant. The act itself prohibited a revivor as in ordinary cases. This question is concluded by the decisions in the McCreary and Duke cases cited *supra,* where we held the procedure authorized by the act was constitutional and within the power of the Legislature to enact.

The record in this case discloses a further reason why the foreclosure decree by the State in 1879 should be held binding and conclusive against appellants; and that reason is based upon the doctrine of *lis pendens.* The record here shows that the devise to appellants was made during the pendency of the foreclosure suit against the lands devised. The general rule is that whoever acquires the subject-matter of the suit *pendente lite* takes subject to the decree or judgment which may be rendered in such suit. This rule has been enunciated and recognized in a multitude of cases from nearly every jurisdiction, both Federal and State, 17 R. C. L., § 1009. It is further laid down as fundamental that a judgment *in rem* binds all the world irrespective of whether the persons bound are or not parties to the litigation. The theory upon which a judgment *in rem* is regarded as a judgment binding upon all the world is that all the world has constructive notice of the seizure, with the cause and purpose of the taking by the court of the control of the

res, and has notice thereby of the time and place at which any person may appear before a competent tribunal and have a trial, before condemnation of his property, 15 R. C. L., § 84, p. 641. In the strictest sense of the term, a proceeding *in rem* is one which is taken directly against property or which is brought to enforce a *jus in rem.* The distinguishing characteristic of judgments *in rem* is that they operate directly on the property and are binding upon all persons, or, as sometimes said, upon the whole world, 15 R. C. L., § 72, p. 629. It follows from the general rule that a person who acquires the property *pendente lite* takes subject to the court's adjudication of the rights in the property which is the subject-matter of litigation; such persons will be bound whether a party to the litigation or not. Parties, their privies, and purchasers *pendente lite* are all grouped together as bound by the court's decision, 17 R. C. L., § 28, p. 1031. Also to same effect, 2 Pomeroy's Equity Jurisprudence, 3d ed., pp. 632-635. The rule as above stated has been recognized and followed by this court from its early days to the present time, as the following citations well show: *Whiting* v. *Beebe,* 12 Ark. 564-566; *Holman* v *Patterson's Heirs,* 29 Ark. 358; *Montgomery* v. *Birge,* 31 Ark. 491; *Hale* v. *Warner,* 36 Ark. 217; *Ritchie* v. *Johnson,* 50 Ark. 551, 8 S. W. 942; *Brown* v. *Bocquin,* 57 Ark. 107, 20 S. W. 813; *Burleson* v. *McDermott,* 57 Ark. 229, 21 S. W. 222; *Boynton* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 214, 105 S. W. 77; *Hudgins* v. *Schultice,* 118 Ark. 144, 175 S. W. 526; *Causey* v. *Wolf,* 135 Ark. 17, 204 S. W. 977; *Bailey* v. *Ford,* 132 Ark. 203, 200 S. W. 797; *Cherry* v. *Dickerson,* 128 Ark. 572, 194 S. W. 690; *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972; *Collum* v. *Hervey,* 176 Ark. 714-721, 3 S. W. (2d) 993; *Turley* v. *Owen,* 188 Ark. 1072, 69 S. W. (2d) 882.

The State's foreclosure suit was strictly an action *in rem* against the specific mortgaged land, the subject-matter involved in said suit. James B. Keatts by his will dated July 23, 1872, while the State's foreclosure suit was pending, bequeathed the mortgaged lands to Helen Hobbs for life with remainder over to appellants. This

bequest was taken, and could only be taken, under the law, subject to the State's *lis pendens* lien. Therefore if, upon the final decree and sale thereunder, all of said mortgaged land was sold in satisfaction of the mortgage, then there was nothing left of said bequest for the devisees to take, their entire right and title to said land was extinguished, and the full title vested in the State by reason of said decree and sale; and the title attempted to be transferred to the devisees by their testator's will was entirely extinguished and ceased to exist as a valid claim of title to said land. For the reasons herein stated, we are of the opinion that appellants are without right or title to the land herein involved; that the decision of the trial court was correct, and should be affirmed. It is so ordered.

BUTLER, J., disqualified, and not participating.

SOUTHEAST ARKANSAS TELEPHONE & POWER COMPANY *v.* ALLEN.

4-3976

Opinion delivered October 14, 1935.

Sid J. Reid, for appellant.

Isaac McClellan and *W. H. McClellan*, for appellee.

BAKER, J. W. T. Allen sued the Southeast Arkansas Telephone & Power Company for the penalties provided for in § 10,251 of Crawford & Moses' Digest, upon failure of the telephone company to connect the telephone in his residence with the telephone exchange, and to give him service. He alleged that he had been a renter of the telephone for many years, but that the telephone at his residence had been disconnected since August 8, 1931, although his rentals were then paid up and in advance. On August 26, 1933, after repeated demands, he made demand in writing for service, and offered to comply with the requirements of the telephone company, but the company discriminated against him, refused to give him any service, and by reason thereof he was entitled to the penalties provided in the above and foregoing section of the statutes, amounting to $100, and $5 per day, for 165 days of alleged delinquency, on the part of the telephone company.

The answer to the complaint made specific denials of the allegations set forth therein. It was also pleaded that the defendant had adopted certain rules for the operation of its business, among these was a requirement for the payment of an installation fee and monthly rental in advance.

Upon these issues the case was developed, but the abstract furnished us contains a report meager in details, with very little order or continuity. From it, and from statements made in argument, we get the following facts:

Consumers Utilities Company was a prior owner of the telephone properties. It served appellee, but became bankrupt. Its exchange and other properties were sold, and appellant became the purchaser. The Consumers Utilities Company had required customers to pay at least one month's rental, of $1.50, in advance, and also made an installation charge. We do not know what this fee or charge was.

It appears that the plaintiff had paid to the Consumers Utilities Company $20. Of this amount, $2, if not more, was a payment in advance, and this subscriber was insisting that the new company, appellant here, after its purchase of the properties, should give him credit for this payment. The appellant at the time of its purchase took over all of the properties belonging to the former company, including bills and accounts receivable, but it did not assume the obligations of the former company.

The appellee filed his claim in the bankruptcy court for some amount, not shown in this record, which he alleged was due him by the Consumers Utilities Company. On account of the attitude of the plaintiff and his insistence, even at the time of the trial, that he had paid the telephone company in advance, appellant seriously objected and briefs the proposition that appellee was permitted to testify that the appellant is a successor to Consumers Utilities Company. The appellant might as well have admitted this fact. No liability would have followed on account thereof. The mere fact that one company succeeded another in the conduct and management of the business would not make it liable for any debt or obligation of the predecessor. The question and answer could have implied nothing more than the fact that one company succeeded or followed another in the same business; that is to say, the question and answer showed the relative order in time in which the two companies were engaged in the telephone business at Sheridan and surrounding community. If the question and answer meant anything more than that, there is not sufficient abstract of related facts to indicate it. Hence there was no error in the admission of this testimony.

The undisputed testimony, however, shows that the plaintiff made a written demand upon the appellant for service, and this demand was made by letter, dated August 26, 1933, delivered, according to the testimony, on the same date, by Ralph Wilson, to L. D. Murphy, who was then the manager of the telephone company. He admitted the receipt of the letter.

On September 15, 1933, the appellee and W. A. Hines met, and Hines, an employee of the appellant, solicited Allen to become a subscriber, and he testified that Allen refused, and said that the company owed him money; that he refused to comply with the advanced rental requirement, and refused to pay the installation charge. In response to this testimony, the appellee, however, testified that he told Hines that he would pay the rentals in advance, but that Hines advised him that he would have to pay the advanced rentals and installation fee and "drop this thing," that is, his claim for penalties, in order to get the service.

Appellant complains that it was not permitted to show its rules and regulations. Hall, one of appellant's witnesses, testified that its rules and regulations were with the referee at Little Rock. By that statement we understand the appellant to contend that it was following the rules and regulations of the Consumers Utilities Company, a bankrupt. The appellant might, if it so desired, have effectively adopted its predecessor's rules and regulations as its own rules and regulations. But there is no testimony it did this.

The court, however, permitted the company to prove that it operated under a business custom, that all customers must pay rentals in advance and must pay installation charges. The proof was undisputed. Therefore, the only rule appellants insisted upon was established. Their rule as to payment of rentals in advance does not appear to be unreasonable, but reasonable and enforceable. In this case, however, we do not see the necessity or reason for an installation charge against the appellee.

This is particularly true when it is remembered that the telephone had been in the appellee's house, installed,

for eighteen years, but, if it were meant by an installation charge, that there should be some fee paid for the new connection, and the amount was reasonable, the charge might well have been made. These matters are not more fully developed.

These statements in regard to the installation charge must be treated as speculation, because of the meager facts abstracted for our consideration, we are unwilling to be committed to a proposition of correctness of such charge as may have been contemplated. We are only attempting to say that the appellant had a right to make and enforce reasonable rules and regulations governing and controlling its business and dealings with its customers, and to enforce such reasonable rules by requiring that prospective customers comply therewith, as a condition precedent to the delivery of service. *Yancey* v. *Batesville Telephone Co.,* 81 Ark. 486, 492, 99 S. W. 679; *S. W. Tel. & Tel. Co.,* v. *Sharp & White,* 118 Ark. 541, 545, 177 S. W. 25; *Southwestern Telephone Co.* v. *Danaher,* 238 U. S. 482, 35 S. Ct. 886, L. R. A. 1916 A, 1208.

The foregoing was the only rule of the telephone company, so far as appellant has shown us, of any importance to a proper settlement of this case. Appellee offered to comply with this rule. He says that he was prevented from doing so, by a requirement that he surrender his right to sue for penalties accruing to him by reason of the alleged discrimination. The telephone company did not have the right to require him to yield or surrender any claim for penalties as a condition upon which it would render him the service.

It is argued also that it was error for the court to permit the appellee to prove that he had given this written notice, by having the same served or delivered by Ralph Wilson. This contention is without merit, because of the fact that it is not only in testimony, given by the appellee, that he wrote the letter, signed it, gave it to Wilson for delivery to the telephone company, but the manager of the telephone company admits the receipt of this notice and demand. There is no legal requirement that such notice shall be served by any officer, or that

the return of any officer would be *prima facie* evidence of service.

It is argued also in regard to some of the instructions that the court did not state therein that the jury should find the facts only upon a preponderance of the evidence. This is urged as to instructions No. 1 and No. 2, given at request of plaintiff. It was also suggested as error that the court did not tell the jury that plaintiff must comply with all reasonable rules before he could recover. Whatever merit there may have been in these criticisms of the instructions does not appear. Other instructions given may have covered the suggested deficiencies. Appellant does not contend there were not other instructions. The legal presumption by which we are bound is that other instructions were correct and met or supplied any alleged deficiencies in those criticised in the brief. *Sovereign Camp, W. O. W.* v. *Condry,* 186 Ark. 129, 52 S. W. (2d) 638; *Mo. Pac. Railroad Co.* v. *Treece,* 188 Ark. 68, 64 S. W. (2d) 561; *Standard Oil Co.* v. *Richerson,* 188 Ark. 882, 67 S. W. (2d) 1003; *Beason* v. *Withington,* 189 Ark. 211, 71 S. W. (2d) 461; *Fries* v. *Phillips,* 189 Ark. 712, 74 S. W. (2d) 961.

It is also argued that the court erred in not allowing the appellant the privilege of showing by testimony of jurors Warren Douglas and Wilbur Shearer that they were employed by plaintiff, and that they failed to disclose that fact on direct examination by the court and on *voir dire.* This record is not abstracted. We cannot tell from what is furnished us what was asked any juror, nor what answer any juror made. Nor is there any evidence that any juror fraudulently imposed himself upon the court or parties to the litigation. *Gribble* v. *State,* 189 Ark. 805, 75 S. W. (2d) 660; *Newton* v. *State,* 189 Ark. 789, 75 S. W. (2d) 376.

This proposition was fully discussed in the Newton case just cited. It is unnecessary to reargue the matters there set out.

Only one other matter deserves to be mentioned. That is that the appellee at one time sent his check to the appellant company as an advanced fee for service. The check, however, instead of being payable to the ap-

pellant, was payable to the Consumers Utilities Company, then out of business. The check was held for a time, and then returned to the appellee. It must be recognized that the check should have been payable to the defendant company, and we presume that the error in the designation of the payee is the reason for the return of the check. It does not appear, however, that upon the return of the check to the appellee any explanation was made as to why it was returned, nor that any request was made to correct the check by naming the appellant as the payee.

This presentation of this controversy may appear to the reader as somewhat pointless and disconnected, shot through with uncertainties and speculations, but it is our best effort to arrive at and state the issues from the presentation made to us upon the briefs, and to decide them. We must assume that all matters counsel desire to have us consider have been presented.

Appellant has shown us no reason or cause for the reversal of the judgment, and we must therefore assume there was no error.

It is affirmed.

DIXON *v.* STATE.

Crim. 3950

Opinion delivered October 21, 1935.

P. L. Smith, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. This is the second appearance of this case here, and those possessed of sufficient curiosity are referred to the statement of facts as they appear on former appeal. 189 Ark. 812, 75 S. W. (2d) 242. In reference to the surrounding facts and circumstances of the killing, the testimony on this appeal is substantially the same as that presented on the former appeal, and we there said of it: "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." 189 Ark. 813, 75 S. W. (2d) 242. The conviction here complained of was for murder in the second degree, as was the former conviction, but the punishment was reduced to five years.

Appellant's primary contentions on this appeal are of errors which arise out of instructions, requested, given, or refused. For instance, it is urged that the court erred in giving to the jury in charge the State's requested instructions numbered 6, 7 and 8 as follows:

"6. A bare fear of those offenses, to prevent which the killing is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the defendant really acted under their influence and not in the spirit of revenge."

"7. The killing being proved, the burden of proving the circumstances of mitigation which might justify or excuse the homicide shall develop on the defendant unless the proof on the part of the State is sufficiently manifest that the crime amounted only to manslaughter or

that the defendant was justified or excused in committing the homicide."

"8. You are told that the law has such regard for the sanctity of human life that one person shall not kill another person, even in his necessary self-defense, except as a last resort, and when he has done all in his power, consistent with his own safety, to avoid the danger and avert the necessity of the killing. So in this case, although you may believe that the deceased was making a hostile demonstration against the defendant at the time of the killing, still, if you further believe from the evidence that the defendant could have reasonably avoided any danger to himself and averted the necessity for killing the deceased, it was his duty to have done so."

Instruction number 6 is copied from § 2374 of Crawford & Moses' Digest; number 7 is a literal copy of § 2342 of Crawford & Moses' Digest; and number 8 is grounded upon § 2375 of Crawford & Moses' Digest. Each of these instructions are applicable to the facts of this case, and are amply supported by testimony. Therefore the court did not err in giving them. *Elder* v. *State*, 69 Ark. 648, 65 S. W. 938; *McPherson* v. *State*, 29 Ark. 225; *Palmore* v. *State*, 29 Ark. 248; *Thomas* v. *State*, 85 Ark. 357, 108 S. W. 224.

Appellant's next contention is that the court erred in refusing to give to the jury in charge his requested instruction number 2, as follows: "The theory of the State, and there has been evidence introduced, that the defendant came upon the deceased while he was stopped at a certain branch, and without provocation or previous trouble ran him up the hill and at the top of the hill after a short encounter of words shot and killed deceased. The burden is on the State to prove his case beyond a reasonable doubt, and if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give him the benefit of such doubt and acquit him."

The first paragraph of this instruction is merely a narrative of certain testimony introduced in the case and presents no question of law for judicial consideration. The second paragraph states a correct declaration of

law upon the theory of reasonable doubt, but this part of the instruction was fully covered in another instruction given by the court to the jury in charge. It is also insisted that the court erred in refusing appellant's requested instruction number 7, as follows: "Evidence has been offered that the prosecuting witness, Elberta Furlow, had lived with deceased as his wife. You may consider this evidence as showing her interest in the deceased or her bias against the defendant." This requested instruction singles out the testimony of the witness, Elberta Furlow, and undertakes to give undue emphasis thereto. Such an instruction has been emphatically condemned by this court in the recent case of *Morgan* v. *State,* 189 Ark. 981, 76 S. W. (2d) 79. No error therefore is made to appear from this assignment.

Other instructions given in the court's charge are criticized by appellant, but it would unduly extend this opinion to here set them out or discuss them in detail. It suffices to say that we have carefully read and considered all requested, refused and granted instructions, and no error appears therein.

Lastly, appellant contends that the verdict of the jury is not responsive to the State's theory of this case nor to the appellant's theory. This contention has been urged upon this court many, many times but we have uniformly held that, if the testimony is sufficient to support a higher degree of homicide than that for which the accused had been convicted, it will not be reversed on appeal. *Armstrong* v. *State,* 171 Ark. 1136, 287 S. W. 590.

The appellant has had a fair and impartial trial, and the testimony is amply sufficient to sustain the jury's verdict, therefore the judgment is affirmed.

GREER *v.* KEATHLY.

4-3996

Opinion delivered October 21, 1935.

Gordon Armitage and *B. E. Taylor,* for appellants.

Glenn H. Wimmer and *Emmet Vaughan,* for appellees.

MEHAFFY, J. Leo Keathly and six others filed suit against the appellants in justice court to recover what they alleged was due them for cutting and hauling logs. There was a judgment in favor of appellees, and from this judgment an appeal was taken to the circuit court.

The cases were set for trial in the circuit court at Des Arc on March 20, 1934, and judgment was rendered against appellants on said day. Thereafter, on January 29, 1935, this suit was begun in the Prairie Circuit Court under the seventh subdivision of § 6290 of Crawford & Moses' Digest, which provides for vacating or setting aside a judgment after the term at which it was rendered. The seventh subdivision of said section reads as follows:

"For unavoidable casualty or misfortune preventing the party from appearing or defending."

The original suit in the justice of the peace court was begun by attachment, and the attachment was sustained both in the justice court and the circuit court.

This suit is for the purpose of setting aside and vacating the judgment of the circuit court. The complaint alleges that both Mr. W. H. Gregory, attorney for M. H. Greer, and Mr. M. H. Greer were sick and thereby prevented from attending the trial of the cases. The attorney, Mr. Gregory, communicated with the judge of the court by telephone, according to the statement in the complaint. The complaint is sworn to by Mr. M. H. Greer, and no evidence was introduced to support the allegations

in the complaint. No evidence was offered showing that either Gregory or Greer was unable to attend court.

The court treated the complaint as a motion to retax costs in the judgment rendered on March 20, 1934. The court, in regard to postponing the trial on account of the sickness of one of the parties and his attorney, made the following statement:

"The morning that this case was set for trial in the Northern District of Prairie County, Mr. Gregory, attorney for the defendant, called me over the telephone from Searcy and asked me whether or not this case was set for trial. "I told him that it was, and that the plaintiffs were there waiting, and that their attorney, Mr. Wimmer, was insisting upon a trial because, if the case was continued, it would have to go over until the next term of court, which would be six months off; that these plaintiffs were day laborers, most of them with families; that they needed the money to purchase the necessities of life; that they claimed the work had been performed and they were entitled to be paid.

"I informed Mr. Gregory over the phone that personally I had no objections to a continuance, but under the circumstances the amount being small due each plaintiff, if they were entitled to anything at all, the case should be tried at this term of court. That, before I would consent to a continuance for the term, I wanted him to get in touch with Mr. Wimmer, and, if he agreed to it, same met with my approval. I held this case off until the last case to be tried at this particular term of court. When the case was called, I asked Mr. Wimmer whether or not Mr. Gregory had called him concerning the matter, and he informed me that Mr. Gregory had not talked with him. I then permitted a jury to be impaneled and the case proceeded to trial.

"I never heard any more about the case until several months later when Mr. Armitage, attorney of Searcy, filed pleadings in the case to set the verdict aside. I treated the motion also as a motion to retax cost as it appeared from the record that the justice of the peace, and constable had made erroneous charges, and that his motion for a new trial was overruled. Mr. Gregory

claimed that he was suffering from a cold and was unable to be at court that morning."

The granting or refusing to grant a continuance ordinarily rests in the sound discretion of the trial court, and, unless there is abuse of discretion, the trial court's ruling will not be disturbed. *Mo. & N. Ark. Rd. Co.* v. *Robinson,* 188 Ark. 334, 65 S. W. (2d) 546; *Wilson* v. *State,* 188 Ark. 846, 68 S. W. (2d) 100.

In this case we not only think that the trial judge did not abuse his discretion, but appellants knew the case was pending, offered no evidence at all to contradict the statement of the judge as to what happened, and offered no evidence to support any of the allegations in the complaint.

The statement in appellant's complaint would not have warranted the trial court in setting aside the verdict and judgment. There is no claim that they did not know about the judgment in time to take an appeal. There is no evidence anywhere of any meritorious defense. It is true that the statement is made in the complaint, which is sworn to by Mr. Greer, that the appellees were indebted to one of the parties in an amount equal to or greater than the amount sued for, but there is no other statement in the complaint anywhere about a defense.

Appellants call attention to and rely on the case of *Leaming* v. *McMillan,* 59 Ark. 162, 26 S. W. 820, but it was shown in that case that Mr. Darling was over 80 years of age, feeble, and unable to leave his home, and his attorney, to whom he had intrusted the management of the suit, was detained on account of the severe illness of his wife. Neither Darling nor his attorney learned of the judgment until some time in September, following the July term at which the judgment was rendered. The court said: "Under the circumstances of the case at bar, there being no contention that Darling's case lacked merit, we think no laches was imputable to him, and the sickness of his attorney's wife was an unavoidable casualty excusing his non-attendance at the court."

Appellants next call attention to the case of *Capital Fire Insurance Company* v. *Davis,* 85 Ark. 385, 108 S. W. 202. In that case it was shown that the attorney was sick,

and unable to go from Little Rock to Heber Springs, and that the answer tendered showed a meritorious defense.

The next case relied on by appellants is the case of *Thweatt* v. *Grand Temple & Tabernacle of the International Order of Twelve Knights and Daughters of Tabor of Arkansas,* 128 Ark. 269, 193 S. W. 508. The court in that case misunderstood the matter, and said that he was to blame and probably was misled, and therefore he set the judgment aside, and it was affirmed by this court.

The court in this case retaxed the costs, and appellees prosecuted a cross-appeal. They call attention to the case of *Hudgins* v. *Beavers,* 69 Ark. 577, 65 S. W. 99. The court there said:

"The circuit court was without jurisdiction to adjudicate the matter, as on a motion to retax the costs, for the costs involved had not accrued in this proceeding, and neither the sheriff nor any of the parties in the attachment proceeding had moved for a retaxing of the costs."

But that was an independent suit, and the suit at bar is the same suit that was appealed from justice court to the circuit court, and the circuit court had jurisdiction.

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

BERRYMAN *v.* CUDAHY PACKING COMPANY.

4-4007

Opinion delivered October 21, 1935.

Robert Bailey and *Charles W. Mehaffy,* for appellant.

Hays & Smallwood, for appellee.

BUTLER, J. The appellants began this action in the Pope Circuit Court against the Cudahy Packing Company and Claude Westerfield to recover for the injury and death of appellants' intestate, alleged to have been occasioned by the negligence of the company acting through its agent and employee, Claude Westerfield. Summons was issued and served on both defendants. The Cudahy Packing Company moved to quash service of summons as to it. The court sustained the motion, and from that order the appellants prosecuted an appeal to this court, which reversed the judgment of the trial court and remanded the cause with directions to overrule the motion to quash service. *Berryman* v. *Cudahy Packing Company,* 189 Ark. 1157, 76 S. W. (2d) 956. After the motion to dismiss was sustained in the lower court, appellant Berryman proceeded against the defendant Westerfield to judgment. On remand the appellee company filed its motion in the trial court to dismiss on the ground that the taking of the judgment against its co-defendant Westerfield constituted a discontinuance of the action against it. The court sustained the motion and adjudged that the appellee company be permitted to go hence without day. From that judgment this appeal has been prosecuted.

To sustain the action of the court below, appellee relies (1) on the provisions of § 1287, Crawford & Moses' Digest, and (2), the rule announced in § 50, page 1166, 18 C. J., as follows: "In an action *ex delicto* the taking of a judgment by the plaintiff against one of several defendants operates as a discontinuance of the case as to all the other defendants." In support of the doctrine last announced, reliance is placed upon the case of *Criner*

v. *Brewer,* 13 Ark. 225, and the cases of *McCulla* v. *Brown,* 178 Ark. 1011, 13 S. W. (2d) 314; *Coats* v. *Milner,* 134 Ark. 311, 230 S. W. 301, and *Sessions* v. *Johnson,* 95 U. S. 347, 24 L. ed. 596.

1. Section 1287, Crawford & Moses' Digest, provides as follows: "An action at law upon contract, wherein the summons has been served in due time as provided in § 1208, upon part only of the defendants, shall stand for trial on the first day that the court meets in regular or adjourned session after the expiration of the time allowed by said section as to those so summoned, and may be continued to a future day as to the others for further proceedings. In other actions in proceedings at law the plaintiff can only demand a trial as to part of the defendants upon his discontinuing his action as to the others."

This statute has no application to the facts of the instant case. It applies only to actions upon a contract, and then only to cases where there is failure to serve part of the defendants, and the plaintiff elects to proceed to trial which can be done only where there is a nonsuit taken on the first day of the term as to the defendants not served. *Biddle* v. *Riley,* 118 Ark. 206, 176 S. W. 134. In the case at bar the action is one sounding in tort, and both defendants were served in the proper manner and in apt time, and this status was not altered or suspended by the erroneous conclusion and order of the trial court. *Berryman* v. *Cudahy Packing Co., supra.*

2. The case of *McCulla* v. *Brown, supra,* merely states the rule that, joint tort-feasors being jointly and severally liable for the tort, the plaintiff is entitled to join them all in a suit for damages, or to sue them separately, although entitled to but one satisfaction. This is the rule announced in the case of *Coates* v. *Milner,* and also in *Sessions* v. *Johnson, supra.* In the latter case there is an announcement of the further principle that, if a plaintiff first sues all jointly, or any one of them separately, he is bound by his election and cannot afterward seek his remedy against the defendants otherwise. These principles have the approval of this court in the case of *Bush* v. *Barksdale,* 122 Ark. 262, 183 S. W. 173, and in cases

cited by appellee, and is indeed one upon which all authorities agree. What is said of these cases demonstrates their inapplicability to the question presented by the contention (2) of appellee.

An examination of the facts in the case of *Criner* v. *Brewer, supra,* discloses that it, too, is not in point. That case was an action of trespass for assault and battery brought by Brewer against Criner and Robert and William Parker. At the return term it appeared that William Parker was not served with process, and the case was discontinued as to him. Criner and Robert Parker filed their separate pleas of not guilty. The plaintiff joined issue to the plea of Criner, but refused to notice or take issue with that of Robert Parker. The case was tried as to the issues raised between plaintiff and Criner, which resulted in a verdict for the plaintiff and an assessment of the sum of $50 in damages. On appeal, the point raised by Criner was that, as the case was left pending against one of the defendants, and the judgment failed to dispose of the whole case, it was error to render judgment against him. There is language used in the opinion which might tend to support the contention of appellee in the instant case, but it is to be seen from the facts stated that the question here involved was not an issue in the case decided.

The rule (2) contended for is that generally adopted by the English courts, but which has not found favor in the courts of this country, although courts of a few of the States have followed it. The effect of a judgment for or against one joint-feasor as a bar in proceeding by the injured party against another is stated in Freeman on Judgments, 5th ed., vol. 2, § 573, as follows: "Generally, such wrongdoers are regarded as jointly and severally liable, and obviously there is no privity between them, since they do not claim through each other. The rule now generally followed in the United States, therefore, is that a judgment against one is not *res judicata* as to another, and, unless satisfied, does not bar an action against him, the rule in such case being similar to that applied to judgments upon joint and several contracts, though in one or two States the contrary English rule

is followed." To the same effect is the conclusion of the author in Cooley on Torts, 4th ed., vol. 1, § 82. There are many cases supporting the doctrine announced in the quoted text which may be found collected in note 9 to § 573, Freeman on Judgments, *supra.* The doctrine is further well expressed in the case of *Sloan* v. *Herrick,* 49 Vermont, 327, as follows: "In actions of tort, nothing less than what in law is regarded a legal satisfaction of the tort by one joint tort-feasor will operate to discharge the other joint tort-feasor. Neither the recovery of a judgment against one joint tort-feasor that remains unsatisfied in whole or in part, nor the release of one on the receipt of part satisfaction for the tort, when it is expressed in the release that the sum paid is received only in part satisfaction, operates to bar the injured party from pursuing the other joint tort-feasors for so much of the tort as remains unsatisfied."

The Supreme Court of Alabama, referring to one of its former decisions holding that an injured party may proceed against the trespassers jointly as well as severally, but that he may have only one satisfaction for the same trespass, has this further to say: "This I take to be the correct rule, for, the trespassers being severally as well as jointly liable, they cannot be discharged from their liability until there is a satisfaction of it, and the mere rendition of judgment, without more, against one joint trespasser will not preclude the plaintiff from proceeding to judgment against the others." *Blann* v. *Crocheron,* 19 Ala. page 647.

The Civil Code provides (§§ 401 and 404, now §§ 6235 and 6237, Crawford & Moses' Digest):

Section 6235. "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

Section 6237. "Though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against them alone."

In discussing the effect of these provisions, this court, in *Parke* v. *Meyer,* 27 Ark. 551, observes: "Thus it is to be seen the Code allows a several judgment to be entered whenever a several suit might have been brought."

At common law a final judgment against part of defendants in actions *ex contractu* could not be entered without disposing of the entire case. It was to alter this rule that the statutes above quoted were enacted, and to create a common procedure for both actions *ex contractu* and *ex delicto.* This is clearly the intention of the statutes, because no distinction is made as to the nature of the action with which it deals. As to the reasons for the enactment of the statute and its effect, reference is made to vol. 11 Enc. of Pl. & Pr. pages 852-854.

Since a several suit might have been brought against any one of the joint tort-feasors, the quoted statute becomes applicable under the rule announced in *Parke* v. *Meyer, supra.*

From the authorities cited we conclude that the learned trial judge erred in sustaining the plea of the appellees. The judgment will therefore be reversed, and the cause remanded with directions to overrule appellee's motion to dismiss, and for further proceedings in conformity to law and not inconsistent with this opinion.

PEAY *v.* PANICH.

4-4005

Opinion delivered October 28, 1935.

R. E. Wiley, for appellants.

Buzbee, Harrison, Buzbee & Wright, for appellee.

JOHNSON, C. J. On April 9, 1933, W. B. Miller, Gordon N. Peay and their respective wives were returning from a week-end visit to Natchez, Mississippi. They were traveling in W. B. Miller's automobile, which was being driven at the time of the incident hereinafter referred to by the owner. Near Vicksburg, Mississippi, the car in which this party was traveling was wrecked while traversing highway 61. Mr. Miller was killed, and his wife was seriously injured, Gordon N. Peay was fatally injured, dying about one month later, and Mrs. Peay suffered very serious and permanent injuries. Two suits were instituted by Mrs. Peay, one in her own right and the other as administratrix of the estate of Gordon N. Peay, deceased, against the administrator of the estate of W. B. Miller, deceased, to compensate the loss and injuries sustained. The complaints alleged, in effect, in addition to the facts heretofore stated, that Miller the owner and driver of the car, was negligent in operating the same at a dangerous rate of speed, namely, more than 60 miles per hour without regard to the safety of the occupants of the car or other traffic upon the highway, and in violation of the traffic statutes of the State of Mississippi which were specially pleaded. All material allegations of the complaints were specifically denied by

answers and subsequently the cases were consolidated for trial purposes.

Upon trial to a jury the testimony adduced by appellant tended to establish the following facts: A Mr. Bobb, a witness for appellant testified that on the day of the wreck he was at a filling station situated on the east side of highway 61 going north toward Vicksburg in the State of Mississippi; that at this point a country road intersects the main highway at right angles, and the filling station is located in this intersection; that there is a bridge spanning a small stream in front of the filling station over which the public passes in traveling the highway; that this bridge is 16 or 18 feet in width and approximately 30 feet in length; that the bridge has wings which narrow the highway for the approach of the traveling public; that the highway is straight for approximately one quarter of a mile south of this bridge and in traveling from the south any one can see a two-story frame store building, the filling station building and the bridge for a distance of at least one-quarter mile; that near the bridge is located a sign which says, "Local Road," that south of the bridge open fields lay adjacent to the highway; that immediately prior to the wreck of the Miller automobile, a colored person drove his automobile out of the filling station and began entering the highway; he first saw the Miller car when it was about at the bend of the highway, twelve or fifteen hundred feet south of the store; the colored man's car was driven out into the public road with its front wheels near the center thereof which the Miller automobile was traveling; that he headed south when something went wrong with his engine, and when he saw the other car coming he cut his front wheel back north and the Miller car hit this negro's car about the back end of the front left fender just a glancing blow, knocking his bumper off and bending his fender in and knocking a hole in his left front casing and almost straightening the negro's car north nearly in the center of the road; the Miller car was trying to come back onto the highway and didn't have room and then ran into the banister, the concrete wing of the bridge and then into the creek; that the

Miller car was traveling at a rate of speed of not less than 60 miles per hour, and witness could not ascertain that he slowed up to any extent until the car hit the concrete abutment of the bridge. Mr. Bobb's testimony heretofore quoted was corroborated in detail by that of W. W. Pope, who was interrogated by counsel for appellee on cross-examination as follows:

"Q. (Hands witness a paper.) That gives in a brief form your account of the accident two or three days after the accident?

"A. Yes, sir, that is my signature. I recognize it as my version of the accident."

On redirect examination the following occurred:

"Q. Mr. Harrison has shown you a statement you signed that was made before an insurance adjuster who called on you shortly after the accident?

"Mr. Harrison: Defendant objects to that question as being prejudicial and asks the court to declare a mistrial.

"Mr. Wiley: But your Honor, I have the right to ask this witness if he didn't make this statement to an insurance agent about his interest and all the circumstances.

"The Court: Gentlemen, I think it is highly improper to bring in any insurance company in your examination. Ladies and gentlemen of the jury, you will not consider in this case the statement of the attorney that this statement the witness gave was to an insurance adjuster."

The testimony on behalf of appellee was in sharp conflict with that adduced by appellant and also tended to establish that the negro's car suddenly ran across the highway and into contact with the Miller car. We think it unnecessary to further set out the testimony in detail.

Over the objections and exceptions of appellant the trial court among other instructions gave to the jury in charge appellee's request number 4 as follows:

"No. 4. You are instructed that one who enters an automobile to take a ride with the owner takes the driver of the automobile as he finds him. That is to say that if Mrs. Peay and her husband, Gordon N. Peay, entered

an automobile owned and driven by W. B. Miller, they impliedly accepted whatever risk attended the degree of W. B. Miller's proficiency as a driver and his usual and customary habits of driving, known to them at the time and with which they were familiar, but the Peays did not assume the risks of any negligence or any failure to exercise ordinary care on the part of Mr. Miller."

The jury decided the issues of fact in favor of appellee, and from the consequent judgment entered thereon appellant prosecutes this appeal.

Appellant urges upon us but two contentions for a reversal, first, that the trial court erred in refusing permission to counsel to interrogate the witness Pope on redirect examination in reference to his signing a written statement at the solicitation of the insurance adjuster and the court's emphatic statement to the jury that counsel's reference to the insurance adjuster was highly improper. This contention presents no error. We have several times held that questions not dissimilar to the one propounded by appellant's counsel were improper and, if pursued, highly prejudicial. *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6.

We understand the great weight of American authority to be that any unnecessary reference to an insurance company which has insurance on the subject-matter of the risk is improper and prejudicial. See exhaustive annotations in 56 A. L. R. 1418, 74 A. L. R. 849 and 95 A. L. R. 388.

Neither can we agree that the offered examination of the witness was proper on the theory that it was cross-examination upon new matter injected into the case by appellee's counsel. The written statement referred to was not introduced in evidence, and was only presented to the witness for the purpose of refreshing his memory. The witness admitted making and signing the written statement and explained the asserted discrepancies between his testimony and the written statement. This was proper cross-examination and transgressed no rule of evidence which has been called to our attention, and

did not justify any reference to the statement being procured by an insurance adjuster.

Appellant's second contention is that the giving of appellee's requested instruction number 4 heretofore quoted is reversible error. The argument is that under the doctrine announced by us in *Howe* v. *Little,* 182 Ark. 1083, 34 S. W. (2d) 218, and *Shrigley* v. *Pierson,* 189 Ark. 386, 72 S. W. (2d) 541, a guest in an automobile assumes only the defects in the car not known to the owner, and that the instruction complained of erroneously stated the law to be that such guest also assumes the usual and customary habits of the driver which are known to the guest. We think this instruction is a correct declaration of the law, when measured by the facts and circumstances of this case. The great weight of authority is to the effect that one who enters an automobile as a guest takes not only the car as he finds it (subject of course to the limitation that such defects are not known to the owner) but also assumes the known risks incident to the driver's incompetency, inexperience and driving habits. Volume 4, § 2512, of Blashfield's Cyclopedia of Automobile Law, states the rule as follows: "A guest, entering an automobile, assumes the dangers incident to the known incompetency, inexperience, and driving habits of the driver. Thus such guests accept whatever risk may attend the degree of proficiency which their host has acquired as a driver, and the hazards which are connected with his usual and customary habits with which they are familiar." See also *Rappaport* v. *Stockdale,* 160 Minn. 78, 199 N. W. 513; *Barger* v. *Chelpon,* 6 S. D. 66, 243 N. W. 971; *Poneitowcki* v. *Harres,* 200 Wis. 504, 228 N. W. 126; *Cleary* v. *Eckart,* 191 Wis. 114, 210 N. W. 267, 51 A. L. R. 576; and *Liggett & Myers Tobacco Co.* v. *De Parcq,* 66 Fed. (2d) 678.

No error appearing, the judgment is affirmed.

McEachin *v.* People's National Bank.

4-4012

Opinion delivered October 28, 1935.

[redacted]

Tom W. Campbell, for appellant.

Donham & Fulk and *Pat Mehaffy,* for appellee.

Smith, J. L. L. McEachin died testate September 26, 1933. Prior to his death he had been engaged in business with his brother, G. C. McEachin, under the firm name of McEachin & McEachin. By his will he bequeathed $100 to his son, and the remainder of his estate to his wife, Harriett A. McEachin, who was named sole executrix to serve without bond.

G. C. McEachin, as surviving partner, proceeded to wind up the affairs of the partnership, which had accumulated a large quantity of material used by the partnership in the performance of construction contracts into which it had entered. The partnership also owned certain lots in North Little Rock, on which the partnership warehouse stood, and also had title to a twenty-acre tract of land.

Mrs. McEachin, the widow and legatee of L. L. McEachin, proposed to G. C. McEachin, who was then engaged in winding up the partnership affairs, that he make a price which he was willing to give or take for the partnership assets, and he fixed a price of $22,000. Mrs. McEachin elected to buy at that price, and she paid her brother-in-law $11,000 in cash, taking a bill-of-sale for all the personal property and a deed to the real estate. In each of these instruments there was a reservation of a lien upon the property sold to secure the remaining $11,000 of purchase money.

On September 30, 1933, Mrs. McEachin filed in the probate court a petition for appointment of administrator *cum testamento annexo,* which recited that, under the will of petitioner's husband, she had been appointed sole executrix without bond, but that she was unacquainted with the business operations of her deceased husband, "and that, since it will be necessary to wind up his said affairs as expeditiously and economically as possible, and reposing special confidence in the integrity and business ability of Louis Rosen, of Pulaski County, Arkansas, she believes, and therefore states, that it would be to the interest of the said estate and to the interest of her son, Leonard L. McEachin, Jr., and herself, who are the sole devisees under the will, and to whatever creditors there may be of said estate, for Louis Rosen, a citizen and resident of Pulaski County, Arkansas, to be appointed administrator *cum testamento annexo.*"

Pursuant to the prayer of this petition Rosen was appointed administrator with the will annexed, but he resigned the appointment October 28, 1933.

On November 16, 1933, Mrs. McEachin filed another petition in the probate court, reciting the resignation of Rosen, and praying the appointment of the People's Bank of Little Rock as administrator. The prayer of this petition was granted, and the bank proceeded to make an inventory of all the assets of the estate, which was duly filed 12-22-1933. Among the assets listed was an "undivided ½ interest in partnership McEachin and McEachin, Contractors." An appraisement of the estate was filed January 31, 1934.

G. C. McEachin indorsed and delivered to the bank, as administrator, the purchase-money note which Mrs. McEachin had given him as surviving partner. This note was not paid at maturity, and this suit was brought by the bank, as administrator, to enforce payment and to subject to sale the property for which the note had been given. At the trial of this cause the writings above referred to were offered in evidence.

The administration of the estate by the bank appears to have been in charge of its president, who testified that "everything we did, or everything that we had done, with reference to the estate in all the settlements were at her request and really advice." That this was done because Mrs. McEachin was the sole beneficiary under the will with the exception of the hundred dollars' bequest to her son, and that he had no knowledge that Mrs. McEachin would renounce the will and claim dower until she filed an answer to the suit against her on the note and a cross-complaint, in which she alleged her renunciation of the will and her election to take dower. This answer and cross-complaint was filed November 21, 1934, and makes profert of a deed which she had executed, as widow of L. L. McEachin, to his only child, L. L. McEachin, Jr., in which she renounced all interest to any property devised to her, and declared her election to take dower under the statute. This deed was dated November 21, 1934, was filed for record on the same day, and recorded the following day.

It will be observed that this deed was executed more than twelve months after the death of McEachin, but within less than eighteen months after that event occurred. A large portion of the briefs of opposing counsel is devoted to a discussion of the question whether the renunciation of the will and the election to take under the statute was made within the time allowed by law to the widow for her election. Relating to this subject, the question is discussed whether § 3527 or § 3542, Crawford & Moses' Digest, applies, the answer thereto depending on the finding whether the real estate owned by the partnership should be treated as personal property. *Lenow* v. *Fones,* 48 Ark. 557, 4 S. W. 54.

We find it unnecessary to pursue this interesting question, for the reason that the decree of the court on another issue is conclusive of the case.

The court found "* * * that the defendant Harriett A. McEachin had elected to take the legacies bequeathed to her under said will of L. L. McEachin, deceased, prior to the filing of her cross-complaint herein for the assignment of dower, and that she thereby waived her right to dower." The court found that Mrs. McEachin had purchased all of the assets of the partnership, and a lien was declared thereon for the balance of unpaid purchase money, and this appeal is from that decree.

We concur in this finding that Mrs. McEachin has waived her right to claim dower in the estate of her husband, and, having reached this conclusion, it is unnecessary to consider any other question.

It is apparent that Mrs. McEachin dominated the administration of her husband's estate, and she was permitted to do this upon the assumption that, except as to the bequest of a hundred dollars, she was the sole legatee. She was thoroughly conversant with the estate, and appears to have had the advice of competent counsel of her own choice. While the administrator was represented by one attorney, Mrs. McEachin was represented by another. She was desirous of continuing the contracting business in which the partnership had been engaged of which her husband had been a member. Numerous conferences were held in regard to the purchase of the partnership outfit and its warehouse. During this time she had the benefit of the advice of her own attorney, and she admits that during all this time she had intended to take under the will. She expressed her desire frequently for the debts of her husband to be paid, and gave as one of her reasons for desiring to purchase the partnership assets that she could thus obtain certain contracts out of which sufficient profits would be made to pay the debts, if the assets were not sufficient for that purpose.

But certain proceedings in the probate court constitute the most convincing evidence of an election to take under the will, and not under the statute.

There was filed by the bank, as administrator, on February 1, 1934, a petition praying confirmation of the sale of the partnership assets to Mrs. McEachin. This petition contains the following recital: "Mrs. Harriett A. McEachin joins in the presenting of this petition, asks of the court that the foregoing settlements be approved and confirmed, and also hereby waives, releases and relinquishes any and all right, title, claim, equity, interest or dower, if any, that she may have or could have in or to the said estate of L. L. McEachin, deceased, other than as designated in said will of L. L. McEachin, deceased."

The order of the court approving the sale contains the following recitals:

"The court still further finds that Harriett A. McEachin joins the administrator in the presenting of the petition upon which this order is based, asks that this order be made and also further finds that Harriett A. McEachin has waived, released and relinquished any and all right, title, equity, claim, interest or dower that she may have or could have, if any, in or to said estate of L. L. McEachin, deceased, other than as designated in the will."

A corporation was organized by Mrs. McEachin under the name of McEachin & McEachin, Inc., to continue in the business of construction contracts.

It appears that thereafter Mrs. McEachin applied to the bank which was acting as administrator of the estate of her husband, for a line of credit for this corporation, which was denied upon the ground that Mrs. McEachin had on deposit in her name a large and sufficient sum of money. On August 23, 1934, Mrs. McEachin filed in the probate court a petition for the removal of the bank as administrator, in which she recites "that she is a legatee, in the last will and testament of said deceased," and is a creditor of said estate. The prayer of this petition was denied, and an appeal was prosecuted to the circuit court, which appears to be now pending and undisposed of.

Mrs. McEachin attempts to relieve herself of the consequence of her petition to the probate court, and

the order of the court thereon reciting and adjudging that she was a legatee under the will, by saying that she was not advised of this proceeding. There is but little intimation—and no proof—that any fraud was practiced upon her, and it would be trifling with the solemn judgment of a court to permit her to say that she was unaware of a proceeding had upon her petition, and of which she was the beneficiary by making the purchase which the probate order authorized.

It is insisted, however, that, even though Mrs. McEachin had elected to take under the will, and not under the statute, she had the right to rescind this action within the time allowed her by law in which to elect, inasmuch as the rights of no one would be prejudiced by that action. But it is not certain that this is true. The president of the bank which acts as administrator testified that the partnership property would not have been sold as it was except for Mrs. McEachin's election to take under the will. He was asked this question: "Q. When it came to a sale of this partnership property, would you have made that sale to her on credit except for the fact that she expressly waived any right of dower in it?" and answered: "A. Well, unless we had known that she was willing to allow those assets to go to pay his debts, why, of course, we couldn't have done that."

However this may be, we think there was an election which may not be retracted. The law of the subject was declared in the case of *Goodrum* v. *Goodrum*, 56 Ark. 532, 20 S. W. 353. There a widow accepted the proceeds of a policy of insurance which had been devised to her in her husband's will. The opinion recites that the widow had never expressed in writing or by words that it was her purpose in receiving the money to thereby make an election to take the bequest made to her in the will in lieu of her dower. But it was said that this was the natural and legitimate inference from her action. However, because her husband had recently died when the money was paid her, and there had been no inventory or statement made of the condition of her husband's estate, it was held that she might rescind the election when she became apprised of the condition of

her husband's estate. But it was there said: "An election, once made, under circumstances which show that the party required to elect had, or might by the exercise of reasonable diligence have had, such information in regard to the relative value of those things between which a choice must be made as would enable the party making the election to make an intelligent and discriminating choice, cannot be retracted."

Under this test, the election of Mrs. McEachin must be held to be irrevocable.

The case of *Cooley* v. *North,* 130 Ark. 350, 197 S. W. 577, is also decisive of this question. It was there held (to quote a headnote) that "In order to bind the widow to take under her deceased husband's will, she must do some decisive act, with knowledge of her situation and rights, and a mere expression of intention is insufficient."

We are asked to modify the decree, if we do not reverse it, to the extent of allowing the widow to offset the allowance given her by § 80, Crawford & Moses' Digest, against the judgment which has been rendered against her in favor of the administrator on the note indorsed to the administrator by the surviving partner of her deceased husband. This note is the basis of the suit.

The widow, having made an irrevocable election to take under the will, may not claim any part of the estate as dower. But this election does not preclude her from claiming the statutory allowances if she is otherwise entitled to them. This is true unless the will expresses the intention of the testator to deprive his wife upon his death of the statutory allowances to which she would otherwise be entitled. It was expressly so decided in the case of *Cypert* v. *McEuen,* 172 Ark. 437, 288 S. W. 923. See also *Costen* v. *Fricke,* 169 Ark. 572, 276 S. W. 579. The will here involved contains no such expression, and it does not, therefore, exclude the widow from claiming the benefit of § 80, Crawford & Moses' Digest. Whether there are any minor children to share the benefit of this statute with the widow is a question which appears not to have been developed at the trial from which this appeal comes.

The decree will therefore be modified to the extent of allowing the defendant widow to offset against the judgment the value of her allowances under § 80, Crawford & Moses' Digest. In all other respects the decree is affirmed.

MOORE *v.* WALLIS.

4-4010

Opinion delivered October 28, 1935.

Dwight H. Crawford, for appellant.

J. H. Lookadoo and *Lyle Brown*, for appellees.

MCHANEY, J. Appellant is the owner of a plot of ground in the southeast quarter of block five, Browning's Survey of Arkadelphia, Arkansas, located at the intersection of Tenth and Pine streets. Tenth Street has been designated as the route of United States Highway No. 67 through that part of Arkadelphia, over which passes a very heavy stream of traffic. There are stop signs on all four sides of this intersection which require all vehicles to stop thereat. Appellant's property is vacant, and she has entered into an agreement to lease same to

the Marathon Oil Company for the erection of a small drive-in filling station thereon. It is not the intention of appellant or of said oil company to operate a garage in connection with the filling station. Appellees are the owners of property adjacent in said block five and in that immediate vicinity. They objected to the construction of a filling station by appellant's proposed lessee, and brought this action to enjoin her therefrom. They allege that the building of such a station would be a nuisance for the reason that it would work injury to their comfort and health because of the noise and fumes it would create, and would decrease the value of their property and irreparably damage them. Appellant answered denying that a filling station on her property would be a nuisance or that it would work injury to the comfort and health of appellees, or that it would create unusual noises, or that it would be injurious to their property by decreasing the value thereof. She alleged that she proposed, if desired by appellees, to grow a hedge between her property and theirs to shut off the view of the filling station from their property, and to landscape and beautify the lot so that it would be more attractive than at present; that a filling station is already in operation one block north of and across the street from her property and another in the third block south of her property, and that permits have been granted by the city council for the erection of filling stations in blocks eight, sixteen and seventeen, which are within two blocks of her property; and that property on Tenth Street is no longer strictly residence property, but has become mixed residence and business property. She further alleged that her property is chiefly valuable as a filling station site, and that she will be deprived thereof if she cannot use it for such purpose. She prayed that the complaint be dismissed, and that her answer be treated as a cross-complaint, and that appellees be restrained from further interference with her erection of a filling station on her property. Trial resulted in a decree against appellant perpetually enjoining her from building and operating, or causing to be built and operated by lease, a filling station on said property. The case is here on appeal.

Four witnesses testified for appellees. The effect of their testimony, briefly stated, is that they think that the value of the property of appellees would be decreased by the construction of a filling station on appellant's property, although there is a filling station one block north and another about a block and a half south; that there would be a certain amount of noise caused by automobiles stopping and starting, the changing of tires, also some offensive odors from gasoline and grease, and that the lights at night might burn late. It was the opinion of these witnesses that they would be disturbed, and that their home life would be rendered less comfortable. Appellant testified that she had a permit from the city council for the erection of a filling station, not a garage; that her property is not residence property since the highway is there, but is business property. In addition to appellant, eleven witnesses testified to the general effect that a filling station would not be a nuisance if properly conducted, and that they do not cause any inconvenience or discomfort to those living near them. A number of them live near filling stations; that the proposed filling station in their judgment would not decrease the value of neighboring property. It was also shown that the filling station would not be an all-night station but would close from eight to nine o'clock; that there would be no congregation of people or the sale of liquor; and that there would be no unusual noise except the starting and stopping of cars. As above stated, it was shown that all cars are now required to stop and start at that corner.

It is fundamental that every person has the right to own and enjoy property and to put it to any lawful use that may best subserve his interest or wishes so long as he does not trespass on his neighbors' rights. The maxim, "*Sic utere tuo ut alienum non laedas*" limits the use thereof. This maxim means, according to Blackstone and Bouvier's Law Dictionary, "So use your own as not to injure another's property." The difficulty the courts have is in determining in advance whether the proposed use of the property will work injury to another. It has been held by this court that the operation of a filling station and garage is not a nuisance *per se*. *Hud-*

dleston v. *Burnett,* 172 Ark. 216, 287 S. W. 1013. See also *Ft. Smith* v. *Norris,* 178 Ark. 399, 10 S. W. (2d) 861. In 29 Cyc. 1153, a nuisance *per se* is defined as follows: "A nuisance at law or a nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." This definition was quoted by Judge KIRBY in *Jones* v. *Little Rock Boys' Club,* 182 Ark. 1050, 34 S. W. (2d) 222, where injunctive relief was sought against the erection of the Little Rock Boys' Club at Eighth and Scott streets, in the city of Little Rock. It was there said: "The erection of the building itself could not constitute a nuisance under the circumstances of this case, and it is not insisted that it could be, but only that, as erected and operated as formerly, it would constitute such a nuisance. In any event therefore the erection of the building could not constitute a nuisance *per se* entitling appellant to an injunction prohibiting its construction."

In *Lonoke* v. *C. R. I. & P. Ry. Co.,* 92 Ark. 546, 123 S. W. 395, 135 Am. St. Reports, 200, the court said: "The act done or the structure erected may be a nuisance *per se,* or the act or use of the property may become a nuisance by reason of the circumstances or location or surroundings. In the one case the thing becomes a nuisance as a matter of law; in the other it must be proved by evidence to be such under the law." This statement was quoted in *Swaim* v. *Morris,* 93 Ark. 362, 125 S. W. 432, where the court held, to quote a headnote, as follows: "Where an injunction is sought merely on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection, leaving the complainant free to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance." In *Cooper* v. *Whissen,* 95 Ark. 545, 130 S. W. 703, where it was sought to enjoin the construction of a wagon yard at the corner of Rock and Fourth streets, Little Rock, the court held that such a structure was not a nuisance *per se,* and said: "The structure for a wagon yard business is not any more a

nuisance *per se* than is a building for a livery stable, a steam gin, a planing mill, a railway depot and the tracks connected therewith." Citing *Durfey* v. *Thalheimer, supra; Terrell* v. *Wright*, 87 Ark. 213, 112 S. W. 211; *Swaim* v. *Morris, supra; Lonoke* v. *C. R. I. & P. Ry. Co., supra.* It was there further said: "This court has recently held that it will not enjoin the erection of a structure that is not a nuisance *per se. Swaim* v. *Morris, supra.* It has also held that it will not demolish a structure by mandatory injunction nor prevent the prosecution of a business that is not *per se* or necessarily a nuisance." In this case, the court further said: "This court is in line with those cases, and they are numerous, which hold that ordinarily an injunction will not be granted unless the act or thing threatened is a nuisance *per se.* 'When it may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful or contingent,' equity will not interpose in advance to prevent by injunction." *Durfey* v. *Thalheimer, supra.* So in *Murphy* v. *Cupp,* 182 Ark. 334, 39 S. W. (2d) 396, where it was sought to enjoin the Baptist Church in Nashville, Arkansas, from erecting a tabernacle on its property, the court quoted with approval from 21 Cyc. 708, as follows: "Where the claim to relief is based upon the use which is to be made of a lawful erection, the court will ordinarily refuse to enjoin the construction or completion of the erection; but in such a case the defendant, if he proceeds, does so at his peril and is liable to an injunction or an action of damages if such use results in a nuisance." And the court there said: "The rule is well-settled that no injunction will be issued in advance of the construction of the structure unless it will be certain that the same will constitute a nuisance."

The cases of *Murphy* v. *Cupp* and *Jones* v. *Little Rock Boys' Club, supra,* appear to be our last cases on the subject. It appears, however, that the court has never varied from the rule announced in the cases cited, and the rule applies to the case at bar. Appellant sought to erect or have erected a drive-in filling station on her property. Such a structure is lawful and not a nuisance

per se, and, before the court would or should enjoin the erection of such a structure, the proof must show with certainty that the use to which it will be put will constitute a nuisance. The proof in this case fails to show this fact. The preponderance of the evidence is to the contrary. The proof on the part of appellees is not of a definite and certain character, and not based upon actual experience, whereas the proof on the part of appellant is very definite and certain that such a business will not constitute a nuisance.

The erection of the building itself not being a nuisance, and the evidence having failed to show that the use to which it will be put will constitute a nuisance, the court erred in enjoining appellant from the erection of the building. The judgment will therefore be reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

AMERICAN INDEMNITY COMPANY *v.* REED.

4-4013

Opinion delivered October 28, 1935.

House, Moses & Holmes and *W. R. Roddy,* for appellant.

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

BAKER, J. Gordon Walker contracted for the construction of a courthouse at Russellville, Arkansas. He was required to execute contractor's bond, and this bond was made by the Union Indemnity Company, a corporation, as paid surety.

The Union Indemnity Company had, sometime previously, been authorized to do business in the State of Arkansas. The record is silent on the matter of the surety for the Union Indemnity Company, at the time it was authorized to do business in the State, and also at the time it became surety upon the bond for Gordon Walker. However, on July 28, 1931, the American Indemnity Company executed and filed what is called a qualifying or sustaining bond for the Union Indemnity Company.

Thereafter, on the 14th day of March, 1932, the Union Indemnity Company executed a new sustaining bond, and filed it with the Insurance Commissioner. This new bond of the Union Indemnity Company had, as its surety, the Independent Indemnity Company. This last mentioned company is sometimes referred to in part of the record as the "Independence Indemnity Company." We are not sure as to the correct name of this company, but since it is mentioned more frequently in the abstract and brief as the Independent Indemnity Company, we will so refer to it in our discussion.

Burl Reed, Leon L. Reed, Willie P. Reed and Huey Reed were laborers who worked for a time upon the courthouse under employment by Walker, some of them beginning their labor in November, and the others in December of 1931, and all of them continuing until April 15, 1932.

A copy of the bond, upon which the American Indemnity Company became a surety need not be set forth herein, as the pertinent parts or effect thereof will be set forth in the opinion, but it is necessary to say that the bond bore this indorsement:

"Indorsement:

"Superseded by bond of Union Indemnity Co., with Independence Indemnity Co., as surety for $50,000, which is approved and filed March 14, 1932.

"A. D. DuLaney, Ins. Com.,
"By J. W. Hatley, Deputy."

Walker became insolvent. His surety upon his contractor's bond, Union Indemnity Company, became insolvent, and the plaintiffs, who had owing to them per-

haps something above $2,000 in the aggregate, being unable to collect their money upon judgments recovered against Walker and his surety, sued the American Indemnity Company, upon the qualifying or sustaining bond it had executed for the Union Indemnity Company, and all of the parties recovered judgment for the amounts sued for, and this appeal, by the American Indemnity Company, is from that judgment and decree, rendered by the chancery court of Pulaski County.

The appellees insisted that, inasmuch as the American Indemnity Company was a surety at the time they began to work upon the courthouse, the liability attached, or the effect of the guaranty was invoked and continued until they were paid. The appellant insists that when the new bond was executed with the Independent Indemnity Company, as surety, by operation of law, the new bond, upon its acceptance by the Insurance Commissioner, automatically released the appellant, or former surety, and that the new surety became bound for all obligations owing to plaintiffs that had accrued to that date.

The appellant also argues in the alternative that from and after the date of March 14, 1932, when the new bond was executed and substituted for the bond that had been signed by the appellant as surety, the appellant, being no longer a surety upon the bond, could not be bound for the payment of any debts or liabilities arising or accruing after the said date of March 14th.

The undisputed facts show that a larger part of the work was done before the new bond was executed by the Independent Indemnity Company. Without attempting to be mathematically accurate, as to the exact time or amounts covered by the respective bonds, as argued by the appellant, it may be said that about six-sevenths of the work had been done, or the amount sued for had been earned, when the new bond was filed, and that thereafter, as stated in the brief, 331 hours of their labor were performed. We are not attempting to check or verify the accuracy of these allegations. Upon the assumption that they are correct, our opinion may be stated with the same result.

Surety bonds, of the kind sued on here, are authorized to be made under § 6134 of Crawford & Moses' Digest, and the amendment thereto, as made by act No. 493 of the Acts of 1921. That part of said act to which our attention is invited is as follows:

"Any guaranty or surety company desiring to transact business in this State as herein provided shall execute a bond signed by any other guaranty or surety company authorized to transact business in this State, or by citizens of this State, for the benefit of its obligees, in the sum of $50,000, to be approved by the Insurance Commissioner and filed in his office; provided the guaranty or surety company making the deposit of securities herein named with the Insurance Commissioner of this State shall not be required to give the bond herein provided for."

It is further provided that the guaranty or surety company making a deposit of securities with the Insurance Commissioner shall not be required to execute the bond by another surety or guaranty company. The securities mentioned must be of the value of $50,000, and be deposited with the State Treasurer for the benefit of obligees.

We call attention to the fact that the provision for the aforementioned bond does not provide for any time limit or period for which such bonds should run, or during which the surety would be bound, nor is it provided in any way for the release of the sureties upon any account or for any reason whatever, except that if the Insurance Commissioner shall at any time determine that the security is inadequate, he may require, in the exercise of his discretion, the deposit of other securities, or the execution of a new bond.

These suits were predicated upon an alleged breach of the following conditions of the qualifying bond, as executed by the American Indemnity Company:

"Now therefore if said principal shall promptly pay when due all claims and obligations arising or accruing in this State by virtue of any bond or contract made by the principal, and all amounts due the State of Arkansas by virtue of any statute, and in all respects comply with

the laws of this State, then this obligation shall become void, otherwise to remain in full force and effect."

The complaint alleged the insolvency of Walker and Union Indemnity Company, and that it became the duty of the American Indemnity Company to pay maturing claims and obligations arising or accruing by virtue of the Union Indemnity Company's bond or contract.

For the purposes of discussion, we may treat the bond sued on herein as if it expired by force of law on March 14, 1932, the date the new bond was executed and filed. Then, as to the question of liability upon appellant's bond to the date of its expiration, and under the terms of the bond, quoted above, we would be impelled to hold that if these claims, later reduced to judgments, arose or accrued prior to March 14, the surety company would be liable, though the obligation might not be payable until long after the expiration period of the bond. It is argued seriously, by appellant, that the execution of the new bond operates to discharge the liability of the old, and the new bond becomes liable for all of the accumulated liabilities to the date of its execution, and during such time as it may run. It is contended that this liability is contingent upon the accrual of a cause of action and maintenance of suit before a new bond is filed. We confess that this argument carries with it considerable force, and this is particularly true when we consider that, instead of the bond, the surety or guaranty company desiring to qualify could have placed with the Treasurer of the State the $50,000 worth of securities and later, upon the expiration date, if there were one, it might execute then a surety or guaranty bond, or withdraw the original securities and put up new or different securities that would meet with the approval of the Insurance Commissioner. In the event of such arrangements, it may well be argued that there would never be available to the obligees of the surety company, an amount in excess of $50,000, and that amount therefore is the total limit required for suretyship.

The presentation of the foregoing argument or statement is made upon a supposition that we would treat, as in this case, the 14th of March, the date of the new bond,

as an end of the term of the suretyship. We now call attention to the fact that that is a false premise, upon which the argument is founded, and, however plausible the argument may have seemed to appear, it must fail. The effect of the contract was to pay such claims as might arise or accrue under the bond, the payment to be made, however, at maturity of the debt. This may be illustrated by a suggestion that appellees in this case could have been employed at the times and worked for the same number of hours as they did, under an agreement that they would be paid at a certain date, long after March 14th. At the end of each unit for which each laborer had worked, whether hour or day, if each were given a due bill for the amount accruing for that period, but payable after March 14th, no one would have the temerity to suggest that the claim did not arise while the bond was in full force and effect, and that consequently liability would necessarily follow, unless released by the execution of a new bond. Such release is not provided for by the statutes.

Learned counsel suggest that the case of *Mass. Bonding Company* v. *Home Life & Accident Company*, 113 Ark. 576, 168 S. W. 1062, furnishes a rule for our guidance in a determination of this difficult question. The bond, however, in the above-cited case was one that had a definite and certain term, and no liability or claim could arise or accrue after the end of that term. The fixing of the definite and certain term is a matter that furnishes reasons for the rule announced in that case. The $20,000 bond was the amount of security for the protection of obligees for a period of a year. This bond might be much better security and provide greater protection for obligees of the insurance companies required to execute such bonds, than would be furnished obligees of guaranty and surety companies, when the same surety or guaranty company might or could remain on the same qualifying or sustaining bond, for a period of four or five years, or even longer. This fact alone is sufficient to justify the court in saying:

"The only consistent interpretation of that scheme is that successive bonds extinguish the liability of sure-

ties on the preceding bonds. The provision continuing the force of the bond during the lifetime of any policies issued during the period it covered was meant merely to continue that liability until it was extinguished by a renewal. We think this carries out a consistent scheme, and that it was what the Legislature intended." *Mass. Bonding Co.* v. *Home Life & Accident Co., supra.*

That construction is perhaps a declaration most favorable to the obligees that could be placed upon the bond, as it does permit or allow a $20,000 bond that will cover the annual or yearly liabilities.

The provision of the bond sued on here is an obligation to pay at maturity claims that arise or accrue while the bond is in effect, so it must appear that there is no question of the liability of the appellant here for such part of the obligation as may have accrued prior to and including March 14, 1932.

The remaining question to be settled is the one of appellant's liability for labor done and performed after March 14, 1932, by any and all of the appellees. It is argued by the appellees that the appellant here could not exempt itself from liability of the amount of indebtedness accruing after March 14th, by the substitution of another bond for the one it had executed. This is not quite a fair statement of the situation. According to the record, as abstracted for our consideration, there is nothing here to show that the American Indemnity Company substituted another bond. In fact, there is no disclosure as to why the new bond was executed with the Independent Indemnity Company thereon as a surety. If we should follow the express provisions of the statute in order to arrive at a presumption, we might presume that the Insurance Commissioner required the execution of a new bond, because of the fact that he may do so, if he deems the bond in force not sufficient or insecure.

The American Indemnity Company may have demanded its release and the Union Indemnity Company, as a mere matter of accommodation, may have executed a new bond with the Independent Indemnity Company as its surety. On the other hand, the Union Indemnity Company may have preferred, on account of some matter

wholly unknown to the Insurance Commissioner, or others than themselves, to substitute a new bond. Whatever the reason, or even if there were not any, a new bond was substituted. No presumptions or speculations need be indulged. The Insurance Commissioner did not attempt to discharge or release the appellant company. If the appellant was released, his release came by operation of law growing out of the intendment and conduct of the parties interested.

We are unwilling to say that the appellant company was so bound that it could not be released or discharged. We think such release or discharge would be from obligations or claims that might arise or accrue from and after the date of the filing of the substituted bond. It would not be a release or discharge of the liability that had already arisen and accrued prior thereto. The weight of authority seems to be, quoting from *Lawrence* v. *American Surety Co. of N. Y.*, 88 A. L. R. 535, 541: "On the other hand, a surety, bound for an indefinite and contingent liability, where the bond has no definite time to run, may end his future liability by giving reasonable notice of withdrawal."

A number of cases are cited sustaining the text above quoted. To the same effect, applicable here, is 18 C. J., page 589, § 63, and authorities there cited are well in conformity with this conclusion. See also 21 R. C. L., 983, § 32.

It must be said then that the weight of the authority is to the effect that sureties upon these bonds, of contingent liability and for indefinite periods, even though there be no cancellation provision, may be released after proper and reasonable notice. Such release violates no rights of the appellees here, since the law authorizes the release in proper cases. They contracted with Walker, whose contract was secured by bond of the Union Indemnity Company. Walker's surety could not be released without consent until full performance, but a different rule prevails as to the qualifying or sustaining bond made by the American Indemnity Company, and appellees must be said to have contracted with reference to the

law permitting a release or discharge upon notice, and by the substitution of the new bond.

Appellant was bound by its written obligation, but further appellees must be deemed to have dealt with all parties according to law forming a part of such contracts. They were confronted with the legal proposition that sureties, such as appellant, in this kind of case might properly be released. After March 14, 1932, the American Indemnity Company, bound prior thereto, because it was upon the bond, was discharged because it was no longer surety. Work was done from and after that time, and all claims for that work, subsequent to that date, were those that arose and accrued at a time when the appellant here was no longer surety.

Since we do not know that wages paid for the labor performed were uniform or the same after March 14th as were prior thereto, we are unable, except by surmise, to determine the amount of liability accruing to date of March 14th, and on that account cannot render judgment here.

The decree rendered in this cause for the several appellees is therefore reversed, and the cause is remanded, with directions to enter judgment and decree against the appellant for labor done and performed prior to and including March 14, 1932. Appellant is not liable for labor performed after that date.

CHECKER CAB & BAGGAGE CO., INC. *v.* HARRISON.

4-3946

Opinion delivered November 4, 1935.

Barber & Henry, for appellant.

W. R. Donham, for appellee.

JOHNSON, C. J. In the early morning of December 25, 1934, appellant, Checker Cab & Baggage Company, was engaged by appellee, Perry Harrison, to convey himself, his mother and his little nephew to his home situated on the south side of Twelfth Street pike in west Little Rock. Appellant's cab, after being engaged as aforesaid at the Missouri Pacific station in Little Rock, conveyed the party to appellee's home situated in the 6200 block. The taxicab driver, instead of approaching the address or curb so as to permit the passengers to disembark from the right side of the cab upon the curb, approached same and parked the cab so that it was necessary for appellee and his co-passengers to disembark from the cab upon the main traveled portion of the highway. The cab was parked at an angle to the curb. The appellee while engaged in disembarking from the cab and while endeavoring to make the necessary change to compensate appellant for the service rendered was run against or struck by a moving automobile being driven by Johnny Lord which last-mentioned car was being driven in the opposite direction to that last pursued by appellant's cab. Appellee was very severely and permanently injured as a consequence of the collision and instituted this action against the cab company and Johnny Lord in the Pulaski Circuit Court to compensate his injuries.

Appellee's complaint alleged that he was injured by the joint and concurring negligence of appellant and Johnny Lord in this: that the Checker Cab & Baggage Company was negligent in parking its cab on the south side of the street facing west, leaving its lights burning thereby interfering with east-bound traffic upon said street, and was also negligent in discharging appellee and his co-passengers from said cab upon the main traveled portion of the highway or in the path of the east-bound traffic; that Johnny Lord was negligent in driving his car at an excessive rate of speed without due regard for other traffic upon the way. Separate answers were filed by appellant and Johnny Lord, in which all material allegations of the complaint were specifically denied.

The testimony adduced by appellee upon trial to a jury, when viewed in a light most favorable to him, as we are required to do, was to this effect: Appellee resided at 6223 West Twelfth Street in the city of Little Rock; about 2:30 A. M., December 25, 1934, appellee, his mother and his nephew arrived at the Missouri Pacific station in Little Rock and engaged a cab from appellant Checker Cab & Baggage Company to convey the party to appellee's home; that the cab driver, upon reaching appellee's address, parked the cab on the south side of the street or way headed west and left the lights burning; that the cab driver got out of the cab on the right side, and came back and opened the rear cab door on the right side and invited the appellee and the other passengers out upon the main traveled portion of the highway; that the left-hand door of the cab or the door adjacent to the curb was securely fastened and could not be opened by the passengers, although they endeavored to do so; that, when appellee disembarked from the cab, the driver gave him a check for the fare, and while endeavoring to make change and pay the fare he was struck by a fast-moving automobile being driven by Johnny Lord; that the cab was parked at an angle to the curb and the right front door was left open by the driver while the passengers were being discharged. The road or street at the point where the accident occurred is of asphalt and is 17 feet, 9 inches in width. The cab parked as aforesaid occupied

approximately 10 feet of the open highway from the south line or approximately one-half of the open highway. The highway or street at this point from the south line to the north line is approximately 25 or 26 feet in width but approximately four feet of the open highway on the north side is not used by the traveling public.

The testimony on behalf of the appellant in reference to the physical conditions surrounding the accident and the manner in which it occurred was in sharp conflict with that offered by appellee, but it is not deemed necessary to here set it out because the jury's findings are adverse thereto. The testimony further established that the appellee was very seriously and permanently injured, but, since no complaint is urged in reference to the jury's award being excessive, we shall omit a detailed statement thereof. The trial court, at the request of appellee and over the objection of appellant, gave to the jury in charge requested instruction number 2 as follows: "You are instructed that, if you find from a preponderance of the evidence that the plaintiff was a passenger on one of the passenger cabs of the defendant Checker Cab & Baggage Company on the night of the 24th of December, 1934, and if you further find from a preponderance of the evidence that, upon reaching his destination, the driver of said cab discharged him in the street in a place where, under all the circumstances shown in evidence, the driver in the exercise of ordinary care should have reasonably foreseen that injury might result to plaintiff by his being struck by a passing automobile, and if you further find from a preponderance of the evidence that in so discharging plaintiff, the driver of said cab acted as a reasonable prudent man would not have acted under the circumstances, and on that account as a proximate cause thereof plaintiff was injured while in the exercise of ordinary care for his own safety, then your verdict will be for the plaintiff against the Checker Cab & Baggage Company," and refused to instruct the jury at appellant's request as follows:

No. 1.

"You are instructed to return a verdict for the defendant, Checker Cab & Baggage Company, Inc."

No. 11.

"You are instructed that the defendant, Checker Cab & Baggage Company, Inc., was a common carrier of passengers for hire, and if you find from the evidence in this case that the defendant, Checker Cab & Baggage Company, Inc., transported the plaintiff with safety to the gate in front of his home and discharged him upon the highway in safety, its duty to him was performed, and thenceforth the plaintiff, Harrison, was a mere traveler upon the highway subject to all the duties and obligations imposed upon him as such traveler, and if you find from the evidence that after the defendant, Checker Cab & Baggage Company, Inc., had discharged safely the plaintiff, Harrison, he was struck by an automobile driven by the defendant, Johnny Lord, or the negligence of the plaintiff, Harrison, concurring with the negligence of the defendant, Johnny Lord, or solely on account of the negligence of the plaintiff, Harrison, himself, then you will return a verdict for the defendant, Checker Cab & Baggage Company, Inc."

The jury returned a verdict in favor of appellee and against appellant, Checker Cab & Baggage Company and Johnny Lord for the sum of $7,500, and from a judgment entered thereon, this appeal comes.

Appellant Johnny Lord has filed no abstract and brief in this court, therefore under rule 9 the judgment against him must be affirmed. *Ozark Hardware Company* v. *Covington,* 187 Ark. 1054, 63 S. W. (2d) 844.

Appellant Checker Cab & Baggage Company contends that trial court erred in refusing to direct a verdict in its favor as requested by it. This contention is grounded upon the argument that there is no testimony tending to show that its negligence, if any, in parking the cab on the wrong side of the street and in discharging appellee upon the main traveled portion of the public highway were the proximate and efficient causes of the collision of the cab and the automobile and appellee's consequent injury.

Under the facts and circumstances heretofore detailed we think this was a question of fact for the jury's consideration and judgment. In the recent case of *Healey & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. (2d) 242, the question of proximate cause was painstakingly considered and discussed, and, under facts and circumstances in many particulars similar to those presented here, we stated the applicable rule as follows: "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 we have already said, whether this conduct on the part of the driver of the ambulance was negligence was a question for the jury."

It is the rule of general application, and finds support in our own cases, that to render a person liable for a negligent act, it need not be the sole cause thereof. It is sufficient if it concurs with one or more efficient causes. Where several efficient causes combine to produce injuries, a person is not relieved from liability because he was responsible for only one of them. *Coca-Cola Bottling Co.* v. *McAnulty,* 185 Ark. 970, 50 S. W. (2d) 577; 45 C. J. 920.

A number of cases from other jurisdictions are urged upon us as decisive of the issues here argued, notably the case of *Cole* v. *German Savings & Loan Society,* 124 Fed. 113, but we find it unnecessary to review these cases at length. Our own opinions, heretofore cited, decide the issue, in effect, and we feel impelled to adhere to their doctrine.

It is also urged that the parking of the cab on the south side of the street in the manner in which it was parked was not negligence because there was a space of more than 15 feet of the main traveled portion of the highway left unobstructed. See § 24 of act 223 of 1927. The testimony is in sharp conflict on this question of

fact. That on behalf of appellee tended to show that the parked cab obstructed one-half of the open highway which according to the testimony was in no event more than 25 or 26 feet in width. If the cab occupied one-half of this open space, then § 24 of act 223 of 1927 was violated. On the other hand, if the main traveled portion of the highway is restricted to that portion which has asphalt surface, then the uncontradicted testimony shows that appellant's cab was parked in violation of said section. At any rate this was an issue of fact and was properly submitted to the jury for its consideration. The court therefore did not err in refusing to direct a verdict as requested by appellant.

Appellant's next contention is that the trial court erred in giving to the jury in charge appellee's requested instruction number 2 and in refusing to give appellant's request number 11, both of which are heretofore quoted. It will be noted that appellant's request number 11 absolved it from all liability when the passengers were discharged from the cab, irrespective of the place of discharge or the conditions surrounding it. We do not understand this to be the law. In *Arkansas Power & Light Co.* v. *Hughes,* 189 Ark. 1015, 76 S. W. (2d) 53, we stated the applicable rule as follows: "The law imposes the highest degree of skill and care on common carriers, consistent with the practical operation of their cars, to furnish their passengers a safe place to get on and get off." See also *Western Casualty & Surety Co.* v. *Independent Ice Co.,* 190 Ark. 684, 80 S. W. (2d) 626.

Appellant's requested instruction number 11 ignores this principle of law and was erroneous, and appellee's requested instruction number 2, conforming thereto, was a correct declaration and properly given, therefore no error is made to appear from this assignment.

No error appearing, the judgment is affirmed.

BUMPAS *v.* SINCLAIR REFINING COMPANY.

4-4020

Opinion delivered November 4, 1935.

Fred M. Pickens, for appellant.

Malcolm Gannaway and *Jones & Wharton,* for appellees.

JOHNSON, C. J. To compensate an alleged personal injury, this suit was instituted by appellant against appellees, Sinclair Refining Company and L. H. Bacus, in the Jackson Circuit Court. The case was tried to a jury upon the facts adduced by appellant substantially as follows: On June 20, 1934, appellant was in the employ of appellee, L. H. Bacus, and engaged in the business of selling and delivering gasoline, motor oil and other Sinclair products in the trade territory adjacent to Newport, Arkansas. Appellee, Bacus, was the agent of the appellee, Sinclair Refining Company, in that trade territory. Appellee Sinclair Refining Company, owned the warehouse, connected platforms, storage tanks and all merchandise products which were being distributed by appel-

lee, Bacus, in that trade territory. A loading platform was maintained by appellees as a part of the warehouse, and it was floored with 2 x 6 boards. On June 20, 1934, as aforesaid, appellant while in the performance of his duties as employee of appellee, Bacus, parked his truck adjacent to the loading platform for the purpose of loading a number of crates of motor oil to be subsequently delivered to certain purchasers. In effecting this loading of oil, it was necessary for appellant to remove a can of oil from the rack located upon the framework of the truck so as to make room for the crates to be loaded. To accomplish this purpose, appellant stepped upon the frame of the truck, in the usual and ordinary manner of doing this work and lifted the can of oil from the rack. Appellant then stepped backwards upon the platform and his foot broke through the flooring thereof, and he was thereby very seriously and permanently injured. Appellant had been in the employ of Bacus for a number of years and was familiar with the warehouse and its surroundings. Some three, four or six weeks prior to appellant's injury, while engaged in loading a barrel of motor oil over this loading platform, he noticed that the board which subsequently broke through with him was in a weakened or broken condition and so reported to appellee, Bacus. Under the agency contract existing between Bacus and the Sinclair Refining Company, the agent, Bacus had the duty of reporting needed and necessary repairs to the Refining Company, but the Refining Company had the duty of effecting such repairs.

In respect to appellant's knowledge of the weakened or broken condition of the board in the platform prior to his injuries, the following questions and answers appear in the transcript:

"Q. Now, back to the time of the injury, now did you know anything about that broken plank or the plank that was cracked in the platform, the one that you fell through there, did you know anything about it before that time? A. Well, about three or four weeks, maybe longer than that, why, me and Mr. Bacus was loading a barrel of oil out, and I had it up and was rolling it along

to get it to the truck, and that plank kind of sagged down with the loaded barrel on it, and I told Mr. Bacus that he had better inspect to see if the plank was broken, and if it was to repair it, that if it was broken some one is liable to step through and hurt themselves. Q. What did he say to that? A. He said: 'All right.' Q. Then, how long was it afterwards—did you pay any more attention to it, or did you rely upon Mr. Bacus to get it fixed? A. I relied upon Mr. Bacus to see that it was fixed if it was broken. Q. How long was it after that until you fell through? A. It was three or four weeks afterwards or longer, maybe. Q. When that plank sagged when you rolled the barrel of oil across it there, was it such a thing as a person could see just casually walking across the platform? A. No, sir. Q. Would it require close inspection to observe it? A. Yes, sir. Q. Did you have—was it any part of your duties to inspect the building or any of the platforms around there? A. No, sir. Q. Were you there a great deal during the daytime? A. No, only just long enough to load and leave."

Appellant also admitted signing a written statement immediately after the accident, to this effect: "Something like three weeks before the time I was injured, June 20, 1934, I rolled a barrel of motor oil out on the platform to load on the truck, and when I rolled the barrel over the platform, it broke or cracked one of the planks in the flooring of the platform. At the time I rolled this barrel over plank and broke or cracked it, it sagged a little, and in a while it was sagging probably a quarter of an inch. At any rate the plank sagged enough that any one could tell that it was broken, that is any one working on the platform looking closely at it. The plank that was broken was a plank near the outside of the platform. I do not know which plank exactly it was that was broken, but it was one near the outside of the platform. At the time I broke this plank, I told Mr. Bacus that he had better report this; that that plank might be broken and some one might step through the hole."

The testimony also reflected that appellant was seriously and permanently injured as a consequence of the incidents heretofore stated. At the conclusion of the production of testimony, the trial court, at appellee's request, directed the jury to return a verdict in favor of appellees, and this appeal comes from the consequent judgment.

Appellee, L. H. Bacus, was the agent and employee of the appellee Sinclair Refining Company, and as such had the duty of exercising ordinary care in furnishing his employee, appellant Bumpas, a reasonably safe place to perform his services. *Mills* v. *Roberts,* 136 Ark. 433, 206 S. W. 751; *Williams Bros. Inc.* v. *Witt,* 184 Ark. 554, 43 S. W. (2d) 255.

We pretermit any discussion of whether appellant was also an employee of appellee Sinclair Refining Company, for the reason that this question has not been argued in briefs, and we rest our opinion upon the theory hereinafter discussed.

Appellee Sinclair Refining Company owned the warehouse, platform, storage tanks and all the merchandise products which were being distributed in that trade territory by its agent and employee, L. H. Bacus, and thereby expressly invited not only the public but the employees of its agent, Bacus, to come upon and use its premises for the transaction of business with it. Under such circumstances the Sinclair Refining Company owed to appellant the duty of exercising ordinary care to keep its premises in an ordinarily safe condition for ingress or egress in loading and unloading its products. *St. L. I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, 92 S. W. 789; *Faulkinbury* v. *Shaw,* 183 Ark. 1019, 39 S. W. (2d) 708; 20 R. C. L., § 51, page 55, and cases therein cited.

We understand that appellee tacitly concedes this to be the applicable rule, but insists that appellant knew the condition of the platform and that his continued use thereof was such contributory negligence as to bar his right of recovery. Usually the existence of contributory negligence which will bar a recovery is a question of fact for the jury's consideration and judgment. *Beal Doyle*

Dry Goods Co. v. *Carr*, 85 Ark. 479, 108 S. W. 1053. But if the testimony in this regard be such that all reasonable minds much reach the same conclusion, then it resolves itself into a question of law. *Gibson Oil Company* v. *Bush*, 175 Ark. 944, 1 S. W. (2d) 88.

The testimony heretofore quoted shows that appellant knew from four to six weeks prior to his injury that the loading platform contained a weak or probably a broken plank, but the jury might have found from appellant's testimony that he had the right to assume that the owner had exercised the care required of him as such, and that the place had been made reasonably safe. We think this was peculiarly a question for the jury's consideration and judgment.

For the error indicated, the cause is reversed, and remanded for a new trial.

DUTY *v.* KEITH.

4-4024

Opinion delivered November 4, 1935.

Duty & Duty, for appellant.

Earl Blansett and *J. W. Nance*, for appellees.

MEHAFFY, J. In the year 1932, C. H. Clouston owned and operated a farm in Benton County, Arkansas. Mr. Clouston was a widower and lived alone. Some time in the early spring of 1932 he entered into correspondence with the appellees, and about May 7, 1932, employed them by express contract, which provided that appellees were to cook for him and perform other household duties, and nurse and care for him when he was ill. Appellees expressly agreed to perform the services mentioned and were to receive, as pay for their services, their board, rooms, a car, including upkeep on the car, gasoline and oil, and $6 a week in cash. Later the cash item was voluntarily doubled, and they received $12 a week instead of $6, in addition to the other items mentioned.

Mr. Clouston died on January 31, 1933. Appellees had been paid under the original agreement, had been furnished with a residence, their board, a car with gasoline and oil, and had been paid $6 a week for a while, when the weekly payment was raised to $12. The appellees do not deny this.

In January, 1934, the appellees filed their claims in the probate court, Ed Keith making a claim for $508 for nursing, giving medicine, and caring for Clouston at $4 a day from May 7, 1932, to January 31, 1933, the day Clouston died, except the time Clouston was in the hospital. Mrs. Keith filed a claim for $381 which was $3 a day for nursing, giving medicine and caring for Mr.

Clouston from May 7, 1932, to January 31, 1933, except the days Clouston was in the hospital.

There was a judgment of the probate court for Emma Keith in the sum of $122, and judgment for Ed Keith for $244. Appeals were prosecuted to the circuit court and a judgment entered there for Ed Keith and Mrs. Keith in the sum of $450, and the case is here on appeal.

Appellees do not deny that there was a contract by which they cared for Mr. Clouston and were paid from May 7, 1932, to January 31, 1933, the amount agreed upon, occupied the residence, were furnished a car with the upkeep, including gas and oil. They however seek to recover an additional sum for nursing and caring for Mr. Clouston during the entire time from May 7, 1932, up to the time he died, except the days he was in the hospital. There was no evidence of any additional contract and no competent evidence that they had not been paid.

Section 2 of the schedule to the Constitution and § 4144 of Crawford & Moses' Digest prohibit parties from testifying where the action is by or against executors, administrators or guardians, as to any transactions with or statements of the testator or intestate. They could no more testify that they had not been paid than they could that they had been.

There is no dispute about appellees caring for Mr. Clouston from May 7, 1932, to January 31, 1933, but they were required to do this under their original contract.

There is some testimony of other witnesses that the appellees performed the services, and as to the value of the services. This, however, is not disputed. No one testifies that appellees were employed other than by the original contract. The physician who testified was asked if he employed them, and he testified positively that he did not. It is not denied that they were paid the full amount under the original contract. No claim was ever made by the parties for an additional sum until long after Mr. Clouston's death.

In the case of *Cashion* v. *Parr,* 177 Ark. 458, 6 S. W. (2d) 544, where parties had been paid monthly during the lifetime of deceased, the court said: "As to the allowance of the additional amount for room rent the proof

shows conclusively that he paid $30 per month each and every month up until the 18th of November, 1926, and that at his death he owed for 12 days' board, which the court properly allowed at the rate of $1 a day. There was no contract to pay any additional sum. He had never paid a specified amount for room rent and another specified amount for board. Both were included in a flat monthly sum and paid by him monthly. When therefore they continued to accept a specified sum monthly after his return from Louisiana, without a special contract agreeing to pay more, they would have no just claim against his estate after his death for an additional sum, the presumption of law being that the stipulated payments monthly were in full satisfaction of all claims on this account, unless the claimant is able to show that the decedent agreed to pay an additional sum."

In 24 C. J. 280, it is said: "Where services have been fully paid for in the lifetime of decedent, there cannot, of course, be any further recovery on that account against the estate, and where the claimant has received a stated sum periodically for wages or salary in payment of board or otherwise, the presumption is against a larger allowance unless decedent is shown to have agreed accordingly."

The construction placed upon a contract by the parties is entitled to great weight and will generally be adopted by the court in giving effect to its provisions. *Coca-Cola Bottling Co. of Arkansas* v. *Coca-Cola Bottling Co.,* 183 Ark. 288, 35 S. W. (2d) 579; *Craig* v. *Golden Rule Ins. Co.,* 184 Ark. 48, 41 S. W. (2d) 769.

In the instant case both Mr. Clouston and appellees acted on the original contract. The appellees occupied the residence belonging to Mr. Clouston, received their board, had the use of the car, and Mr. Clouston, the evidence shows, performed his part of the contract. There is no evidence that another contract was made, either express or implied, and there is no contention that the original contract was not made.

To abrogate or modify a prior contract, it is necessary that the minds of the parties meet by an offer and acceptance of the new term. Conduct which is not nec-

essarily inconsistent with the continuation of a contract, will not be regarded as showing an implied agreement to discharge it, although such conduct might have been consistent with an agreement to discharge such prior contract. Page on Contracts, vol. 4, § 2458.

The conduct of the parties in the instant case is inconsistent with the making of a new or implied contract. They performed the original contract, received pay without objection, and there is no evidence that any additional contract was ever made.

The judgment in favor of the appellees is reversed, and the cause dismissed.

BENEUX *v.* BROWN SHOE COMPANY.

4-4014

Opinion delivered November 4, 1935.

Starbird & Starbird, for appellants.

C. R. Barry, for appellees.

MEHAFFY, J. H. A. Beneux, a merchant of Mulberry, Arkansas, died on September 30, 1927, leaving his widow, Mrs. Lillian Beneux, and R. J. Beneux, Kobel Beneux and F. L. Beneux, his only heirs at law. He owned a stock of merchandise and some other property in and

around Mulberry. After his death there was what the parties call a family agreement; that is, the three sons and widow, with several of the larger creditors, agreed that the business should be continued, and an effort made to pay the indebtedness. This was acquiesced in by the smaller creditors.

No administrator was appointed at the time, and the business was carried on in the name of H. A. Beneux Estate. On January 12, 1931, the appellant, R. J. Beneux, was appointed administrator of the estate of H. A. Beneux, deceased, and this suit was begun in July, 1931.

Section 1 of Crawford & Moses' Digest reads as follows: "When all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and collect all demands and property left by the intestate, and to manage, control and dispose of such estate without any administration being had thereon in all cases where the creditors of such estate consent or agree for them to do so, or where they have paid or satisfied all valid debts and demands against such intestate, or where such intestate was, at the time of his death, under no legal liability, either matured or incipient, to any person; and in every such case after they have taken such control and management of the estate no letters of administration shall be granted thereon, or, if granted, the same shall, on their application, be revoked."

It appears from the evidence in this case that all the persons interested as distributees in the estate of H. A. Beneux were of full age at the time they entered into the agreement to continue the business. It also appears that the creditors of the estate consented and agreed to this arrangement.

The business was conducted in this manner from September 30, 1927, to January 12, 1931. During this time all of the debts that existed at the time of the death of H. A. Beneux had been paid. While it was lawful under § 1 above quoted to manage and wind up the business as the parties undertook to do, they could not conduct the business or wind it up in the name of the estate,

and the estate would, in no event, be liable for any debts created after the death of H. A. Beneux.

The section of the Digest above quoted does not provide for the estate continuing in business, and does not provide that the estate may sue or be sued, but it provides for the heirs and all persons interested as distributees in the estate to manage, control and dispose of the estate without administration.

"Estate," as used by the parties in this case, means property. "But under our system of administration, which regards the whole mass of property, real and personal, as assets for some purposes, in the hands of the administrator the word 'estate' has acquired a wider application, in a popular sense, and in this sense, doubtless, the Legislature meant to use it. It means the mass of property left by decedent, and if that, in the aggregate, should be less than $300 in value, the intention of the acts taken together is to give it to the widow, if living, or, if there be no widow, to the minor children." *Harrison* v. *Lamar,* 33 Ark. 824; *Wilson* v. *Massie,* 70 Ark. 25, 65 S. W. 942; *Connertin* v. *Concannon,* 122 Ore. 387, 259 Pac. 290; 21 C. J. 914.

The estate of H. A. Beneux meant simply the property left by him at his death, and, of course, property could not make a contract or bind itself, and all of this property for which suits were brought was sold to the estate, it is said, before any administration. The property was managed and the debts contracted by R. J. Beneux. It is true that the other heirs agreed to it, and also the creditors agreed to it, but the other heirs had nothing to do with the management of the property. The estate, being merely the property of the deceased, of course, is not liable.

Mrs. Lillian Beneux worked in the store for R. J. Beneux, but had nothing to do with the management of the business. The chancery court found in her favor, and there is no appeal from that decree.

R. J. Beneux personally conducted the business, contracted the debts, and is therefore liable to the creditors who sold the goods to him.

It follows that the decree against R. J. Beneux as administrator should be reversed, and the case dismissed, and the decree against R. J. Beneux, personally, affirmed.

It is so ordered.

ENGLAND *v.* CLEVELAND.

4-4027

Opinion delivered November 4, 1935.

E. L. Carter, for appellant.

House, Moses & Holmes, for appellee.

McHANEY, J. This is a suit for specific performance by appellant against appellee to compel him to convey an undivided one-half interest in and to certain tracts of land in Saline County, Arkansas. Appellee owned in fee a twenty-acre tract of land and the mineral rights in four other tracts of land, two forty-acre tracts and two two and one-half-acre tracts, all of which had been permitted to forfeit for taxes. All of it had possibility for mining for bauxite. Appellant conceived the idea of clearing the title to this land, and undertook to make a contract with appellee for one-half interest therein, if he succeeded in doing so. He submitted a proposed form of contract to appellee for this purpose, but this instrument was never signed by appellee, but he wrote to appellant that, if he cleared the title and brought the deeds to the property to him, he would sign the contract. The title to all of this property with the exception of the two

forty-acre tracts was cleared by appellant. These latter had forfeited to the State, and the State had sold them to two gentlemen by the name of Halbert. Appellant tried to get a quitclaim deed from the Halberts to these tracts, but refused to pay them the sum demanded, $250 each. In July, 1934, Mr. Evans, who appears to have been associated with appellant in the proposed deal, wrote appellee that the Halberts held the State's deeds to these forty-acre tracts, and offered to quitclaim them for $250 each; that he feared that the State's title would pass to some one else, unless appellee purchased same from the Halberts. Shortly thereafter, appellee, through his attorney, procured quitclaim deeds from the Halberts at an expense of $500, and he thereupon notified appellant that he would convey to him a one-half interest in all the property to which appellant had cleared the title, but that he refused to convey a one-half interest in the two forty-acre tracts for which he had paid $500 to clear the title. Appellant thereupon sent appellee his check for $500 to pay the cost of the two deeds from the Halberts which appellee refused to accept, but returned same to his attorney in Little Rock, with directions to handle the matter as to him seemed best. The check was never cashed. This action was shortly thereafter instituted, and on a trial the court decreed that appellant was not entitled to any interest in the two forty-acre tracts, but that appellee should convey to him an undivided one-half interest in the other tracts, and should return his unpaid check. From this judgment comes this appeal.

We think the court correctly decided the matter, and that furthermore appellant was not entitled to a one-half interest in the two forty-acre tracts. It is contended by him that the forfeiture to the State was void, and that he could have cancelled the deeds to the Halberts by suits for this purpose. Appellee, however, was not required to take this risk, and did not do so. Instead he settled with the Halberts and received quitclaim deeds to the land, which he had a right to do. We are of the opinion that the contract relative to the clearing of the title to these tracts of land was severable, and that appellee had the right to clear the title himself to the forty-acre tracts

without being obligated to convey a one-half interest therein to appellant under the circumstances of this case.

The decree is accordingly affirmed.

GEORGE *v.* DONOHUE.

4-4016

Opinion delivered November 4, 1935.

Will Steel, for appellant.

J. D. Head, for appellees.

McHANEY, J. This is an appeal from a decree of the chancery court sustaining a demurrer to appellant's amended and substituted complaint against appellees, wherein he refused to plead further and his complaint was dismissed for want of equity. The question is: Did the complaint state a cause of action? The substance of the complaint is that appellant and appellee, R. J. Donohue, had entered into an oral agreement that they would obtain a lease, under an oral option from the Texarkana Oil Corporation by getting some one who would pay $10,000 therefor, for the purpose of drilling a

well, and reserve unto appellant and said appellee a ten thirty-seconds interest therein, or five thirty-seconds to each of them, and that said appellee breached this agreement by procuring his brother, the appellee, Ed or E. J. Donohue, to acquire said lease by assignment from the Texarkana Oil Corporation, without reserving to appellant and appellee, R. J. Donohue, said ten thirty-seconds interest. The complaint further alleged that said appellee fraudulently caused this lease to be assigned to his brother, E. J. Donohue, for the purpose of depriving the appellant of his interest therein or the profits arising therefrom. The prayer was that appellant's interest and right in and to a ten thirty-seconds interest in said oil and gas lease be declared and established, and that appellee, E. J. Donohue, be declared to hold said interest in trust for him and said R. J. Donohue. It was further prayed that, if said R. J. Donohue secured a lesser interest in said lease than a ten thirty-seconds, or any consideration other than an interest in said lease, he be required to account therefor to appellant.

We agree with the trial court that no cause of action was stated in this complaint for equitable relief. The complaint shows on its face that appellant and R. J. Donohue were not to furnish any part of the purchase price of said lease, but only that they should procure a purchaser. No fraud is alleged in the acquisition of the lease by E. J. Donohue, but it is charged that both appellees, knowing of the oral agreement between appellant and R. J. Donohue, fraudulently caused said lease to be assigned to E. J. Donohue for the purpose of depriving him of any interest therein or any profits arising therefrom. Neither appellant nor R. J. Donohue ever owned the lease or any interest therein, the allegation being that they had an oral option to buy, and that they entered into an oral agreement whereby they would sell to some third party, said lease for $10,000, to drill a well, reserving a ten thirty-seconds interest to themselves. It appears, therefore that appellant is seeking to impress upon the lease from the Texarkana Oil Corporation to E. J. Donohue and implied trust based on his alleged oral agreement with R. J. Donohue. We think such trust may not

be established by parol testimony, but falls within the statute of frauds. We have had many decisions to that effect. In *Bland* v. *Talley*, 50 Ark. 71, 6 S. W. 234, it was held, to quote the headnotes: "A parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a purchaser that he buys for another, without an advance of money by that other, falls within the statute of frauds, and cannot create a resulting trust. On a bill to establish a resulting trust in a tract of land, the plaintiff in effect, proved that he and W. and J. entered into a parol agreement to purchase the land on a credit, pay for it out of their joint labor, and that the three should own it, when paid for, in equal shares; that W. purchased the land in his own name, furnished all the money and took the title to himself. *Held*: that the agreement was void by the statute of frauds, and there was no trust in favor of the plaintiff and J." According to the rule laid down in this case and subsequently consistently followed, if R. J. Donohue had taken the title to said lease in his own name, instead of the name of his brother, E. J. Donohue, he would have been protected in his title against the claim of appellant by reason of the statute of frauds. See also *Robbins* v. *Kimball*, 55 Ark. 414, 18 S. W. 457; *Roberts* v. *Pratt*, 147 Ark. 575, 228 S. W. 379; *Eason* v. *Wheeler*, 167 Ark. 320, 268 S. W. 29.

Nor can we agree that the facts in the complaint establish a trust *ex maleficio*, for the reason that the complaint fails to allege that there was any fraud in the conveyance from the Texarkana Oil Corporation to E. J. Donohue. In *LaCotts* v. *LaCotts*, 109 Ark. 335, 159 S. W. 1111, this court said: "We are of the opinion that, according to the proof adduced, this case does not contain any elements of a trust *ex maleficio*, for the reason that the proof does not show that appellant procured the title by the commission of any fraud. Putting it in the strongest light, the testimony adduced by appellee only tends to establish a promise on the part of appellant to purchase the land and hold it for appellee, and a breach of that promise. This alone is not sufficient to establish a trust *ex maleficio*." Citing *Spradling* v. *Spradling*, 101 Ark. 451, 142 S. W. 848. The court in said case quoted

Judge RIDDICK's language in *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910, concerning a trust *ex maleficio,* as follows: "There must, of course, in such cases be an element of positive fraud by means of which the legal title is wrongfully acquired, for, if there was only a mere parol promise, the statute of frauds would apply." Citing 2 Pom. Eq., § 1056. See also *Worthen Company* v. *Vogler,* 145 Ark. 161, 224 S. W. 626, where it was held, to quote a syllabus: "A trust *ex maleficio* cannot be established merely on a broken promise to purchase lands for another; there being no positive fraud perpetrated other than the breach of the promise." To the same effect see *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94; *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822.

We think the cases relied on by counsel for appellant, *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338, and *Edlin* v. *Moser,* 176 Ark. 1107, 5 S. W. (2d) 923, have no application to the facts alleged in the complaint in this case.

It is finally insisted by appellant that, even though it be held that he is not entitled to have a trust fixed upon said lease or the interest of R. J. Donohue retained therein, if any, he is still entitled to an accounting of the profits received by Donohue from the sale of the lease. We cannot agree with appellant in this contention. We do not believe the allegations of the complaint show that any partnership existed between appellant and R. J. Donohue. So far as the complaint shows, this is the first venture between them. Neither of them acquired this lease and neither of them advanced any money looking to the acquisition thereof. It was not contemplated that they should ever acquire the lease, but only that they might secure a purchaser therefor, and that they would reserve an interest therein. So far as the complaint shows, it was not the purpose to sell said interest nor is it alleged that any sale has been effected. The allegation of the complaint is that the Texarkana Oil Corporation conveyed the lease to E. J. Donohue and that an interest was reserved by R. J. Donohue. Just how R. J. Donohue could reserve an interest in the assignment of a lease absolute in form from the Texarkana Oil Cor-

poration to E. J. Donohue is not alleged further than that it may be inferred that he had some secret agreement with his brother to give him an interest therein. There was no reservation in the deed of assignment. In *O'Bryan* v. *Zuber,* 168 Ark. 613, 271 S. W. 347, the facts were that Zuber claimed a partnership between him and O'Bryan to buy and operate an orchard in Pike County, each to pay one-half of the purchase price and to share equally in the expense and profits from the operation thereof. O'Bryan furnished all of the money to purchase the orchard and took the title in his own name, and Zuber claimed that O'Bryan agreed to lend him his one-half of the purchase price at 8 per cent. Passing upon this question, the court said: "The contract, so far as appellee's alleged half interest in the lands is concerned, was clearly within the statute of frauds, and the appellant, under the issue raised by the pleadings, as well as the proof, had a right to avail himself of the statute. There is no testimony in this record to warrant a finding that the parties had entered into a contract of partnership for the purchase of the land, in order to share in the profits and resale of the land itself. There is nothing to show that the parties contemplated a resale of the land. According to the testimony of the appellee himself, they were to own the land jointly and to share as partners in the operation and cultivation of the land. * * * Now there was no previous partnership between the appellant and the appellee for the purchase and sale of lands and to share equally in the profits from such transaction. There were no partnership funds created for that purpose. On the contrary, the purchase of the land was the first and only transaction for which it is alleged the partnership was formed."

The allegations of the complaint being insufficient to show a partnership arrangement between appellant and R. J. Donohue, it follows that he is not entitled to an accounting.

No error appearing, the decree is affirmed.

STANDARD OIL COMPANY OF LOUISIANA *v.* BURNS.

4-4029

Opinion delivered November 4, 1935.

O. M. Young, for appellant.

Meehan & Moncrief, for appellee.

BUTLER, J. On April 4, 1932, the appellant obtained a judgment against the appellee in the Arkansas Circuit Court in the sum of $335.05. On November 2, 1932, an execution was issued on said judgment and returned *nulla bona* on January 2, 1933. On that day a second execution was issued which was likewise returned *nulla bona* on March 2, 1933.

The appellee, who is a farmer and rice grower, had obtained advances from the Riceland Credit Corporation to finance his farming operations, and had, in the hands of said credit corporation, a quantity of rice mortgaged to secure said advances. This rice was sold by the credit corporation, which from the proceeds paid itself the sums due it by the appellee and delivered to the latter

its check for the balance in the sum of $428.90. This transaction occurred on February 20, 1933. Appellee owed the thrasher men for the thrashing of his rice, the sum of $100. In the afternoon of February 21, 1933, appellee delivered this check to the attorney of the appellant company, but which was not presented for payment on that day. It was drawn on the First State Bank of Stuttgart which closed its doors at the close of banking hours on February 21, 1933, and did not thereafter open. On February 23, 1933, it was taken over by the State Banking Department as an insolvent bank. The attorney retained the check in his possession until June 13, 1933, and on that day returned the same to the appellee with the advice that he had been unable to collect it.

Appellee brought this suit alleging that about one o'clock on the afternoon of February 21, 1933, he indorsed and delivered the check in question to the attorney and agent of appellant company with the express understanding that the agent would present it to the drawee bank within the banking hours of that day and from the proceeds would satisfy appellant's judgment and pay to appellee $100; that appellant's agent negligently failed to present the check on that afternoon; that the following day was a legal holiday and the bank did not open for business; that on February 23, 1933, the bank failed to open, and the check remains unpaid; that appellant's agent failed to satisfy said judgment and to pay the sum of $100 to appellee as agreed; that appellant is liable in the sum of $150, statutory penalty for failing to satisfy the judgment. The prayer was that the judgment be canceled and satisfied in full, and that appellee recover the sum of $250.

The answer denied the authority of the agent of appellant company to settle with appellee and satisfy the judgment, denied the other allegations of the complaint, and alleged that the agent and attorney, as a personal favor to the appellee, handled the said check for the purpose of collecting same, paying from the proceeds the sum of $100 to W. M. Schafer and the balance to the sheriff to be applied toward the satisfaction of the execution then in his hands.

Appellee testified in effect that the debt due the appellant company, which had been reduced to judgment, was for tractor fuel; that there was an overcharge of $26 and that the attorney agreed to credit the judgment with this amount; that the attorney had been trying to collect the judgment, and an execution was then outstanding against the witness; that he went to the attorney and explained that he could not pay then, but would pay out of his rice crop; that the attorney advised witness that when he sold his rice to bring the check to him; that he received the check about ten o'clock on the morning of February 20, 1933, and immediately carried it to the attorney's office, but the latter was not in; that the next morning he went back again and was informed by one in the office that he might see the attorney at one o'clock at which hour he again returned to the office, found the attorney in, indorsed the check and delivered it with the understanding and agreement that it should be presented to the bank within the banking hours of that afternoon and $100 of the proceeds be delivered to witness when he returned from his farm in the evening; that when he came back from the farm the attorney was not in his office and witness did not see him until the next morning which was a legal holiday and the bank was closed; that on the following morning witness again saw the attorney, who told him that he did not think the bank would open; that the bank did not open again, and witness told the attorney that he wanted the $100 and a receipt for the judgment. The attorney advised him that he could not do that just then; that it looked as if they would have a lawsuit over it, and a few days later the attorney informed him that he was going to sue the credit corporation for the appellant on the check; that the attorney kept the check in his possession until June 13, 1933, when it was returned with the advice that he had been unable to collect the same.

Mr. Fuess, manager of the Riceland Credit Corporation, testified that, at the time the check was drawn, the corporation had on deposit in the State Bank of Stuttgart ample funds to pay the check if it had been presented at any time between its date and the day the bank

was closed. He further testified that the attorney for the appellant company stated to him, after the bank had closed, that if the credit corporation did not pay the check he would bring suit against the corporation for the appellant to recover the amount for which it had been given.

Mr. Young, the attorney for the appellant company, testified in effect that he had authority to collect the judgment, but no authority to make any compromise, and that appellee had never asked for any; that appellee came to him and asked as a favor that he handle the check which appellee expected to obtain for his rice within a few days; that, if appellee took the check to the bank, it would be applied on the payment of a debt due by appellee to said bank, and he wanted to deliver the check to witness to cash and give the thrasher men $100, the balance to be applied on the judgment; that the following week appellee advised witness that the rice had been sold, but he had not yet gotten his settlement; that later, about 2:30 on the afternoon of February 21, 1933, appellee delivered the check to him, and he then told appellee he was busy in court but would attend to the matter the next morning; that the bank closed, and he returned the check to appellee, who said that he would see Mr. Fuess and get the money on the check; that later appellee came back to witness' office, informed him that he could not get any money, and asked witness to collect it for him. Witness took the matter up with Mr. Fuess and after a time was informed that the credit corporation would not pay the check; that he then returned it by mail to the appellee, informing him that witness was returning the check delivered to him for collection; that he had made several attempts to collect the item and advised appellee to get some one else to represent him in the matter of collection from the credit corporation.

The evidence is to the effect that all parties resided in Stuttgart, the city in which the First State Bank of Stuttgart was located; that this bank was just a few doors from the office of the credit corporation and that of Mr. Young.

A number of instructions were given at the request of the defendant (appellant) to the effect that appellant was not required to present the check to the bank on a legal holiday but that this might be done on the next succeeding business day; that if the check was delivered to the attorney of appellant company at the instance of appellee with the request that it be cashed and directions given as to the application of its proceeds, the attorney would be acting as the agent of the appellee, and not as the representative of the appellant company in that particular. Instructions were also given on the question of a reasonable time within which the check might have been presented for payment and on reasonable diligence required for such presentation. The jury was told that the presumption was that the check was given by way of security, and the burden was upon the appellee to show otherwise.

Other instructions were requested by the appellant and refused by the court, but as to these no complaint is made.

Upon its own motion, the court gave the following instruction: "If you find that J. R. Burns is entitled to recover the amount of the check, less the amount due the Standard Oil Company, figured out by its attorney, which, according to the proof, leaves a balance of $31.43, the difference between the amount of the check and the amount Mr. Burns owes the Standard Oil Company. If you find that he is entitled to recover that amount, he would be entitled to recover 6 per cent. interest per annum on $31.43 from February 21, 1933." When this instruction was given, the court announced that the plaintiff (appellee) would be given permission to amend his complaint in accordance with the instruction, whereupon the attorney for appellee amended the prayer of the complaint so as to ask for a recovery of the difference in the amount of the check and the judgment, and for a money judgment in the sum of $250 with costs.

The jury returned a verdict in favor of the appellee in the sum of $31.43 with interest from February 21, 1933. Judgment was accordingly rendered, and this appeal followed.

On behalf of the appellant it is argued that there was no proof of any damage because of the negligence of the appellee to present the check on the afternoon of February 21, 1933, and that there was no allegation nor proof that the check was to be accepted in payment of the judgment.

Appellee cites us to a number of authorities holding in effect that an agent authorized to collect money may receive a check payable to himself and indorse and collect the same. We deem this question of no importance for it was not an issue in the case. Appellant cites us to authorities holding that an agent authorized to collect a judgment has no implied authority to accept less than the amount of such judgment or anything except in lawful money in payment thereof; also, that the presumption is that the acceptance by a creditor of a check is presumed to be security for the payment of a debt.

Under the allegations of the complaint, which was only amended with respect to the prayer, we are of the opinion that the only issue for submission to the jury was the negligence of the appellant, if any, in failing to present the check for payment on the afternoon of February 21, 1933. The instruction given by the court on its own motion, however, gave the jury no guide to determine the question of whether or not appellee was entitled to recover, merely telling the jury in effect that the agent of appellant had no authority to compromise and accept a less sum than the face of the judgment, and that appellee was not entitled to recover the statutory penalty or anything more than the difference between the amount of the check and the judgment.

If it may be said that the question of the negligence of appellant, if any, was properly presented to the jury, then we agree with the appellant that no damage has been proved. The most that can be said is that the check has not yet been paid, and that the Credit Corporation had on deposit a sum sufficient to pay the check if it had been presented on the afternoon of February 21, 1933. There is no evidence, however, to the effect that the First State Bank of Stuttgart will not pay its creditors in full or that it had in fact any money in its vaults after one

o'clock P. M., on February 21, 1933, to pay the check had it been presented.

We think, as previously indicated, that the instruction given by the court on its own motion is defective in that it failed to submit to the jury any theory of law or fact as a basis for its deliberation.

The judgment of the trial court is therefore reversed, and the cause remanded for further proceedings.

HAMMETT *v.* MOTOR EXPRESS, INC.

4-4018

Opinion delivered November 4, 1935.

John E. Coates, Jr., for appellants.

House, Moses & Holmes, for appellee.

BUTLER, J. The appellants brought suit against the appellee to recover on a judgment theretofore obtained against J. E. Thompson Motor Express Company, on the allegations, (1) that appellee company was merely a reorganization or continuation of the J. E. Thompson Motor Express Company, and (2) that appellee had assumed the liabilities of the former company. Issue was

joined and evidence adduced. At the conclusion of the testimony the trial court instructed the jury to return a verdict in favor of the defendant. Judgment was entered in accordance with the verdict, from which judgment this appeal has been duly prosecuted.

Counsel for appellant bases his argument on the theory that, under a merger or consolidation or a continuation or reorganization, the successor corporation is liable for the debts of the old company, and cite authorities which amply sustain that contention. He also contends that the assets of a corporation are a trust fund for the payment of its debts, and may be followed into the hands of any person other than a *bona fide* purchaser in due course of business. The authorities cited sustain that contention.

When we examine the evidence, however, we find a total lack of any testimony to which the principles of law cited by the appellants would be applicable. There is no evidence that we can discover tending to show a reorganization or continuation of the J. E. Thompson Motor Express Company in Motor Express, Inc. While Motor Express, Inc., was organized to transact business similar in nature to that pursued formerly by the J. E. Thompson Motor Express Company, only one of the owners of the capital stock of the former company was a shareholder in the succeeding company, and he owned only ten shares of its capital stock. Further than this there appears to be no connection between the two companies. The only assets of the former company shown to have been purchased by the latter was the license of the Thompson Motor Express Company and certain permits for the operation of motor truck transportation facilities. In regard to the purchase of the assets of the former company, the only evidence offered was a letter of Mr. C. H. Moses, the secretary and treasurer of Motor Express, Inc., written to counsel for the appellants, in which the statement is made that the old Motor Express Company had gone out of business more than a year previous to the writing of the letter, and that an entirely new corporation took over the routes and probably some of the other assets. In this connection, J. E. Thompson,

who had been the president of the J. E. Thompson Motor Express Company, testified that Mr. Moses agreed to assume his (witness') liability in the company if witness turned loose his interest to Mr. Moses, which he did. Witness stated that the Thompson Company owed an outstanding mortgage of $3,000 to Abe Kempner and around $9,000 to the Federal Bank which witness was informed Mr. Moses had paid; that this payment was for the consideration of turning over witness' interest to Mr. Moses. This was all the evidence in the case. This falls far short of showing that the appellee company was not a *bona fide* purchaser, or that the appellee company assumed the liabilities of the Thompson Motor Express Company. If any one assumed these liabilities, it was Mr. Moses, and he, only to the extent of paying the Kempner and Federal Bank debts.

In testing the action of the trial court in directing the verdict, we recognize and adhere to the rule announced in *Plunkett* v. *Hayes,* 180 Ark. 505, 21 S. W. (2d) 851, and *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. (2d) 1043. But, as we find no evidence tending to establish the allegation of the appellant's complaint, we conclude that the lower court properly directed a verdict for the appellee, and its judgment will therefore be affirmed.

FEDERAL LIFE INSURANCE COMPANY *v.* PEARROW.

4-4030

Opinion delivered November 4, 1935.

Carmichael & Hendricks, for appellant.
H. B. Mixon, for appellee.

BAKER, J. Chicago Life Insurance Company issued a policy of insurance in January, 1906, insuring the life of Putnam S. Box. This policy was issued upon what is generally called a "twenty-year-payment plan." Box paid his last premium in January, 1926, and the policy was then paid up. Sometime after the issuance of the said policy, the Federal Life Insurance Company took over this particular policy, and perhaps the entire business of the Chicago Life Insurance Company. Sometime during this twenty-year period Box began to borrow money from the insurance company, borrowing the accumulated loan values, and pledging the policy for payment. At the time his policy was paid up he had borrowed, and there was owing to the company $428. Upon this he had agreed to pay 5 per cent. interest per annum. At the time he borrowed the money, or at least when the last loan agreement was signed, this provision became a part of the loan agreement: "Whenever the total indebtedness against said policy is equal to or in excess of the loan value thereof, the said company shall have the right to forfeit and cancel said policy upon thirty days' written notice."

After the maturity of the policy, by the payment of the full number of premiums required, the insurance company sent frequent notices to the last known address of the said Box, requesting him to pay up his interest, and advising that, upon failure to do so, his policy would lapse, in accordance with the above-quoted provision of

the policy, whenever the indebtedness was equal to or exceeded the loan value. For some reason these notices were never delivered to Box, but were returned to the office of the insurance company. This condition continued, although notices were sent at intervals, until September 24, 1934, at which time, we are advised, the indebtedness was equal to the full loan value upon the policy. Thereafter, notices were sent at frequent intervals requesting the insured to pay the accumulated interest, but no answer was received. However, shortly after the date the policy was paid up, on January 24, 1926, the insurance company received a letter from D. S. Plummer, an attorney, who stated that Mr. Box understood that at the end of the twenty-year period he would be entitled to $428 in cash, plus dividends of $245, and that he would have a $1,000 paid-up policy. The insurance company, by letter to Mr. Plummer, advised that the insured had borrowed $428, so he could not get any more, and that his policy would be paid up, subject to the loan, provided the insured paid up the interest. Perhaps this may be said to have been the nearest approach to contact with Box for several years after the maturity date.

Box had lived at Aubrey, Arkansas, and the last letter the company received from him, or his representative, was received from that place in January, 1927. The company answered under date of February 2d. Another letter was written by the company on March 17, 1930, in which the company requested the insured to pay his interest. Another letter was written to the same effect on April 1, 1930, and another on April 15th.

These interest accruals were charged, in addition to the amount of the loan, against the loan value of the policy. This was done again in January, 1931. The indebtedness had increased to $487.

In 1933, the company sent another notice showing the accumulated interest. This had increased the indebtedness from $474.23 to $497.96. The loan value of the policy had increased to $508.

In January, 1934, the company sent Mr. Box a notice stating that there was then due $24.90, the payment of

which would carry the policy up to January 24, 1935. Mr. Box did not pay this $24.90. The notice was returned undelivered. On March 19, 1934, the accumulated unused loan value of the policy was used to pay interest to September 24, 1934. This increased the indebtedness to $515.50, as of September 24, 1934, and that was the full loan value of the policy, that is to say, the indebtedness at that time equaled the full policy reserve held by the company upon that policy.

Again in September, the company sent another notice advising that an interest payment of $8.59 was due to carry the policy from September 24, 1934, to January 24, 1935. There was no response to this notice. Thereafter, on November 13, 1934, the company sent a letter to the insured at Aubrey, Arkansas, the last known address, advising the insured that, as the loan outstanding against his policy had not been paid or the interest thereon, his policy had been lapsed.

The insured died on the 23d of November, 1934, at Brickey, Arkansas. The policy was payable to his estate. Pearrow was appointed administrator of the estate and sued to recover $1,000, less the indebtedness. The first matter to be determined is the proposition of the lapsing of the policy. Did the policy lapse automatically upon the failure of the insured to pay interest at such time as the indebtedness equaled the loan value of the policy, or was there yet something to be done by the insurance company before forfeiture would be effective?

Let it be stated in the beginning of our discussion that the facts in this case were stipulated, and that there is no controversy in regard thereto. The matter is one of interpreting the meaning of the provision in the policy which we have hereinbefore quoted. It is not a question of the power or right of the insurance company to cancel the policy, under the conditions shown. We must determine whether or not the policy was in fact lapsed or cancelled.

Referring to the quoted provision of the policy, we find the parties expressly contracted that the company should have the right to forfeit and cancel the policy when the total indebtedness was equal to or in excess of

the loan value. If that were all that is set forth in the quoted provision, then the appellant company would be correct in its contention that there was a lapse, but that is not all of the provision. It also provides: "The said company shall have the right to forfeit and cancel said policy upon thirty days' written notice." The insurer must first act to cancel or forfeit the policy, if it is so desired. It might waive or defer, for a time, the forfeiture it had the power and right to enforce. It did defer or delay the forfeiture or lapse for a time. It could not cancel by giving less than thirty days' written notice. It gave the notice on November 13, 1934, and ten days later Box died. Had it given the notice so that the full thirty days would have expired prior to Box's death, to the effect that it had cancelled the policy, it would have been entirely within its rights, and would have been acting in full accord with the provisions of the contract.

It is insisted that every effort had been made to give Box notice for several years, and that he had never received any of the notices, and that, therefore, if the company had sent notice immediately after September 24, 1934, at the period when the indebtedness equaled the loan value, Box would not have received it. That is a fair presumption and most probably is a correct statement. However, we do not know that this is absolutely true. At any rate the company did not do that. It preferred not to lapse the policy, and had made every effort for a number of years to reach Box, in order to induce him to continue the payments of interest upon his indebtedness, and even in September, 1934, sent him notice advising that if he would pay $8.59 upon his interest, it would carry his policy to January 24, 1935. It was not within the terms or provisions of the contract that it should lapse of itself. The provision was that the insurance company had the power and the right to lapse and forfeit the policy, and it was unwilling to exercise that power until November 13, 1934. Had Box lived for thirty days after this notice was sent, the forfeiture would have been complete, and Box's estate would have been without right of recovery. We are unwilling to read into the policy a forfeiture which was not expressly

provided by the contract. In fact forfeitures are not favored. *Missouri State Life Ins. Co.* v. *Fostor,* 188 Ark. 1116, 69 S. W. (2d) 869. Above case followed in *Missouri State Life Ins. Co.* v. *Withers,* 188 Ark. 1130, 69 S. W. (2d) 872; *Home Life Ins. Co.* v. *Ward,* 189 Ark. 793, 75 S. W. (2d) 379.

The only other question open for discussion is whether the insurance company became liable for the 12 per cent. penalty and the attorney's fee, as fixed by the court. The contention is made that the administrator was suing for a small amount more than he was entitled to recover. There was a mistake in the calculation, or a failure to compute interest for a short period, that made a discrepancy of about $3. It is certain, however, plaintiff sued for the $1,000, face of the policy, less the amount of the indebtedness due by the estate of Box to the insurance company. This was what his complaint called for. He was entitled to that amount. The appellant relies upon this error as a reason why it should not be taxed with the penalty and attorney's fee. This might readily have been corrected had the appellant called the attention of the trial court to the facts, or had the attention of counsel for appellee been called to it. The matter is one of demonstrable error, of little practicable importance or effect, and not an effort to recover a greater amount than was actually provided for in the policy itself. In fact, there is nothing in the policy, as abstracted, providing for the payment of interest, which was charged against the proceeds of this policy. The interest owing was upon a separate loan contract. It was connected with the policy only because the policy was security for repayment of the loan.

It cannot be said that the appellee sought a recovery for any greater amount than was actually due, the full face value of the policy less the indebtedness, owing to the company, in accordance with the loan agreement. There was a denial of any liability.

Therefore the appellee had the right to recover the penalty and the attorney's fee. *Home Life Ins. Co.* v. *Ward,* 189 Ark. 793, 75 S. W. (2d) 379; *Security Life Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581; *Na-*

tional Union Fire Ins. Co. v. *Bynum,* 183 Ark. 1100, 40 S. W. (2d) 446.

The judgment is affirmed.

SUTTON *v.* LITTLE ROCK.

Cr. 3962

Opinion delivered November 4, 1935.

John F. Clifford and *S. W. Trimble,* for appellant.

PER CURIAM. Appellant was duly convicted in the municipal court of Little Rock for the violation of a city ordinance, and appealed to the circuit court of Pulaski County, whereupon trial to a jury he was again convicted and fined in the sum of $500. Copies of the judgments have been duly filed in this court as a basis for appeal, but no bill of exceptions has been filed for the reasons hereinafter stated.

On a previous day of this term we had under consideration appellant's motion for a writ of certiorari or mandamus or some other appropriate writ, requiring the circuit clerk, the circuit judge or the stenographer of the Pulaski Circuit Court to make and furnish without cost a bill of exceptions for review in this court on appeal. Neither the circuit clerk, the circuit judge nor the stenographer were made parties or appeared in this court in response thereto, therefore upon due consideration the prayer of said motion was denied without written opinion. We are now asked by petition for rehearing

to review our previous finding, and to now grant the appropriate writ. The original petition shows that the circuit court stenographer has refused to prepare and file a transcription of his notes of the proceedings appealed from by appellant; therefore a writ of certiorari against the clerk, even if he were before the court, would be unavailing, and we expressly held in Ex parte *Whitley,* 113 Ark. 372, 168 S. W. 144, that this court was without power to compel a circuit court stenographer to prepare and file a transcription of his notes of the proceedings reported by him in the circuit court. Therefore, were the stenographer a party to this proceeding, we would be without power to compel a transcription or filing of such transcription. Appellant's only remedy in this case is by mandamus in the circuit court and against the stenographer thereof to compel the stenographer to prepare and file a transcription of the proceedings had and done in the cause, and, since no such proceeding is before us for review, we pretermit any discussion of the merits of appellant's contentions.

The petition for rehearing will therefore be denied.

WALKER *v.* STREETER.

4-4040

Opinion delivered November 11, 1935.

Tom F. Digby, for appellants.

Paul E. Talley and *Wayne W. Owen,* for appellee.

JOHNSON, C. J. Appellee, Janius Streeter, a man of color, instituted this action in the Pulaski Chancery Court against appellants, Eagle Walker and M. I. Baker, and for his cause of action alleged that on and prior to February 4, 1931, he was the owner in fee simple of a certain described tract of land located in Pulaski County, Arkansas; that on the last-mentioned date, by mistake he signed and executed a warranty deed by the terms of which he conveyed to appellants said tract of land in fee simple, when in truth and in fact the intentions of the parties were that said written instrument was to be a mortgage to secure certain advances that had been made. By general denial the appellants put in issue these allegations, and the case was made ready for trial. From the evidence adduced upon the trial the chancellor found that the deed of February 4, 1931, was intended by the parties as a mortgage to secure advances then and theretofore made in the sum of $250 and directed foreclosure; the court also denied reduction of the advances by reason of rentals. From this decree both parties have appealed to this court.

The testimony adduced at the trial in favor of appellee tended to establish that in the early part of 1930 appellee became ill and was lodged in a Little Rock hospital for treatment and there incurred obligations of something more than $100; that soon after he was released the said hospital began insistently demanding the payment of its bills; that appellee approached appellant Eagle Walker, in reference to advance of money sufficient to pay these hospital bills, and that Walker agreed to pay the bills for him and accept a mortgage against appellee's tract of land to secure him in such advances; appellee is about 60 years of age, uneducated and incapable of taking care of himself in a business transaction; that the value of the tract of land on February 4,

1931, was between $1,000 and $2,500; appellee did not know that appellant claimed to own the land until sometime in 1934, and, upon being apprised of their claim of ownership, immediately instituted this suit; appellee has resided upon this land since the execution of this deed to appellants in 1931 and has rented a part thereof to appellant Walker subsequent to the deed; that Walker has refused to pay a reasonable rental therefor. Appellee testified that he did not know and was not advised by appellants or any one else that he was executing a deed to his lands when he signed the written instrument, but on the other hand was told that he was signing a mortgage. The testimony adduced by appellee was sharply contradicted by that offered by appellants, but it would serve no useful purpose to set it out in detail. It must suffice to say we have carefully read and considered all the testimony, and we are of the opinion that the chancellor's finding is not against the clear preponderance of the testimony. It is true, of course, that we have consistently held that the testimony to warrant the court in holding that a written instrument is not what it purports to be upon its face must be clear, concise and convincing. See *McIver* v. *Roberts,* 112 Ark. 607, 165 S. W. 273. But it is also true that the inadequacy of the consideration supporting such written instrument is a potent circumstance to be considered by the court. *Wimberly* v. *Scroggin,* 128 Ark. 67, 193 S. W. 264.

The clear preponderance of the testimony shows that this tract of land on February 4, 1931, was of a value greatly in excess of $250, the sum which the chancellor found was due appellant, Walker, as advances. This circumstance, taken in connection with appellee's testimony, is amply sufficient to sustain the chancellor's finding.

On cross-appeal but little need be said. Appellee's claim of rentals is supported only by his own testimony. Courts are not required to receive and accept blindly the testimony of parties to the suit. *Elmore* v. *Bishop,* 184 Ark. 243, 42 S. W. (2d) 399; *McGraw* v. *Miller,* 184 Ark. 916, 44 S. W. (2d) 366. And this is all sufficient to dispose of this assignment.

For the reasons stated, the decree is affirmed on appeal and cross-appeal.

CANTLEY *v.* TURNER.

4-4031

Opinion delivered November 11, 1935.

W. E. Rhea, G. B. Segraves, Jr., and *G. B. Segraves,* for appellant.

Ogan, Shaver & Ogan, for appellee.

SMITH, J. This appeal grows out of an order distributing rents collected by a receiver in a real estate mortgage foreclosure. The court decreed that seven-twelfths of the rents collected by the receiver be paid to the plaintiff mortgagee and that five-twelfths of the rents be paid to the owner of the note given for the rent for the year in which the foreclosure proceeding had been brought, which note had been assigned to him by the mortgagor.

The foreclosure suit was filed December 9, 1932, and notice of *lis pendens* was filed the same day and recorded December 12, 1932. On February 23, 1933, the court appointed W. N. Killough receiver, and authorized him to

collect the 1933 rents. On the same day a motion was filed to revoke the appointment, and the court directed the receiver to refrain from qualifying as receiver pending the disposition of the motion. This motion was apparently abandoned, and the receiver qualified on May 23, 1933. There is some question whether the receiver filed his oath and bond on that day, but the finding of the court below that he did does not appear to be contrary to the preponderance of the evidence.

On September 25, 1933, L. E. Turner intervened in the foreclosure suit claiming the 1933 rents as pledgee of the note given by the tenant to the defendant landowner for the rent of that year under a power-of-attorney executed on the back of the note by the landowner. It was alleged that the power-of-attorney was executed October 4, 1932.

A decree was rendered on the same day ordering the foreclosure of the mortgage and appointing a commissioner to make the sale. Pursuant to this decree the mortgaged lands were sold to the plaintiff for $13,727.09, and the report of sale was approved January 22, 1934. This price left a deficiency of more than a thousand dollars. The rent note was for a thousand dollars. There is some question as to the date upon which the rent note was assigned and delivered to the intervener, but the decree based upon the finding that it had been assigned prior to the appointment of the receiver does not appear to be contrary to the preponderance of the testimony.

Upon the facts as thus found the decree from which both parties have appealed is correct.

Judge HUGHES, in his excellent work on Arkansas Mortgages, at § 470 thereof, says that: "The rents and profits and crops, after a receiver thereof has been duly appointed and qualified, are treated as part of the security. They stand in the same category as the land itself. The lien of the mortgage covers them." This statement of the law is fully supported by the following cases: *Ozburn* v. *Lindley,* 163 Ark. 260, 259 S. W. 729; *Deming Investment Co.* v. *Bank of Judsonia,* 170 Ark. 65, 278 S. W. 634; *Bank of Weiner* v. *Jonesboro Trust Co.,* 168 Ark. 859, 271 S. W. 952.

These cases are authority, of course, for the converse of the proposition, that, until foreclosure and sale or the appointment and qualification of a receiver, the mortgagor is entitled to the rents.

Practically five months of the rent year had expired when the receiver was appointed, and, of course, seven months of the year remained. The apportionment of five-twelfths of the rents to the intervener and seven-twelfths to the mortgagee accords with the rule applicable to such cases in this State. A recent case, in which earlier cases to the same effect are reviewed, is that of *Purvis* v. *Elder,* 175 Ark. 780, 1 S. W. (2d) 36. In that case it was held that when a receiver was appointed under a foreclosure decree, and had possession of the land for three months of the year, the mortgagors having retained possession for nine months, the latter and their assigns were entitled to three-fourths of the rents as against the mortgagees.

The decree, which conforms to these principles, is correct, and must therefore be affirmed on both the appeal and the cross-appeal. It is so ordered.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* MCNEECE.

4-4044

Opinion delivered November 11, 1935.

S. Hubert Mayes and *J. Paul Ward,* for appellant.

W. P. Smith and *Hugh Williamson,* for appellee.

MEHAFFY, J. The appellee began this action in the Jackson Circuit Court to recover damages alleged to have been caused by drinking Coca-Cola that had a fly and other foreign substance in it. She drank a little of it, and it made her sick.

The appellant filed its answer denying all the material allegations in the complaint, and alleged that appellee was guilty of contributory negligence.

The jury returned a verdict for $200, and this appeal is prosecuted to reverse that judgment.

The following stipulation was introduced in evidence:

"The defendant admits that the Coca-Cola sold by the retail dealer from whom the plaintiff purchased the bottle in question is Coca-Cola from the Coca-Cola Bottling Company of Arkansas at Batesville, Arkansas, and that such Coca-Cola is manufactured at the plant in Batesville. This defendant, however, specifically denies that the bottle purchased by the plaintiff contained any foreign substance at the time it left the plant or place of business of defendant at Batesville or at the time it was delivered to the retailer.

"It is further stipulated and agreed by the parties hereto that that portion of the complaint reading: 'And she has been caused to have a permanent injury, soreness of the stomach and great nervousness' is eliminated from the complaint and stricken out.

"It is further stipulated that the deposition of Dr. M. S. Craig which has heretofore been taken and reduced to writing may be read in evidence by either party in this cause."

The appellee testified that she lived at Walnut Ridge and was engaged in business with her husband; that on July 26, 1934, she was at Batesville with a crowd of Walnut Ridge people in the grandstand at the baseball game; one of the parties from Walnut Ridge purchased six bot-

tles of Coca-Cola; the boy who was selling them stood in the aisle, pulled the caps off of the bottles, and handed the bottles to the parties; appellee started drinking and saw something in the bottle. She testified that she was excited about the ball game and did not pay much attention, but drank another swallow or two; she then felt something in her mouth, put her handkerchief up to her mouth, spit out the Coca-Cola, and spit out a fly in her handkerchief. She could not tell about the other substance in the bottle, but it looked like fly legs or wings or something that had come to pieces in the bottle. There was another fly in the bottle that she could see. She sat there a few minutes and began to get sick, her body was cramping and drawing; she was taken out of the grandstand and laid on the grass, and then taken to Dr. Craig's hospital. He gave her a hypodermic to cause her to vomit and then gave her another after a few minutes, and a large glass of salt water. She was cramping about her body. After the hypodermics and the glass of warm salt water, her stomach began to relax and she began to vomit. She stayed in the hospital about four hours and was very sick. She was put in the automobile and laid down on the back seat and was carried home, and Dr. Rainwater was called, and treated her stomach for about ten or twelve days. She testified that she had recovered, and that she did not claim any permanent injury. She suffered severe physical pain and mental anguish. She is 24 years old. She testified that she could see things in the Coca-Cola, a mesh-like substance like fly's legs, or something that had come to pieces. She suffered severely for about 28 hours, and was under the care of a doctor. When the little boy that sold the Coca-Cola handed out the six bottles, appellee handed them down the row as he handed them to her, and the bottle she got was the last bottle from which he pulled the cap, and she started drinking it at once. There was something decomposed in the Coca-Cola, and it looked like it might have been in there some time.

Several other witnesses testified and corroborated the testimony of appellee.

The testimony offered by the appellant was in conflict with the evidence introduced by appellee.

The only ground relied on by appellant is that the evidence is not legally sufficient to support the verdict. Appellant, in its brief, says: "The appellant in this case seeks a reversal and dismissal of the judgment had against it upon the sole ground that the appellee is not entitled to recover for the reason that there was no legal damages proved for which this appellant would be liable. In other words, that there was no actual physical injury brought about or proximately caused by the alleged occurrence, and hence any damages suffered would be unaccompanied by any physical injury attributable to or proximately caused by the incident complained of."

There is ample evidence to show that the appellee suffered physical pain and injury.

Appellant calls attention to the case of *Peay* v. *Western Union Telegraph Company*, 64 Ark. 538, 44 S. W. 348, and argues that that case holds that a person cannot recover for mental anguish or physical pain unaccompanied by physical injury. That was a suit for damages for failure to deliver a telegram. In that case there was no physical injury, and the court said: "While there is considerable conflict in the adjudged cases upon this question, we are of the opinion that the better considered cases are against the right of recovery for mental pain and anguish unaccompanied by physical injury."

In the present case the evidence clearly shows that there was physical injury.

The appellant calls attention to several other cases, but in none of them was there any evidence of physical injury.

"When passing on the sufficiency of the evidence to support the verdict, we must give the evidence which tends to support the verdict the highest probative value." *Missouri Pac. Rd. Co.* v. *Fowler,* 183 Ark. 86, 34 S. W. (2d) 1071; *Fort Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. (2d) 647; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. (2d) 798; *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. (2d) 45. There is a long line of cases holding that the Supreme Court, on ap-

peal, weighs the evidence in the light most favorable to the appellee and indulges all reasonable inferences in favor of the judgment. We deem it unnecessary to cite more authorities on this question.

We have many times held that where there is any substantial evidence to support a verdict of the jury, it is binding on this court, because the jurors are the judges of the credibility of witnesses and the weight of the testimony. *Kansas City Fibre Box Co.* v. *F. Burkart Mfg. Co.,* 184 Ark. 704, 44 S. W. (2d) 325; *Kearnes* v. *Steinkamp,* 184 Ark. 1177, 45 S. W. (2d) 519.

Although we might believe that the verdict was against the preponderance of the evidence, still if there is any substantial evidence to support the verdict of the jury, such verdict will not be set aside by this court on the ground of insufficiency of evidence.

There is ample evidence in this case that the appellee suffered physical pain and injury, and the judgment will therefore be affirmed.

NELSON *v.* WELLS.

4-4045

Opinion delivered November 11, 1935.

Brewer & Cracraft, for appellant.
Daggett & Daggett, for appellees.

McHaney, J. Appellees brought this action against appellant to recover judgment on two promissory notes dated June 10, 1927, due two and three years after date, with interest at 6 per cent. Certain amounts had been indorsed on the back of said notes as payments thereon. Judgment was prayed in the sum of $7,780.97 as of March 26, 1935, with interest thereafter at 6 per cent. Appellant answered, admitting the execution of the notes and the amount thereof, but set up an affirmative defense substantially as follows: That on December 31, 1926, appellant and E. M. Allen and George L. Davidson were the owners of certain real property in the city of Helena, which they desired to have graded and put in condition for sale; that they entered into an agreement with appellees to do the grading according to certain specifications for a consideration and price of thirty-two cents per cubic yard, to be paid as follows: "When the work has been completed and the total cost of said grading known, said cost shall be prorated against the number of lots that will be platted and offered for sale. When said lots are sold, the selling price of same will then be prorated between the first parties and the second parties in proportion to the interest of each; that is, between the cost price charged to each lot and the selling price. Whatever money is paid or whatever notes are given shall be divided proportionately between the first and second parties." It was further agreed that appellant and associates should execute their promissory notes payable in three equal installments due one, two and three years, with interest at 6 per cent., and to be secured by deed of trust on the lots so graded by appellees. The answer further alleged that appellees performed the grading contract at a cost of $12,318, and that on June 10, 1927, appellants executed their promissory notes to appellees as called for in the contract of December 31, 1926, and that a new agreement was simultaneously entered into between the parties, which recited the ownership of the property by appellant and his associates, the grading of the lots by appellees, and the cost thereof, as well as the execution of the notes and the deed of trust heretofore mentioned. The agreement then continues: "Therefore, for

and in consideration of the parties of the first part giving the parties of the second part said security, the parties of the second part hereby covenants and agrees with the parties of the first part to release any part of the above-described land whenever the parties of the first part perfect a sale of any of said land, and the parties of the first part and the parties of the second part are to receive an equal amount of the proceeds of said sale, both in cash and secured lien notes until such time as the indebtedness in the sum of twelve thousand three hundred eighteen dollars ($12,318) and interest has been paid to the parties of the second part by the parties of the first part." The answer further alleges that appellant and his associates attempted to sell the lots, but have been unable to do so, and that, by the terms of the contract of December 31, 1926, appellees were to be paid if and when said lots were actually sold, and that since, through no fault of appellant, said lots have not been sold, the debt is not due. To this answer a demurrer was interposed and sustained by the court. Appellant declined to plead further, elected to stand on his answer, and judgment was entered against him for $7,780.97, with interest at 6 per cent. The case is here on appeal.

We think the court correctly sustained the demurrer and entered judgment against appellant. The obligations on which the suit is based, the two notes, were in writing and fixed definite dates for their maturity. Any defense thereto based on the ground that they are not due according to their terms must be supported by an instrument in writing and not on parol testimony, or contemporaneous oral agreement, because such an agreement would vary the terms of the written contract. In *Abbott* v. *Kennedy,* 133 Ark. 105, 201 S. W. 830, the court speaking through Mr. Justice Wood, used this language: "The note upon its face was a plain promissory note for $1,000, payable one year from the date thereof to the payee or his order. Appellee admitted the note was executed and delivered. This completed the contract between the parties to it. To permit oral testimony that the consideration was to be paid only upon a condition precedent was in contravention of the familiar rule which

precludes the admission of parol evidence to contradict or substantially vary the legal import of a written instrument." Citing *Featherstone* v. *Wilson*, 4 Ark. 154; *Joyner* v. *Turner*, 19 Ark. 690; *Borden* v. *Peay*, 20 Ark. 304; *Roane* v. *Greene & Wilson*, 24 Ark. 210; *Castell* v. *Walker*, 40 Ark. 117; *Bishop* v. *Dillard*, 49 Ark. 285, 5 S. W. 341; *Richie* v. *Frazer*, 50 Ark. 393, 8 S. W. 143; *Tisdale* v. *Mallett*, 73 Ark. 431, 84 S. W. 481; *Harmon* v. *Harmon*, 131 Ark. 501, 199 S. W. 553.

Therefore if there is any defense to the action, it must be found in the written agreement dated June 10, 1927, the same date the notes were executed, for this agreement supersedes the preliminary contract of December 31, 1926, and is the final contract between the parties relating to the subject-matter. A careful examination of the contract of June 10, 1927, will disclose nothing that limits the right of appellees to collect the amount due them on said notes solely from the sale of lots. It was provided therein that appellees will release from the deed of trust any lots which are sold and for which they are given one-half the purchase price either in cash or notes. It bound the appellant and his associates to pay appellees one-half of the sale price of any lots, but there is no language that limits their right to collect from the sale price of lots alone. Appellant contends that the two contracts should be read together, and, when so read, ambiguity will be found which will justify oral testimony to establish the agreement to pay only when and if said lots were sold. We see no ambiguity in the two contracts, but, even reading the two contracts together, we think it would be a strained construction to say that the intention was to pay only from the sale of lots. There being no ambiguity, oral testimony is inadmissible to contradict the notes themselves as to the maturity thereof.

The court correctly sustained the demurrer, and the judgment is accordingly affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* HINSON.

4-4039

Opinion delivered November 11, 1935.

Francis R. Stark and *Trimble, Trimble & McCrary,* for appellants.

W. P. Beard, L. B. Reed, Jr., and *L. R. Harrell,* for appellee.

BAKER, J. Sidney Hinson sued the Western Union Telegraph Company and Lee Roberts for an injury that he suffered on November 20, 1934, in the city of Little Rock. At the time of the injury the plaintiff was attempting to cross Scott Street and was struck by an automobile driven by Lee Roberts, messenger for the Western Union Telegraph Company. Lee Roberts was a young man about twenty-three years of age, had been working for some time for the Western Union Telegraph Company as a messenger, and on this particular occasion was directed by his superior officer or manager of the Western Union Telegraph Company, to go to the Missouri Pacific depot and procure a ticket to be delivered to some one at the Marion Hotel.

Up until some time in October, prior to the date of this injury, Western Union had permitted messenger

boys or employees to use automobiles in the delivery work, but on account of the decrease in business the messenger boys or employees were ordered to refrain from the use of automobiles, but to use bicycles instead. Lee Roberts lived in North Little Rock, drove his own automobile from his home to the Western Union office, where he went on duty about 4:00 P. M., and remained on duty until 12:00 P. M. He was a student in one of the schools in North Little Rock and studied in the Western Union office, when not engaged in some duty or service for the company.

When ordered or directed by the manager to run the errand and procure the ticket, Roberts, in violation of the direct and positive orders of his employer, started upon the errand, driving his own automobile, which had been parked near the Western Union office, and, before he had driven a block, struck Hinson, the appellee, and seriously injured him.

The facts, stated most favorably for the appellee show that Roberts at the time of the injury had driven his car upon the wrong side of the street, or turned his car too shortly in negotiating the corner. Roberts denies this fact, but this disputed fact has been decided against him by the jury, and it is the only material fact about which there is any dispute. The evidence is undisputed that the manager of the Western Union office or the employer, having control of the messenger boys, had given positive and direct instructions and commands forbidding the use of automobiles in the company's business. Roberts' statement is to the effect that this was the first and only time that he had violated that order, but, on account of the fact that it was raining and that he desired to make the trip to the depot as quickly as he could and return to resume his studies, he took the automobile instead of his bicycle, which he had brought to the office in the automobile.

A recovery by judgment was had against both Roberts and the Western Union. There is no question raised on this appeal, except the one of liability of the appellants. Appellants do not suggest that, if liability be de-

termined on this appeal, the amount of the recovery is excessive, but urge only that the trial court should have directed a verdict for the defendants.

From the foregoing facts, which must be treated as undisputed upon this appeal, we are impelled to say that there is no error in the trial of the case as against appellant Roberts. He was not driving at a very fast rate of speed at the time of the injury, but he did cut a corner and drive upon the wrong side of the street, striking the appellee with his car in so doing. He testified he was within five feet of Hinson before he saw him. He was properly held responsible for his negligence. As to him, the judgment herein must be affirmed.

As to appellant, Western Union Telegraph Company, a more serious problem presents itself. In the matter of running the errand, Lee Roberts was acting in the obedience to the directions or positive orders of his superior, and, if this were the entire statement, the doctrine of *respondeat superior* would apply. It is undisputed, however, that, in the performance of this duty in accordance with the command, Lee Roberts, in violation of express orders and instructions, chose a different agency, and much more dangerous one from that which he had been directed to use. He had authority to use a bicycle. He had no authority to use an automobile in making the trip. Therefore, in his choice of the agency with which he performed the service he was directed to do, he was beyond and outside the scope of his authority.

It must be conceded by all that the master has the right to choose the instrumentalities or agencies for the performance of the work or duties required of employees, and it is upon this principle that the master may become liable for his failure to exercise ordinary care in choosing and furnishing a tool or appliance reasonably safe.

This question on appeal is not a new proposition. The same principle has been frequently before the courts for consideration. In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Robinson,* 117 Ark. 37, 173 S. W. 822, the facts are so nearly like the ones

under consideration that the announcement of the law there becomes the rule of decision here. In the cited case, a boy made use of a bicycle when sent to call employees to go upon duty. His superior officers, agents of the railroad, knew he was making use of the bicycle, but there was in fact no necessity for the use thereof. He was not authorized to use the same, because the distances over which he had to travel in making these calls were not such as to necessitate the use of that instrumentality in order that he might call employees in due time. He was presumed to go upon foot and make his calls. In the unauthorized use of the bicycle he injured one who, on account of the injury, sued the railroad company. In deciding this case, the court, through the late Mr. Justice KIRBY, said:

"If the service required of the call boy could not have been performed in the time given therefor without the aid of the instrumentality used, the bicycle, it would have occasioned a necessity, and the knowledge by the agent of such use in the performance of the service would have amounted to an implied authorization thereof, making the railroad liable for a negligent injury thereby. But such is not this case, and there was no testimony to warrant the jury in finding that the bicycle was necessarily used in the service of the railway company by its call boy, with the knowledge of its servants of the use and necessity therefor, and consequently no negligence shown in the injury to appellee for which it is required to answer or respond in damages."

The last-mentioned case was cited with approval of the rule announced therein in the case of *Southwestern Bell Telephone Company* v. *Roberts,* 182 Ark. 211, 215, 31 S. W. (2d) 302. Moreover, by distinguishing the Roberts case from the Robinson case above, it emphasized the fact that without the knowledge or direction of the master the servant would not be permitted to select or employ his own agency or means of performance of the duty owing to the master, unless there was the actual necessity for such selection and choice by the servant in order to perform his duties. In such cases, where the

actual necessity existed, a presumption of knowledge and permission would be imputed to the master. Consent, express or implied, will be presumed.

No such condition prevailed in this case. It is violative of principles announced in the Robinson case as more clearly set forth and defined in the Roberts case, in that the servant had a means or instrumentality for use in the performance of his duties, which was authorized by the master, and (2) the instrumentality used was not only expressly forbidden, but (3) was unnecessary.

The following authorities from other jurisdictions may be read with interest: *Hughes* v. *Western Union Telegraph Corporation,* 211 Iowa 1091, 236 N. W. 8; *Kennedy* v. *Union Charcoal & Chemical Company,* 156 Tenn. 666, 4 S. W. (2d) 54, 57 A. L. R. 733.

Appellants have favored us with numerous other appropriate citations which we deem unnecessary to incorporate herein. This line of cases is distinguishable from those founded upon a well-defined principle of law, that the wrongful act of a servant, when acting within the scope of his employment, will render the master liable for consequent damages, although such wrongful act may have been in violation of the express orders of the master. Aside from the right of the master to control the employee and direct him in his activities in the rendition of his service, the master has a right to choose or select the tools, appliances, or agencies which will be used by the servant. If that were not true, the servant, in the exercise of his individual discretion, making his own selection and use of agencies, might, perhaps, not only injure himself in the attempted performance or rendition of his services, but he might also render an inferior service to the master, to his damage and detriment, or probably bring destruction to the master's property, and by such conduct some third party might be injured, for which the master might become liable to the extent of financial ruin.

It must appear from the foregoing that the proposition of liability in cases of this type must be determined from the facts in relation thereto. This is clearly seen

from the citations in the Robinson case and Roberts case above set out.

We think therefore the court erred in not directing a verdict for appellant Western Union Telegraph Company. The case has been fully developed, and no liability has been established against said company.

The judgment is therefore reversed as to appellant, Western Union Telegraph Company, and that part of the cause is dismissed.

[redacted]

MORGAN *v.* SLAYDEN.

4-4023

Opinion delivered November 4, 1935.

[redacted]

Richardson & Richardson, for appellant.

Smith & Judkins, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Lawrence County, Eastern District, in unlawful detainer to recover possession of the SW¼ of section 29 and the NW¼ of section 32, township 16 north, range 1 west, in said county, containing 114 acres, alleging that he rented appellant said real estate with the improvements thereon for and during the year 1934, and that, notwithstanding he notified him to vacate the premises after the expiration of the year, he failed to surrender the possession thereof and is unlawfully holding same.

Appellant filed an answer denying that he leased said land for one year only, but averring that he leased same for the years 1934 and 1935 and that he is in the lawful possession thereof under said lease.

Appellant also filed a cross-complaint alleging as follows: "That plaintiff (appellee) now is, and has been since on or about the 1st day of December, 1934, indebted unto the defendant (appellant) in the sum of one-half of $338.10 rental received by the plaintiff (appellee) from the Secretary of Agriculture for thirty acres of said farm previously rented defendant (appellant) received from said Secretary of Agriculture on said farm, which the plaintiff (appellee) has failed and refused to pay unto defendant (appellant); that said sums of money are due defendant (appellant) by the plaintiff (appellee) by reason of a certain contract executed by the plaintiff (appellee) and the Secretary of Agriculture for the year 1934, whereby thirty acres of the land previously leased unto defendant (appellant) by the plaintiff (appellee) on said farm was rented unto the Secretary of Agriculture, in which contract it was provided that a 'managing share-tenant' should be paid and received one-half of said rental, and the tenant, whether he be managing share-tenant or not, should be paid and receive three-fourths of the parity payment for said farm; that the defendant (appellant) was in fact such managing share-tenant for the year 1934 on said farm, and, the plaintiff (appellee) having received from the Secretary of Agriculture the sum of $338.10 as Government rental on said farm for said year 1934, and $64.29 as parity on said base acreage consisting of 87 acres of said farm, and having failed to pay over to defendant (appellant) one-half of said rental and three-fourths of said parity unto defendant (appellant), the plaintiff (appellee) now has in his possession and withholds from and refuses to pay to defendant (appellant) the total sum of $209.77 with interest at 6 per cent. thereon from December 1, 1934, and prayed that plaintiff (appellee) take nothing on his complaint; and that defendant (appellant) recover of and from the plaintiff (appellee) judgment in the sum of $207.77; for his costs herein and for all other proper relief."

On March 19, 1935, appellee filed his reply to appellant's cross-complaint as follows:

"Now comes Dr. L. T. Slayden and denies that the plaintiff (appellee) is indebted to the defendant (appellant) in the sum of $64.29, the defendant's (appellant's) part of the parity checks, under and by virtue of any agreement with the Secretary of Agriculture, or for any other sum for any other reason; that the defendant (appellant) was a managing share-cropper on plaintiff's (appellee's) land; that the defendant (appellant) is entitled to $338.10 in addition to the above amount, or in any other sum as Government rental paid for the year 1934; that the plaintiff (appellee) is indebted to the defendant (appellant) in the total sum of $209.77 or any other sum by reason of any payments made by the Secretary of Agriculture to the plaintiff (appellee) for said year. Wherefore prays as in original complaint, and that the defendant's (appellant's) cause be dismissed, and that the cross-complainant take nothing by reason of same, and that plaintiff (appellee) have all other proper relief."

On March 20, 1935, the cause was tried to a jury. The evidence introduced by appellee tended to show that the contract of rental or lease was for the year 1934 only. The evidence introduced by appellant tended to show that said lease or contract was for the years 1934 and 1935. The evidence was conflicting as to whether appellant was a managing share-tenant under the Federal Adjustment Act of May 12, 1933, (7 USCA, § 601, *et seq.*) and entitled to any part of the parity check and rental check appellee should and did receive from the Secretary of Agriculture for thirty acres of land rented to the Government and which was not cultivated by appellant in the year 1934.

The undisputed evidence, however, showed that appellee owned the land, paid the taxes thereon, and that appellant made no improvements thereon.

The undisputed evidence also showed that no privity existed between appellant, the tenant, and appellee, the landlord, in the contract which appellee entered into with the Secretary of Agriculture under the authority of the Agricultural Adjustment Act aforesaid.

At the conclusion of the testimony, the court submitted the issue of whether the lease or rental contract entered into by appellant and appellee was intended to and did cover the period of one or two years, which issue the jury found in favor of appellant, and the judgment rendered pursuant thereto has not been appealed from.

The court also dismissed appellant's cross-complaint at the conclusion of the testimony, from which judgment of dismissal an appeal has been duly prosecuted to this court. The contract between the Secretary of Agriculture and appellee is similar to the contract between the landlord and the Secretary of Agriculture in the recent case of *West* v. *Norcross,* 190 Ark. 667, 80 S. W. (2d) 67. This court said in the West case that no privity existed under the contract between the landlord and the share-croppers, and that the tenants had no enforceable cause of action under it against the landlord. The instant case is governed by the West case.

No cause of action having been alleged in the cross-complaint or reflected by the evidence, the court should have dismissed the cross-complaint as he did.

The judgment is therefore affirmed.

JENKINS *v.* STATE.

Crim. 3959

Opinion delivered November 4, 1935.

C. W. Garner, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted in the circuit court of Pulaski County, First Division, on three separate charges of murder for poisoning and killing three of her children and on two separate charges of assault with intent to kill her husband by poisoning him. She was tried and convicted in said court upon the charge of murder in the first degree for killing her daughter, Alta Fern Jenkins, and as a punishment therefor was adjudged to serve a life term in the State penitentiary, from which judgment an appeal has been duly prosecuted to this court.

She has assigned a number of alleged errors as grounds for a reversal of the judgment, only one of which is regarded by the court as reversible error, viz., the action of the trial court in permitting her husband, Charley Jenkins, to testify against her in the trial.

He testified that on Wednesday night, November 23, 1934, his wife, the appellant, filled eight capsules with quinine out of a blue bottle of quinine he had previously purchased, which he and their three children took on Wednesday and Thursday nights with no ill effect; that on Thursday night he filled ten capsules out of the same bottle and left them in a brown box where the quinine bottle was kept; that on the following night about seven o'clock, at the suggestion of appellant, he gave each of the children a capsule out of the box where he had left the capsules the night before, from the effect of which the three children died that night, and he, himself, came near dying; that at the time he did not notice a brown bottle in the box with the blue one; that prior to this time, on November 3, 1934, he went to Carlisle on a mission for his wife, and that before he left, she fixed up some liquor for him to take along and told him not to

drink it until he got down the road away from everybody and then to turn it up and drink it all, and that when returning from Carlisle he tasted it; that it was very bitter and made him violently sick so that for more than an hour he could not walk; that, after returning from Carlisle, he told appellant the effect it had on him, and that some one must have doped it; whereupon she advised him to pour what was left in the commode, which he did.

The testimony detailed above was prejudicial to appellant in the trial of the cause in view of the fact that it was shown by other testimony that prior to these occurrences she had purchased from a druggist under an assumed name a bottle of strychnine in a brown bottle like the one found in the box with the quinine bottle, and in view of the fact that she confessed after the death of her children to having poisoned the whiskey she gave her husband to drink on his trip to Carlisle, and in view of the fact that prior to her confession she had denied any knowledge whatever of strychnine being in the house.

Under the common law, neither spouse was a competent witness against the other in any kind of a case, for the reason that husband and wife were one person and to permit one to testify against the other would stir up strife between them and destroy the sacred marital relationship existing between them. The preservation of the holy bonds of matrimony was the inspiration for the rule of evidence by the courts and grounded in what they regarded a safe public policy. This court is thoroughly committed to the rule stated above except in so far as it has been changed by statute. *Woodard* v. *State,* 84 Ark. 119, 104 S. W. 1109; *Padgett* v. *State,* 125 Ark. 471, 188 S. W. 1158; *Lighter* v. *State,* 157 Ark. 261, 247 S. W. 1065; *Conley* v. *State,* 176 Ark. 654, 3 S. W. (2d) 980; *Robinson* v. *State, ante* p. 455.

It goes without saying that this rule might be changed by statute, but such a statute, being in derogation of the common law, must be strictly construed. The State, in the instant case, justifies the admission of the testimony of Charley Jenkins against his wife, the ap-

pellant herein, under § 3125 of Crawford & Moses' Digest, which is as follows:

"In any criminal prosecution, a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either."

Under a strict construction of the statute, the word "property" does not include children. *Verser* v. *Fort,* 37 Ark. 28; *Warsaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S. W. 457; *Anthony* v. *Tarpley,* 45 Cal. 72, 187 Pac. 729. Strictly speaking, the word "property" as used means only real and personal property. The statute then means that a spouse may testify against the other in all cases where he or she has injured the real or personal property of the other.

It is urged with much zeal and fervor by counsel for appellant that it was error to admit the written confession of appellant relative to her attempt to poison her husband a short time before this tragedy occurred: first, for the reason that the confession was not voluntary, and, second, because the confession in the main related to a different and independent crime from the charge upon which she was being tried.

(1) The evidence was conflicting as to whether any coercion was practiced upon appellant to induce the confession. The court heard evidence pro and con upon this issue before admitting the confession, and his conclusion that it was voluntarily made finds ample support in the testimony.

(2) The attempted crime to which she confessed tended to show an identical attempt on her part a few weeks before to commit the same kind of crime upon one member of her family for which she was being tried. Poison was used in each instance to make away with her husband, and the nearness in point of time so connect the two attempts with the poisoning of the daughter that it tends to show a plan or scheme on her part to destroy her whole family perhaps for the purpose of collecting insurance carried upon their lives or that she might have a better opportunity to associate freely with her alleged paramour.

The kindred nature of the crimes and their nearness in point of time justified the court in admitting the confession she made relative to her attempt to poison her husband.

The court fully and correctly instructed the jury in the case.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

ARKANSAS STATE HIGHWAY COMMISSION *v.* NELSON BROTHERS.

4-4026

Opinion delivered November 4, 1935.

Carl E. Bailey, Attorney General, *Neil Bohlinger, Leffel Gentry* and *W. L. Pope,* for appellant.

Mahony & Yocum, for appellee.

BUTLER, J. The trial court entertained jurisdiction of a suit instituted by the appellees against the appellant, Arkansas State Highway Commission, to recover balance alleged to be due for construction work done on State highways under a contract with the commission. The appeal prayed from the decree awarding to the appellees the amount claimed challenges the jurisdiction of the court.

The lower court doubtless based its decision on the cases of *Arkansas Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879; *Baer* v. *Arkansas Highway Commission,* 185 Ark. 590, 48 S. W. (2d) 842, and *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71. The appellant insists (1) that the case at bar is distinguishable from the cases, *supra,* and comes within the exception of *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993, and the late case of *Ark. State Highway Commission* v. *Dodge,* 190 Ark. 131, 77 S. W. (2d) 981, and (2) that the instant case is one in effect against the sovereign State and is prohibited by § 20, art. 5, of the Constitution of 1874. The appellees insist that there is no valid distinction in principle between the instant case and the cases first cited, and that it is ruled by them.

It is difficult to reconcile our decision in the first-named cases with the two last pronouncements of this court. We refrain from an analysis and comparison of these cases, but it must be confessed that they appear not to be in harmony and the two later cases—and especially the Dodge case in the 190 Arkansas seem to impair the validity of the cases first mentioned. Candor also compels the admission that the result serves as an uncertain guide for the profession and the trial courts.

The important question is: shall we attempt to distinguish the instant case from the three cases first cited, or shall we re-examine those cases, and, if the principles there announced clearly appear to be erroneous, shall we do in fact what appears to be implied in the last Dodge case, namely, abandon our erroneous views and overrule those cases? We prefer the latter course, although it involves this court in some degree of embarrassment.

In *Arkansas Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879, five of the justices were of the opinion that the plain provisions of § 20, art. 5, of the Constitution prohibited the State from giving its consent to its being made the defendant in any of its courts. Five justices held that the Arkansas Highway Commission was a State agency, and that a suit against it was in effect a suit against the State. With these views enter-

tained by the majority, the illogical conclusion was reached that the Highway Commission, although the State's *alter ego,* could be made the defendant in the courts. This result flowed from the concurrent opinion of four of the justices, two of whom held that the Commission was not an agency of the State but "a legal entity," or "a juristic person" and, as such, was without the pale of the immunity to suit inherent in the sovereign. The other two judges held to the view that the Highway Commission was an agency of the State engaged in the discharge of the State's sovereign functions, but that the section of the Constitution, cited *supra,* was not mandatory, but simply declaratory of the inherent immunity of the State to suit except by its consent; that the State had consented by legislative enactment to suits against it, and therefore the suit against the Highway Commission could be maintained.

We first examine the theory that the Highway Commission is not an agency of the State, but a mere legal entity. This theory is bottomed on the authority of the case of *State ex rel. State Highway Commission* v. *Bates,* a case decided by the Supreme Court of Missouri and reported in 317 Mo. 296, 296 S. W. 418. In so far as we are advised, or our research extends, this case stands unique in the history of jurisprudence, and the principle there announced that a body clothed with the powers of the State and delegated to perform its duties is not an agency of the State but a mere legal entity (whatever that may be). We submit that this principle is based on neither reason nor authority, and the cases cited in support of it do not in fact lend support to that doctrine. Moreover, the Constitution of the State of Missouri does not contain the prohibition, or one similar to that of § 20, of art. 5, of our Constitution, and the Supreme Court of Missouri expressly found in that case that the State which created the commission subjected it to be sued by express statutory provision, and that "if it is in fact and in law the State, the State has consented to suit being brought." Although this conclusion was reached, the court proceeds with the following unnecessary remarkable declaration: "It (the commission) is

not the State, but a mere entity created by the State for the specific purpose of contracting of the building of State highways and bridges and the maintenance of the same, and doing all other things pertaining thereto." It is upon this pronouncement that the opinion of two of the judges in the first Dodge cases is based.

A case cited by the Missouri court as "a case fully in point" is *Cross* v. *Ky. Board of Managers of World's Columbian Exposition,* 105 Ky. 840, 49 S. W. 458. In that case the board of managers was authorized by the act creating it to operate a restaurant in connection with the State building erected at the exposition. The suit was brought to recover for a breach of contract in the operation of the restaurant. The court said: "The erection of the headquarters building and the running of a restaurant were matters of business in which this board stood on the same plane as others engaged in like undertakings." The nature of the business, then, in which the board of managers was engaged was not a discharge of the sovereign functions of the State, as is the business of constructing, maintaining and operating the State's highways. The Constitution of the State of Kentucky in § 231 thereof provides: "The General Assembly may by law direct in what manner and in what courts suits may be brought against the Commonwealth." The reasoning of the Kentucky case seems to place liability on the State on the ground of consent more than on the nature of the business engaged in. We do not review the other cases cited, but it would seem that they come from States in which there is no prohibition against consent being given to suits, and do not support the declaration we have quoted from the Missouri court or persuade us that such declaration announces sound doctrine.

If the power delegated and the duties to be performed by the Highway Commission are essentially public in their nature, then it must be the agent of the State, for in the nature of things the State must act through agents, and these, while in the discharge of public duties, stand in the place of the State. The Highway Commission, by the act creating it, is clothed with the power and the duty to construct, operate and maintain highways.

If these powers and duties rest primarily in the State, the Highway Commission, when clothed therewith, is something more than the "legal entity" thought to be its status. In *Williams* v. *Parnell,* 185 Ark. 1105, 51 S. W. (2d) 863, in speaking of legislation relating to highways, the court said: "In it the Legislature declared it to be the policy of the State to take over, construct, repair, maintain and control all the public roads in the State, comprising the State highway system as defined in the act." In that case, in upholding the right of the State to issue bonds for the purpose of borrowing money to construct highways and to levy taxes for their support, the court further said: "The reason is that highways may be constructed and maintained for public use by the State itself or by governmental agencies created by law for that purpose. Public highways are for public use, and there is no reason why the power of taxation by the State may not be exercised in their behalf. While it is elemental that taxes may only be levied for a public purpose, one of the most important duties of the State is to provide and construct public highways." (Citing *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.) Numerous authorities might be cited to support this statement, and we apprehend there are none to the contrary. Illustrative of these are *Wooster* v. *Arbentz,* 116 Ohio St. 281, 156 N. E. 270, 52 A. L. R. 518; *Robbins* v. *Limestone County,* 114 Tex. 345, 268 S. W. 915; *Kansas City Bridge Co.* v. *Alabama, etc.,* 59 Fed. (2d) 48; and *Dougherty* v. *Vidal,* 37 N. M. 256, 21 Pac. (2d) 90.

If, then, the Highway Commission discharges duties primarily residing in the State, it must of necessity be the State's agent. This was the express holding in *Dougherty* v. *Vidal, supra,* and in the advisory opinion to the Governor, 94 Fla. 967, 114 So. 850. In the last case the court said: "The road department is a State agency and component part of the State government. The product of its work is State property, it exercises a part of the sovereign power of the State, and its activities are supported by funds created by State taxes and Federal aid funds." This is also necessarily implied by the language of the court in *Williams* v. *Par-*

nell, supra. Indeed, a majority of this court has always held that the Highway Commission is the agent of the State. In *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, this court, in holding that the penitentiary board was an agency of the State and as such not amenable to suits in our courts, said: "The penitentiary board is created by statute as the agent of the State to manage and provide for working the convicts of the State. That board has the power to make contracts for the State, and it is the sole agent of the State in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion and all that it does for the State."

We perceive no just distinction between the penitentiary board in its relation to the State and the Highway Commission. Both discharge public duties, receiving authority from the State, and, if one is the agent, the other must be.

We proceed next to an examination of the position of the two justices holding that the State could have, and has, given its consent to suits against the highway commission. As has been heretofore stated, a majority of this court has always held that § 20, art. 5, *supra,* providing that "the State of Arkansas shall never be made defendant in any of her courts" was mandatory, and that by reason thereof the State was incapable of giving its consent to being sued in the courts. There was no case cited in the first Dodge case, or in the Baer case, *supra,* which in our opinion sustains the view of the justices as to our constitutional provision quoted. The most that can be said for these cases, both from our own court and from the Supreme Court of Alabama, is that a liberal construction has been given certain constitutional provisions which may have departed from the letter of the same. But these are no authority for so great a departure as the theory under discussion would have us go. The language of the quoted prohibition is so precise and clear as to admit of no room for interpretation or for any refinement of judicial construction which would obscure or change the common and ordinary meaning of the words employed. The case of *Pitcock* v. *State, supra,*

when examined from its four corners and considered in connection with the later case of *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S. W. 663, indicates a clear intention to give full effect to our constitutional prohibition. In the Pitcock case we find this statement: "All who contract with the State must do so with full knowledge that they must rely solely on the legislative branch for the performance of the contract and for satisfaction of the State's just obligations." Reinforcing the view that a literal interpretation of the constitutional prohibition must be adopted is the fact mentioned in *Watson* v. *Dodge, supra, i.e.,* that the Constitution of 1868 provided that the General Assembly should direct by law in what manner and in what courts suits might be brought by, and against, the State, and that this provision was eliminated from the Constitution of 1874 and § 20, art. 5, *supra,* was included. This fact is significant and precludes the idea suggested by the late Chief Justice HART in his opinions in the Dodge and Baer cases, *supra,* that the provision was merely declaratory of the immunity of the State from suit without its consent. It is clear that, if this were true, the Constitution of 1874 would have re-enacted the provision of the Constitution of 1868 or said nothing on the subject, under which, in the latter case, under settled principles, the State could have consented to be sued. It is a matter of history that at the time of the adoption of the Constitution of 1874 the State was emerging from a period in which its very foundations had been shaken. Its resources were exhausted, and many fraudulent and unjust claims were being made against it, and, as suggested in the case of *Watson* v. *Dodge, supra,* the impelling motive for the prohibition that the State should not be made a defendant in its courts was similar to that which brought about the adoption of the eleventh amendment to the Federal Constitution, stated in *Cohen* v. *Virginia,* 6 Wheat. 264.

The State Constitution of Alabama contains a provision practically identical with our own, and which expressly prohibits the State from being made a party defendant in any court of law or equity. Under that provision the Supreme Court of Alabama held in the case

of *Alabama Industrial School* v. *Reynolds,* 143 Ala. 579, 42 So. 114, and in the *Alabama Ind. School* v. *Adler,* 144 Ala. 555, 42 So. 116, 113 Am. St. Rep. 58, that neither the State nor any of its agencies could be sued, and the courts were without jurisdiction. In the latter case it is said: "There is not only no law giving the court capacity to entertain the complaint against the defendant, but there is the section of the organic law of the State which prohibits such capacity. There is no provision in the Constitution by which the exemption of the State from suit may be waived." This is identically the situation in this State.

In *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71, the court reached a unanimous opinion following the first Dodge case and the Baer case without attempting to justify those decisions, but bending to the will of the majority and treating the question as *fait accompli.* Whatever the motives constraining the court, that decision is indefensible on legal principles. The human element in Legislatures and courts, following a natural impulse, abhors an injustice perpetrated without a forum in which the right denied or the wrong suffered may be asserted or redressed. Therefore we find Legislatures devising means for the assertion of rights or the redress of wrongs, even when the State is involved, and the courts are as sensitive to such impulse as the Legislatures. On that account, laws are often enacted and decisions rendered to effectuate abstract justice, but which on no just grounds can be sustained except by unsound or specious reason. An apt illustration of this is found in the cases which we have reviewed. It is with reluctance that we have undertaken this review, but we are impelled by the conviction that those decisions are wrong. We realize that the overruling of a decision has a tendency to render the laws of the State less certain. In this case, however, to adhere to our former decisions would be, as we conceive it, nothing short of judicial usurpation. It is our settled conviction that the State cannot give its consent to the maintenance of an action against it and the court below was without jurisdiction. No one has a vested right to sue

the State, even when that privilege may be, and has been, given; it may be withdrawn even where a suit has been commenced without disturbing any vested right. *Beers* v. *State,* 20 Howard 527. "The plaintiff cannot complain because the court overruled its former decision, even though that decision permitted the plaintiff to maintain its suit similar to the one now before us." *Pitcock* v. *State, supra.*

It follows that the decree of the trial court must be reversed and the case dismissed, and the cases of *Ark. Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879; *Baer* v. *Ark. Highway Commission,* 185 Ark. 590, 48 S. W. (2d) 842, and *Arkansas Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71, are expressly overruled, and so much of the opinion in *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, as tends to support the doctrine of the cases overruled is also overruled.

SMITH and MEHAFFY, JJ., dissent.

SMITH AND MEHAFFY, JJ., (dissenting). The effect of what is now the majority opinion is that the State Highway Commission may make contracts for the construction, maintenance, repair, etc., of the State's highways, but the courts of the State will not be permitted to lend their aid to secure their enforcement. Any differences between the contracting parties growing out of the performance of these contracts must be referred to the General Assembly for adjustment and settlement.

It is fortunate for the State that this decision was rendered at the conclusion—rather than at the beginning—of the State's road-building program. It is very doubtful whether the Highway Commission could have contracted advantageously, had contractors and road builders been advised, when the State first entered upon its road construction program (under the provisions of the Martineau road legislation, Acts 1927), that they were entirely at the mercy of the Highway Commission and its employees and representatives in the settlement of the many and varied questions which might arise, and

which actually arose, under the almost innumerable contracts which the road program made necessary. It is not only probable, but it is reasonably certain, that if contractors had known that upon making a contract with the Highway Commission they made themselves dependent upon the sense of fairness of the Commission and its employees, with no remedy, in case of disagreement, except an appeal to the General Assembly, contract prices must necessarily have been made to compensate the hazard.

But this now appears to have been what they did, and what future contractors will necessarily do. These contractors make bond to secure the faithful performance of their contracts, which bind them and their sureties, but the other contracting party (the Highway Commission) is not bound. The contractor has no forum where he may present his side of any controversy relating to his contract except the General Assembly. He must accept what is offered. He must take what is given. No court or other forum may hear his complaint that the engineer, inspector or other agent of the Highway Commission has acted ignorantly or corruptly or has misinterpreted or misapplied the provisions of the contract. He may, however, apply to the General Assembly, which, if it pleases, may hear him. A result so unfair should not be reached unless compelled. Does the Constitution compel it?

Justice MEHAFFY and I fully concur in so much of what is now the majority opinion of the court which holds that the State is immune from suits in the courts of this State, and that the General Assembly is without power to give that consent. We expressed that view in the opinion in the case of *Arkansas State Highway Commission* v. *Dodge*, 181 Ark. 539, 26 S. W. (2d) 879, which case, for brevity, will hereinafter be referred to as the Dodge case.

Arkansas and Alabama are among the few States whose Constitutions contain provisions denying the General Assembly of the State the power to consent to such suits. The Constitutions of the majority of the States are either silent, like that of Missouri, or contain direc-

tions to the General Assembly to direct by law in what courts and in what manner suits may be commenced against the State. The Constitutions of this State of 1836, 1861, 1864 and 1868 contain this latter provision.

The majority say: "Five justices held (in the Dodge case) that the Arkansas Highway Commission was a State agency, and that a suit against it was in effect a suit against the State." This was never, and is not now, my opinion or that of Justice MEHAFFY. It was and is our opinion, as expressed in the Dodge case, that the suit there authorized was not in fact or in effect a suit against the State. The majority say it is unimportant to distinguish the Dodge case from the instant case, as the Dodge case has been expressly overruled. Justice MEHAFFY and I shall not, therefore, now consider whether there is any distinction.

It is true Justice MEHAFFY and I were much persuaded by the reasoning of the Supreme Court of the State of Missouri in the case of *State ex rel. State Highway Commission of Missouri* v. *Bates,* 317 Mo. 696, 296 S. W. 418. We thought it was exactly in point, and that its reasoning was perfectly sound. It was rendered by the Supreme Court of Missouri *in banc,* and obviously after full investigation and reflection. The opinion recites that all the Justices concurred. The case will speak for itself. That it sustains the views expressed by Justice MEHAFFY and the writer is conceded in the majority opinion. They say, however, that, although this is true, the Missouri case is without authority in this State for the reason that the Constitution of Missouri, unlike that of this State, contains no inhibition to the General Assembly of the State against giving consent to suits against that State. But, as we said in the Dodge case, "The opinion (of the Supreme Court of Missouri) begins with a quotation from a former opinion of the Supreme Court of that State, where Justice LAMM, speaking for the court, had said: 'That the sovereign State may not be sued is a truism,' and while it was added that the sovereign may, by law (under the Constitution of that State), give consent to the citizen to sue it, the point was expressly decided and made the basis

of the decision that the suit was not in fact against the State."

The authority of that case for the views expressed by Justice MEHAFFY and myself is, therefore, not to be impaired because the Constitution of Missouri does not contain the inhibition found in ours, for, as was held by the Supreme Court of that State, the inhibition exists in that State, although their Constitution is silent on the subject. The point there decided was that this inhibition, which existed notwithstanding this silence, did not deprive the General Assembly of that State of the power to create an agency to supervise the construction of State highways and to make appropriations for that purpose and to authorize this agency or entity, as it was there called, to make contracts relating to these appropriations and to set up a forum wherein differences arising out of these contracts might be adjudicated. The legislation of this State referred to in the opinion in the Dodge case was to the same effect as that of Missouri. A similar agency or entity had been created with similar powers. What we there said expressed the view which we still entertain and which were there summarized as follows:

"In the proceedings there provided for a judgment might be rendered fixing a liability against the Highway Commission, but a judgment so rendered would not be a judgment against the State as such, and could not be enforced by the seizure or sale of the property of the State, as a judgment could be enforced against a private litigant. Satisfaction can be had only out of the fund specifically appropriated for the purpose in regard to which the Highway Commission was authorized to contract.

"The appropriation for the use of the Commission is a fund set aside for a specific purpose. The Highway Commission is an entity, or juristic person, created to disburse this money in payment of work which it is authorized to contract for, and, while the appropriation was not made specifically to satisfy judgments rendered against the Commission, it was contemplated that judgments might be rendered, and the appropriation is the

State's provision for their payment. It was not contemplated that the Highway Commission should accede to every demand of every contractor, yet it was contemplated that in the expenditure of a sum of money so large the Highway Commission, in its zeal to protect the fund, might take positions which, if persisted in, would work injustice to some contractor, who could not sue the State as such. Therefore, a forum was constituted where these differences might be adjusted according to applicable legal principles, this forum being the courts at the seat of government in Pulaski County."

Entertaining these views, Justice MEHAFFY and I joined in making the opinion in the case of *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993. In that case an attempt was made to seize and operate a State-owned toll bridge, and we voted to prohibit that action, because, as we had said in the Dodge case, the State's property could not be seized or sold. The majority say the law is unsettled and uncertain, and so it is, but that uncertainty arose out of the recent case of *Arkansas Highway Commission* v. *Dodge,* 190 Ark. 131, 77 S. W. (2d) 981, where it was held for the first time that a suit against the State Highway Commission was a suit against the State. Mr. Justice MEHAFFY was disqualified and did not participate in that case. I dissented.

We do not agree that the Missouri case, *supra,* furnished us the only authority for our views expressed in the Dodge case. We there said: "The instant case is somewhat similar to the recent case of *Urquhart* v. *State,* 180 Ark. 937, 23 S. W. (2d) 963." That case had been decided by an undivided court. It was a continuation of the litigation begun to collect a balance alleged to be due from the State upon a purchase of lands for use as a State Penitentiary, reported in the case of *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S. W. 663, which case is cited in the majority opinion in the instant case. It is interesting to note that the opinion in this case of *Jobe* v. *Urquhart, supra,* reversed the chancellor by a vote of two to three, Justices WOOD and HART dissenting. The unsuccessful litigants, the Urquharts, pursued their remedy to the Legislature, and that body, instead of

granting relief, as it might have done, passed, at its 1929 session, legislation which constituted the chancery court of Pulaski County as an agency to adjudge the extent of liability of the State remaining unpaid upon the contract to purchase a State convict farm.

We there said of this legislation in the last appeal of the Urquhart case, *supra*: " 'The Legislature might have ascertained the amount, both of principal and interest, and have made an appropriation accordingly, but it elected to constitute another agency to make this finding of fact, and made an appropriation in what was assumed to be a sufficient amount to pay both the principal and the interest, and, under the remittitur which has been entered, the appropriation is sufficient.' It is true that suit was brought by the State, as the act provided it should be, but the act also provided that the State's vendor might litigate his claim for interest, and that either party should have the right to appeal from an unfavorable decision."

No member of the court as it was then constituted thought that the creation of this agency to adjudicate this controversy was a suit against the State. The opinion was delivered by a unanimous and undivided court only about two months before the opinion in the Dodge case was delivered.

But the opinion in the Dodge case referred to another case even more directly in point than the Urquhart case. We there said: "The instant case is more like that of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41."

In the Grable case, which is reported in the same volume of our reports as the last Urquhart case, the opinion was written by Chief Justice HART, of honored memory, who spoke for an undivided and unanimous court. It cannot be distinguished from the Dodge case. Like the Dodge case, it was a suit against the State Highway Commission, and was begun in the courts of Pulaski County. Its purpose was to compel the Highway Commission to make a disbursement of a portion of an appropriation for road purposes in accordance with what the plaintiff citizens thought was the duty of the Com-

mission to do. There were two suits seeking this relief, one in the Pulaski Circuit Court, the other in the Pulaski Chancery Court. The relief prayed had been denied in each court, and the appeals from that action were consolidated and disposed of by the opinion in the case of *Grable* v. *Blackwood, supra.* The judgment of the circuit court and the decree of the chancery court were both reversed in this opinion by Chief Justice HART, and the causes were remanded with directions to compel the Highway Commission to carry out the provisions of the appropriation act and for further proceedings in accordance with the opinion. The directions required the courts of Pulaski County to do what we said in the Dodge case they had jurisdiction to do.

The majority now say that "* * * so much of the opinion in *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, as tends to support the doctrine of the cases overruled is also overruled." If any portion of the Grable case still remains as the law of this State, the confusion engendered by the opinion in the case of *Arkansas Highway Commission* v. *Dodge,* 190 Ark. 131, 77 S. W. (2d) 981, has not been removed.

Justice MEHAFFY and I believe the opinion in the Dodge case is sound in principle and is fully supported by our own cases herein cited as well as by the Missouri case, also cited. We therefore dissent from the present opinion which overrules the Dodge case.

MCGEHEE *v.* WILLIAMS.

4-4172

Opinion delivered November 11, 1935.

R. S. Wilson, for appellant.

Starbird & Starbird, Fadjo Cravens and *Daily & Woods,* for appellees.

JOHNSON, C. J. Under a Federal Government loan and grant by the Public Works Administration, the city of Fort Smith, Arkansas, is constructing a municipal waterworks system and plant including a large reservoir. This reservoir or the water supply will be obtained in the vicinity of the city of Alma, Crawford County, Arkansas. The impounded water will be conveyed through a 27-inch pipe and will pass in the vicinity of the city of Alma.

The city of Alma is likewise constructing a waterworks distributing system with funds procured from the same source from which Fort Smith obtained its funds. October 12, 1935, the two cities referred to, through their regularly constituted officers entered into the following written contract:

"WHEREAS, the city of Fort Smith, (Arkansas), pursuant to a loan and grant agreement with the United States of America (Public Works Administration), issued

revenue bonds under and pursuant to the provisions of act 131, of the Acts of 1933, as amended, and has acquired land for, and entered into construction contracts for the creation of, a lake or impounding reservoir, and the building of a filtration plant northeast of Mountainburg, in Crawford County, Arkansas, and has entered into construction contracts for the connection of said water supply (impounding reservoir) and filtration plant with the present water distribution system operated by the city of Fort Smith, Arkansas, in the city of Fort Smith, by means of a 27-inch steel pipeline; and

"WHEREAS, § 3 of Ordinance No. 1682 of the city of Fort Smith, providing for the issuance of said revenue bonds contemplates and provides for sale of water by the city of Fort Smith to other municipalities at contract rates; and

"WHEREAS, the incorporated town of Alma desires to own and construct an elevated water storage tank and water distribution system in the town of Alma, and to connect same by means of an 8-inch water pipeline to be owned and constructed by the town of Alma with the 27-inch pipeline now being constructed by the city of Fort Smith, and further desires to thereafter take and purchase water through said connection for the purpose of furnishing fire protection to the town of Alma and the property located therein, and for the purpose of furnishing and selling water to domestic, commercial and industrial consumers in said town:

"Now, therefore, this agreement witnesseth:

"The parties agree that the town of Alma may at its sole expense construct said elevated water storage tank, distribution system, and 8-inch pipeline, and may connect said 8-inch pipeline to be constructed, and owned by the town of Alma, with the 27-inch pipeline now being constructed by the city of Fort Smith. Said connection shall be made at or near the settlement of Rudy, in Crawford County.

"The town of Alma shall at its sole expense install all necessary valves at or near said connection to the end that the flow of water through said 8-inch pipeline may be controlled and/or shut off and turned on, and the

town of Alma shall at its sole expense install a meter house at or near said connection and shall at its sole expense furnish and deliver at said meter house a 6-inch protectus meter (or equivalent) to be used in measuring water delivered to it through said connection.

"The city of Fort Smith shall at its own expense set and connect said meter and shall thereafter repair and maintain same. Said meter shall be installed in said meter house, which shall be located at or near the connection of said 8-inch pipeline with said 27-inch pipeline.

"The town of Alma shall within thirty (30) days from the date of this contract furnish plans and specifications for said meter house and valves, and said plans and specifications shall show the exact location of the point of connection and the exact location of said meter house and valves, and said plans and specifications shall be subject to the written approval of Commissioner No. 2 of the city of Fort Smith, and said connection shall not be made until said plans and specifications shall have been approved by said commissioner.

"Subject to the agreements and conditions hereinafter set out, the city of Fort Smith agrees to sell and deliver water to the town of Alma through said connection and meter at the prices and upon the terms hereinafter set out, and the town of Alma agrees to purchase and take water through said connection and meter at the prices and upon the terms hereinafter set out.

"The town of Alma agrees to pay to the city of Fort Smith ten cents per thousand gallons for the first 250,000 gallons of water delivered through said connection and meter in any calendar month, and six cents per thousand gallons of water over 250,000 gallons delivered through said connection and meter in any calendar month, provided that the town of Alma further agrees to pay a minimum of at least twenty-five dollars ($25) each calendar month during the life of this contract.

"The town of Alma agrees to pay on or before the 20th of each month at the prices and minimum specified above for water delivered during the preceding calendar month, and expressly agrees that on its failure to do so the city of Fort Smith, after giving ten days' notice by

registered mail addressed to the mayor of the town of Alma, may cut off said water by means of the valves installed at or near said connection and may cease furnishing water under this contract. In the event said connection is closed pursuant to this section, then the city of Fort Smith shall not be obligated to reopen said connection until all unpaid bills plus ten dollars ($10) to cover cost of reopening said connection shall have been paid by the town of Alma.

"This contract shall run for a period of twenty (20) years from the date said connection is made."

This suit was instituted in the Crawford Chancery Court by appellants, citizens and taxpayers of the city of Alma to restrain and enjoin the further performance of the said contract by the respective parties for the reason that it is illegal, *ultra vires* and void.

The two cities demur to the complaint thus filed, and the trial court sustained the same, and the case is here for review on appeal.

Appellants' first contention is that the city of Alma is without power or authority in law to purchase a water supply for distribution to the inhabitants from another city. Section 7564 of Crawford & Moses' Digest, when construed with § 2 of act 131 of 1933, confers the express power upon municipalities to provide a water supply for their inhabitants by constructing or acquiring by purchase or otherwise, wells, pumps, reservoirs, or waterworks, or any integral part thereof; to regulate the same and to this end may go beyond its territorial limits to accomplish these purposes. It is thus seen that the power to supply water to the inhabitants of a town or city situated in this State is expressly granted by the statutes, and it necessarily follows from this that the means of acquiring such water supply is incidental to the express power conferred and is therefore certainly and definitely implied. *Brown* v. *Bentonville*, 94 Ark. 80, 126 S. W. 93.

This conclusion is irresistible when we consider that by § 2 of act 131, *supra,* the law as it then existed was amended to provide that waterworks should be construed

to mean waterworks system in its entirety or any integral part thereof.

This conclusion means that the city of Alma has the power and authority, under the statutes referred to, to acquire by purchase or otherwise a water supply for distribution to its inhabitants from any source and may contract to this effect.

A number of cases from other jurisdictions are urged upon us as decisive of the doctrine that municipalities are without power to act save in cases where authority is expressly granted. See *Childs* v. *Columbia,* 87 S. C. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542; *Farwell* v. *Seattle,* 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130. But such does not appear to be the doctrine of general application. See 19 R. C. L. 768, which states the generally accepted rule as follows: "It is well settled that a municipal corporation has only such powers as are clearly and unmistakingly granted to it by its charter or by other acts of the Legislature, and consequently can exercise no powers not expressly granted to it, except those which are necessarily implied or incident to the powers expressly granted and those which are indispensable to the declared objects and purposes of the corporation."

Appellants next urge that the city of Fort Smith is without power in law to contract for the sale of water to the city of Alma. *Kearny* v. *Payonee,* 90 N. J. Eq. 499, 107 Atl. 169, and other cases are cited in support of this contention. The courts generally seem to be divided on this question, but we conceive that we are not now at liberty to review the many cases pro and con on this question. In *Armour* v. *Fort Smith,* 117 Ark. 214, 174 S. W. 234, we expressly held, quoting from the headnote, that, "A city took over the control of the water supply and system of Water District No. 1. Later, District No. 2 was organized covering other territory in the city not covered by District No. 1. *Held,* the city had authority to permit District No. 2 to connect with the mains of District No. 1, and to sell water to the said District No. 2, where there was an ample supply of water, and the city made money by the transaction." True, the case last referred to did

not involve the identical question here presented, but the legal principle there stated cannot be distinguished from the one here presented, upon sound reason or logic. We conclude, therefore, that the city of Fort Smith has the power in law to sell its surplus water to inhabitants located without the city limits, and to this end has power and authority to execute a contract.

Appellants also contend that this contract is in violation of Amendment No. 10 to the Constitution of 1874. This contention is grounded upon the theory that the water rentals due under the contract would be a charge against the general revenues of the city of Alma during the life of the contract. We do not so construe the contract. The rentals therein provided are to be paid from the revenue derived from the distribution of the water supply. When the contract is thus construed, it can in no event offend the amendment. We so expressly held in *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. (2d) 1017. See also *Ozark* v. *Ozark Water Co.,* 190 Ark. 872, 81 S. W. (2d) 920.

Nor can we agree with appellants that the fact that the incomes and physical properties of both city projects are pledged for the payment of the bonds and interest to the Federal agency, renders this contract illegal and void. This contract, as we understand, is fully recognized and authorized in the respective ordinances creating these projects and is a part and parcel thereof, and, in the event of insolvency or change of ownership of either water system, the receiver or purchaser thereof must take notice that the property is burdened with this contract. See *Warmack* v. *Major Stave Company,* 132 Ark. 173, 200 S. W. 799.

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

GREAT ATLANTIC & PACIFIC TEA COMPANY *v.* GWILLIAMS.

4-4041 and 4042

Opinion delivered November 11, 1935.

King, Mahaffey, Wheeler & Bryson, for appellant.

Carrigan & Monroe, for appellees.

SMITH, J. The appellees in this case have recovered judgments for a second time against appellant for damages to compensate injuries and suffering occasioned them by eating tainted and impure food which it was alleged appellant had negligently sold. The first judgments in which damages were recovered were reversed in an opinion appearing in 189 Ark. 1037 *et seq.*, 76 S. W. (2d) 65. The testimony offered at the first trial is fully recited in the former opinion, and we said it was insufficient to support the verdicts because its effect was to show only that the plaintiffs were made sick by eating cheese which had been purchased from appellant without showing that appellant was guilty of negligence in making the sale. The cases had been tried upon the

theory that the cheese which the plaintiffs ate and which made them sick had been kept in a display case which also contained tainted meats, and that the cheese had been contaminated by the meats. After an extensive review of the testimony, we said that, while this might have been true, the testimony failed to establish that fact, and that it was only by speculation and conjecture that this conclusion could be reached. The judgments were therefore reversed because of the insufficiency of the testimony to support the verdicts, and the cases were remanded for a new trial. Upon the remand and retrial of the causes, there were again verdicts and judgments in favor of the plaintiffs, from which is this appeal.

It is insisted, for the reversal of these second judgments, that the testimony is substantially identical with that which on the former appeal was held insufficient. But we do not think so. The missing link in the testimony was supplied by a witness, Robert Watson, who did not testify at the former trial. A vigorous assault is made upon the credibility of this witness; but this was, of course, a question for the jury.

This witness testified that at about six o'clock on the Saturday evening before the cheese which poisoned the appellees was purchased the following Monday morning he purchased a piece of bologna sausage, which was cut from a stick of sausage lying against the cheese in the glass display case in appellant's store and meat market. The witness ate a portion of this sausage on Saturday evening before the cheese was sold at noon the following Monday, and was made sick by eating it. The witness had the butcher who made the sale slice the sausage, so that he would not have to slice it at home, and this was done with a knife inside the case. The testimony shows that this knife was used in selling both the cheese and the sausage. Witness returned the sausage early the following Monday morning, and told the butcher who had made the sale that it was spoiled. The butcher gave witness a piece of meat for the spoiled sausage, and remarked as he did so, "Most any meat will spoil in time behind the counter."

Upon this testimony, and the other testimony in the case which the former opinion recites, the court permitted Dr. Martindale to answer the following hypothetical question: "Q. State whether or not if these children had eaten a piece of cheese, and that piece of cheese it developed had come in contact with a piece of spoiled or contaminated bologna sausage, or laid by a piece of contaminated bologna sausage, and these children were poisoned after eating that cheese, and that was all they had eaten, the cheese was what in your opinion caused that condition?"

To this question objection was made that there was no testimony to prove the hypothesis. Over appellant's objection and exception the doctor was permitted to answer as follows: "A. I would like to say that anything that was contaminated with ptomaine poison in a glass case, or a wooden case, or anywhere confined, would contaminate everything in there."

Other questions and answers admitted over the appellant's objections and exceptions were as follows: "Q. I want to ask you if a piece of cheese in itself—if it will contaminate or become poison without coming in contact with some other poison? A. Well, it's not likely to. I don't know that I have ever known ptomaine poison from cheese unless it had come in contact with flesh or some kind of meat. Q. Well, will contamination appear in bologna sausage? A. Oh, yes. Any kind of meat. I don't think of anything more apt to do it than bologna sausage, unless it was just ordinary pork sausage or beef sausage."

We think, in view of the testimony recited in the former opinion and the additional opinion recited in this opinion, that there was sufficient testimony to prove the hypothesis, and the objection was not therefore well taken.

No complaint is made of the instructions under which the cases were submitted to the jury. Indeed, the former opinion is the law of the case, and we have concluded, under the law as there declared, that the testimony in its entirety is sufficient to support the finding

that appellant's salesman was negligent in selling the cheese which made appellees sick.

The judgments must therefore be affirmed, and it is so ordered.

JENKINS *v.* JENKINS.

4-4043

Opinion delivered November 11, 1935.

J. H. Reynolds, for appellants.
Dean, Moore & Brazil, for appellees.

HUMPHREYS, J. Appellants, heirs of Joshua Jenkins, deceased, brought suit against appellees, also heirs of deceased, in the chancery court of Conway County to partition a tract of land in Conway County consisting of 172 acres between them according to their several interests therein, alleging that Joshua Jenkins was the owner of all of said land at the time he died.

Appellees filed an answer admitting that all the heirs owned the several interests alleged in 152 acres of said tract, but alleged that they owned an undivided one-half interest in the SE¼ of the NE¼, section 31, township 8 north, range 14 west, known as the "gin 40," deraigning title thereto by conveyance from A. C. New, widow of N. B. New, to Robert Jenkins and his father, Joshua Jenkins, in 1904, which deed of conveyance is of record in Book 41 at page 511 of the Records of Conway County, specifically referring to said book and page and making same a part of the answer.

Upon a hearing of the cause, the trial court found and decreed an undivided one-half interest in the "gin 40" to appellees, from which finding and decree an appeal has been duly prosecuted to this court.

Relative to the ownership of the "gin 40," the record reflects as follows:

On December 23, 1902, J. J. Jenkins and George Jenkins entered into a contract with N. B. New to purchase the "gin 40" from N. B. New for $200. J. J. Jenkins concluded he did not want to buy an interest in said 40, so Joshua, his father, took his place and paid New for same and received a deed in 1904 from A. C. New, widow of N. B. New, conveying said 40 to himself and his son, Robert L. Jenkins, who was a party to the original contract of purchase. Joshua Jenkins paid the taxes, occupied and managed all the lands, including said "gin 40," until he died in 1912, after which time all the heirs occupied any portion of it they chose, moving from one part of it to another part thereof from year to year which was not occupied and cultivated by another one of them. No one of them occupied any particular portion thereof to the exclusion of the others for any definite

length of time claiming title thereto. The taxes were paid on the whole tract by various heirs after the death of Joshua Jenkins. Only two acres of the "gin 40" were in cultivation, and it had been cultivated by appellees two or three years before the suit was instituted, and by their immediate ancestor, Robert L. Jenkins, before he died. In the year 1929, appellants or some one of them had the A. C. New deed recorded. No effort was made by any or all of them to have the deed reformed. All of the heirs joined in oil leases to said lands.

Appellants contend for a reversal of the decree in awarding appellees an undivided one-half interest in the "gin 40." We think not. The deed from A. C. New to Joshua Jenkins and Robert Jenkins conveyed an undivided one-half interest therein to each of them. Appellants approved and confirmed the recitals of the deed by safely keeping and recording same and by allowing Robert and his descendants to occupy and cultivate it without attorning to them. Appellants argue, however, that they are not estopped to question the recitals in the deed, alleging that the deed is void because A. C. New had no title to the land and had no right to convey same to Joshua and Robert pursuant to a contract made between her husband, N. B. New, and them. The deed recites that she had title thereto and the right to sell same. It may be that she acquired title thereto by will or deed. Her husband could have deeded or willed it to her. There is nothing in the record to show how she acquired title thereto. It is also argued that their ancestor, Joshua Jenkins, acquired title to same as against Robert by adverse possession, but the evidence does not show that he claimed title as against Robert during the time he occupied it and paid the taxes on it. His possession and payment of taxes is not conclusive that he did not make a gift of it to Robert. He had a perfect right to give it to him. Appellants' contention that they acquired title thereto from Robert as well as appellees by adverse possession is not supported by the evidence. According to the decided weight of the testimony, no one of the heirs held any of the lands adversely to the other.

This court said in the case of *Singer* v. *Naron*, 99 Ark. 446, 138 S. W. 958, that:

"In order for the possession of a tenant in common to be adverse to that of his co-tenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed."

No error appearing, the decree is affirmed.

COMMERCIAL UNION ASSURANCE COMPANY *v.* LEFTWICH.

4-4032

Opinion delivered November 11, 1935.

John E. Coates, Jr., for appellant.

Evans & Evans, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for 12 per cent. penalty and attorney's fee rendered under § 6155 of Crawford & Moses' Digest against appellant in favor of appellee in the circuit court of Logan County, Southern District. The suit was based upon a fire insurance policy covering appellee's cotton in the sum of $2,500, less the amount of the premium due there-

on. When appellee made proof of the loss, appellant denied any liability under the policy by letter, the concluding paragraph being as follows: "The companies interested therefore feel that no contract was legally entered into and cannot accept any liability under their policies of insurance. The letter was written December 11, 1934, and suit was instituted on the 11th day of January, 1935.

The case was set for hearing on April 8, 1935, at which time appellant tendered the face value of the policy, plus interest and costs, less the premium which appellee owed it, in full settlement of the claim under the policy. Appellee refused to accept the tender in full settlement, claiming that he had been compelled to employ an attorney and bring the suit to collect what appellant owed him, and that, in addition to the amount tendered him, he was entitled to recover a 12 per cent. penalty and a reasonable attorney's fee under § 6155 of Crawford & Moses' Digest; whereupon counsel for the parties agreed in open court that the acceptance of the tender should not affect or prejudice the rights of either party in respect to the claim for the penalty and attorney's fee. The tender was accepted on this condition, and the issue left open was tried with the above result.

The only question therefore for determination on this appeal is whether an insurer can escape liability to the insured for the statutory penalty and attorney's fee by making a tender of the face of the policy, plus interest and costs, less the unpaid premium, after first denying liability and compelling the insured to bring a suit to collect the amount due upon the policy.

Section 6155 of Crawford & Moses' Digest 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, 12 per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said

loss; said attorney's 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."

This court, in the case of *Pacific Mutual Life Insurance Company* v. *Carter*, 92 Ark. 378, 123 S. W. 384, in speaking of the purpose of the act, said: "The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it."

This court also said, in the case of *Bronx Fire Insurance Company* v. *Cooper*, 187 Ark. 93, 58 S. W. (2d) 678, that: "The failure of the insurance company to pay the amount of the loss within the time specified in the policy after demand subjected it to the payment of attorney's fees upon the recovery under the policy, and it can make no difference in its liability to the payment of such penalty and costs that it failed to comply with and pay the loss when demanded, because the policyholder was indebted to the insurance company in a matter which could be set off against the insured's claim of loss under the policy, that furnishing no justification for failure to pay the loss within the time specified in the policy, and not relieving against the penalty of the statute."

The act is unambiguous and means that 12 per cent. is given as damages for failure to comply with the contract by payment and the attorney's fee as compensation for the cost of collection.

The facts in the instant case bring it well within the meaning of the statute. It is undisputed that appellant denied any liability on the policy and refused to pay the debt until the date of trial. The employment of an attorney and the institution of the suit was necessary to collect the debt.

It is next contended that the allowance of $200 as an attorney's fee was excessive. We do not think so, considering the amount involved, the investigation of the law, the filing of the suit, and the preparation for trial.

No error appearing, the judgment is affirmed.

WASSON *v.* TAYLOR.

4-4033

Opinion delivered November 11, 1935.

Moore, Gray, Burrow & Chowning, for appellants.
John Sherrill and *Howard Cockrill,* for appellees.

McHaney, J. Dr. Charles M. Taylor died testate in 1905, leaving a large estate, and by the terms of his will he created a trust into which he conveyed practically all of his property, and appointed the Union Trust Company and Julia P. Taylor as trustees for the management and control of said trust estate. They were given full and complete power to sell, rent, lease, mortgage or otherwise dispose of the properties held by them. The trustees accepted said trust and took charge of the trust property and continued in charge thereof until August, 1933. In 1927, they purchased from the Union Trust Company, agent, $50,000 in notes which had been executed by Conoway Scott and Lillian Scott, his wife, which notes were secured by deed of trust on certain real property owned by the Scotts in Pulaski County, aggregating 788 acres. The notes became due on March 1, 1930, at which time there remained unpaid $43,366.11 of the indebtedness. In December, 1931, Mrs. Lillian Scott died, leaving a will by the terms of which she appointed the Union Trust Company executor of her estate, and letters testamentary to it were issued on December 23, 1931. Suit was instituted for the balance on said notes by appellees, and on April 2, 1934, judgment was rendered in their favor against Conoway Scott for the sum of $57,207.72, the amount then due including interest. This judgment was compromised by appellees by an assignment of the notes to Mr. Sam W. Reyburn, prior to judgment, for the sum of $39,054.39, and it is alleged in this action that this was the highest and best price that could be obtained for the assets securing the debt, and it is further alleged that Mr. Scott did not then and does not now have any additional property or assets from which the deficiency of $18,153.33 could be collected.

Thereafter, this action was instituted against the Union Trust Company, in which it was alleged that it became its duty as trustee under the will to present to itself as executor of the estate of Lillian Scott, and, as such executor, to allow the claim for the total amount of the indebtedness due at the time of her death, $43,366.11, and that it was its duty to present the claim to the probate court for allowance and thereafter to collect from

Lillian Scott's estate, and from itself as executor, the amount of the claim to the extent of the assets of the estate; and that as said executor there came into its hands assets of said estate largely in excess of the amount of their claim. It is further alleged that their failure to do this was a breach of duty to appellees, and that, as a result of the alleged breach of trust, appellees have sustained a loss in the sum of $18,153.33, for which amount they prayed judgment against the Union Trust Company and Marion Wasson, as State Bank Commissioner, in charge thereof, and that said judgment be declared a prior and preferred claim, and that the Bank Commissioner be restrained from pledging the assets of the trust company or in any manner encumbering same until further orders of the court. Appellants answered, denying the material allegations of the complaint and setting up an affirmative defense which will hereinafter be discussed. On a trial of the case, the court found the value of the land subject to the mortgage to be $40,000 upon the date of the sale by appellees of the mortgage notes to Reyburn, and decreed that appellees have judgment against the Union Trust Company and the Bank Commissioner for $17,207.70, the difference between the value of the property as found by the court and the amount of the mortgage debt. The court further held that the claim of appellees was a prior or preferred claim, and ordered that it be so classed and paid by the Bank Commissioner out of the assets of the trust company.

To reverse this judgment, appellants make three contentions as follows: (1). That appellees by their own conduct in voluntarily compromising with Reyburn are estopped from maintaining the action. (2). That, upon assigning and transferring the Scott notes and mortgage to Reyburn, appellees passed out of the case for the reason that the sale and transfer to Reyburn of the notes and mortgage carried all their interest therein, and all remedies and rights incident thereto, to Reyburn. (3). That the claim asserted by appellees can in no event be a prior or preferred claim, even though they be wrong about points (1) and (2), and the court erred in so classifying it.

1. We cannot agree with appellants that appellees estopped themselves from proceeding in this action by compromising their indebtedness against Scott with Mr. Reyburn. The notes became due in March, 1930, and their maturity was extended until March, 1933, at which time they defaulted. It is true that the testamentary trust of which appellees were the beneficiaries was terminated in August, 1933, and that appellees thereafter took charge of and handled for themselves the assets of said estate. We cannot see how the settlement with Reyburn could work an estoppel, in view of the fact that the court found on disputed evidence that the settlement was not an improvident one, but was one for the approximate value of the land securing the notes at the time the settlement was effected. As above stated, the settlement was made with Mr. Reyburn for $39,054.39, and the court found the value of the land to be at that time, $40,000. It is not contended that this finding is against the preponderance of the evidence. It appears therefore that appellees exercised good judgment in making the settlement with Mr. Reyburn. But appellants insist that it was the duty of appellees, before concluding a compromise with Reyburn, to notify them that they expected to assert a claim against them for the deficiency and thus give appellants an opportunity to protect themselves against loss, or to minimize the loss, or by taking whatever steps the law gave them as a means to that end. It is argued that they might have raised Reyburn's bid and themselves purchased the notes and mortgage. While the record is silent as to positive testimony that they did know about it, we apprehend from the facts and circumstances in evidence that they knew all about every step that was taken in the case. The Union Trust Company was a party to the suit. These notes had been held by it in the trust estate for more than six years. It knew the notes were in default, and it knew the trust was terminated in August, 1933, six months after the extended maturity thereof. It is useless to speculate on what appellants might have done, had they been given formal notice. The fact is they did nothing to collect same prior to the termination of the trust, although one of the joint makers of the note

had died, leaving an estate in its hands as executor thereof, largely in excess of the full amount of the notes and interest, and no claim was presented to itself as executor of said estate seeking a collection of said debt. It did nothing looking to a collection of said debt when it had the power to do so and at a time when it was its duty to do so, prior to the termination of the trust, but permitted the bar of the statute of nonclaim to run against the estate of one of the joint makers. Appellants cite a number of cases to the effect that where a trustee, having failed to collect a note or mortgage before they were outlawed by the statute of limitations, and having thereafter paid the amount of the same to the trust estate, the title to the note and mortgage vested in the trustee by subrogation. These decisions cannot help appellants because it is undisputed that appellants did not pay the amount of the notes to the trust estate. Had they done so, they would have acquired the Scott notes by subrogation. We agree with the trial court that appellees did not estop themselves by settling or compromising the Scott indebtedness and assigning the notes and mortgage and the judgment based thereon to Mr. Reyburn.

(2) Nor can we agree that the sale of the Scott notes and mortgage to Reyburn divested appellees of this cause of action. It is contended that such sale carried with it the right to maintain the suit for negligence against the bank. We are of the opinion, however, that a mere assignment of the notes and mortgage without assignment of an independent cause of action against the trustee for negligence in handling the trust, did not pass to the assignee, but was a personal right independent of the indebtedness represented by the notes and mortgage. Counsel for appellants seem to rely upon the case of *Munson* v. *Exchange National Bank*, 52 Pac. (Wash.) 1011. This case appears to hold that an assignor who had a right of action against a bank for failure to notify an indorser, lost such right in assigning the note. We think the better rule, and the one supported by the weight of authority, is stated in *Robinson* v. *Saxon Mills*, 124 S. C. 415, 117 S. E. 424, to quote a headnote, as follows: "An assignment of the notes and mortgages does not *ipso facto* constitute an

assignment of a right of action for a tort which had theretofore been committed in reference to the property covered by the mortgages."

Only those rights are passed by assignment that are incident thereto, and all other rights, not regarded as incidental to the assignment, must be specifically mentioned to pass to the assignee. Here the assignment of the notes and mortgage to Reyburn carried with it all the rights the assignees had against the Scotts by virtue thereof. The right to sue the Union Trust Company for a neglect of duty in connection with the handling of the notes and mortgage was a personal right to appellees and was in no manner connected with any action against the Scotts to foreclose the land covered by the mortgage.

(3) We cannot agree with the trial court in classifying the judgment rendered as a preferred claim. We have many times had occasion to construe § 1, act 107, of the Acts of 1927 as to what constitutes a prior creditor. The fifth subdivision of that section provides that a prior creditor is: "The beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust, or a trust *ex maleficio,* of which the bank was the trustee and which was evidenced by a writing signed by said bank at the time thereof." Of course, the Union Trust Company was the trustee of an express trust in this case. The latter part of said section of said act defines the rights of prior creditors. It is too lengthy to quote, but it clearly requires that the subject of a preferred claim must be money or property that actually got into the bank, enhanced its assets and, as such, may be followed and traced into the hands of the Bank Commissioner. The only exception made by the act is the seventh class of prior creditors. While appellees are the beneficiaries of an express trust of which the Union Trust Company was the trustee and which was evidenced by a writing signed by the bank at the time of the creation of the trust, still there was no money or property that ever came into the bank by virtue of this trust, and there just remains no room to classify this claim as a preferred one.

The decree of the chancery court was therefore correct in all things except in the matter of the classification

of said judgment claim. The cause will be reversed and remanded with directions to classify the claim as that of a common creditor.

ARKANSAS BOND COMPANY *v.* HARTON.

4-4046

Opinion delivered November 11, 1935.

W. K. Ruddell, for appellant.

Roy Richardson, for appellee.

BUTLER, J. Appellant filed a pleading in the Stone Circuit Court, styled "complaint," by which it sought to procure a writ of mandamus to require the appellee, the clerk of the county court, to issue certain warrants. During the course of the proceedings, appellee, as a taxpayer, filed an intervention praying judgment against the appellant for $750 theretofore paid it out of the county treasurer. She also, as clerk of the county court, interposed a demurrer to the complaint filed against her as such. The demurrer was sustained, appellant's complaint dismissed, and a judgment by default rendered in favor of the county against the appellant on the taxpayer's intervention. From these orders and judgments appellant has prosecuted an appeal to this court.

We set out the substance of the complaint to the effect that appellant entered into a contract with the county judge of Stone County to refund the bonds of that county in the amount of $53,500, and, as a fee for his services, he was to receive a sum equal to five per cent. of the face of the bonds. Appellant is a corporation organized and doing business under the laws of Arkansas, and has fully complied with its part of the contract by having printed and delivered the said refunding bonds to the holders of the old bonds. The contract with the county judge was made exhibit A to the complaint. There was the further allegation that on the 19th day of December, 1934, the county court made an order allowing the claim of the appellant for the sum of $1,275, balance due it under the aforesaid contract, and directing the appellee, as county clerk, to draw certain warrants in favor of the appellant payable out of the "bond fund" and deliver the same to it. A copy of said order is attached to the complaint as exhibit C. There was also an allega-

tion that on December 27, 1934, the county court made and entered an order of record directing the county "treasurer" to issue "her check or draft" in the sum of $650 to the appellant to be paid out of the "bond fund" when collected by the collector of revenues. This order was made an exhibit to the complaint, but does not appear to be involved in the proceeding against the county clerk. It was alleged that demand had been made upon the county clerk to issue the said warrant and that she had refused to do so. The prayer was for a writ of mandamus to issue directing the county clerk to comply with the orders of the court.

In testing the sufficiency of a complaint on general demurrer, the court indulges every reasonable intendment in its favor, and if the facts stated, together with every reasonable inference arising therefrom, constitute a cause of action, the demurrer should be overruled. *Ellis* v. *First National Bank,* 163 Ark. 471, 260 S. W. 714; *Sharp* v. *Drainage District,* 164 Ark. 164, 251 S. W. 923; *Driesbach* v. *Beckham,* 187 Ark. 816, 12 S. W. (2d) 408. And incomplete, ambiguous, and defective averments should be reached by motion to make more definite and certain. *Fitch* v. *Walls,* 169 Ark. 745, 276 S. W. 578. When tested by these rules, we think the complaint, with the exhibits, sufficiently pleaded a judgment of allowance of appellant's claim by the county court and the order based thereon to the county clerk to issue the warrants and the clerk's refusal to obey said judgment and orders.

County courts, within the sphere of the jurisdiction conferred on them by the Constitution, are superior courts of record and have exclusive original jurisdiction in all matters relating to the fiscal affairs of their respective counties, including claims against the said counties. Section 28, art. 7, Constitution; *Pierce* v. *Edington,* 38 Ark. 150; *Williams* v. *State,* 64 Ark. 159, 46 S. W. 186; *Saline County* v. *Kinkead,* 84 Ark. 329, 105 S. W. 581; *Leathem* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570; *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S. W. 106. The county court had jurisdiction to pass on the claim of the appellant, and to make the necessary orders

for its payment when allowed. The question presented by the demurrer raises a collateral attack on the judgment and orders of the county court. These judgments and orders, when collaterally attacked, must be presumed to be regular and correct. *Clay* v. *Bilby,* 72 Ark. 101, 78 S. W. 749; *Kulbreath* v. *Drew County Timber Co.,* 125 Ark. 291, 188 S. W. 810.

As we must presume the court properly allowed the claim, the only question we can consider in this proceeding is the order directing the clerk to issue the warrants payable out of the "bond fund." The record made in the trial court and presented to us is unsatisfactory and sheds but little light upon the question to be considered. We are not advised whether refunding the bonds effected a saving to the county, whether the benefit to be derived was merely an extension of maturities of the debts first funded, or whether both purposes were served. The authority of a county to refund its bonds within certain limitations was upheld in the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. (2d) 71. This authority necessarily implies the power of the county court to provide and pay for the necessary expense incurred in refunding bonds. As the order allowing appellant its fee has not been appealed, for the purposes of this case the propriety of the fee as a part of the necessary expense is *res judicata.* The question then is, how shall that fee be paid, whether from the bonding fund or from the general revenues of the county?

The appellant construes a sentence contained in § 1 of act No. 102, Acts of 1935, as authority for direction to the clerk to draw the warrants on the bond fund. The sentence is: "Such refunding bonds shall not be issued in a greater amount than the face value of the bonds and matured interest outstanding of such county then being refunded, with interest to the date of such new bonds, plus expenses, payable out of the bond fund account, incurred in connection with the issuance of the new bonds, and any such new bond shall not be delivered except upon the surrender and cancellation of a like amount of the indebtedness being refunded, and in no event shall any

such refunding bond bear a greater rate of interest than that borne by the bond for which it is exchanged." As will be observed, the sentence is long and involved, the phrases disconnected, and the punctuation serves rather to obscure than to clarify the legislative intent. It can hardly be construed to mean that the refunding bonds may be issued in an amount equal to the matured face value of the funded debt with interest to which shall be added the expense of refunding; for, giving it this construction, it might serve to increase the county's bonded indebtedness. Neither could the language, "plus expenses, payable out of the bond fund account," be construed to mean that the expenses of refunding should be paid from the fund created by taxation for the purpose of paying the bonded indebtedness where to do so would increase the sum total of the indebtedness to be discharged by that taxation. The reason is that this would divert the revenues to a purpose not within the meaning of the constitutional provision authorizing the levying of the tax and, to the extent the indebtedness was increased, would impair the obligations of the contract existing between the bondholders and the county.

It may be gathered from the language of the entire act, considering the purposes sought to be effected, that the Legislature indulged the presumption that a refund of the county's bonded indebtedness might effect a saving to the county by obtaining a lower interest rate on the new bonds than on the old, and that, out of such saving, the expense of reissue might be paid out of the bond fund without the impairment of existing contracts or departing from the spirit of Amendment No. 10, which dedicates the fund arising from the taxation authorized to the payment of the indebtedness represented by the bonds. Where a saving is effected in any manner, whether by securing a lower interest rate or otherwise, the payment of the expense of securing the refund would be an effectual application of such as a payment *pro tanto* of the indebtedness, and, as thus construed, will not offend against any of the provisions of Amendment No. 10. When tested by demurrer, we must assume there was the

basis indicated for the order that the warrants be drawn payable out of the bond fund.

Omitting the formal parts, the intervention is as follows: "Mrs. Frances Harton, by leave of court, intervenes herein and says: That she is a taxpayer in Stone County; that the plaintiff has been paid seven hundred and fifty dollars; that said amount was paid without any warrant for the same being issued; also, that it was paid out of the bond fund of the county, which fund was pledged for the payment of the bonds described in the complaint; that said amount was paid contrary to law, and the plaintiff should be required to refund said seven hundred and fifty dollars to Stone County."

Appellant complains that the judgment by default was rendered without summons having been issued on the intervention or served on it, and it had no notice that the intervention had been filed. This would be of no avail to the appellant. An intervention is not an independent proceeding where it is against the plaintiff in the original action, but is ancillary and supplemental to the main case. In a suit where there is an intervention, the original parties are already in the court and must take notice of all subsequent proceedings relating to the subject-matter, including intervening petitions. *Board of Directors, etc.,* v. *Raney,* 190 Ark. 75, 76 S. W. (2d) 311. The intervention here, however, alleges no facts upon which the judgment could be grounded. There is no allegation that appellant was not justly due the said $750 paid it or any facts alleged tending to show that such payment was fraudulently made. The allegation, "said amount was paid contrary to law," is merely the pleader's conclusion without the statement of any fact properly leading to that conclusion apart from the pleader's deduction. The pleading of a mere conclusion fails to state a cause of action, and a judgment by default based upon such a complaint is void. *Brodie* v. *Skelton,* 11 Ark. 120; *Thompson* v. *Hickman,* 164 Ark. 469, 262 S. W. 20; *Wilson* v. *Overturf,* 157 Ark. 385, 248 S. W. 898.

It follows from the views expressed that the judgment sustaining the demurrer and the default judgment

is reversed, and the cause remanded, with directions to overrule the demurrer and to set aside the default judgment to the suit, and for such further proceedings as the parties may be advised.

STONE *v.* BOWLING.

4-4047

Opinion delivered November 11, 1935.

Northcutt & Northcutt, for appellant.

N. P. Ford and *Oscar E. Ellis*, for appellees.

BAKER, J. Judgment was rendered in this case in a justice of the peace court. There was no appeal from the original judgment. Garnishment was issued out of the justice of the peace court and served on the Bank of Salem to require the bank to answer and account for funds alleged to be held by it as belonging to the appellant, W. J. Stone. Stone filed a statement or answer, in the garnishment proceeding, setting up that the money he had on deposit in the Bank of Salem was part of the proceeds from the sale of his homestead in said county, and that it was on that account exempt from seizure. This claim of exemptions was overruled by the justice of peace, and an appeal taken to the circuit court. There it appears that certain evidence was heard upon the trial of the case, and the circuit court again denied the allowance of the claim of exemptions. It is here on appeal.

Appellant has furnished us with a somewhat defective abstract. Our attention is directed to the fact that the appellant has failed to abstract or set out any motion for a new trial. Except for one matter this leaves us without anything for consideration. In appellant's brief there is set out what purports to be the judgment rendered by the circuit court, and this contains a statement of facts as found by the court. The correctness of this abstract and statement as to facts made by the court is not questioned by either appellant or appellee. Appellant, however, does question the declarations of law made as applicable to the said facts, and it is upon this proposition only that we can give this appeal consideration.

We quote from a portion of the facts as found by the court: "It seems to the court that the facts in this case are undisputed. Mr. Stone owned a homestead; it was the home of himself and his family. There was a mortgage against it for approximately four hundred dollars ($400). The value of the property, judging from the sale price, was about nineteen hundred dollars ($1,900). Ordinarily the eighteen acres in excess of the legal homestead would not be presumed to be worth more than the four hundred dollars ($400) that was against the homestead. This homestead was sold, and a portion of the proceeds apparently deposited in the Bank of Salem, the garnishee in this action. At the time of the issuing of the garnishment, and at the time of the trial of the garnishment in the lower court, Mr. Stone says he had no intention to acquire any further homestead, but that now he has such intention. As the court understands the law, Mr. Stone had a right to a homestead as long as he owned it, as long as he was a married man, the head of a family. The fact that his wife died and the fact that he became a single man by reason of his wife dying wouldn't destroy that homestead as long as he kept it, if he wanted to, until he became a married man or the head of a family. So, the question of his intention goes out of the question and out of the case, even if he intended now to acquire a homestead because he could not acquire it. Under the facts of the case involved, it is not for the determination

of the court as to whether or not the proceeds of the sale of a homestead are exempt when such proceeds are in the hands of a person who cannot acquire another homestead. The court doesn't believe that such proceeds are exempt under the law, and if he should buy other land it would be subject to execution, because it wouldn't be a homestead, and I believe, gentlemen, under the undisputed facts, the court will have to uphold the garnishment and the schedule is disallowed."

This court is bound by the lower court's findings of fact, which are conclusive here, because neither the evidence nor its sufficiency can be questioned in the state of this record. The motion for a new trial would have properly brought these matters here on appeal if one was in fact filed. Appellant's abstract shows none.

It must appear therefore that if any of these facts, as found by the court, are sufficient to justify the court in overruling the appellant's claim of exemption, the case should be affirmed.

No other facts, except those that appear in the judgment, are subject to review or consideration by us, but because of the facts that appear in the judgment as findings by the court, we overrule the motion of the appellee to affirm for failure to abstract or set out a motion for a new trial. This holding does not contravene the announcement in the case of *Sublett* v. *Sublett,* 133 Ark. 196, 202 S. W. 233.

We may determine if there is any error upon the face of the record. The court makes certain these facts: The appellant had been the owner of a homestead. He had sold the same, deposited a part of the proceeds of the sale in the bank. At the time of the garnishment he was not intending to use the money in the acquisition of any new homestead. We must, and do presume, as above stated, that these facts are supported by the evidence.

The effect of the foregoing is that the appellant had, by the sale and by his conduct or declarations, made certain the fact of his abandonment of the homestead right. Once the homestead has been abandoned, it cannot be resumed by declaration of a change of mind or intention.

That is to say, after abandonment of the homestead right, a mere declaration of a desire to purchase a homestead cannot amount to a new acquisition.

"Abandonment of a homestead depends almost exclusively on the intent of the owner as revealed by the facts and circumstances of each particular case." *Wooten* v. *Farmers' & Merchants' Bank,* 158 Ark. 179, 249 S. W. 569; *Beeson* v. *Byars,* 187 Ark. 966, 63 S. W. (2d) 540.

The judgment is therefore affirmed.

KELLY *v.* STATE.

Crim. 3966

Opinion delivered November 18, 1935.

Rains & Rains, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. Appellant was duly indicted by the grand jury of Crawford County for the crimes of burglary and grand larceny; upon trial to a jury he was convicted of the crime of burglary and acquitted of grand larceny, from which comes this appeal.

The testimony adduced on behalf of the State tended to establish that on the night of April 6, 1935, some one broke and entered the chicken house of one E. B. Whit-

lock in Crawford County and stole therefrom six chickens of the value of $2 each and of a total value of $12; that the chicken house was securely locked on the evening prior to the theft, and on the next morning it was found that one of the doors thereof was broken open. Three of the stolen chickens were subsequently recovered by the owner from a Mr. Scruggs who testified that appellant had sold to him the stolen property.

Appellant's first contention for reversal is that the verdict of the jury is contrary to the law. By § 2 of act 67 of 1921 burglary is defined as follows: "Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft with the intent to commit a felony."

It appears from the testimony heretofore quoted that this contention is without merit. The uncontradicted testimony shows that on the night of April 6, 1935, some one entered the chicken house of Mr. Whitlock and stole therefrom six chickens of the value of $12. Three of the chickens were subsequently recovered by the owner and a Mr. Scruggs testified that they were sold to him by appellant. This testimony was amply sufficient to warrant the jury in finding appellant guilty of burglary.

Next appellant urges that the trial court erred in giving to the jury in charge the State's requested instruction number 7. This request was to the effect that the jury might, in determining the value of the stolen chickens, consider their value for breeding purposes, and that the jury was not bound to accept the market value of such chickens for eating purposes only. Appellant's insistence is that this instruction was on the weight of the evidence and prohibited by § 23 of article 7 of the Constitution of 1874, which provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party." It was entirely proper for the jury to consider the market value of the stolen property for any and all uses to which the property was adapted, and the trial court therefore did not err in so instructing the jury. 17 R. C. L., p. 31, § 34.

No error appearing, the judgment is affirmed.

LITTLE *v.* EVANS.

4-3981

Opinion delivered November 18, 1935.

[redacted]

Henry Stevens and *D. K. Hawthorne,* for appellants.

Evans & Evans, for appellee.

JOHNSON, C. J. On December 1, 1915, C. C. Hamiter and Eugene Hamiter, his wife, executed to one F. B. Collins a note for the sum of $1,600 due and payable December 1, 1922, drawing annual interest, and, to secure the due payment thereof, executed a mortgage upon certain lands situated in Lafayette County, Arkansas.

On February 4, 1919, C. C. Hamiter and wife conveyed this tract of land to E. W. Howell, subject to the mortgage of December 1, 1915.

On February 4, 1920, E. W. Howell and wife conveyed the tract of land to D. D. Hamiter who by the express terms of the deed assumed and agreed to pay the mortgage indebtedness first mentioned.

On May 7, 1921, D. D. Hamiter and wife executed a mortgage upon this tract of land to Lula Little to secure an indebtedness of $2,000 which by its express terms was subject to the mortgage of December 1, 1915. The mortgage and note first mentioned were by assignment transferred from F. B. Collins to F. L. Collins prior to maturity. On March 21, 1923, D. D. Hamiter and wife, Aletha

A. Hamiter executed an extension agreement in favor of F. L. Collins, the then holder and owner of the mortgage and note of December 1, 1915, by the terms of which the maturity of the indebtedness was extended from December 1, 1922, until December 1, 1929, and by the express terms thereof agreed to guarantee the payment of the principal and interest as they matured.

On March 7, 1929, the following indorsement was entered by the clerk and *ex-officio* recorder of Lafayette County upon the margin of the mortgage record of December 1, 1915:

"A written agreement dated March 21, 1923, for the extension of the time for the payment of the note for $1,600 herein described until December 1, 1929, has this day been filed in my office and is duly recorded in record book R-5 at page 625 this 7th day of March, 1929.

"Attest: A. M. Shirey, Clerk."

By proper assignment, Charles I. Evans is now the legal owner and holder of the 1915 note, mortgage and extension thereof. Interest payments were regularly made upon this mortgage indebtedness up to the time the extension agreement was filed and indorsed upon the margin of the mortgage record, but said payments were not indorsed upon the margin of the mortgage record. On May 10, 1930, D. D. Hamiter and wife executed to Lula Little another mortgage upon this tract of land to secure an indebtedness of $2,000 which was immediately filed for record. No marginal indorsements of payments were placed upon the record of the Little mortgage of 1921.

The 1930 Little mortgage and note were transferred by proper assignment to the Federal Bank & Trust Company of Little Rock.

This suit was instituted by Charles I. Evans in the Lafayette Chancery Court against C. C. Hamiter and other appellees seeking the foreclosure of the 1915 mortgage as extended and the facts heretofore stated were alleged.

By answers of attorney *ad litem* and guardian *ad litem,* theretofore duly appointed, the material allegations of the complaint were put in issue. The State Bank Commissioner filed an intervention in said cause in which

he alleged his status as liquidator of the Federal Bank & Trust Company of Little Rock, and that as such agent he holds as collateral security the note and mortgage securing same, executed by D. D. Hamiter to Lula Little of date May 7, 1930. Answers were filed by the other appellants, but the above statement will suffice to show the decisive issues of the case. Testimony was adduced upon the trial establishing the facts as herein stated, and, in addition thereto, that the Little note and mortgage of May 7, 1930, was executed by the Hamiters in renewal of the note and mortgage of 1921.

The chancellor determined that the Evans note and mortgage were superior to the Little mortgage of 1930 and entered a decree accordingly. He also determined that Aletha A. Hamiter, wife of D. D. Hamiter, was liable upon the extension agreement for the principal and interest due, and this appeal comes from a decree to this effect.

The Little mortgage of 1921 was inferior to the Evans mortgage of 1915 because it expressly so provided. The indebtedness secured by the 1921 Little mortgage matured by its terms in May, 1923. The indebtedness secured by the Collins mortgage of 1915 matured by its terms on December 1, 1922. The extension agreement executed by D. D. Hamiter and wife extended the maturity of the indebtedness secured by the Collins mortgage up to December 1, 1929, although not filed for record nor indorsed upon the margin thereof as required by § 7382 of Crawford & Moses' Digest, until March 7, 1929. We so expressly decided in *Mullins* v. *Wilcox,* 124 Ark. 17, 186 S. W. 290. See also *Wasson* v. *Beekman,* 188 Ark. 895, 68 S. W. (2d) 93; *Wasson* v. *Tapscott,* 188 Ark. 771, 67 S. W. 728; *Bank of Mulberry* v. *Sprague,* 185 Ark. 410, 47 S. W. (2d) 601; *Connelly* v. *Hoffman,* 184 Ark. 497, 42 S. W. (2d) 985; and *Gunnells* v. *Farmers Bank,* 184 Ark. 149, 40 S. W. (2d) 989.

The extension agreement and the indorsement thereof on the margin of the record had the effect of extending the maturity of said indebtedness up to December 1, 1929, therefore the statutory bar of limitations could not attach under § 7382 of Crawford & Moses' Digest un-

til December 1, 1934. The Little mortgage of 1930 being executed subsequent to the marginal indorsement of March, 1929, is inferior to the 1915 mortgage.

On the contention that Mrs. Hamiter is not personally liable, but little need be said. She executed the extension agreement of 1923, and therein expressly agreed to pay the 1915 mortgage debt and interest.

The extension agreement by its terms postponed the maturity of the debt to a definite future date which was a good and valuable consideration. See § 575, Jones on Mortgages, 8th edition.

No error appearing, the judgment is affirmed.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* BASHAM.

4-4049

Opinion delivered November 18, 1935.

Patterson & Patterson, for appellant.

Reynolds & Maze, for appellee.

MEHAFFY, J. On May 18, 1923, the appellant issued its policy insuring J. M. Basham against bodily injury sustained through purely accidental means, independently and exclusively of disease, and all other causes.

The appellee, Mamie Basham, was named as beneficiary. J. M. Basham died on January 7, 1934. On July 14, 1934, the appellee brought this suit in the Johnson Circuit Court, alleging, among other things, that the said J. M. Basham had paid the premiums on said policy up to the date of his death; that Mamie Basham was the wife of J. M. Basham, and the beneficiary in said policy; that on December 27, 1933, during the life of the policy, the insured, J. M. Basham, sustained through accidental means an injury to his great toe on the right foot, from which injury he was confined to his bed under the care of physicians, and as a direct result of said injury he died on January 7, 1934; that all the dues on

said policy had been paid; that the beneficiary has made proof of loss and duly performed all the conditions of the policy. She asked for judgment for $2,000, the face of the policy, a twelve per cent. penalty, and reasonable attorney's fees.

The appellant answered admitting that the appellant undertook to insure the said J. M. Basham as alleged in the complaint, and admitted that said policy number was correctly set forth in appellee's complaint; admitted that Mamie Basham was the wife of J. M. Basham, and named as beneficiary, but denied that said J. M. Basham carried and kept said policy until the date of his death; denied that on December 27, 1933, during the life of said policy, the said J. M. Basham sustained through accidental means an injury to the great toe on his right foot by dropping some sort of a plank on said toe, or otherwise, and denied that the death of Basham was caused, directly or indirectly, by any accident of any kind, but alleged that his death resulted from natural causes. It also denied that the dues had been paid, and that the appellant had been notified of the death of Basham; denied that proof of loss was made and all conditions performed.

On January 14, 1935, appellant filed a demurrer to plaintiff's complaint, which was on January 18, 1935, overruled by the court. Also on January 14, 1935, appellant filed a motion to require appellee to exhibit with her complaint the policy upon which the action was based. This motion was conceded by appellee, and the exhibit was filed.

The case was tried before a jury, and the jury returned a verdict for $2,000. Judgment was rendered for said amount and interest. Judgment was also entered for twelve per cent. penalty, and $350 attorney's fees.

Appellant filed motion for a new trial, which was overruled, and the case is here on appeal.

The appellee testified in substance that she was the plaintiff, and that J. M. Basham died January 7, 1934; that he received an injury on December 27, 1933, and was never able to go out after that time; was confined to his bed on January 1, 1934; the great toe on his right foot was red and angry-looking; the skin was not broken; he

came home at lunch time limping, called a physician before noon on January 1. Witness dressed his foot before the doctor called; the doctor kept his foot bandaged. Witness first called Dr. Boen and then Dr. Will Hunt, Sr. Mr. Basham had a policy of insurance with the appellant, and the premiums were paid up. The policy was exhibited together with the application for insurance.

On cross-examination she testified that she was not present when he received the injury to his toe, and does not know of her own knowledge what caused the bruise on his toe, she only noticed the blue, bruised condition. Basham's health was good before that time. After her husband fell from the scaffold and broke his foot, he had recovered fully. Only one leg was swollen.

Edward Basham's testimony was, in substance, the same as that of appellee. He also said that the bruise was right across the joint where the toe joins the foot. This started swelling, and then the whole foot started swelling. After the third day's illness, the whole leg was swollen from the ankle to the knee. Blood blisters about the size of a half-dollar came out and burst on their own accord. His leg was swollen three times the ordinary size. His left leg was not swollen at all. J. M. Basham did not complain that morning before he went to work.

On cross-examination, witness testified that his father was a contractor and worked with his men. His father was injured in the fall of 1923 and confined to his home for about ten months, and afterwards had a spell of malaria, and had flu in 1928.

David Basham, another son, testified in substance that he saw his father that morning, he was not complaining; saw him at noon, and he reported he had dropped a piece of wood on his foot; he was limping; he did not continue to work, but was confined to his home, his condition growing worse until January 7, 1934; his foot continued to swell; blisters appeared on his leg and would burst; the doctor kept his leg bandaged; his father was in good health.

Livingston Hardwicke testified that he was connected with his father in the funeral business, and had been

actively engaged in it for fifteen years. He assisted in embalming the body of J. M. Basham; the condition of his body was all right except his right leg; from the foot up to the kneecap was very badly decomposed, and for six inches above the knee was badly swollen; was about two times the size it should be; the other leg was normal.

W. M. Hardwicke testified that he was an undertaker and funeral director and had charge of the J. M. Basham funeral; found that he had blood poisoning; had a very badly swollen right leg full of blisters, and the toe was badly swollen.

Allie Kraus visited Basham when he was sick; his foot was badly swollen; his leg was bandaged and badly swollen; prior to that time his health was good.

Dr. A. L. Boen, a practicing physician living in Clarksville, testified he knew J. M. Basham during his lifetime; treated him for malaria in 1929 and 1930; was called to treat him when he died; was called on January 1, 1934, and found him with injury to his toe, which was swollen and hurting him; Basham gave the doctor a history of the case; the first day he treated Basham he told him a scantling dropped on his right toe; the skin was a little rough and swollen; found his toe in such condition as would have resulted from such an injury as he did receive; treated him from January 1 until he died; his foot and ankle were swollen, but there was nothing wrong with the other foot.

On cross-examination, Dr. Boen testified that osteomyelitis is an inflammation of the bone marrow; cellulitis is an inflammation of the connective tissues; these are separate and distinct diseases. Witness said that he made a statement of Basham's condition to the adjuster, signed and swore to it, and identified his signature. In the statement he said Basham died of osteomyelitis; he thought at the time that was true, but afterwards decided it was cellulitis. At the time he made the statement, he did not know that Basham had cellulitis; did not change his mind after he made the report until he saw his toe; when he saw his toe later, he knew it was not osteomyelitis; did not see his toe until the autopsy was held, which was in November, 1934.

W. R. Hunt testified that he was a practicing physician living in Clarksville, treated J. M. Basham in January, 1934; went to Basham's house on the morning of the sixth and stayed there several hours; Basham died shortly afterwards; found an injury to his right toe; he did not tell witness the history; he had a case of cellulitis; his right leg was swollen to two or three times its normal size.

Earl Hunt testified that he was a practicing physician and surgeon; knew Basham but did not see him before he died; examined his body at the post-mortem.

Jim Brock, a witness for appellant, testified that he knew Basham; in 1933 talked with him about his health. Basham had worked for witness in 1928 and told witness that he could not work like he did then.

Dr. H. S. Thatcher testified that he lived in Little Rock, was professor of pathology at the University of Arkansas Medical College, a director of that department, and had charge of the laboratory; had seen about ten thousand autopsies; had done about five thousand himself; he described how the autopsies were performed, and said that he made an autopsy on the body of J. M. Basham on November 3, 1934; the body had been well embalmed, and the interior well preserved; found the kidney was diseased, and no evidence of cellulitis; no evidence of blood-poisoning; cellulitis is a germ disease; there could be no infection to a man's toe without breaking the skin; was able to ascertain the cause of Basham's death; he died from chronic condition of the heart and kidneys, chronic nephritis, commonly known as Bright's disease. This disease is fatal. He showed dropsy in both sides of his chest. Dropsical condition produces a swollen condition of the leg. Dropsy first appears in the lower limbs. In nephritis the heart is usually enlarged. The heart of Basham was enlarged. Witness submitted his report of the condition found in the autopsy of Basham. His death was caused from chronic condition of heart and kidneys, chronic nephritis. This could not result from cellulitis.

On cross-examination witness said he found a bandage on the right leg and toe; the swelling, if any, had

gone out. Often one leg is swollen more than the other; in this case witness advised that it was on account of heart and kidneys; found no evidence of infection. Could have received an infection if there had been an opening. If there was a break in the skin of his toe, witness did not see it. Witness saw more of the body than the other doctors. They did not see inside of the body; did not see anything wrong with foot, toe, or leg; examined tissues on toe and leg and found no evidence of infection.

Dr. J. R. Wayne, a practicing physician of Little Rock, testified that he was with Dr. Thatcher at the time the autopsy was held on J. M. Basham; assisted; took specimens and tabulated them; the body was in condition for accurate examination so that they could properly ascertain the cause of death; does not think cellulitis or osteomyelitis could have resulted from chronic origin without breaking the skin; Basham died from chronic nephritis and chronic myocarditis. Bright's disease and nephritis are fatal. Examined the toes, and both toes looked similar. After death, if it had been swollen, the swelling would disappear. In cases of dropsy, the swelling begins in the lower limbs and abdomen; often one limb is swollen more than the other.

On cross-examination witness said that he made notes and put down the findings of the autopsy; found no difference in measuring the right and left leg; the toe did not show any abrasion; if the toe was roughed and protruded through the skin so that bacteria could get in the blood, it would cause infection; found no evidence of infection; found no cellulitis.

Alvin Laser testified, reading excerpts from the policy.

Dr. W. R. Hunt, recalled, testified that he saw a break on the skin of Basham, and infection of the foot, and that is what killed him; does not think they could determine what killed this man with a pathological examination.

Dr. Earl Hunt, recalled, testified that he could not see where the microscopic examination would be worth anything; body was decomposed; both legs were same size; impossible to say what killed him.

Livingston Hardwicke, recalled, testified that in dropsy cases they have an excessive amount of fluid; did not find this in this case.

Appellee was recalled and testified that her husband did not complain of heart trouble or kidney trouble; was never disturbed at night.

The appellant first contends that the burden of proof was upon the appellee not only to show the death of the deceased, but also to show that his death resulted purely by accidental means. It is true that the burden of proof was on the plaintiff, as stated by appellant; and unless there is substantial evidence to show that the death of Basham resulted from accidental injury, the judgment could not be sustained.

Appellant cites and relies on *National Life & Accident Ins. Co.* v. *Hampton,* 189 Ark. 377, 72 S. W. (2d) 543, and says that that case is very similar in all respects to the present case. The court in that case said: "It is the well-settled doctrine in this State that a jury's verdict cannot be predicated upon conjecture or speculation." We have many times announced this as the established rule, and adhere to it. Unless there is some substantial evidence to support the verdict, it cannot stand. But in the case relied on by appellant the court said: "The effect of the testimony 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."

In the instant case, Dr. Boen testified that he was called to treat Basham on January 1, 1934, found him with an injury to his toe; it was swollen and hurting him. Basham told witness that he dropped a scantling on his right toe, and said it was swollen and looked as though cutis of the skin was a little rough and swollen. He found

the toe in such condition as would have resulted from such injury as he did receive. This witness also testified that he had cellulitis, although he had made a sworn statement contrary to this. In explanation of his testimony he said he did not see the toe, until the autopsy was held, and then he knew.

Dr. W. R. Hunt was called to see Basham on January 6, 1934, shortly before he died. He found an injury to his right toe; had a case of cellulitis; his right leg was swollen two or three times the normal size. When Dr. Hunt was recalled, he testified that he saw a break in the skin of Basham, and infection of the foot, and that that is what killed him.

Several witnesses testified that there was nothing wrong with him in the morning when he went to work; that he came home limping; that the toe on his right foot and right leg began to swell, and was swollen to two or three times its normal size. The doctors introduced by appellant testified that he died of Bright's disease, and this testimony was contradicted by the witnesses for the appellee.

We have many times held that this court, on appeal, in determining the sufficiency of the evidence, will consider the evidence in the light most favorable to the appellee and will indulge all reasonable inferences in favor of the judgment. *St. L. S. F. Ry. Co.* v. *Hall,* 182 Ark. 476, 32 S. W. (2d) 440; *Union Security Company* v. *Taylor,* 185 Ark. 737, 48 S. W. (2d) 1100; *Ark. Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. (2d) 45; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. (2d) 798; *Ft. Smith Traction Co.* v. *Oliver,* 185 Ark. 227, 46 S. W. (2d) 647; *Sw. Gas & Elec. Co.* v. *May,* 190 Ark. 279, 78 S. W. (2d) 387; *Southwestern Bell Tel. Co.* v. *Balesh,* 189 Ark. 1085, 76 S. W. (2d) 291; *Arkadelphia Sand & Gravel Co.* v. *Knight,* 190 Ark. 386, 79 S. W. (2d) 71; *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. (2d) 532.

When the evidence is thus considered, there appears to be sufficient evidence to sustain the finding of the jury.

Appellant, however, insists that the testimony of Dr. A. L. Boen to the effect that the deceased told him he had

dropped a scantling on his toe was incompetent and inadmissible.

Testimony relative to statements by the injured persons to his attending physician as to how an accident happened and what caused it is not admissible, but in this case the answer objected to was as follows: "I was called on January 1, 1934; found him with injury to his toe, it was swollen and hurting him. He gave me a history of the case. He said he was working for Dyke Lumber Company at the time and said he dropped a scantling on his toe." The appellant objected to this testimony, and the court said: "He can state the history he received in order to diagnose the case, and for no other purpose." The appellant then moved that the evidence be excluded from the jury. It will be observed that a portion of the evidence was competent. The appellant did not ask that the particular part that was incompetent be excluded, and the witness proceeded: "He told me on the first day that I attended him that he dropped a scantling on his right toe. It was swollen, looked as though the cutis of the skin was a little rough and swollen."

A portion of this answer was objectionable, but the appellant did not object to that part of it alone, but objected to the testimony, although a portion of it was a statement of the physician as to the condition of his toe.

If appellant had wished to have that portion of the evidence which the doctor said the injured person had told him excluded, it should have requested the court to exclude that portion only.

While the burden was on the plaintiff to establish the fact that Basham's death resulted from an accidental injury, she was not required to prove this by direct testimony.

A well-connected train of circumstances is as cogent evidence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony. 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. 166, 46 S. W. (2d) 798.

The direct evidence in this case that was competent, together with the circumstances, was sufficient to justify the jury in finding that Basham's death was caused by accidental means.

When David Basham testified that his father reported that he had dropped a piece of wood on his foot, objection was made and this was excluded.

It is next contended by the appellant that the court erred in giving the following instruction No. 4: "You are instructed that you are the judges of the cause of the death of J. M. Basham, and if you find from a preponderance of the evidence in this case that on the 27th day of December, 1933, the said J. M. Basham received injuries by accidental means, as alleged in the complaint, you will find for the plaintiff."

It is contended that this instruction is misleading because the jury might have assumed that the question of the manner of deceased's death was left solely to the jury regardless of the evidence. The jury could not have assumed this, because the instruction contains the statement, "if you find from the evidence."

Another objection to the instruction is, if they found any accident, regardless of that alleged in the complaint, they would find for the plaintiff. There is no merit in this contention. There was no evidence about any other accident.

They also object because the court told the jury that it was the judge of the cause of death. In appellant's instruction No. 1, given by the court, the question was submitted to the jury as to whether his death was caused by accident as alleged in the complaint. Of course, the jury was the judge of what caused his death; that was the principal question involved in the case; a question of fact, submitted to the jury on instructions requested by both parties given by the court. Instruction No. 4 was not in conflict with the instruction given at the request of the appellant.

It is contended by the appellant that it was equally probable that Basham's death might have resulted from

either one of two causes, and appellant then quotes from the testimony of Dr. Thatcher. It is true that, if the jury had believed the testimony of appellant's witnesses, it would necessarily have found that Basham's death was not caused by accident, but was due to natural causes.

The evidence was in conflict; appellant's witnesses tending to show that Basham's death was from natural causes, and appellee's evidence tending to show that it was caused by accident. It was the province of the jury to determine which was true. The jury was the sole and exclusive judge of the weight of the evidence and credibility of the witnesses.

We have examined the instructions requested, given and refused. We are of the opinion that the court did not err in this respect, and that the jury was fully and fairly instructed.

We find no error, and the judgment is affirmed.

[redacted]

FLEMING *v.* ROLFE.

4-4156

Opinion delivered November 18, 1935.

[redacted]

Roy D. Campbell and *C. W. Norton,* for appellant.

S. S. Hargraves, Winstead Johnson and *Marvin B. Norfleet,* for appellee.

McHANEY, J. This is the second appeal of this case. See *Fleming* v. *Rolfe,* 189 Ark. 865, 75 S. W. (2d) 397. Appellant and appellee were rival candidates for nomination for the office of county judge in the run-off primary election held in St. Francis County, August 28, 1934, in which appellee was returned as the winner. Ap-

pellant contested the election. Appellee contended in the former case that appellant's contest was not supported by the affidavits of ten qualified electors and moved to dismiss his complaint. The lower court sustained said motion, but upon appeal this court reversed the judgment of the trial court and remanded it for further hearing. At the time of filing the motion to dismiss in the lower court, appellee also filed an answer denying all of the allegations of the amended and substituted complaint. The answer contained no affirmative defense, and no allegations relating to illegal ballots having been cast for appellant. Early in the trial, after the remand, and upon cross-examination of a witness offered by appellant, it was attempted to be shown that the witness under examination was himself an illegal voter in the election. Appellant objected to this examination upon the ground that appellee had not in his answer specified that the witness had cast an illegal vote and could not for this reason show that he was an illegal voter. Appellee insisted that such could be shown without any specification in the answer in regard to that particular vote, and further that he could do this in regard to any illegal vote cast in the election for appellant without any allegation to that effect in the answer. The trial court held, however, that appellee should amend his answer so as to specify all illegal votes which he claimed had been cast for appellant before proof could be made. Both parties objected to the ruling, but appellee thereafter amended his answer in accordance with the ruling of the court. The case proceeded to trial, and it was found that appellee had received a substantial majority of the legal votes cast in said primary election. The real question before the trial court was, who received the greater number of legal votes cast in the election? The county committee having found that appellee had been nominated, the burden was upon appellant to show that he, and not appellee, had received the greater number of legal votes. This he failed to do.

Appellant insists that the court erred in requiring or permitting appellee to amend his answer setting out the votes received by appellant which were illegal. He

does not question the correctness of the court's finding as to the actual number of legal votes cast and received by each. No question is raised as to any ruling of the court as to what constitutes legal or illegal votes. To reverse this case for the reason assigned would result in permitting appellant to get the benefit of all of the illegal votes cast for him. The same rule relating to the illegality of any vote cast must apply to appellant the same as to appellee, and the purpose of the contest was to determine who received the greater number of legal votes.

Since the burden was upon appellant to show this, and he has failed to do so, the judgment must be affirmed.

CRISSMAN *v.* SHAVER.

4-4050

Opinion delivered November 18, 1935.

J. C. Brookfield, for appellant.
Ogan, Shaver & Ogan, for appellees.

BUTLER, J. The election commission of Cross County, in preparing the official ballot to be voted at the general election, November 6, 1934, failed to have printed thereon the name of the appellant as the independent candidate for the office of county and probate judge of Cross County. E. L. Cooper was the regular democratic nominee for said office. Appellant filed his complaint in the circuit court praying for a writ of mandamus to compel the election commissioners to place his name upon the ballot as an independent candidate for the office of county and probate judge. At the hearing the court found that appellant had complied with the law entitling him to have his name placed upon the ballot as an independent candidate and noted upon his docket, on the second day of November, 1934, the granting of the prayer of appellant's complaint. After this a formal order was prepared and signed by the circuit judge directing the election commissioners to place appellant's name on the ballot as an independent candidate for the office of county and probate judge. Just when the election commissioners became apprised of this order is not shown, but, at any rate, at some time between November 2 and November 6, the date of the election, at the order of the commission, appellant's name was placed on the ballot as an independent candidate by having same typewritten thereon.

We gather from the record that at the election held on November 6, 1934, E. L. Cooper received the majority of the votes cast for the office of county and probate judge and was declared to be elected to that office. In his abstract and brief appellant states the proceedings had thereafter, as follows: "The mandamus or certiorari case being still on the docket, the appellant filed an additional complaint in which he asked an order to enforce the former order, which order he asked to be declaring the election as to this office void for fraud and uncertainty and the calling of a new election."

Subsequent to the filing of the amendment the appellant filed two other amendments to the original amendment. To these pleadings the appellees, election commissioners, demurred and at a hearing, the court sus-

tained the demurrer. In the order, however, the court also found that the election commissioners had substantially complied with the previous order of the court. That part of the order sustaining the demurrer is as follows: "This proceeding is being brought as a continuation of the mandamus proceedings, and it not being alleged in the complaint that the petitioner received a majority of the legal votes cast in the election, it being stated here in open court by his attorney that he didn't know whether he did or not, in my opinion the demurrer is well taken and it will be sustained. The petitioner refuses to plead further."

On appeal it is insisted that the court found without proof that the commissioners had substantially complied with its former order. Appellant's amended complaint alleges that certain ballots are attached as exhibits showing the manner in which his name was typewritten upon the ballot. We do not have those ballots before us, but doubtless they gave the trial court information upon which its finding was based. Without expressing an opinion as to the correctness of the court's conclusion regarding the action of the election commissioners in having appellant's name typewritten upon the ballot, we think the demurrer to the complaint was properly sustained.

In the various pleadings filed after the election, complaint is made as to the manner in which appellant's name was placed upon the ballot, that no booths were furnished, that in certain townships appellant received more votes than were counted for him, that certain other illegal votes were cast; that certain of the election judges were partisans of Cooper, and that a number of electors failed to vote for appellant because of the manner in which his name appeared upon the ballot. In none of these pleadings, however, is there an allegation as to the total number of qualified electors of the county or as to the number of these who voted for Cooper or for the appellant. There is no allegation that appellant received a majority of the votes cast or any facts alleged from which it might be deduced that he would have re-

ceived same had his name been printed upon the ballot when originally prepared.

The proceeding is unusual and appears to be an effort to convert a mandamus proceeding into an election contest. Contests of general elections must be by independent proceeding in which the contestant shall plainly and fully set forth the grounds upon which the contest is founded, and he is confined to the grounds mentioned in his complaint, but which may be amplified by amendment where to do so will not prejudice his opponent. Section 3848, Crawford & Moses' Digest. The contestant shall also enter into a bond with good security, to be approved by the clerk of the court in which the contest is brought, which will secure to the contestee in the action and to the officers of the court the payment of any money which might be adjudged against him in the court in which the suit is brought, or in any other court on appeal. Section 3855, Crawford & Moses' Digest. The proceeding in question was clearly not brought under the statute cited, and no authority exists for it to have been brought otherwise. Moreover, as there were no allegations from which it might be inferred that appellant could, or would, have been elected, no cause of action was stated. *Storey* v. *Looney,* 165 Ark. 458, 265 S. W. 51; *Moore* v. *Childers,* 186 Ark. 563, 54 S. W. (2d) 409; *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. (2d) 230. It is true the election in these cases were primary elections, but the principle is applicable to general elections as well.

We have examined the cases cited by the appellant—*Rhodes* v. *Driver,* 69 Ark. 501, 64 S. W. 272; *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831; *Pattan* v. *Coates,* 41 Ark. 111; *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024; *Sailor* v. *Rankin,* 125 Ark. 557, 189 S. W. 357—and are of the opinion that they have no application to the instant proceeding because they involved contests of elections instituted in the method prescribed by statute and containing the necessary allegations.

It follows that the judgment of the trial court is correct, and it is therefore affirmed.

EX PARTE O'NEAL

Crim. 3971

Opinion delivered November 18, 1935.

Howard Hasting, for petitioner.

Carl E. Bailey, Attorney General, and *Guy E. Williams* and *J. F. Koone, Assistants,* for respondent.

PER CURIAM. This is an original proceeding in this court by which is sought to quash a judgment of the Jackson Circuit Court, made and entered on September 21, 1928, in which judgment petitioner was adjudged guilty of murder in the first degree and sentenced by the court to serve the balance of his natural life in the State penitentiary. The record in the Jackson Circuit Court is brought before us by stipulation of counsel which dispensed with the necessity for formal issuance of a writ of certiorari. In aid of petitioner's proceeding we are also asked to issue a writ of habeas corpus by which petitioner's body may be brought before this court to be dealt with according to law. The judgment of the circuit court of Jackson County under which petitioner is confined in the State penitentiary is as follows:

"On this day comes the State of Arkansas by its attorney, H. U. Williamson, and comes the defendant in

person, and by attorney, and by leave of the court enters his plea of guilty to the crime of murder in the first degree as charged in the indictment herein, and submits his case to the court sitting as a jury, and, the premises being seen and by the court fully understood, it is by the court considered, ordered, and adjudged that said defendant, upon his plea of guilty is guilty of the crime as charged and doth fix his punishment for the duration of his natural life. And it further appearing to the court that said defendant is without means with which to pay the costs of the prosecution of this cause, it is considered, ordered, and adjudged by the court that the county of Jackson pay all costs herein expended."

Petitioner relies upon Ex parte *Jones,* 27 Ark. 349, as authority for this proceeding. In the case referred to this court entertained jurisdiction in habeas corpus as an original proceeding, and in aid thereof quashed a judgment of an inferior court sentencing petitioner to a term in the State penitentiary because, as it was there said, the judgment under which the petitioner was detained was void. The facts in the Jones case, *supra,* were that petitioner was confined in the State penitentiary under a judgment entered by the Sebastian County Circuit Court while in session at Fort Smith, which time and place of sitting of said court were not authorized by law. This court there said: "In the case at bar, the judge was clothed with no judicial authority; there was no court, consequently no judgment." In the more recent case of *State ex rel.* v. *Neel,* 48 Ark. 283, 3 S. W. 631, we stated the applicable rule as follows: "If the person restrained of his liberty is in custody under process, nothing will be inquired into, by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued. If he be detained under a conviction and sentence by a court having jurisdiction of the cause, no relief can be given by habeas corpus, the general rule being that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment."

The rule as thus stated has the approval of the Supreme Court of the United States. See Ex parte *Siebold,* 100 U. S. 375; Ex parte *Yarbrough,* 110 U. S. 651.

When appellant's rights are measured by the rule heretofore stated, he is entitled to no relief in this proceeding. By § 11 of article 7 of the Constitution of 1874, circuit courts are created, and by § 45 of the same article the jurisdiction of all criminal proceedings are vested in them. It is plain therefore from the Constitution and laws of this State, that the circuit courts are given exclusive jurisdiction to try and determine all felony cases, and it necessarily follows from this that the circuit courts have the exclusive jurisdiction to try, hear and determine the guilt or innocence of any one charged with a felony under the laws of this State. If this be true, and it must be so conceded, then the Jackson County Circuit Court had jurisdiction to try, hear and determine petitioner's guilt or innocence in the murder charge pending against him. But petitioner's insistence seems to be that the Jackson County Circuit Court erroneously exercised the jurisdiction conferred in failing to impanel a jury to determine the degree of homicide of which he was guilty. Granting that this is true, it does not follow that the judgment is void upon its face. Erroneous judgments are not necessarily void judgments. If the court in which the erroneous judgment is entered has jurisdiction of the subject-matter and the parties thereto, such judgment is voidable, but not void, 33 C. J. 1078, § 39; 15 R. C. L. 835, § 310. The circuit court of Jackson County had jurisdiction of the subject-matter, and of the person of the petitioner, and the judgment entered, though it may be erroneous, is not void, and its validity can only be brought in question by appeal or writ of error. *Lancaster* v. *State,* 71 Ark. 100, 71 S. W. 251.

The writ of habeas corpus is therefore denied.

McCrary *v.* Schenebeck.

4-3993

Opinion delivered November 18, 1935.

Trimble, Trimble & McCrary and *Chas. A. Walls,* for appellants.

Robert L. Rogers II and *John R. Thompson,* for appellee.

McHaney, J. Prior to its insolvency and its being taken charge of for liquidation by the State Bank Commissioner on December 19, 1931, the Lonoke County Bank was the duly designated and qualified depository for the public funds of Lonoke County, with the appellants as sureties on its depository bond. On November 30, 1934, the county court of said county made and entered an order compromising and settling with appellants their liability on said bond for 10 cents on the dollar. There was an appeal from this order to the circuit court by a citizen and taxpayer. On December 1, 1934, appellee, also a citizen and taxpayer, brought this action in the circuit court against the county treasurer and the bondsmen on her official bond, as set out in the first count of the complaint, and against the bondsmen for the depository, as set out in the second count, both seeking to recover the amount of public funds on deposit in the Lonoke County Bank when it closed. The county treasurer and her bondsmen defended on the ground that act

No. 16 of the Acts of 1935 relieved them from liability. Appellants defended on the ground, among others, that they were relieved by the provisions of act No. 325 of the Acts of 1935. The trial court sustained the plea of the treasurer and her bondsmen and denied a recovery as to them. It overruled the plea of appellants and rendered judgment against them on count 2 of the complaint. From this judgment there is an appeal and a cross-appeal.

Disposing of the cross-appeal first, it is contended by the cross-appellant that said act 16 of 1935, p. 37, is unconstitutional and void, and that it does not relieve the treasurer of Lonoke County and her bondsmen from liability, and *Bauer* v. *No. Ark. Highway Imp. Dist. No. 1,* 168 Ark. 220, 270 S. W. 533, is cited to support the contention. But in that case the rule was again stated that the Legislature may enact valid legislation to relieve a public officer and his bondsmen from loss of public funds, where the loss is not occasioned by the officers' fault, for the reason that individual taxpayers have no vested interest in such funds, and there is no impairment of the obligation of contracts. It was there further held that the special act of 1923, relieving sureties on a bond indemnifying appellee district against loss of funds in a depository bank was invalid, as it impaired vested rights of taxpayers in said district. This court has frequently held such legislation as act 16 of 1935 valid. *Pearson* v. *State,* 56 Ark. 148, 19 S. W. 499; *Newton County* v. *Greene,* 104 Ark. 270, 149 S. W. 73; *State* v. *Davis,* 178 Ark. 153, 10 S. W. (2d) 513; *Huxtable* v. *State,* 181 Ark. 533, 26 S. W. (2d) 577. Since said act 16 of 1935 is valid legislation, and since it does relieve county treasurers and their bondsmen for loss of public funds occasioned by insolvency of any bank in which such funds were lawfully deposited, where such bondsmen are not paid sureties, it necessarily follows that cross-appellant cannot recover.

The direct appeal in this case has given us more concern. Appellants set up act 325 of the Acts of 1935, as relieving them from liability. If it does, and we now so hold, it becomes unnecessary to discuss other questions argued in the briefs of counsel on both sides. Said act

is entitled "An act to relieve county officials and their bondsmen from liability for funds lost in closed banks." Section 1 thereof is as follows: "In all cases where any funds in the hands of any county officials of this State have been lost or become unavailable by reason of the insolvency of any bank in which the same were deposited, and not through defalcation of such county official, such county officials and their bondsmen, and the bondsmen for any county depository, in cases where such bondsmen have not become sureties on account of the payment of a cash consideration and in such cases only, are hereby released and relieved from any and all liability for loss of such funds. And further where any such county official has advanced all or any part of any such funds out of his private resources for the purpose of relieving a temporary emergency such funds shall be repaid to him out of the funds to which said advances were made in order that the effects of this bill shall be fair and equitable, provided, this act shall apply only to such banks as were closed by proclamation of the President of the United States, and/or State Bank Commissioner of Arkansas."

This act became effective April 4, 1935. The proviso in said section causes all the difficulty in its construction, —"provided, this act shall apply only to such banks as were closed by proclamation of the President of the United States, and/or State Bank Commissioner of Arkansas." All the National and Federal Reserve banks were closed by proclamation of the President on March 6, 1933. The Lonoke County Bank, of which appellants were bondsmen, was closed by the Bank Commissioner on December 19, 1931, more than a year before the President's proclamation. Are the bondsmen for said depository bank relieved by the provisions of this act, or does the proviso above quoted exclude them as well as the bondsmen of all other depository State banks that were closed by the Bank Commissioner prior to March 6, 1933? The President's proclamation did not close any bank not a member of the Federal Reserve System. The Bank Commissioner's records, of which we take judicial notice, show that very few State banks were, at that time,

members of the Federal Reserve,—approximately seven per cent. If we hold that only the banks that were closed on March 6, 1933, are included in said act, it would appear to work a discrimination against those State banks and their bondsmen that were closed by the Bank Commissioner prior to said date without any valid reason therefor. We do not think the language of the proviso open to this construction, nor that the Legislature intended to make any discrimination, but intended to relieve all county officials and their bondsmen from liability for funds lost in banks closed by the President's proclamation, or closed by the Bank Commissioner, without reference to the time when they were closed by the latter. Under the contention made by appellee, a State bank closed by the Bank Commissioner one day before March 6, 1933, having county funds on deposit and a bond with non-paid sureties, would be compelled to make the deposit good, but such a bank with like conditions, on being closed the next day, is relieved. We do not think the Legislature intended such injustice, but that all should be treated alike. The intention was, and, as we think, plainly written in the act, that its provisions of grace should extend to banks closed by the President's proclamation and those closed by the Bank Commissioner, without regard to the time when closed by him. This construction of the act and determination of the legislative intent is further strengthened when we consider its course through both houses of the General Assembly, as reflected by the journals, of which we take judicial notice.

House Bill No. 72, the predecessor of this act, by McCall of Saline, was introduced on January 17, 1935, read twice and referred to the committee on judiciary. The bill was amended in the committee and returned with the recommendation that it do pass as amended. Later the amendments were adopted and the bill ordered engrossed. On February 14, it was amended as follows: "Amend House Bill 72, by McCall of Saline; strike from said bill the following language: 'provided, this act shall not apply where any bank was not taken over by the Bank Department on or after March 1, 1933,' and insert the following: 'Provided, this act shall apply

only to such banks as were closed by proclamation of the President of the United States, and/or State Bank Commissioner of Arkansas on or after February 28, 1933'." Another amendment was later adopted, but it is not material to this inquiry. The bill was ordered engrossed, reported correctly engrossed, and on March 4 it was read the third time and failed to pass. This action was reconsidered and on March 7, the bill was read the third time and passed with the emergency clause attached. It was transmitted to the Senate on the same day, where it was read the first and second times, whereupon Senator Holloway offered the following amendment: "Amend House Bill 72, by McCall of Saline, by striking the following words from the last line of § 1, to-wit: 'on and after February 28, 1933'." This amendment was adopted, and on March 11 the bill as amended was read the third time and passed by the Senate as amended. It was thereupon returned to the House, which body concurred in the Senate amendment, was ordered engrossed and was passed by the House as engrossed on March 13th. The force and effect of all this is that it reflects the legislative intent that the act should apply to all banks closed by the Bank Commissioner, whether before or after February 28, 1933. The amendment striking out the date, February 28, 1933, is very persuasive that the Legislature intended the act to apply to all banks closed by the Bank Commissioner without regard to the time when closed. Moreover, this amendment was offered by the Senator from Lonoke County, the county in which this bank was located, and we think it fair to presume that the intention of his amendment was to cover this identical situation.

This view of the matter makes it unnecessary to consider or discuss the other questions raised on the appeal and the cross-appeal. The act being valid and being applicable to the bondsmen of the county depository, the Lonoke County Bank, the trial court erred in overruling the plea of the act as a bar to the action.

The judgment based on count 2 of the complaint will be reversed, and the cause dismissed.

JOHNSON, C. J., (dissenting). I concur in the majority opinion that by act 16 of 1935 the treasurer of

Lonoke County and her bondsmen were relieved from all liability for all public funds on deposit in banks as found by the circuit court, but cannot agree that act 325 of 1935 relieves appellants from liability. As pointed out in the majority opinion, this act became effective April 4, 1935. By the proviso: "This act shall apply only to such banks as were closed by the proclamation of the President of the United States and/or State Bank Commissioner" was retroactive only to the date of the proclamation of the President of the United States or the State Bank Commissioner. The bank in which these public funds were on deposit became insolvent and was voluntarily placed in charge of the State Bank Commissioner for liquidation more than one year prior to March 6, 1933. It is universally held that courts take judicial notice of proclamations of the President of the United States and of State officials. *Booe* v. *Road Imp. Dist.*, 141 Ark. 140, 216 S. W. 500; *Arkansas-Ash Lumber Company* v. *Pride & Fairly,* 162 Ark. 235, 258 S. W. 335; 23 C. J., p. 101, § 1900. Therefore we take judicial notice that the President of the United States issued his proclamation on March 6, 1933, closing all National and Federal Reserve Banks in the United States and its provinces. This proclamation did not take into account the solvency or insolvency of any bank or banks—it was a blanket order and closed every National and Federal Reserve Bank situated in the United States and its provinces. Furthermore we take judicial notice that simultaneously with the President's proclamation the Arkansas State Bank Commissioner issued his proclamation closing all State banks situated in this State, and moreover the question of the solvency or insolvency of said banks was not considered in this blanket order. We also know and are required to take judicial knowledge thereof that the State Legislature had this information when act 325 of 1935 was introduced and enacted. We also know and the Legislature knew that but one blanket proclamation has ever been issued by the President of the United States or the State Bank Commissioner closing all banks. We also know and the Legislature knew that insolvent banks are not closed for liquidation by proclamation of

the President of the United States or the State Bank Commissioner.

We also know, unless we close our eyes to the facts, that no such proclamation has ever been issued by the President of the United States or the State Bank Commissioner save the one issued on March 6, 1933. It appears therefore that the Legislature could have had but one date in mind, namely, March 6, 1933, when it deliberately wrote the word, "Proclamation" into the priviso of act 325 of 1935.

The purpose of act 325 of 1935, if indeed its purpose is pertinent to this inquiry, was to relieve county officials and their bondsmen of liability caused by the closing of all banks whether solvent or insolvent, by the peremptory proclamation of the President of the United States and the State Bank Commissioner. Many banks which were closed by these peremptory proclamations although going concerns up to that time, were never able to comply with conditions prescribed by the Comptroller of Currency of the United States or the State Bank Commissioner, and were therefore prohibited from reopening for transacting a banking business. Examples need not be sought elsewhere than in Little Rock. To relieve county officials and their bondsmen of deposits in apparently solvent banks on the date of the peremptory orders of the President of the United States and the State Bank Commissioner or on March 6, 1933, and which were denied the privilege of reopening for business because of more stringent rules and conditions were the exclusive class of banks selected as exempt by the provision of this act. From the majority opinion it is uncertain whether they deliberately ignore the proviso in act 325 or so construe its language as to produce the same result, but either theory is equally fallacious. Apparently the majority opinion ignores the proviso and treat its effect as if it were stricken therefrom. They say that the act relieves "all county officials and their bondsmen from liability * * * without reference to the time when they were closed." This unwarranted departure, *ignotum per ignotius,* sets this court up as a legislative body, and cannot be justified under the Constitution of this State.

The proviso in the act emphatically says: "This act shall apply only, etc." The majority opinion says it shall apply to all banks, regardless. Since when until now has this court assumed the power and authority to ignore plain and simple language which appears in a legislative enactment and substitute therefor a construction wholly at war with the plain and unambiguous language employed in the act? No case is or can be cited from this court justifying such interpolation, and I dare say none can be found in the printed reports.

The majority further say that their conclusion is strengthened when it is considered that act 325 was amended on its passage by striking out the phrase "on and after February 28, 1933," and leaving the act to read as it became a law; they say that this is very persuasive that the Legislature intended to make the act applicable to all banks irrespective of the time they were closed. In my opinion this amendment shows no such intent. On the contrary, it demonstrates that this phrase was stricken out because leaving it in would create an irreconcilable conflict in the language employed in the proviso. The President's proclamation was issued March 6, 1933, and with the language left in the proviso "on and after February 28, 1933," created such conflict as to be irreconcilable. In other words the Legislature by its amendment sought to avoid the very inconsistent and irreconcilable conflict into which the majority has fallen. The proviso in act 325 should be construed as it reads, and, when this is done, only such county officials and their bondsmen who had funds on deposit in National, Federal Reserve and State banks on March 6, 1933, would be relieved because closed by the proclamation of the President of the United States and the State Bank Commissioner. If the majority opinion be a construction of the language employed in the proviso of act 325, it creates the anomalous situation that by judicial construction an act of the Legislature is made applicable and retroactive to all National and Federal Reserve banks as of March 6, 1933, but as to State banks is made applicable and retroactive to the first day of the year one. This judicial interpolation is arrived at from plain

and unambiguous language used in the proviso. If such unwarranted construction be not discriminatory, unconstitutional and void, an act could hardly be found that is. Just why should county officials and their bondsmen who had funds on deposit prior to March 6, 1933, in National and Federal Reserve banks be held liable but those who had funds in State banks be relieved of all liability? It occurs to me that such discrimination is not only abhorrent to common honesty and decency, but is prohibited by positive law. See article 2, § 18, Constitution of 1874; *Jonesboro, L. C. & E. Rd. Co.* v. *Adams,* 117 Ark. 54, 174 S. W. 527.

I am unwilling for this court to usurp the power vested in the State Legislature by the Constitution of this State, and this I conceive to be the direct effect of the majority opinion.

For the reason stated, I most respectfully register my dissent.

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

O'CONNELL *v.* SEWELL.

4-3992

Opinion delivered November 25, 1935.

Haynie, Parks & Westfall, Nash, Ahern, McDermott & Kiley, for appellant.

Newby, Rathbun & Burditt and *Coleman & Riddick,* for appellee.

HUMPHREYS, J. The only issue presented on appeal and cross-appeal for determination by this court is whether appellant is entitled to the possession of a fund and interest thereon of $60,328.23 held by the Gulf Refining Company of Louisiana, constituting the proceeds of the one-eighth royalty under an oil and gas lease of 160 acres of land in Ouachita County, Arkansas, to-wit: SE¼ of the NW¼ and the SW¼ of the NE¼ of section 33, township 15 south, range 15 west, by reason of the homestead rights of Arthur W. Sewell and John W. Sewell, minors, in said real estate, which was inherited from their mother, Parthenia Berry Sewell; or whether appellee, their father, is entitled to said fund by reason of an estate by the curtesy in said lands.

The undisputed facts in the record are as follows: Nannie Berry, wife of Ab Berry, acquired said real estate by purchase on February 11, 1904. At the time of purchase, Ab Berry and Nannie Berry resided upon an 80-acre tract of land adjoining said 160-acre tract, which

Ab Berry purchased on September 28, 1883, upon which they were residing and continued to reside after Nannie Berry purchased said 160-acre tract. During the year 1910, Nannie Berry died intestate, and, by descent, Parthenia Berry became the sole owner of the 160-acre tract subject to the estate by the curtesy consummate of her father, Ab Berry. Subsequent to the death of Nannie Berry, Parthenia Berry continued to reside with her father, Ab Berry, upon the 80-acre tract. On May 1, 1915, Parthenia Berry married appellee, Arthur W. Sewell, and they lived with Ab Berry on the 80-acre tract until after their first child was born and then moved on the 160-acre tract and improved same by building a house and clearing up and cultivating a part thereof. On November 4, 1918, their second child, John W. Sewell, was born on the 160-acre tract. Appellee paid the taxes on the 160-acre tract, and he and Parthenia used it without any objection on the part of Ab Berry. In fact, Ab Berry expressed himself as being glad they had moved on their own property. They desired to borrow some $400 or more on the property to recondition their home, and, at the suggestion of the bank from whom they borrowed it, Ab Berry joined in the note and mortgage. From the time they moved on the 160-acre tract in 1917, Parthenia Berry Sewell, with her husband and two children, continuously resided upon same openly and notoriously and enjoyed the issues and profits therefrom to the exclusion of Ab Berry, who continued to reside upon the 80-acre tract. On March 24, 1920, Parthenia Sewell died intestate, leaving her husband, appellee, and her two children as her only heirs, who continued to reside upon the 160-acre tract until they moved to Chicago, Illinois. On July 3, 1921, Ab Berry died intestate, leaving surviving him his two grandchildren, the sons of his daughter, Parthenia Berry Sewell, as his only heirs. On the 19th day of August, 1922, appellee applied for and procured letters of guardianship of the estate of his sons, Arthur W. and John W. Sewell, in the probate court of said county, alleging in the application therefor that the two minor sons were the owners of the 160-acre tract. He was residing with his minor sons at the time on the home-

stead tract of 160 acres. In the year 1922, oil was discovered in the vicinity of the 160-acre tract and, in order to develop the oil on said tract, appellee for himself and as guardian of his sons, by consent and order of the probate court, leased the property for an initial cash payment and a royalty of one-eighth of the oil to be produced, from which the fund involved in this suit is a part. The lease was approved by the probate court on the theory that appellee owned a curtesy interest in the land and the sons owned the fee and a homestead interest as heirs of their mother, Parthenia Berry Sewell. On account of the nearness of oil wells to the house on said property, the probate court ordered that the residence be sold and removed, which was done. Subsequently, appellee, with the minors, moved to Chicago and established his residence in that city. On May 7, 1923, appellee applied to the probate court of Cook County, Illinois, for guardianship letters for his minor sons and obtained same. Acting under these letters, he administered the estate of the minors until June 12, 1930, when he resigned, and the Chicago Title & Trust Company was appointed his successor, to whom he accounted for all assets in his hands belonging to his wards. Later, the Chicago Title & Trust Company resigned, and William L. O'Connell was appointed guardian in succession, to whom it accounted for all the assets in its possession belonging to said minors. William O'Connell, as such guardian, was substituted as a party plaintiff and is the appellant in the instant case, and appellee is a cross-appellant herein. During the administration of the estate by appellee in Illinois, he procured an order from the probate court of Cook County to purchase a house for his wards out of the funds in his hands and did so on June 20, 1926, which purchase was approved by said probate court. The value of said 160-acre tract at the time Parthenia Berry Sewell died was not in excess of $480. A suit was brought by appellee against his two sons, who were represented by their next friend in chancery in the superior court of Cook County, Illinois, in which a final decree was rendered adjudging that appellee individually had no right, title, or interest whatso-

ever in the 160-acre tract of land in Ouachita County, Arkansas, and was not entitled to any part of the one-eighth royalty on oil drawn or extracted therefrom, and this decree was pleaded by appellants in the instant case as a bar to appellee again litigating his claim to an interest in said land in the courts of Arkansas. In addition to these undisputed facts, evidence was introduced pro and con tending to show whether Ab Berry surrendered his life estate or curtesy interest in the 160-acre tract to his daughter, Parthenia Berry Sewell.

Based upon the undisputed facts set out above and the additional conflicting testimony introduced by the respective parties, the chancery court found and decreed that Ab Berry surrendered his interest by curtesy in the 160-acre tract to his daughter, Parthenia Berry Sewell, at which time she became the owner in fee simple of the same. Also that, upon the death of Parthenia Berry Sewell on March 24, 1920, title in fee simple to said tract of land passed by descent to Arthur W. Sewell and John W. Sewell, minors, in equal undivided shares, subject to an estate by the curtesy consummate in Arthur Sewell, the father of the minors, which said estate by the curtesy in Arthur Sewell was subordinate to the homestead exemption in said minors during their minority in the N½ of said 160-acre tract, and that appellee is entitled to all earnings or income from royalties received or to be received from the S½ of said 160-acre tract. The chancery court also adjudged that appellant, as guardian for the estate of the minors, pay to appellee $29,250, one-half of the cash consideration received for the lease dated October 11, 1922, together with the earnings thereon from the date received. The chancery court also adjudged that appellee should receive all the earnings received on the royalties from the date of the lease on the S½ of said 160-acre tract and required appellant, as guardian, to file a statement of account within thirty days showing all moneys received by him in royalties and the earnings thereon on the N½ as well as the S½ of said 160-acre tract. The chancery court then appointed the First National Bank of El Dorado curator of the estate of said minors to collect the amount due from the

Gulf Refining Company and to collect all accrued royalties from oil and gas produced and severed from said 160-acre tract in accordance with the terms of the oil and gas lease as well as all royalties to accrue thereunder, and to preserve and invest the corpus and to pay the appellant the earnings from that produced on the N½ and appellee the earnings from that produced on the S½ of said 160-acre tract.

Appellant first contends that appellee acquired no curtesy interest in the 160-acre tract because at the time Parthenia, his wife, died, her father, Ab Berry, had a life estate or curtesy interest therein. Appellee contends that prior to her death, the life estate or curtesy interest of Ab Berry had been surrendered by him to Parthenia and had merged in her reversionary estate, and that at the time she was the owner of the fee simple title thereto. The court found for appellee on this point and correctly so. Ab Berry had allowed his daughter, Parthenia, with her husband, to move on the 160-acre tract, making valuable improvements thereon, and pay the taxes without attorning to him. He treated them as the owners of the property from the day they moved on it, and by his acts and conduct surrendered his curtesy interest therein to his daughter, Parthenia. Under the facts, his interest by curtesy passed to Parthenia by operation of law, although there was no proof of an express surrender, abandonment, or gift by him to her. Parthenia was therefore after acquiring the life estate of Ab Berry, seized of an estate by inheritance in the 160-acre tract, and her husband, appellee, upon her death, was entitled to an estate therein by the curtesy. This court said in the case of *Owens* v. *Jabine*, 88 Ark. 468, 115 S. W. 383, that: "To entitle a husband to an estate by the curtesy, it is necessary that the wife be seized during coverture of an estate of inheritance in the land."

Appellant also argues that, owing to the lapse of time in asserting his right of curtesy, he is barred now from claiming same, and that he has estopped himself from doing so by treating the property as the individual property of the minors. It is true that he acted for many years as guardian of the estate of the minors, but dur-

ing that time he did nothing which operated to their prejudice or which caused them to alter their condition to their injury, which are necessary elements of laches or estoppel. *Reaves* v. *Davidson,* 129 Ark. 88, 195 S. W. 19; *Johnson* v. *Taylor,* 140 Ark. 100, 215 S. W. 162; *Lessor* v. *Reaves,* 142 Ark. 320, 219 S. W. 15; *Reynolds* v. *Cowan Bros. & Hardin,* 148 Ark. 655, 232 S. W. 941.

Appellant also argues that appellee is now precluded from claiming an estate by the curtesy in said land on account of the Illinois decree in which it was decided that he had no interest by the curtesy in the Arkansas land. By inspection of the Illinois judgment pleaded as *res judicata* of the issues involved in this case and asserted as an estoppel of appellee's right to claim an interest by the curtesy in the 160-acre tract, we find that the basic question involved therein was the title to the 160-acre tract situated in Arkansas. The Illinois court was without jurisdiction to determine title to lands in this State, and the adjudication there cannot estop appellee from claiming an interest in real estate in this State nor can the adjudication there be pleaded as *res judicata* of issues here involving title to said land. *Clopton* v. *Booker,* 27 Ark. 482; *Williams* v. *Nichol,* 47 Ark. 254, 1 S. W. 243; *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75.

This brings us to a consideration of when the homestead right vested in the minor children, and whether it extended to the boundaries of the 160-acre tract or to only 80 acres adjoining the dwelling, and whether the homestead interest therein was paramount to the curtesy interest of appellee. Under the Constitution of 1874, the estate of homestead vests in the minor children upon the death of the parent who owned and occupied the land as a residence. *Cowley* v. *Spradlin,* 77 Ark. 190, 91 S. W. 550; *Smith* v. *Scott,* 92 Ark. 143, 122 S. W. 501; *Bruce* v. *Bruce,* 176 Ark. 442, 3 S. W. (2d) 6. In the instant case, the value of the 160-acre tract at the time the homestead right vested in the minor heirs did not exceed $480; hence it extended to the boundaries of the 160-acre tract. *Cowley* v. *Spradlin,* 77 Ark. 190, 91 S. W. 550.

It has been definitely decided by this court that the husband's right of curtesy in the homestead of his wife yields to the right of the heirs to occupy same and enjoy the fruits thereof during their minority. *Thompson* v. *King*, 54 Ark. 9, 14 S. W. 925; *Littell* v. *Jones*, 56 Ark. 139, 19 S. W. 497.

It follows therefore that the trial court erred in finding that appellee is immediately entitled to any part of the funds in question or the income or interest thereon or in other funds arising from the one-eighth royalty received under the lease from its date or any part of the initial cash consideration paid for the lease during the minority of Arthur W. and John W. Sewell, and in appointing the First National Bank of El Dorado curator for Arthur W. Sewell and John W. Sewell to collect and administer upon any of the funds in question, but should have adjudged that the funds paid into the registry of the court by the Gulf Refining Company be paid to appellant, the duly appointed and acting guardian of said minors, upon the execution of a good and sufficient bond to preserve the corpus of the fund, and should have stopped at that. Appellee's curtesy right to enjoy the income from the funds will not mature until the younger heir attains the age of twenty-one years and may never mature should he die before the younger heir reaches that age. In that event it would all pass to the appellants. The decree rendered by the chancery court is reversed, and the cause is remanded with directions to the chancery court to enter a decree in favor of appellant for the funds involved upon the execution of a good and sufficient bond to preserve the corpus of the funds now in the registry of the court.

BENE *v.* NEW YORK LIFE INSURANCE COMPANY.

4-4048

Opinion delivered November 25, 1935.

Isgrig & Robinson, for appellant.

Louis H. Cooke and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

MEHAFFY, J. The appellant brought this suit in the Pulaski Circuit Court to recover $1,969, 12 per cent. penalty, and a reasonable attorney's fee, against the appellee. Appellant was the beneficiary in a policy of insurance issued by the appellee, insuring the life of appellant's husband, in the sum of $2,000. The insured died on March 11, 1933, and due notice was furnished the insurance company. There was an indebtedness due the company from the insured in the sum of $85.90, and a dividend due of $55.72, leaving a net indebtedness due the company of $30.18.

The appellee answered denying the material allegations in the complaint. It is agreed that the yearly premiums for the years 1925, 1926 and 1927 were paid in cash, and that the premium due for the year 1928 was paid by a loan on the policy. It is agreed that the premium for 1929 was not paid.

The evidence introduced by appellee tended to show that, when the policy lapsed, there was not sufficient reserve to pay for extended insurance to the insured's death. Evidence was introduced showing that a surrender charge was necessary if the policy was surrendered or lapsed from the third to the ninth years.

The policy contains the following provisions:

"After three full years' premiums have been paid, the insured may, within three months after any default in payment of premium or within thirty days after any anniversary if the policy has become fully paid, surrender the policy, and

"1. Receive its cash surrender value; or

"2. Receive the amount of participating paid-up insurance which the cash surrender value at date of default, less any indebtedness hereon will purchase, payable at the same time and on the same conditions as this policy, but without disability or double indemnity benefits. The insured may at any time obtain a loan on such paid-up insurance, or surrender it for its cash surrender value; or

"3. If the policy be not surrendered for cash or for paid-up insurance within three months after default in payment of premium, its cash surrender value at date of default, less the amount of any indebtedness, shall automatically purchase continued insurance from the date of default for the face of the policy plus any dividend additions and less any indebtedness to the company. The continued insurance shall be without future participation and without the right to loans, cash surrender values, disability or double indemnity benefits.

"The cash surrender value shall be the reserve on the face of the policy at the end of the insurance year or, in event of default, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any outstanding paid-up additions, plus any dividends standing to the credit of the policy, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent. of the face of the policy. Such reserve will be computed on the basis of the American Table of Mortality and interest at three per cent., and the amount of paid-up insurance under (2) and the term of the continued insurance under (3) will be computed on the same basis at the attained age of the insured on the date of default.

"The values in the table opposite are computed in accordance with the above provisions, assuming that

premiums have been duly paid for the number of years stated, that there is no indebtedness to the company, no outstanding paid-up additions, and no dividends standing to the credit of the policy; the surrender charge, if any, has been deducted."

It is unnecessary to set out the evidence because there is no dispute about the facts. The only question presented for our consideration is: Was the appellee justified in making a surrender charge in this case?

The policy provides that the cash surrender value shall be the reserve on the face of the policy at the end of the insurance year, or, in the event of default, at the date of default, and the reserve on any outstanding paid-up additions, plus any dividends, standing to the credit of the policy, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent. of the face of the policy. It will be seen that the contract itself provides for a surrender charge. It is agreed that if this surrender charge is a proper charge, and not prohibited by public policy, the insurance was not extended to the time of the insured's death; but that if the surrender charge was prohibited by public policy, the insurance was extended beyond the death of the insured, and appellant would be entitled to recover.

The appellant states that the main question is whether appellee was justified in making a surrender charge in this case. Appellant calls attention to the case of *Security Life Ins. Co.* v. *Watkins,* 180 Ky. 20, 224 S. W. 462. This case was decided by the Supreme Court of Kentucky in 1920. The contention of the insurance company in that case was that the Kentucky statute applied to domestic companies only, and not to foreign corporations. The statute impliedly prevented an insurance company from making a surrender charge. We have no such statute in this State.

Appellant next calls attention to *Boozer* v. *Anderson,* 42 Ark. 167. In that case the note provided that, if it became necessary to collect the note, the maker would pay attorney's fee of 10 per cent. on the amount that should be recovered. The court held that that was

a penalty, and the provisions for attorney's fee was void. The note itself bore 10 per cent. interest, the maximum amount allowed under the Constitution, and it could have been nothing else but a penalty. The court in that case, however, said that, about the validity of such stipulations, there has been and is great diversity of judicial opinion.

The surrender charge in the policy in this case is not a penalty, but it is expressly agreed in the policy that the surrender value shall be the reserve, plus any dividends standing to the credit of the policy, and less a surrender charge for the third to the ninth year, inclusive, of not more than one and one-half per cent. of the face of the policy.

The next case to which appellant calls attention is *United States Life Ins. Co.* v. *Spinks,* 126 Ky. 405, 96 S. W. 889. The opinion in that case also construed a statute, and, after discussing the statute at some length and the facts in the case, the court said: "Having determined to prevent forfeitures, the next step of the Legislature was to provide a plan by which the value of the defaulted policy might be justly and correctly ascertained."

We have no such statute in Arkansas, and the evidence in this case shows that the surrender charge in the contract was a fair and equitable charge. The evidence is given in general terms, statements made as to the cost of procuring the insurance, but there is no evidence tending to show what any of the particular items of cost consist of. But, as we have said, we have no statute here, and the question is whether public policy prohibits the surrender charge.

In 50 C. J. 858, the rule with reference to public policy is stated as follows: "Nevertheless, with respect to the administration of the law, the courts have frequently quoted and often approved of the statement that public policy is that principle of law which holds that 'no one' can lawfully do that which has a tendency to be injurious to the public or against the public good; that rule of law which declares that no one can lawfully do that which tends to injure the public or is detrimental to the public good; the principles under which freedom of contract

or private dealing is restricted by law for the good of the community. 'Public policy' has been said to be synonymous with 'policy of the law,' and also has been defined as 'the public good'."

As to whether a contract is against the public policy is a question of law for the court to determine from all the circumstances of each case. Persons should not be unnecessarily restricted in their freedom to make contracts, and a court will not hold that a contract is void, as being contrary to public policy, unless the contract binds one to do something which is injurious to the public interest. 13 C. J. 427; 6 R. C. L. 707.

The question involved in this case was decided by the court of appeals of the eighth circuit. The court said in that case that the table introduced showed: "The loan and surrender values under this policy shall be upon the Actuaries Table of Mortality with 4 per cent. interest per annum, and the net value thereof is the entire reserve, less not more than 2½ per cent. of the amount insured by the policy." *Inter-Southern Life Ins. Co.* v. *Zerrell,* 58 Fed. (2d) 135.

The court also said in that case: "The policy was an Arkansas contract, and it is conceded that there was no statutory requirement that the insured have the benefit of the entire reserve in case of default in the payment of premiums. Therefore the amount available for the purpose of extended insurance depends upon the terms of the policy."

The court further said in that case: "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense."

The surrender charge provided for in insurance policies has been discussed and upheld where there was no statute prohibiting such charges, in *Gilley* v. *Mo. State Life,* 116 Tex. 43, 273 S. W. 825; *Erickson* v. *Equitable Life Assurance Society,* 193 Minn. 269, 258 N. W. 736.

We have no statute in this State which prohibits the making of the contract here involved, and it is not

prohibited by public policy. The judgment of the circuit court is therefore affirmed.

MORRISON *v.* STATE.

Crim. 3934

Opinion delivered September 23, 1935.

Jack M. Bowman, O. D. Longstreth and *John R. Thompson*, for appellants.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

SMITH, J. Appellants were convicted of violating § 2668, Crawford & Moses' Digest, and have appealed. This section of the statute provides that any person who shall sell, vend, or otherwise dispose of any lottery ticket, gift concert ticket, or like device, shall, on conviction thereof, be fined in any sum not less than fifty dollars nor more than five hundred dollars.

There is no question about the guilt of appellants if the testimony of a former mayor of the city and the chief of detectives of the city police department is to be credited. The chief of detectives testified that he kept noticing every afternoon that an automobile loaded with negro men drove over the Broadway Bridge from the city of Little Rock to the city of North Little Rock, and about an hour later the automobile would return with the same passengers. The witness stopped the car on one of these trips, and found that it contained all the paraphernalia used in the operation of a lottery known as the policy racket, except only the balls used in drawing the numbers. The witness described how this lottery or racket was conducted.

The witness arrested five negro men, and held them in custody until the following morning, when appellant Morrison called and demanded the release of the men and of his car in which the men were riding when arrested. He stated that these negroes were selling lottery tickets for him, and he demanded their release upon the ground that negroes employed by John Hardin, who was his competitor in the policy racket, had not been arrested or disturbed. Morrison stated to the chief of detectives that if his men were not released he would go to the mayor and have the chief discharged.

The defendant Neely admitted to the chief that he was engaged in selling lottery tickets for his codefendant, Morrison.

The ex-mayor testified that Morrison came to him about having his employees released, and, in the course of the conversation, stated that he was being persecuted, in that his employees were arrested while those of his competitor were not disturbed.

The recital of this testimony disposes of the contention that the evidence was insufficient to support the conviction.

It is insisted that the testimony of the mayor and chief of detectives should be disregarded, because no showing was made that the alleged confessions were free and voluntary. Both Morrison and Neely denied making any admission of guilt.

We think the testimony was competent. If the confessions were made, they were free and voluntary; in fact, Morrison sought the interview with both the mayor and the chief of detectives.

It is, of course, competent to prove the declarations of an accused against his interest, and it is not required that it be first shown that the declarations were freely and voluntarily made.

In the case of *Davis* v. *State,* 182 Ark. 130, 30 S. W. (2d) 830, it was said: "The practice in such cases has been defined in numerous decisions of this court. It is to this effect. When testimony in the nature of a confession is offered, the accused has the right to object to its admission, upon the ground that the alleged confession was not voluntarily made, in which event the trial court should hear testimony as to the circumstances under which the alleged confession was made, and should exclude the confession if it was not voluntarily made. If the testimony is conflicting on that question, the jury should be told to disregard the alleged confession unless they found that it was, in fact, voluntarily made; but, if it appeared to have been voluntarily made, to consider it in connection with all the other evidence in the case."

No suggestion was made, when the testimony as to the admissions was offered, that they were not freely made, and the court was not therefore required to hear testimony on that issue.

It was also said in the Davis case, *supra,* that statements in the nature of a confession are not to be excluded for the reason only that they were made to an officer having the accused in custody, and, when voluntarily made the officer may testify what they were.

The only question in the case which gives us any concern is the ruling of the court in requiring the defendant, Morrison, when testifying in his own behalf, to answer how many times he had been arrested.

In the case of *Kennedy* v. *Quinn,* 166 Ark. 516, 266 S. W. 462, it was said: "We have frequently and recently decided that a witness cannot be interrogated on his cross-examination for purpose of impeachment concerning indictments or mere accusations of crime. He

may be asked if he was guilty or was convicted, but he cannot be asked if he was indicted or accused." (Citing cases.)

It is therefore not proper, ordinarily, to ask a witness, on his cross-examination, whether he has been arrested for the commission of a crime. Such a question was held, however, not to be error in the case of *Smith* v. *State,* 183 Ark. 100, 34 S. W. (2d) 1083. But in that case home brew, an intoxicating liquor, was found in the home of appellant, who denied having made it. The State was attempting to show that the accused was in that business, and that having the brew in his possession was a part of the business in which the accused was engaged, and it was there held that it was not incompetent to show that the home where the liquor was found had been raided a number of times by officers and the accused arrested during these raids. The admission of this testimony in that case, which was introduced to show a course of conduct, must be regarded, however, as an exception to the general rule that a witness should not be asked, on his cross-examination, if he had been accused or arrested.

While we think this testimony was not competent in the instant case, we do not think its admission was error calling for the reversal of the judgment. The witness explained fully that, while he had been twice arrested, neither arrest had any relation to the offense charged in the indictment. He stated that both arrests were unjust, and that both were dismissed without a trial. His answer to these collateral questions was, of course, conclusive of that inquiry.

There appears to have been no prejudicial error, and the judgment will therefore be affirmed. It is so ordered.

GAZZOLA *v.* NEW.

4-3965

Opinion delivered October 7, 1935.

C. F. Greenlee and *W. W. Sharp,* for appellant.

Emmet Vaughan and *D. D. Panich,* for appellee.

BUTLER, J. J. J. New brought suit for malicious prosecution against John Gazzola, the appellant, and

J. L. Woodfin. At the conclusion of the testimony the trial court directed a verdict in favor of defendant Woodfin and submitted the case to the jury against Gazzola. The jury found in favor of the plaintiff in the sum of $200, actual damages, and $1,800, punitive damages, upon which a judgment was entered. To reverse that judgment, this appeal is prosecuted.

Appellee has moved to dismiss the appeal on the ground that appellant has failed to comply with the provisions of § 1314, Crawford & Moses' Digest. The applicable part of the section provides that "where the verdict or decision is rendered within three days of the expiration or adjournment of the term a motion for a new trial with alternative prayer for appeal in case said motion be overruled may be presented upon reasonable notice to the opposing party or his attorney of record to the judge or chancellor or his successor of the district in which said verdict or decision was rendered at any time within 30 days from the date of the verdict or decision, and such judge or chancellor shall pass upon said motion and indorse his ruling thereon upon the back of the motion either granting the motion or overruling the same; and if said motion be overruled he shall also indorse upon said motion his order granting appeal to the Supreme Court and his further order specifying a reasonable time allowed in said cause for filing a bill of exceptions," etc.

The verdict was rendered on March 19, 1934, the last day of the term. Motion for a new trial was filed in the office of the clerk of the court on April 16, 1935, without any indorsement of the judge relating to its presentation or his action thereon. On the 29th day of April, appellant's attorney withdrew with the permission of the clerk the motion and returned it to the clerk for filing on that day. When returned it bore this indorsement:

"Lonoke, Arkansas, 4/29/35.

"This motion for a new trial in the case of *New* v. *Gazzola* was presented to the court at Clarendon, Arkansas, April 15, 1935, and taken under advisement. On this day, said motion is overruled. The defendant ex-

cepts to the ruling of the court. Defendant prays an appeal to the Supreme Court, which is granted and 60 days given to file bill of exceptions.

"W. J. Waggoner, Circuit Judge."

"Upon return of the motion, the clerk indorsed the following filing:

"The above order of the circuit judge was filed on the 30th day of April, 1935.

"Leo H. Rogers, Clerk."

From this indorsement it appears that the motion was presented to the judge within the 30-day period provided by statute, and we must presume that for a sufficient reason it was taken under advisement until the 29th day of April, when the motion was overruled and the proper indorsements of the judge's action with the required orders indorsed thereon. The action of the court thus appears to have been beyond the 30-day period.

The specific contentions made for dismissal of the appeal are that no notice was given to the opposite party or his attorney. The provision for notice should not be disregarded, for in some cases it might be a fatal omission; the reason for the notice is, that the opposing party may have an opportunity to hear and resist the allowance thereon. Where, as in this case, the court ruled in favor of the opposing party by denying the motion, he is not prejudiced by the failure of appellant to give the notice.

It is next contended that the notice was not in proper form when it was filed on April 16, in that it did not have the rulings of the judge indorsed thereon. Under the rule of practice laid down by the statute, the motion must first be presented to the judge and after the latter has indorsed his action with respect to granting or overruling the same, his grant of appeal and extension of time for filing bill of exceptions, the motion is then to be filed with the clerk. Therefore the filing on April 16, without the judge's indorsement was premature.

The further contention is made that the court could not extend the time for filing the motion by taking the same under advisement, and that, after the expiration of the 30 days, the judge had no authority to rule upon the

motion, grant the appeal or fix the time for filing the bill of exceptions. In support of this contention we are cited the case *Spivey* v. *Spivey,* 149 Ark. 102, 231 S. W. 559. There is an expression in that opinion which seems to sustain the position taken by appellant, which is as follows:

"The statute requires the motion for a new trial to be presented to the court for its action and be acted upon by the court within 30 days from the date of the verdict or decision." An examination of that case discloses, however, that the time in which "the court acted" was not an issue in the case, and that the words "be acted upon by the court" was not necessary for the decision of the question presented. The judgment under consideration was rendered on August 25, and within three days before the adjournment of court. On the date on which the court adjourned which was the 26th day of August, a motion for a new trial was filed in the office of the clerk of the court, but was not presented to the judge until after the expiration of the 30-day period provided. The judge overruled the motion, but did not indorse on it an order granting an appeal and naming the time in which bill of exceptions might be filed. Therefore two express requirements of the statute were not obeyed, and the motion was not sufficient to bring the bill of exceptions into the record for review. It therefore appears that the expression "and be acted on by the court" was dictum and must be regarded as "a slip of the pen," for the statute does not provide for any certain time in which the motion shall be filed in the office of the clerk, or when it shall be acted upon by the judge. Therefore the language of the court last above quoted is not justified by any provision of the statute. Cases may well be supposed where it would not be practicable for the judge to pass upon the motion within 30 days, and as noted the statute does not so provide. Under circumstances which might justify it, the motion, might be presented on the last day allowed, and the errors assigned might be such as would require the taking of testimony in order that the judge be properly advised before filing thereon. This appears

a sufficient reason for the silence of the statute as to when the motion must be acted upon by the court.

The premature filing of the motion, while erroneous, was not fatal to the appeal for the reason that all that is required is that it be filed when the judge has indorsed his action thereon.

We conclude therefore that the proceedings on the motion were in substantial compliance with the statute, and the motion to dismiss is denied.

Appellant contends that the complaint shows on its face the cause of action barred by the statute of limitations, and that its defense of set-off was exclusively cognizable in a court of equity, and the trial court erred in its refusal to transfer the cause and proceedings to trial of the issues over his objection. We think these contentions are without merit, but find it unnecessary to discuss same for reasons which hereinafter appear.

The serious contention presented is that the appellee in the court below failed to establish the fact that the prosecution was malicious and without probable cause. In an action for malicious prosecution the finding of an indictment by the grand jury is *prima facie* evidence of probable cause, and, while not conclusive of that fact, the burden is upon the plaintiff to prove both want of probable cause and malice. *Wells* v. *Parker,* 76 Ark. 41, 88 S. W. 602; *Casey* v. *Dorr*, 94 Ark. 433, 127 S. W. 708.

It is essential in an action for malicious prosecution that the plaintiff show not only want of probable cause but also malice on the part of the defendant. These two elements must concur in order to constitute malicious prosecution. *Price* v. *Morris,* 122 Ark. 382, 183 S. W. 180; *Foster* v. *Pitts*, 63 Ark. 387, 38 S. W. 1114; *McIntosh* v. *Bullard,* 95 Ark. 227, 129 S. W. 85.

The testimony relied on to establish these essential elements is that of J. J. New and his brother, Walter New, and Clyde Erby. The evidence given before the grand jury resulting in the procurement of the indictment was that of Mr. Woodfin who stated:

"J. J. New lived on Mr. Gazzola's place and gave him a mortgage on a number of mules, and it turned out

in the fall, when he went to close out the mortgage, a brother of J. J. New claimed that two of the mules didn't belong to him, and that they were his, and he wouldn't give the mules up, and Mr. Gazzola wants to indict him for giving a mortgage on mules that didn't belong to him. He did not send the sheriff to take possession of the mules, but he claimed the mules belonged to J. J. New. J. J. New's brother's name is Walter New, and in the fall of the year Walter claimed that he never knew his brother had given a mortgage on the mules. J. J. New had given the old man four mules and then Walter claimed these other two. J. J. New claimed they were his brother's mules, and he didn't tell his brother about it until that fall. The debt between them has been settled except these mules."

This was all the testimony considered by the jury. Mr. Gazzola had appeared in the jury room, but he spoke such broken English that he could not make himself understood.

Subsequent to the return of the indictment, New was tried and acquitted and afterward brought this action. At the trial he testified regarding a settlement he had had with Mr. Gazzola by which he was to move from Gazzola's farm and be given four mules and turn over to Gazzola all of the property mentioned in two chattel mortgages, which he had given him during the year 1929. The first of these mortgages was executed on the 21st day of March, 1929, and another on June 26, following. Witness testified that at the time this agreement was made Mr. Woodfin listed the chattels described in the two mortgages; (the two mules in controversy were two of those named in the mortgage of June 26, 1929); that he never made any such statement as that attributed to him by Woodfin in his testimony before the grand jury; that he had never told Mr. Gazzola or Woodfin that he had sold the two mules to his brother, and had never spoken to Mr. Gazzola since the day of the settlement. Witness stated that in May, 1930, he had a conversation with Mr. Woodfin, but did not tell him that he had sold the mules to his brother. As to moving off Gazzola's farm, witness was asked: "What did you do with the balance of

the stuff—you left it on the place?" and he answered: "Yes, sir."

Walter New testified that he was present when Gazzola and his brother, J. J. New, had their settlement, and that he heard the terms, that he had had the two mules in controversy in his possession since the spring of 1929 when he had come to Gazzola's farm to make a crop with his brother; that during the latter part of May or the first of June of 1930 Gazzola and Mr. Woodfin made a demand upon him for the mules in his possession, including the two mules in controversy, and that he refused to give up these two mules. In explaining this he said: "I reasoned with them and felt like I was entitled to some consideration. I told them there was a consideration and a considerable amount that should come to me out of that crop. I thought that I was due some consideration before I turned the mules over to them." Previous to this, in answer to the question, "Do you know anything about the two mules that are involved in this matter between Mr. New and Mr. Gazzola and Mr. Woodfin?" Witness had stated: "We were farming and my brother turned two mules over to me to farm with. We made a verbal trade that in the event I paid for the mules that fall I could keep them. I had them in my possession * * * and kept them * * * until they came up there after them and I refused to release them." Witness stated that at the time J. J. New made the verbal trade with him that J. J. New informed him that the mules were mortgaged to Gazzola, and, in answer to the question, "You wouldn't turn those mules over to anyone until you had a settlement with your brother?" he answered, "No—not until I got a settlement." Witness was asked, "You explained to them that you had bought the mules from your brother and that's why you were trying to hold them?" He answered, "It was understood that we had a conditional trade." At no place in his testimony, however, does it appear that he frankly disclosed to Gazzola that J. J. New had told him when they had the verbal trade that the mules were under mortgage to Gazzola.

J. J. New testified that the two mules in controversy, at the time of the settlement with Mr. Gazzola belonged to witness subject to Gazzola's mortgage. Later on he said: "I was going to sell them provided that he (Walter) paid out subject to the mortgage Mr. Gazzola held." Witness was present when Walter was testifying and admitted that his testimony was truthful as to the sale of the two mules. It does not appear from the evidence given by J. J. New that he disclosed to Gazzola or Woodfin the trade between himself and Walter New and explained to them that transaction.

The witness, Clyde Erby, stated in effect that some time in 1928 or 1929 he went to Mr. Gazzola and told him that he would like to handle his (Gazzola's) place for him, and "he kind'o blew off and said that he didn't know whether he wanted to let it go or not; that Jim (J. J. New) had stolen everything he had over there and I turned around and walked out."

The following facts are undisputed: In 1926 J. J. New rented Gazzola's farm and moved upon it. The result of his operations on the farm was that in July, 1928, he was indebted to Gazzola in the sum of $6,955.44 and during the year 1929 Gazzola furnished him $9,622.87 in addition. During that year New was farming some land belonging to a Mr. Erwin, and, upon certain representations made by New, Gazzola advanced a considerable sum for the operation of that farm. Later he discovered that these representations were false, and, as he was already dissatisfied with New as a tenant, he decided that that year would terminate their relation as landlord and tenant. At the close of that season's business the account of New with Gazzola, after giving him all credit, left a balance due Gazzola of $8,588.88, exclusive of interest and also of a $2,000 item New owed Gazzola for rent, making an aggregate of more than $10,000 due Gazzola by New. Gazzola inquired of New in the latter part of 1929 if he had found a place to move, and New claimed that under his contract he was entitled to remain on the farm through the year 1930 and indicated that he was going to stay on. He finally made the proposition to Gazzola that if the latter would discharge him of indebted-

ness and give him four mules he would move off the place and surrender to Gazzola all the chattels included in the two mortgages made in the year 1929. After consulting his friends, Gazzola finally agreed to New's demands and settled on New's terms giving him the four mules, and at that time a Mr. Woodfin, who was Gazzola's agent, made a list of the properties, and later on in endeavoring to gain possession of them, Gazzola found that Walter New had possession of two of the mules which were included in the mortgage of June 26, 1929. Gazzola demanded these mules of Walter New who refused to surrender them, claiming that he was entitled to retain them under some kind of a trade made with his brother, J. J. New, and Gazzola never did get these two mules.

Both J. J. New and Walter New claimed that Walter got possession of these mules in the spring of 1929 under the verbal agreement as testified to by Walter New. If this is true, J. J. New was not the owner of the mules at the time he mortgaged them to Gazzola on June 26, following.

A probable cause is that state of case where, after ordinary care in ascertaining the facts, one has reasonable grounds for believing that the statements made by him with relation thereto are true, or, as defined by this court in *Kansas & Texas Coal Co.* v. *Galloway*, 71 Ark. 351, 74 S. W. 521, "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty." Applying this rule to the admissions made by the News and the undisputed facts which have been narrated, we conclude that the testimony fails to show want of probable cause within the meaning of the definition given. One who sues for malicious prosecution must establish not only that he was innocent of the charge but also that there was no probable cause for such prosecution, and where the facts relied upon to constitute such cause are undisputed, the question is one of law for the court to determine and should not be submitted to the jury. *St. L. I. M. & So. Ry. Co.* v. *Tyus,* 96 Ark. 325, 131

S. W. 682; *Whipple* v. *Gorsuch,* 82 Ark. 252, 101 S. W. 735.

An application of these principles to the facts of this record forces the conclusion that all reasonable minds must agree that Gazzola had cause for entertaining an honest and strong suspicion that appellee was guilty of the crime charged. The facts of this case are no stronger for the appellee than those in the case of *Keeby* v. *Stifft,* 145 Ark. 8, 224 S. W. 396, where this court, on appeal, upheld the action of the trial court in directing a verdict for the defendant.

Judgment is reversed, and as the facts appear to have been fully developed the case is dismissed.

CANTLEY *v.* DANAHER.

4-3933

Opinion delivered October 21, 1935.

W. E. Rhea and *G. B. Segraves,* for appellant.

Danaher & Danaher, for appellee.

BAKER, J. At the risk of being tedious, a rather full and detailed statement of the facts in this case is made, for the reason that the writer believes such statement of the admitted facts obviates the necessity of much argument.

On January 5, 1923, the St. Louis Joint Stock Land Bank made a loan to J. D., Martha R., and Sallie S. Hawley, in the sum of $14,000. The borrowers executed their note for this money, and gave a first mortgage on 302 acres of land in Lincoln County, as security for the payment of the debt. The debt was payable in 66 semi-annual installments.

Shortly after the execution of this first mortgage, a second mortgage, or deed of trust, was given by the same parties to M. Danaher, conveying the same land. This second mortgage secured a debt of $2,400, and matured two years after date.

The Hawleys paid to the bank the first semi-annual installment, due on August 3, 1923, and M. Danaher paid the bank other installments, from January 11, 1924, to July 31, 1931, the last payment being made on the last-mentioned date. On April 5, 1932, the bank filed its suit to foreclose and declared the entire debt due and payable, in accordance with an acceleration clause in the mortgage or deed of trust. The bank paid some of the taxes that matured upon the land, and at the time the suit was filed for foreclosure, there was due and owing to it $15,537.43. At the time of the filing of this suit by the bank to foreclose, Danaher had paid $2,988.37, as taxes and special assessments upon the land, and also several thousand dollars of the installments due by the Hawleys to the bank. The first mortgage or deed of trust executed by the Hawleys to M. Danaher contained this provision:

"And if the parties of the first part shall fail to make such payments of taxes, legal assessments, or interest (referring to interest on first mortgage debt to St. Louis Joint Stock Land Bank) the party of the third part (Danaher) may do so, at his option, and all such payments so made by the third party shall be added to and become a part of the principal indebtedness hereby secured."

At the time Danaher quit paying, on August 6, 1929, he had advanced or paid out on taxes, special assessments, installments, insurance, etc., sums, together with the amount secured by the deed of trust of January 19, 1923, which aggregated $10,188.55, and on that date the Hawleys gave to Danaher a new note for that amount, due four years after date, and a new deed of trust to secure this last note, which recited:

"We, J. D. Hawley, Martha R. Hawley, and Sallie S. Hawley, acknowledge that the indebtedness due by us to M. Danaher, secured by deed of trust now of record in Record Book 27, page 29, of the records of Lincoln County, Arkansas, has not been paid, and that at our request M. Danaher has paid out for taxes, insurance, and repairs on the land described in said deed of trust, and for amounts due to the St. Louis Joint Stock Land Bank at various dates large sums of money; and we have made some payments to said M. Danaher. Upon the account between us, allowing proper interest for the sums paid by us to him, there is now due from us to said M. Danaher, principal and interest included, the sum of $10,188.55, which we hereby promise to pay to said M. Danaher on or before four years after this date, with interest thereon payable annually at the rate of six per cent. per annum from this date until paid. We hereby renew the said deed of trust, recorded in Record Book 27 at page 29 as aforesaid to secure payment of all of said indebtedness.

"If grantors shall fail to pay such taxes, legal assessments, or insurance premiums, when same shall become due, or to do any and all things herein mentioned, then the said M. Danaher may do so, and all sums so expended by him shall be due and payable on demand, shall bear interest at the rate of six per cent. per annum

from the date of such expenditure until repaid, and shall be added to and become a part of the principal indebtedness hereby secured, and the interest on such expenditures shall be compounded annually until paid."

During this interval between the dates of the execution of the two mortgages executed by the Hawleys to Danaher, these numerous payments of taxes, special assessments, and installments were made by Danaher for and on behalf of the Hawleys. This is evidenced, not only by the recitals in the two mortgages quoted above, but by numerous letters written by Danaher to the bank. Extracts are copied from some of the letters written when tax receipts were sent to the bank, or when remittances were made to it by Mr. Danaher. The effect of other communications is shown also.

On November 26, 1925, Mr. Danaher wrote, in regard to the tax receipts, which he had sent to the bank, and in asking the return of these receipts to him: "I will need them in collecting the money from Hawley, or in getting judgment if I have to foreclose."

On July 26, 1926, he wrote: "I paid the taxes for him." The tax receipt was made to "J. D. Hawley by M. Danaher."

On April 4, 1927, he sent the bank tax receipts made to J. D. Hawley by M. Danaher. In 1928 the tax receipt was to J. D. Hawley by M. Danaher.

On July 13, 1928, he wrote the bank as follows: "I merely have been making the payments to you for Mr. Hawley under arrangements with him."

Prior to that time, on October 11, 1927, in regard to the selling of some lots, he wrote the bank as follows: "If you are willing to let him sell on these terms, I will agree that the entire purchase price be paid upon his debt to you."

On July 26, 1929, some improvement taxes were paid and the receipts made to J. D. Hawley by M. Danaher. All of these payments, prior to August 6, 1929, were included in the note and deed of trust of that date, executed by the Hawleys to M. Danaher.

Thereafter, on March 18, 1930, and April 9, 1931, taxes were paid by M. Danaher. These receipts were issued in his name, in the aggregate amount of $532.77.

Danaher joined with Hawley in renting the lands to W. E. Tooke in February of 1928 for five years, and to J. N. Scruggs in March, 1930, for three years. Rent notes were made payable by these parties to Hawley and M. Danaher, and were indorsed by Hawley to Danaher, who collected rents from the lands.

One of the provisions for the acceleration of the mortgage or deed of trust to the bank, was as follows:

"It is further agreed that the debt secured herein may be declared due and payable in its entirety at any time on the failure of the mortgagor to pay taxes, either general or special, or assessments, before delinquency."

Danaher testified that he had received, in payment upon his indebtedness, for the account of Hawley, payments made by Hawley and rents, in the aggregate amount of $3,231.64; he also testified that his purpose in paying the taxes and improvement district assessments was to protect his interest in his second mortgage, to prevent the lands from going delinquent.

After the second mortgage or deed of trust was made to M. Danaher, upon August 6, 1929, he paid taxes on the mortgaged land, amounting, as above stated, to $532.77. During this same period, however, he collected as rents upon the land, $1,210, nearly $700 more than his tax payments. During the years of 1931 to 1933, inclusive, the bank paid $667.78 taxes and special assessments. On February 27, 1932, the appellee, M. Danaher, wrote the bank as follows:

"The Hawley place has so deteriorated in value that in my opinion it is not worth the debt due you. The revenues received from it in 1930 and 1931 were not sufficient to pay the taxes. I have determined that I will make no further advancements for Mr. Hawley on the place at the present time."

In this foreclosure suit, M. Danaher was made a party defendant, filed his answer and cross-complaint, in which he claimed the right to be subrogated to the right of the State and the improvement districts, for the full amount of taxes and special assessments he had paid

and prayed that these payments be declared a first lien, in his favor, as against the bank. The decree of the chancery court was in accordance with this prayer of the cross-complaint, and Mr. Danaher was declared to have a first and paramount lien upon the land for all taxes and special assessments paid by him, superior to that of the bank, even as to the taxes and special assessments paid by the bank. As to the second note and mortgage executed by the Hawleys to Danaher a third lien was declared. The bank was declared to hold the second lien upon the property.

From this decree of the chancery court this appeal comes to correct errors alleged by the appellant.

If the foregoing statement is not complete as to all of the facts or details, it will suffice, at least to show the controversy between the parties, and any other pertinent facts the writer finds necessary to discuss will be stated in the opinion. By way of explanation it may be stated further that, after the filing of this suit, the St. Louis Joint Stock Land Bank became insolvent and S. L. Cantley was appointed receiver for it, and after his appointment the suit proceeded in his name as plaintiff.

The foregoing statement is the most favorable that can be made, as we understand the situation, for the appellees. In saying that Mr. Danaher paid the taxes upon this land for several years, there is a necessity for an explanation in regard thereto.

Hawley was on the property. When he borrowed the money from the Joint Stock Land Bank, he needed about $2,400 more money to pay off existing obligations than the Joint Stock Land Bank would furnish him, so appellee, Danaher, furnished this money. At the time of doing so, they evidently anticipated that in addition to the $2,400, other moneys would be furnished Hawley. So it was provided that whatever other funds were supplied by Danaher, they should be secured by the mortgage the Hawleys executed to him, and it was so provided in the mortgage dated January 19, 1923. That this theory is correct, there can be no doubt, when we read the provisions of the mortgage made by the said parties

to Danaher on August 6, 1929. We have just quoted from that mortgage, accepted by Mr. Danaher, in which the grantors say that at their request Mr. Danaher had paid out the taxes, insurance, and repairs on the land described in the deed of trust, and for amounts due the St. Louis Joint Stock Land Bank, at various times, large sums of money, which aggregated the sum of $10,188.55. No doubt, Danaher, thought he was well secured when he was furnishing or advancing these various sums of money from time to time, and he was charging them against the Hawleys to be repaid, if not otherwise, at least by the enforcement of the mortgage lien against the property. It will therefore be seen that the receipts issued by the tax collector, upon the checks sent by Danaher, clearly evidenced the proper party as payer of the taxes, "Hawley by Danaher." Danaher, perhaps had not contracted expressly that he would furnish more money, but he had taken an express agreement and contract from Hawley as to the kind of security he would have for whatever money he might advance. The parties carried out that agreement, when they executed the second mortgage to Danaher, upon a settlement between them as to the amount of indebtedness then due and owing.

An acknowledgment that these two mortgages executed by the Hawleys to Danaher are inferior to the mortgage executed to the Joint Stock Land Bank must be declared as a confession that there is error in the decree. The appellee has contracted for a second and inferior lien in the mortgages or deeds of trust. In this suit he insists upon a first lien by subrogation. As late as February 17, 1932, Danaher recognized the appellant as having a superior lien. That is the reason he assigns for not going further and making other advances upon the land for Hawley. He says at that time: "The Hawley place is so deteriorated in value that in my opinion, it is not now worth the debt due to you. The revenues received from it in 1930 and 1931 were not sufficient to pay the taxes. I have determined that I will make no further advancements for Mr. Hawley on the place at the present time. You are not carrying the loan for me, as

I owe you nothing." In his testimony he said: "I quit making advances."

In face of these statements, evidence of which was furnished personally by Mr. Danaher himself, we must urge that the moneys furnished by Danaher, whether for the payment of installments, special assessments, taxes, improvements or repairs, were funds advanced to Hawley, charged against him, secured by the mortgage of January 19, 1923, which mortgage was renewed by Hawley, when he executed a new and second mortgage on the 6th day of August, 1929, which was junior and inferior to the mortgage of the appellant.

When this last letter was written, which we have copied above, it was after Mr. Danaher had put into this venture of his all of the money for which he now sues upon his cross-complaint, and this letter is not consistent with the theory upon which he now sues, which theory is that the payments of taxes was made by him as a junior mortgagee to protect his lien as such. The advancements of money, or the furnishing of moneys to the Hawleys, upon their credit, for which security had been given, is a course of business inconsistent with the theory that he was required to pay taxes and assessments to protect his lien, and that he is therefore entitled to a first lien, instead of a second lien, for which he had contracted.

We are not unaware of the authority of *Ringo* v. *Woodruff*, 43 Ark. 469, or *Lester* v. *Richardson*, 69 Ark. 198, 62 S. W. 62, and other cases cited upon the same theory, and particularly § 256 of Hughes on Arkansas Mortgages.

It appears, however, that the doctrine of subrogation, as set forth in the several authorities mentioned, is not available to the appellee under the admitted facts in this suit.

Until a short time prior to the filing and trial of this suit, all parties believed the values were sufficient for their protection; so we cannot say, as a matter of law, that the bank, or its receiver, would have foreclosed the first mortgage, had it been advised positively, by Danaher, that he was paying taxes and assessments solely to protect his lien as a junior mortgagee, but there is am-

ple reason to say, and we think the evidence is conclusive in that respect, that Danaher advanced considerable sums of money, not only for the payment of taxes and assessments, but, as he suggests, for insurance and repairs and improvements, and also to pay installments due the holder of the first mortgage. He thought he had ample security therefor, and continued to think so until about the time he wrote the letter from which we have quoted above. If Danaher wanted to rely upon the right of subrogation for his protection, that fact should not have been left to conjecture or surmise, and the holder of the first mortgage should, at least, have been given notice of that fact. Appellee had notified the bank to send notices to him, instead of to Hawley. He was Hawley's attorney, according to his own statement. We think the evidence is conclusive that the appellee was not only furnishing the money, but he was paying for Hawley; therefore, discharging the liens for taxes and special assessments.

It must appear from the foregoing that the right of subrogation does not exist in favor of the appellee. There are other equities that must prevail.

"But, as the doctrine of subrogation was evolved by courts of equity for the prevention of injustice, it is administered, not as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case before the court. Therefore no rule can be laid down for its universal application, and whether it is applicable or not depends upon the particular facts and circumstances of each case as it arises, and is subject to that most ancient maxim, 'he who seeks equity must do equity.'" *Federal Land Bank of St. Louis* v. *Richland Farming Company,* 180 Ark. 442, 445, 21 S. W. (2d) 954.

We have just suggested that the appellant had the right to know if the appellee was intending to insist upon subrogation, instead of acting for Hawley, making payments of taxes and special assessments for him, and thereby discharging the liens. It was not sufficient that the appellant knew that the appellee was forwarding the money. The bank was without knowledge of the agree-

ments or relations between Danaher and Hawley, except that he had advised the bank that he was Hawley's attorney, and to send all notices to him.

In the matter of the execution of lease contracts, wherein the appellee joined with Hawley, as lessor, in the taking of notes for rent, under these leases, which notes were payable to Hawley and Danaher, and by Hawley indorsed to Danaher, the appellee became, in practical effect, a mortgagee in possession. If he did not have the land actually under foot, he had all the rents and profits, all of the benefits of a mortgagee in possession, and, we think, charged with the concomitant results. Therefore the rule in the above cited case, *Federal Land Bank of St. Louis* v. *Richland Farming Company,* governs here.

"During this time, and while the appellant was unaware of the true situation, appellee was making use of its superior opportunities and collecting yearly sums materially lessening its debt, and judging by its subsequent conduct, was attempting to secure by a lien superior to that of the appellant the sums it was yearly paying in taxes and drainage assessments, while all the time the security was depreciating in value—so much so that, while, at the date of the giving of the two mortgages to the appellant and the appellee, it is probable it was thought ample security for both, it now is worth less than the appellant's debt and the taxes and assessments for the years for which appellee has made payment. Appellee knew the mortgagor was not discharging the general taxes and assessment liens, and the appellant did not; if it thought appellant, as senior mortgagor in that state of the case, was obligated to pay the taxes, it certainly ought to have notified it of the delinquency and given it the opportunity to do so. Instead of this, it voluntarily assumed the burden."

The parallel is inescapable. The same rule must obtain. To the same legal effect see *Flower* v. *Bricker,* 178 Ark. 764, 12 S. W. (2d) 394. The same equities prevailed, and the same rule was invoked, in *Deming Investment Company* v. *Citizens Bank & Trust Company,* 190 Ark. 258, 79 S. W. (2d) 274.

Therefore our view is that the appellee cannot be subrogated to the right of the State or the improvement districts for the taxes and special assessments, and that, for the reasons given, the decree of the chancery court is erroneous. Appellant had a first lien for taxes and special assessments paid, and a first mortgage or deed of trust.

The decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

HUMPHREYS and MEHAFFY, JJ., dissent.

LOCKHART *v.* ROSS.

4-4000

Opinion delivered October 28, 1935.

H. P. Smead and *Fletcher McElhannon,* for appellants.

J. H. Lookadoo and *McMillan & McMillan,* for appellees.

BUTLER, J. This appeal comes from a judgment based on a verdict in an action brought by the appellees against Otto Lockhart and Mrs. Nellie Jobe, residents of the State of Texas, and Lillian Brunner and Louise Trueman, residents of the State of Arkansas, for the injury of a child in the residential section of the city of Arkadelphia, Arkansas, caused by the child being struck by an automobile driven by Otto Lockhart in which the other defendants were also riding. Liability was sought against the defendants other than Otto Lockhart on the theory that they were engaged in a common enterprise with him and that his negligence would be imputable to them. The trial resulted in a verdict in favor of Lillian Brunner and Louise Trueman and in favor of the plaintiff against Otto Lockhart and Nellie Jobe in a very substantial amount, which award by the jury is not questioned by the appellants, as being excessive.

1. The first ground urged for reversal is the refusal of the trial court to remove the case to the district court of the United States. The time within which the defendants were required to answer expired at noon on October 29, 1934, that being the first day of the court. Previous to this time apt notice and proper bond for removal were made and filed and before noon on October 29, 1934, the appellants filed their petition for removal of the cause to the Federal District Court; on the afternoon of the same day, filing what is called "An Amendment" to their petition. The last pleading filed was more in the nature of an amended petition than an amendment to the original petition, but this is immaterial. The petition, as first filed, after alleging the nature of the action and the diversity of citizenship of the defendants, contained the following allegations: "That plaintiffs have improperly and fraudulently joined as defend-

ants in this cause the said Lillian Brunner and Louise Trueman for the sole and only purpose of attempting to defeat or prevent the removal of this cause to the United States District Court; that neither the said Lillian Brunner or Louise Trueman was, or now is, a necessary and proper defendant in this cause, and in their pleadings herein plaintiffs wholly fail to show any cause of action or right of recovery as against either of them, or both of them combined; that there was no common enterprise between them or either of them, and the said defendants, Lillian Brunner and Louise Trueman, in the use of said automobile causing said accident and the alleged negligence of the said Lillian Brunner and Louise Trueman, are not actionable at law nor do said allegations, even if taken as true, entitle said plaintiffs to recovery against said Lillian Brunner and Louise Trueman."

The amended petition (much abbreviated but stating its essentials), averred that the plaintiffs had improperly and fraudulently joined Lillian Brunner and Louise Trueman as codefendants for the purpose of vesting jurisdiction in the State courts and of divesting the district court of its jurisdiction. Plaintiffs denied with particularity the alleged negligent acts of Otto Lockhart in the operation of the automobile and denied that they knew of any facts from which they would be informed that Otto Lockhart would not be a proper driver, and denied knowledge of any of the alleged defects in the car he was operating. It was alleged that the allegations as to the negligence of the resident defendants were made for the purpose of divesting the district court of jurisdiction, and the true facts were stated to be that Lillian Brunner and Louise Trueman were riding in the automobile as passengers, having no interest in the same and not being engaged in a common enterprise with the petitioners; that the resident codefendants had no knowledge of the perilous position of the child before, or when, injured; that the accident was wholly unavoidable. Further and final allegations were made that "all of the above facts were known to the plaintiffs at the time of the filing of this cause, or could have been known

by proper investigation; and that all the allegations in plaintiffs' complaint with reference to codefendants, Lillian Brunner and Louise Trueman, were made for the purpose of joining these parties as defendants, so that this court might be vested with jurisdiction, and that the district court of the United States might be divested of its jurisdiction; that plaintiffs have no cause of action against the codefendants, but if they do it is separable from any cause, if any, which plaintiffs have against petitioners."

It must be conceded that the petition as first filed was insufficient to authorize the removal of the cause. The allegation as to the fraudulent joinder merely stated a conclusion of law. No facts were alleged from which that conclusion might be deduced. This is necessary, and the failure to state the facts is fatal to the petitioner's right to remove for that cause. The allegations of the petition for removal considered by the court in the case of *Chesapeake & Ohio Ry. Co.* v. *Cockrell,* 232 U. S. 146, are set out in *Missouri Pac. Ry. Co.* v. *Miller,* 184 Ark. 61, 41 S. W. (2d) 971, with relation to the fraudulent joinder for the purpose of conferring jurisdiction in the Federal court are much fuller and more explicit than in the petition involved in the instant case, but the court there held that the allegations presented no basis for the relief prayed. It said that to merely apply the epithet "fraudulent" will not suffice. In *Wilson* v. *Republic Iron Company,* 257 U. S. 92, 42 S. Ct. 35, the court held that in a petition for removal the showing relating to the fraudulent joinder "must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions." This court recognized the force of this rule in *Mo. Pac. Ry. Co.* v. *Miller, supra,* and in *Phillips Petroleum Company* v. *Jenkins,* 190 Ark. 964, 82 S. W. (2d) 264.

Under the rule announced, it therefore appears that the allegation as to fraudulent misjoinder was not imperfectly stated in the petition but, on the contrary, there was a total lack of allegation upon which the prayer of the petition might rest. The amended petition did not amplify pertinent allegations of the first petition nor does it set out in proper form what had theretofore been

improperly stated, but injects a necessary allegation not contained in the first petition.

It has been held that, after time for pleading in the State court has passed, court may permit a petition previously filed to be amended where the amendment is a mere matter of form and not of material nature. *Roberts* v. *Pacific & A. Railway & Nav. Co.,* 104 Fed. 577. And it is generally held that in the Federal courts the petition for removal may be amended where the amendment goes no further than to cure technical defects and to clarify allegations imperfectly stated or to amplify them. *Carson* v. *Dunham,* 121 U. S. 421, 7 S. Ct. 1030; *Frazier* v. *Hines,* 260 Fed. 874; *Amerson* v. *W. U. Tel. Co.,* 265 Fed. 909; *Hall* v. *Payne,* 274 Fed. 237.

It is doubted whether in any case except in mere matters of form an amendment can be entertained in the State court to a petition filed within apt time where the amendment is filed after the period allowed for the filing of the petition for removal. Such an amendment was allowed by the Supreme Court of North Carolina in the case of *Newton* v. *Liggett Meyers Tobacco Company,* 194 N. C. 816, 140 S. E. 742, but in that case the motion for leave to amend was made prior to the expiration of the time to answer. The court held that, for the purpose of a motion for removal, the amendment to the petition was deemed to have been filed as of the date of the motion to amend, and in that case it was further observed: "The amended petition is but a restatement of the grounds for removal."

In the case of *Security Co.* v. *Pratt,* 65 Conn. 161, 32 Atl. 396, the Supreme Court of Connecticut, after stating the grounds for removal because of diverse citizenship, said: "There are decisions of circuit courts in support of the view that petitions which show no case for a removal may be amended or replaced by another at any subsequent time by leave of the State court, and that such action will relate back to the time when the original petition was filed. Such a doctrine seems to us to contravene the theory on which the fact of removal depends. In a case where a right of removal exists, the filing in due season of a proper petition and bond, when brought

to the attention of the State court, *ipso facto* withdraws the suit from its jurisdiction; and, if the petition is thereafter amendable at all, it is only in the circuit court, and not there to the extent of introducing any new ground of removal. If, on the other hand, in such a case the petition claims the right of removal on wrong grounds, while it can be amended or replaced by another at any time within the period allowed for filing an original petition, yet, should this not be done, to allow the State court afterwards, by permitting an amendment, to make the suit removable, by virtue of a legal fiction as to the relation of amendments to the date of the pleading amended, is to allow the authority of a State to supplant the authority of the United States in regulating the jurisdiction of the courts of the United States."

The case of *Brigham* v. *Thompson Lumber Co.*, 55 Fed. Rep. 881, was a case arising in a State court where in apt time a motion to remove to the Federal court was filed. Thereafter, and after the time for removal had expired, a second, or amended petition for removal was filed. The case was removed to the Federal District Court on the theory that while the petition as first filed was not sufficient the amended petition was and related back to the time when the original petition was filed. The district court, in remanding the case, said: "The petition, not alleging the necessary jurisdictional facts, is a nullity, and the doctrine of relation has no application. There is, of course, no objection on principle to the amendment of a petition. There is no objection to the filing of a second petition, provided it is done within the time prescribed by Congress. But when the time goes by the right is lost. To allow an amendment to the petition after that is the same as allowing a new petition, and either is a clear violation of the law. One purpose of the law was a severe restriction in respect to the time. The object was to require the party to change the forum at once, before waiting to experiment in the State court, either to contest the tribunal, or for mere purposes of delay."

In *Frisbie* v. *Chesapeake & O. Ry. Co.*, 59 Fed. 369, Judge TAFT, in approving the decision, *supra*, said: "The

time within which the necessary petition should be filed is fixed by the statute. It cannot be extended in the discretion of either the Federal or the State court. For the State court to allow an amendment to the petition for removal which shall relate back to the time when the original petition was filed is merely an indirect mode of extending the time within which a removal can be effected."

If we assume that the petition as amended states a removable cause, the amendment, under the authority of the cases cited, came too late, and the trial court did not err in denying the petition.

2. The next question presented is on the contention that the court erred in submitting to the jury the liability of Nellie Jobe, and in giving instruction No. 11 relating to her liability and the others who were travelling as guests in Lockhart's car. Our conclusion is that this contention must be sustained. The liability of Nellie Jobe is predicated on the theory that she and Lockhart were engaged in a common enterprise. The only evidence upon which this theory is based is testimony to the effect that Nellie Jobe is the mother of Otto Lockhart; that she had been for a period of time in Hot Springs, and that Lockhart drove from Kilgore, Texas, their home, to Hot Springs for the purpose of bringing his mother back to Texas. Lockhart is a man forty-five years of age and owned the automobile. There is a total want of evidence to show that Nellie Jobe had any control over the use of the automobile at the beginning of the journey, or as it progressed, or that she had equal authority with the driver to prescribe the conditions of its use. There is no conflict in the evidence in this regard, and no question of fact to submit to the jury. In one of the cases collected in the notes to 80 A. L. R. 312, relied on by the appellee, this rule is stated: "The basis of liability of one associate in a joint enterprise for the tort of another is equal privilege to control the method and means of accomplishing the common design. If the means employed be an instrumentality the negligent use of which inflicts injury, the associate whom the law regards as participating in the conduct of the actor must have had equal control over its use. This control, how-

ever, need not have extended to actual manipulation at the time injury was inflicted. It is sufficient that, at the beginning of the enterprise, or as it progressed, or at any time before the tortious event, he possessed equal authority to prescribe the conditions of use." *Howard* v. *Zimmerman,* 120 Kan. 77, 242 Pac. 131.

In *Roland* v. *Anderson,* (Mo. App.), 282 S. W. 752, cited by appellee, Anderson was held liable for the negligent driving of O'Toole on the basis, not of joint enterprise, but on that of master and servant or agency. Anderson was the owner of the automobile in question and O'Toole drove it at Anderson's request on the occasion when a third person was injured by its operation. The court said: "While it is not shown that Anderson specifically issued orders to O'Toole as to what streets he should take, and in what manner the automobile was to be driven or operated, yet he, as the owner of the car had such right to control and direct it." It will be noted that this case was decided by one of the Courts of Appeal in the State of Missouri, and not by its Supreme Court. Other cases are cited by appellee, but such as might appear to hold contrary to the doctrine stated in *Howard* v. *Zimmerman, supra,* have no foundation in reason or authority.

Our court, in the case of *Minor* v. *Mapes,* 102 Ark. 351, 144 S. W. 219, held that the wife's negligence in driving the car warranted a verdict against the husband because of the common-law liability on the husband for torts of the wife. Also, that, where one is riding with his wife or minor child in a vehicle driven by the one or the other, he is presumed to exercise some control over them under those circumstances, at least to the extent of preventing an act of negligence which is calculated to result in injury to another, and it is his positive duty to do so. In that case the evidence was conclusive that the husband was sitting by his wife, and whatever danger there was in driving was as obvious to him as it was to her, and he needed no knowledge or experience in the operation of the machine to be apprized of the danger. The general rule announced in that case as to the liability of one who rides with another merely upon invita-

tion, and exercises no control over him, and is not guilty of any positive act of negligence, is that the negligence of the driver cannot be imputed to him so as to render him liable for damages.

In *Anthony* v. *Keifner,* 96 Kansas 194, 151 Pac. 524, it was held that a mother who rides in her son's automobile merely as his guest, and who has no control over, and takes no part in the handling of, the car, is not responsible for injuries inflicted on another on account of the negligent driving of the automobile by her son.

In Cyc. of Automobile Law and Practice, Blashfield, vol. 4, chapter 65, page 171, § 2372, it is said: "A person accepting an invitation to ride in the automobile of another does not, merely, by reason of such fact, thereby engage in such common enterprise or joint adventure with the driver as to absolve either from liability to the other for an act of negligence. An essential, and perhaps the central, element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle, and the course and conduct of the trip. There must, as said in another connection, in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, exist concurrently two fundamental and primary requisites, to-wit, a community of interest in the object and purpose of the undertaking in which the automobile is being driven, and an equal right to direct and govern the movements and conduct of each other in respect thereto. "If either or both of these elements is absent, the absence thereof is fatal to the claim of joint enterprise." * * * (page 176.) "The doctrine of joint adventure, in connection with the operation of motor vehicles, should be restricted to those cases where the common right to control its operation, and the correlative common responsibility for negligence in its operation either are clearly apparent from the agreement of the parties or result as a logical and necessary conclusion from the facts as found."

It would be extending the doctrine too far to say that, because of the relation of a mother to a son, the latter's negligence would be imputable to the mother merely because of that relationship. *Bryant* v. *Pacific Electric Co.,* 174 Cal. 737, 164 Pac. 385; *Lange* v. *New York, etc.,* 89 N. J. L. 604, 99 Atl. 346; *Jacobe* v. *Goins,* (Tex. Civ. App.), 3 S. W. (2d) 535.

3. It is next insisted that the court erred in giving instruction No. 3 at the request of the plaintiff, which, after prescribing the duties of one driving an automobile with respect to keeping a constant lookout, and regarding the duty to drive at a careful rate of speed not greater than is reasonable, having due regard to the traffic and safety of others, concludes with the following language: "And it is the duty of such a driver to keep his automobile under such control as to be able to check the speed or stop it if necessary to avoid injury to others when danger is apparent. If you find from the evidence in this case that the defendant, Otto Lockhart, at the time of the alleged injury, failed to observe any of the duties required of a driver of an automobile, and the plaintiff Ada Jean Ross was injured thereby, this would constitute negligence." It is argued that the language above quoted offends against the rule announced in *Coca-Cola Bottling Co.* v. *Doud,* 189 Ark. 986, 76 S. W. (2d) 87: "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." The contention is that the instruction given imposes a higher degree of care on the operator of the car than that required by the rule quoted. We do not think so, because, in the exercise of ordinary care, when the driver sees danger ahead, or it is reasonably apparent if he is keeping proper lookout, then the duty is imposed upon him, and the reasonable control of the car requires, that it be operated so it can be stopped in the threatened emergency. The instant case is quite different in fact from the case relied on, as will be seen from the statement of facts contained therein.

4. It is lastly insisted that the trial court should have directed a verdict in favor of the defendant Otto

Lockhart. The evidence with relation to the situation of the child and the circumstances immediately attendant upon the happening of the injury is in conflict. That upon the part of the appellants tends to show that the injury to the child was the result of an unavoidable accident, and that adduced by the appellees was sufficient to submit to the jury the question of whether the appellant, Otto Lockhart, was in the exercise of due care when the injury occurred. Appellants were entering the city of Arkadelphia on the journey to Texas *via* Texarkana, and had proceeded along a street thirty feet wide from curb to curb to a point beyond the city limits in the residential section. The injury occurred near a point where an automobile was parked on the opposite side of the street from that on which appellant was driving. As he approached this point, he turned to the left to pass a wagon loaded with cotton which was driving on the same side of the street. There was evidence to the effect that in making this movement Lockhart could have passed the wagon without driving his car to the left of the middle line of the street, but that instead of doing this he drove his car so that the right wheels were about on the middle line, and the balance of the car to the left of the middle line. The child was crossing on her way to school, and had reached a point on the street about a third or fourth of the distance between the left curb and the middle line when she was struck by the bumper of the car near its left-hand light. There is some evidence that the child was crossing from forty to fifty feet below where the car was parked and seventy-five feet beyond the wagon. This evidence was a substantial basis for the conclusion reached by the jury that Lockhart was negligent in the operation of his car, either in not seeing the child or in not swerving back to the right ahead of the wagon. There was evidence that this latter movement could have been made, as there was no vehicle or person ahead of the wagon to prevent it.

The judgment of the lower court will therefore be affirmed as to the appellant, Otto Lockhart, and reversed, and the case dismissed as to the appellant, Nellie Jobe.

STANDARD RICE COMPANY, INC. *v.* DILDAY.

4-3954

Substituted opinion on rehearing delivered November 4, 1935.

[redacted]

Joseph Morrison, for appellant.

Meehan & Moncrief, for appellee.

JOHNSON, C. J., (on rehearing). On April 27, 1933, H. D. Dilday, and his son, H. H. Dilday, and his son-in-law, W. W. Crandall, were the holders and owners of a portion of the rice crop which they had grown during the year 1932. There were three lots of the rice, one being owned by H. D. Dilday individually, a second being owned by H. D. Dilday and his son, H. H. Dilday, and the third by Mr. Dilday and his son-in-law, W. W. Crandall. At that time J. K. Carr was the purchasing agent of the Standard Rice Company, Inc. It was his business to buy rough rice from rice farmers. Carr purchased the rice referred to for his employer, which has been sued for an alleged balance of purchase money due the sellers, and from a judgment in their favor is this appeal.

Carr and H. D. Dilday had several conferences in regard to the purchase of this rice. Dilday was unwilling to sell because there was pending legislation in the Federal Congress, which Dilday thought would be enacted and would operate to enhance the price of rice. No one appeared to know the provisions of the proposed legislation.

All of the preliminary negotiations for the sale of the rice were conducted by H. D. Dilday alone, as he acted not only for himself, but for his son and his son-in-law as well. They testified that he had this authority. The three "Rough Rice Purchase Contracts" which were finally executed were all signed by H. D. Dilday, and no one else, although each contract recites the names of the owners of the rice sold. H. D. Dilday signed for himself and the other two owners. Carr signed for the rice company, the purchaser.

H. D. Dilday relates the negotiations leading up to the sale as follows: "On the evening of April 26 Carr asked me again if I was ready to sell, and I told him that I wasn't, so he asked me why not. I told him that if the bill before Congress would pass we will get more for it. Mr. Carr says: 'We will guarantee you any loss against that, if you will sell the rice now.' I says: 'If we can agree upon the amount, I could deliver it.' We discussed the price, and he made an offer which my son didn't want to take for his rice. 'We agreed on the price, and what the rise would be, if there was any.' Mr. Carr said he would have to see the manager (of the rice company), and he called me at my home and told me that the trade was agreeable with them. I told Carr my son and son-in-law had an interest in some of the rice, and to come out the next morning for us all to get together on it. All the parties met on the morning of the 27th, and Carr related the conversation he and I had the evening before 'about guaranteeing the price if it advanced and guarantee any loss.' My son-in-law told him that that's what we are holding the rice for. I signed up as one of the members, and Mr. Carr signed, so he says 'We will have to fix a time—some definite time when this guarantee will end.' He suggested that

we fix the time at May 31. That was agreed upon, and he told us that we were to get the benefits of any rise between that time and May the 31st, but it had to be done by that time, that is, the bill had to pass by May 31, and the price of rice had to go up. When this agreement was reached, the purchase slips were written up on the morning of April 27 in the presence of Mr. Crandall, myself and my son."

These Rough Rice Purchase Contracts, three in number, are identical except as to their numbers, the names of the sellers and the quantity of the rice sold. No. 498, covering the rice of H. D. Dilday and his son-in-law, W. W. Crandall, reads as follows:

"Rough Rice Purchase Contract.

"Standard Rice Co., Inc.

"Stuttgart, Ark., 4/27/1933.

"No agreements other than those in this contract will be recognized by us.

"Purchased from H. D. Dilday & W. W. Crandall.

"P. O. address, Stuttgart, Ark.

"In accordance with the terms printed below.

"Shipping point, rice mill.

"To be graded at mill.

"To be delivered on or before 10 days.

"Rough Rice as Below

				Cup weight
".....Bus.	Edith No.....	.....@	.....per bus.	45 lbs.
"....Bus.	Fortuna No.....	.....@	" "	" "
".....Bus.	L. W. No.....	.....@	" "	" "
".....Bus.	Japan No.....	.....@	" "	" "
".....Bus.	Blue Rose No.....	.....@	" "	" "
" 500 Bus.	E. P. No. 1	39@45c	" "	" "

"Terms of sale, as per sample or samples.....

"Conditions of Sale

"The rice listed hereon shall be delivered within the time stated. All rice to be threshed dry. In the event of rains or other unavoidable contingencies preventing the delivery of this rice in the time specified, the purchaser shall have the option of taking, but shall not be obliged to take said rice when same is ready for delivery. Delivery to be made to purchaser at its mill in Stuttgart,

Arkansas, unless otherwise directed by purchaser before shipping; purchaser to pay transportation charges from point of shipment and to direct routing unless otherwise stated.

"Seller warrants good, clear, unencumbered title to said rice, free of all claims and liens, and will defend buyer against all claims.

"The above is correct.

"(Signed) H. D. Dilday, Owner.

"B498

"(Signed) J. K. Carr, For Standard Rice Co., Inc."

There was written on the face of each of these sales contracts before they were signed these phrases: "To be milled on toll—These prices guaranteed."

Now all the parties agree that the signing of the sales contracts, one of which is set out above, was not the last thing to be done to evidence the complete and entire contract. A letter was to be written which would evidence the time during and for which the guaranty was effective.

Mr. Dilday testified that he received this letter the day after it was written, but that he did not read it until May 1. It reads as follows:

"Standard Rice Company, Inc.

"Stuttgart, Ark., April 27, 1933.

"Messrs. H. D. Dilday, Homer Dilday and W. W. Crandall,

"Stuttgart, Ark.

"Gentlemen:

"In consideration of your executing contracts on this date with the undersigned for rice as set forth, in rough rice contracts numbers 496, 497 and 498, respectively, copies of which you have, we hereby agree that in the event the farm bill now before Congress shall become a law on or before May 31, 1933, and in the event that by virtue of the terms of any such law there will be due and accruing to growers under terms of said law any tax or benefit that would be due you, or either of you, if you had held your rice until the passage of said law and sold the same immediately thereafter, that we will pay

the amount thereof to you as soon as it can be ascertained of authoritative sources the amount due.

"Yours very truly,
"Standard Rice Co., Inc.,
"G. B. Cummings."

The three written sales contracts and the letter last mentioned and quoted constitute the entire contract between the parties.

Appellant seeks to avoid a recovery by appellees upon the theory that the contracts are plain and unambiguous, and, when properly construed, mean that there was a completed sale of the rough rice upon delivery, and that no recovery can be sustained because no direct benefits accrued to appellees by reason of the Federal legislation which was in the minds of the parties at the time. Appellees contend in support of the recovery that the contracts are ambiguous as held by the trial court, but, if not ambiguous, they evidence only a conditional sales contract not to become fully executed until the Federal legislation was passed which occurred on May 12, 1934, and, in addition thereto, any benefits or gratuities which might be accorded to producers by reason of such legislation. The recovery in the trial court was measured by the enhancement of the market value of the rough rice from the date of the sales contracts up to May 12, 1934, the date on which the Federal legislation was enacted. The sustaining of appellant's theory will result in reversing and dismissing the case and the sustaining of either theory advanced by appellees will result in an affirmance.

It is elementary that all preliminary negotiations leading up to a written contract are merged into it when executed. 6 R. C. L., p. 839, § 228, and cases there cited.

A fair interpretation of the three written contracts and the letter in connection therewith creates no ambiguity.

The written-in portion of the contracts, namely, "to be milled on toll—prices guaranteed," if in conflict with other provisions must prevail and control. *Planters' Cotton Oil Co.* v. *Columbia Cotton Oil Company,* 126 Ark. 19, 189 S. W. 166. When the written-in provision

of these contracts is accorded their rightful importance and interpretation and construed together with the letter and all other provisions of the written contracts, they mean that the sellers of the rough rice retained title thereto until May 31, 1934, or until the Federal legislation in the minds of the parties was enacted or defeated, and that, in the event a gratuity or benefit was legislated in favor of the producers of such rice prior to May 31, 1934, the seller would be entitled thereto in addition to the rise in the price of rough rice upon the market. Any other interpretation of this letter would be in direct contradiction of the plain terms of the written contracts, and moreover would permit an *ex parte* letter of one of the parties to override and destroy the manifest intention of the contracting parties as expressed in their written contracts of sale.

The conclusion heretofore stated is irresistible when we accord the phrase, "to be milled on toll—prices guaranteed," its usual and ordinary acceptation. The word, "toll," is defined by Webster's New International Dictionary as, "the portion of grain taken by a miller as his fee." 62 C. J. 1078, defines "toll" as follows: " 'Toll' may be employed to designate a compensation or payments in markets or fairs for goods, cattle, etc., bought and sold. * * * A reasonable sum of money due to the owner of the fair or market upon the sale of things tollable within the fair or market, or, for stallage, piccage or the like."

Moreover, it was conceded by both appellant and appellees in oral argument before us that the phrase, "to be milled on toll—prices guaranteed," standing alone, meant that the title to the rice remained in the sellers until it was milled and the product otherwise disposed of. This admission seems to coincide with all legal definitions of the language employed.

Under the views stated it was the duty of the trial court and he should have, as a matter of law, instructed the jury to return a verdict in favor of appellees for the enhancement of the market price of rough rice from the date of the contracts of April 27, 1934, up to and un-

til May 12, 1934. Therefore there was no prejudicial error in submitting this question to the jury.

The motion for rehearing must be sustained, and the foregoing opinion is adopted as the opinion of the court.

SMITH, MEHAFFY and BAKER, JJ., dissent.

SMITH, J., (dissenting). It appears certain that, but for the insertion of the phrase, "to be milled on toll, these prices guaranteed," there was nothing about which there could have been any litigation. The three "Rough Rice Purchase Contracts," each representing a separate sale, read in connection with the letter of April 27, 1933, as the majority concede they must be, make complete and unambiguous written contracts for the sale of the rice. The letter is a part of each of the three Rough Rice Purchase Contracts and must be read as a part of each of them. The contracts are therefore identical in terms and are in effect a single contract. As no one questions this statement, it may be assumed to be true.

These writings evidence a completed sale under which the title passed, and nothing remained to be done except to classify, weigh and pay for the rice. That these writings were intended to pass the title and that they had this effect is shown not only by the unambiguous language which these writings employ, but by conduct of the parties pursuant thereto. The rice was delivered at the places designated and within the time limited. It was classified and weighed and paid for. Accounts of sale, called "settlement sheets," were offered in evidence without objection, covering the rice mentioned in the contracts of sale. These show that the rice—all of it except that owned by H. D. Dilday individually—was delivered on the 29th day of April and on the 1st of May. The intervening day was Sunday. The delivery of the H. D. Dilday rice began on April 28 and was completed April 29. These "settlement sheets" contain a detailed and comprehensive statement of the transaction. They are dated May 5, and evidence what purports to be a settlement in full. The purchase price, as shown by these accounts of sale, was paid in full. How, then, can it be said, not only in the face of these unambiguous writings but also in view of the conduct of the

parties in delivering the rice, having it classified, weighed and paid for as shown by the unambiguous "settlement sheets," that the title to the rice had not passed?

It is said that the phrase, "to be milled on toll, these prices guaranteed," standing alone, meant that the title to the rice remained in the sellers until it was milled and the product otherwise disposed of. But this language does not stand alone, and the product has been otherwise disposed of. It has been delivered at the time and place designated, has been classified and weighed and paid for. The only question in the case is the one of fact, not whether the title has passed, but whether the purchase money actually paid was all to which the rice owners were entitled. It is not questioned that the rice growers were paid everything to which they were entitled under the Rough Rice Purchase Contracts unless the phrase, "to be milled on toll, these prices guaranteed," entitled them to something additional.

I copy all of the testimony found in the transcript relating to this phrase.

H. D. Dilday was interrogated by his attorney as follows:

"Q. What did he put on those purchase slips, in addition to the price that he was paying you at that time? A. He says: I will have to put on them, 'Toll mill price.' Q. Does it say, To be 'Toll mill price'? A. Yes, sir. He said that that had to be written in there to make it legal." No other testimony was offered as to the meaning of the phrase, "to be milled on toll," by Mr. Dilday or his son, or his son-in-law. The only other testimony relating to these phrases was brought out in the cross-examination of Mr. Carr as follows: "Q. Who wrote this across the slip: 'To be milled on toll price guaranteed.' Did you write that across the face of that slip? A. Yes, sir. Q. You didn't say that it was to be a guarantee according to your letter of April 27? A. I didn't think that was necessary. Q. You had it there and that could have been written in there? A. Yes, sir."

No testimony was offered explaining these trade terms, but appellant in its brief makes the following explanation of them: "The term, 'to be milled on toll,'

has a well-defined meaning. Under a toll milling contract the rice is to be milled for the account of the grower. The miller is to mill and market the rice and account to the grower for the clean rice market price less the toll milling charge." The "settlement sheets" accord with this construction of the phrase and show conclusively that the sale was not contingent or conditional.

Every one agrees that a letter was to be written, which, when written, was to be a part of the contract of sale. But why and for what purpose? Now, these contracts were executed in contemplation of the legislation pending in Congress. None of the parties knew the provisions of the proposed legislation, but Mr. H. D. Dilday admitted that he "was hoping that it (the bill) would raise the price of rice and the rice farmers would receive the same benefits as the cotton farmers." This letter was therefore written for the purpose of defining what the sellers might expect in addition to the guaranteed minimum prices and the time during and for which the guaranty was effective. No other reason existed for writing it, and when this letter, which explains what sums, if any, in addition to the guaranteed minimum prices are to be paid, is read as a part of each contract of sale, we have writings which are too plain to be explained away.

This letter recites that, in consideration of the execution of the "Rough Rice Purchase Contracts," the rice company assumes an obligation in addition to that recited in those writings, and, when we have determined what that obligation is, we have the solution of the only question in the case and which solution should determine it.

Now this additional obligation is assumed in the event only that the farm bill then before Congress should become a law on or before May 31, 1933. But, if so, then what? Let the letter answer. "In the event that by virtue of the terms of any such law there will be due and accruing to growers, under terms of said law, any tax or benefit that would be due you, or either of you, if you had held your rice until the passage of said law and sold the same immediately thereafter, we will pay

the amount thereof to you as soon as it can be ascertained of authoritative sources the amount due."

This letter, which, as all agree, is a part of the contract, does not say that if the Farm Bill should become a law on or before May 31, 1933, that the purchaser will pay the increased market price of the rice, as the plaintiffs contend the defendant Rice Company had agreed to do. The obligation in the case stated is to pay the amount of any tax or benefit which the owners would have had by virtue of the law if they had held their rice until its passage and sold the same immediately thereafter.

This payment was to be made as soon as the amount thereof could be ascertained from authoritative sources. Had this sum meant the difference in market value, as plaintiffs contend, that difference could have been ascertained by inquiry at any rice market (and the place of the sale of the rice here in question was one of the largest of these) without the delay of any application to authoritative sources for that information. The authoritative sources referred to are the governmental agencies which would be charged with the administration of the law. Mere differences in market value could have been ascertained immediately and from many sources.

The parties have entered into the following stipulation: "It is agreed between counsel for the plaintiff and counsel for defendant that the defendant, Standard Rice Company, Inc., is a foreign corporation, authorized to do business in the State of Arkansas; that the letter of April 27, 1933, signed Standard Rice Company, which is addressed to plaintiffs, refers to the Agricultural Adjustment Act of Congress; that the act does not carry or provide any benefits or fix any price of rice to rice growers; that that act is the same act referred to in plaintiff's complaint." This stipulation is conclusive of the fact that the Agricultural Adjustment Act, which finally became a law on May 12th, did not carry or provide for benefits or fix any price to rice growers as was done in the case of cotton and other farmers. As this was the additional payment to which the letter referred, there should be no recovery of any excess over the guaranteed minimum price which was fully paid on May 5th.

The delivery of the rice was completed on May 1st, and Mr. Dilday says he had not read the letter before that day. Even so, it was his duty to read it. It was dated and mailed May 27th and addressed to a man who lived in the town where it was mailed. But little, if any, of the rice was delivered before its receipt. Mr. Dilday knew the purpose of the letter was to declare, and to place in writing, the terms upon which the rice company proposed to buy, and it binds as fully as if it had been read. This is elementary law. The cases of *Allen* v. *Thompson,* 169 Ark. 169, 273 S. W. 396, and *Iron Works* v. *Douglas,* 49 Ark. 355, 5 S. W. 585, are conclusive of the point.

If there were any doubt about the letter of April 27, 1933, being a part of the contract, a letter written by plaintiffs on October 11, 1933, would dispel it. This letter reads as follows:

"Gentlemen: I call your attention to your letter of April 27, 1933, which explains itself. As it is now definitely known what the balance is due under our contract of the above date, we respectfully ask that you now make payment on the balance due."

This letter is plainly a demand for the excess price to which the letter of April 27th related. It is a recognition of the fact that any recovery must be based upon this letter, as it stated the terms upon which the Rice Company was willing to buy the rice. Mr. Dilday, Sr., has not always, however, construed the letter of April 27th as he construed it in his own letter of October 11th. This is shown by his attempt to evade the effect of the letter of April 27th by stating that he did not read it until May 1st, at which time the rice had been delivered. Dilday, Jr., testified that he did not hear the letter read until May 5th, the day on which the settlement was made. Mr. Dilday, Sr., testified that he called to the attention of his son that the letter did not express the agreement which they had with Carr. He was asked: "Q. You didn't notify the defendant company that this letter wasn't what the agreement was you had with Mr. Carr?" He answered, "No, sir." His own attorney then asked him: "Q. State to the jury why you didn't notify the

company." He answered: "A. I had already made the agreement with Mr. Carr and I thought that that was understood." "Q. That you were to receive any benefits of any rise that might take place up to May the 31st?" He answered: "A. Yes, sir." In other words, the attempt now is to construe the letter of April 27th not in accordance with its language, but to conform to Mr. Dilday's recollection and interpretation of his conversation and preliminary agreement with Mr. Carr. The rule of evidence designed to give value to written contracts by excluding parol testimony which contradicts them should prevent this from being done. I think the letter of April 27th is conclusive of the rights of the parties, and that plaintiffs were paid on May 5th everything to which the letter entitled them.

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

HATCHER *v.* WASSON.

4-4021

Opinion delivered November 4, 1935.

Ezra Garner, for appellant.

McKay & McKay, for appellee.

SMITH, J. Appellee Wasson, as Bank Commissioner, brought suit against L. A. Hatcher on two notes aggregating $1,567.65 in the Columbia Circuit Court on April 17, 1933, and recovered judgment for that amount on February 23, 1934, thereafter. An execution was issued on this judgment on April 13, 1934, which was levied upon the following lands: S½ of SW¼, section 19; SW¼ of SE¼, section 19; N½ of NE¼, section 20; and NW¼ of NW¼, section 30, all in township 15 south, range 20 west. On the day before the advertised date of sale under the execution Hatcher, the judgment defendant, filed a schedule of his property which he claimed to be exempt from sale as the head of a family and a citizen of the State. His personal property was shown to be of less value than $500, and was all claimed as exempt. He claimed as his homestead the following lands: SE¼ of SW¼, section 19; SW¼ of SE¼, section 19, and NW¼ of NE¼, section 30, all in township 15 south, range 20 west. The claim of homestead exemption was allowed.

It was discovered before the sale that Hatcher had conveyed the remainder of the land to his two sons, a separate portion to each. Thereupon a suit was filed by the Bank Commissioner against Hatcher and his sons, who were both minors, praying that the deeds to them be declared void as having been executed in fraud of their father's creditors. The allowance of the homestead exemption was not questioned. The deeds were executed on February 8, 1934, which date was fifteen days prior to the judgment for the debt. The relief prayed was granted, and this appeal is from that decree.

The deeds were executed after the institution of the suit but prior to the rendition of the judgment. They were from a father to his sons, and their effect will be, if they are permitted to stand, to render the grantor insolvent. This fact appears from the schedule of exemptions sworn to by the debtor himself. The deeds are therefore presumptively fraudulent. *Crill* v. *Trites,* 186 Ark. 354, 53 S. W. (2d) 577.

Mr. Hatcher, the judgment debtor, testified that, of the 240 acres of land above-described which he had owned, he had inherited a portion from his father, and had bought the remainder from his brother. The land purchased from his brother was conveyed to him in 1926, at which time his two sons were not over nine and ten years old, respectively. At the time of the conveyance to them they were seventeen and eighteen years old, respectively. He testified that it was understood between himself and his brother and his children, when he purchased the land from his brother, that he was buying the land for their benefit, and the children agreed to work and pay for it, and this they had since been doing. The father neglected, however, to take the title in the name of his children, but took it in his own name.

There can be and is no resulting trust. To create such a trust, by reason of the payment of the purchase price, the payment must be made at the time of the purchase or prior thereto so as to form a part of the same transaction. *Chaffin* v. *Crow,* 182 Ark. 621, 32 S. W. (2d) 155; *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. (2d) 308.

Mr. Hatcher testified there was no other consideration except his love and affection for his children. The conveyance to them is therefore, as was found by the court below, voluntary and void. To reinforce this conclusion, it may be said that a portion of the land conveyed to the children was not purchased from the grantor's brother, but was inherited by him from his father.

Hatcher, having been allowed his homestead exemption in 120 acres of land, sought to enlarge the exemption to 160 acres. This claim appears to have been made upon the confirmation of the sale of the land by the commissioner appointed to sell it. The record does not reflect why Hatcher claimed only 120 acres as a homestead in his original schedule, nor why he was not later allowed to claim 160 acres, the maximum acreage allowed by law.

A debtor may claim a rural homestead not exceeding 160 acres of land, provided the same does not exceed $2,500 in value, but in no event may such homestead be

reduced to less than 80 acres without regard to value. Section 5540, Crawford & Moses' Digest.

Hatcher was allowed a homestead claim exceeding 80 acres, but was denied the right to claim 160 acres. Whether this was because of excess in value, or for some other reason, is not made to appear, and the burden rests upon the homestead claimant to show his right thereto. Sections 5543, 5549, 5551, Crawford & Moses' Digest; *Jones* v. *Dillard,* 70 Ark. 69, 66 S. W. 202.

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

BYARS *v.* WOMACK.

4-4008

Opinion delivered November 4, 1935.

Haynie, Parks & Westfall, for appellant.

H. G. Wade, for appellee.

SMITH, J. Appellant, B. J. Byars, brought this suit January 29, 1934, to foreclose a mortgage alleged to have been executed by W. J. Womack and Annie, his wife, to secure a note for $1,000 executed by them to the plaintiff's order on December 2, 1918. It is alleged that the makers of the note paid the interest due for the first year, together with $200 on the principal, reducing it to $800. The interest was paid in full on the note for each year to and including 1930. A payment of $5 interest was made on the note in 1932. The mortgaged land constituted the homestead of W. J. Womack, a portion of which had been purchased with the borrowed money which the note referred to evidenced. Womack died in 1926, and his widow and children, who have been made parties to the suit, have continued since to reside on the

land. Answers were filed, in which the execution of the note and mortgage was denied, and the statute of limitations was pleaded.

The execution of the note and mortgage was proved by the notary public who took the acknowledgment. He knew Mr. Womack, the mortgagor, but did not know his wife, but he took the acknowledgment of a woman represented by Womack to be his wife. He prepared both the note and the mortgage, does not remember seeing Mrs. Womack sign either the note or the mortgage but believes the signature on the note is the same as that to the mortgage the acknowledgment of the execution of which was taken by him of a woman who Womack said at the time was his wife.

Mr. Byars testified that after the death of Mr. Womack the latter's widow and two oldest sons asked him to indulge them until they were able to pay the debt. Mrs. Womack asked him from time to time to continue to carry the debt, and he told her, if she kept on paying the interest, he would not push her. Mrs. Womack never wrote him a check or paid him any money, but the first year after Mr. Womack's death his son, Kinch Womack, deposited $80 in bank to his credit. He saw Mrs. Womack, who told him the money was the proceeds of some cotton grown on the place. After that the interest was deposited to Byars' credit each year in the bank where he carried his account, the last deposit being made December 30, 1930. The last payment of interest was made November 15, 1932, being the value of ten bushels of corn which the mortgagor's son, Jesse, delivered in Byars' crib. This payment was credited on the margin of the mortgage record the day it was made and attested by the clerk. Although Mr. Womack died in 1926, there has never been any administration upon his estate.

Mrs. Womack admitted that she had signed the mortgage, but denied that she had acknowledged it. She denied that she had signed the note, but admitted that her husband had borrowed the money to buy a portion of the land described in the mortgage and evidenced by the note. She denied acknowledging the validity of the note to Byars, or that she had promised to pay it, or that

she had authorized any payments to be made upon the note. She testified that after her husband's death her sons took charge of the farm and ran it, that she would occasionally be given a little money by one or the other of her sons, but they managed the farm and ginned and sold the cotton grown thereon.

Golden Womack, one of the sons, testified that his father had signed both names appearing on the note. Jesse Womack, another and the oldest son, gave testimony to the same effect. He admitted having had a conversation with Mr. Byars about the mortgage, but gives a different version as to what was said. He testified that he told Mr. Byars he would try to pay the mortgage off and take the land himself, and that Byars told him if he would pay the note he would give him a deed. No other members of the Womack family appear to have been advised of this arrangement. Pursuant to this understanding, Jesse paid the interest for a number of years. He testified that the place was turned over to him to make the family a living and to keep things going. The money paid was derived from the proceeds of the sale of crops grown on the mortgaged land.

The decree recites no finding of facts by the court except the general finding in favor of the defendants, upon which the complaint was dismissed as being without equity.

We do not concur in this finding. Mrs. Womack admits signing the mortgage, and the effect of the notary public's testimony is that she also acknowledged it, and had signed the note.

Mr. Byars testified that Mrs. Womack admitted signing both the note and the mortgage, and that she asked and was given indulgence in the matter of payment. That payments were made is shown by the testimony of the oldest son who appears to have taken charge of the estate upon the death of his father. He became his mother's general agent. His testimony that he made the payments upon condition that Byars would make a deed to him, and that they were not made on the note, carries no conviction. Byars could not convey the land to any one. He did not own it. He only had a mortgage on it.

Jesse Womack had not told the other members of the family that he was using the proceeds of the farm, in which they were all interested, to pay, not the debt which the mortgage secured, but purchase money to a man who did not own the farm but only had a mortgage on it.

We think the preponderance of the testimony shows that Mr. and Mrs. Womack signed the note and executed and acknowledged the mortgage which secured it, and that the mortgage had been kept in force by the payments above mentioned by one of the joint makers of the note. If the facts are as we find them to be, there is no necessity to discuss the law of the case. But see *Bowdre & Co.* v. *Pitts*, 94 Ark. 613, 128 S. W. 57.

The decree of the court below will therefore be reversed, and the cause remanded with directions to decree the foreclosure of the mortgage in satisfaction of the balance found to be due on the note, including any taxes the mortgagee may have paid to protect his security.

FIRST NATIONAL BANK OF FORT SMITH *v.* GODWIN.

4-4019

Opinion delivered November 4, 1935.

M. A. Hathcoat and *S. W. Woods,* for appellant.

J. Loyd Shouse and *Shinn & Henley,* for appellees.

BAKER, J. J. L. Godwin was indebted to the Citizens Bank & Trust Company at Harrison, Arkansas, in the sum of $1,800, paid $1,500, and on May 6, 1931, executed his note for $300, the balance owing, said note to mature November 1, 1931, with interest at 8 per cent. until paid.

Thereafter and before maturity, the said note, together with a large amount of other collateral, was delivered to the First National Bank, Fort Smith, Arkansas, as security for money borrowed by the Citizens Bank & Trust Company from the said First National Bank.

In answer to a suit filed by the plaintiff, appellant here, First National Bank, Godwin admitted the execution of the note, but pleaded, by way of defense, that the said First National Bank, had not received the note in due course of business, and denied that it was without knowledge of any existing defense thereto, and alleged that it had no right to maintain a suit for judgment on the said note.

He pleaded further that the Citizens Bank & Trust Company, of Harrison, was justly indebted to him in the sum of $350, evidenced by certain certificates which he alleged he held, and which were issued by the said Citizens Bank & Trust Company as an evidence of its indebtedness for said amounts. Before these pleadings were made up for the trial of the cause, Citizens Bank & Trust Company had become insolvent, and the State Bank Commissioner, in charge thereof, had made his settlement with the First National Bank, which settlement had been duly approved by the chancery court. In this settlement all of the notes deposited or pledged to the First National Bank as security were sold outright to the First National Bank in full settlement of the amount owing by the Citizens Bank & Trust Company to the appellant, and at the time of the trial of this cause, beyond all question, the First National Bank, appellant here, was the owner of the aforesaid note.

It should perhaps be mentioned here that this settlement, made by the Bank Commissioner or his agent with the First National Bank, did not question the validity of the transfer of the notes or bills receivable as security for the money borrowed from the First National Bank.

The principal question raised in the matter of defense here is the authority of the officers of the now insolvent bank to borrow money from the First National Bank. The defendant alleged the invalidity of the pledge of his note, and that therefore the Citizens Bank & Trust Company was, in fact and in law, owner of his note, and that he had the right to counterclaim or offset when sued. In a proper case such defense might successfully be made.

The law regulating banks, and providing a plan or scheme whereby they might borrow money and pledge securities for the payment thereof, was not intended to operate as a trap for the unwary, but, as was said in the case of *Grand National Bank of St. Louis* v. *Taylor,* 176 Ark. 1, 1 S. W. (2d) 818, § 700, Crawford & Moses' Digest, as amended, was for the benefit of the bank, its stockholders and depositors, to prevent, as far as pos-

sible, officers from making away with the assets of the bank for their private purposes.

Said statutes, viewed from this standpoint or angle must be understood as not intending to limit the power of the bank to discount bills and notes, or to borrow money and pledge same as security therefor, but the limitation is upon the acts of the officers, as distinguished from the bank itself. We think a bank might borrow money upon presenting defective resolutions, and use such money so borrowed in the regular course of its business, and not for the personal advantage of the officers acting for the bank, and thereby estop itself to deny the validity of the transaction. It could not receive the proceeds of such transactions, use them in the regular course of its business, and then be heard to allege the invalidity of the transaction whereby it received the money. Such is the effect of the opinion in the above cited case, *Grand National Bank of St. Louis* v. *Taylor*. In the case here there has not been a suggestion of any sinister act or motive in any of the dealings procuring the money, or as to the purpose for which it was borrowed, or the use to which it was put.

In the trial of the case, the minutes of the board of directors of the Citizens Bank & Trust Company were read, showing proceedings on June 8, 1931. Some members of the board of directors were admittedly absent. It is not shown affirmatively that they had notice in writing of this meeting. It is not shown affirmatively, we think, that they did not have notice of it. From these minutes we get this recital: "A resolution was adopted authorizing officers of the bank to borrow money and pledge notes of the bank as collateral to the First National Bank, Fort Smith, Arkansas, in the amount of $25,000." The resolution seemed to bear the date of June 9th, instead of June 8th. It was further suggested, and we think the record shows it, that these minutes did not follow in regular or consecutive order the minutes of a previous meeting, but the secretary of the bank explained that this record was omitted by mistake, and was later copied after the next or succeeding meeting had

been held, and the minutes of which had been written into the minute book.

Let it be said, and suffice for all arguments that can be made in regard to the controverted questions, that, since § 700 of Crawford & Moses' Digest, and the amendments thereto, were intended to protect the bank, its stockholders, its depositors, or other creditors, from misconduct of its officers, there is no evidence whatever of any act of bad faith on the part of the officers in the matter of pledging or transferring the note sued on. Therefore, when the First National Bank took this note as security, it took it in due course, and was entitled to have judgment rendered in its favor upon a directed verdict upon the trial of this case.

The plaintiff asked for a directed verdict, and, upon its request being refused by the court, did not object or save any exceptions to the action of the court in overruling its request. There is nothing here for review upon that matter.

Defendant asked the following instruction upon the trial of the case. "Before the plaintiff could recover in this action, the burden is upon it to show by preponderance of the evidence that, previous to the pledge of the note sued on and within one year prior thereto, there was a resolution actually adopted by the board of directors of the Citizens Bank & Trust Company either in regular meeting or at a special or call meeting of which all the members of the board of directors had received reasonable notice in writing."

The court gave this instruction over the objection of the plaintiff. This instruction was inherently erroneous. This must appear to anyone analyzing § 700, Crawford & Moses' Digest, as amended, and as construed in *Grand National Bank of St. Louis* v. *Taylor, supra.*

We have no hesitancy in saying that a bank could bind itself by estoppel, as well as affirmatively by resolutions.

Plaintiff objected to the said instruction, but saved no exceptions when given over objections made. Such is the record. The matter of the objection was brought

forward in the motion for a new trial, but it is not suggested in said motion that an exception was saved.

Since appellee specially directs our attention to this matter, we give it consideration.

Although it doubtless has appeared from the foregoing that we think defendant should have been required, by judgment, to pay the debt he admits he owes, yet we are powerless to correct errors not properly brought up. It is infinitely more important that we follow the regularly established and beaten pathway of the law of appeal and error, and preserve the integrity of the law, than, by the commission of one error, attempt to correct another error that has been legally waived.

The giving or refusing of an instruction to which no exception was taken in the trial court cannot be reviewed. *Dunnington* v. *Frick Co.*, 60 Ark. 250, 30 S. W. 212; *American Fire Ins. Co.* v. *Haynie*, 91 Ark. 43, 120 S. W. 825; *Meisenheimer* v. *State*, 73 Ark. 407, 84 S. W. 494.

We must and do affirm the judgment of the trial court.

DEENER *v.* WATKINS.

4-4034

Opinion delivered November 11, 1935.

Brundidge & Neelly, for appellant.

Gordon Armitage and *B. E. Taylor*, for appellees.

BUTLER, J. On February 17, 1928, W. D. Watkins was indebted to the Blanton Company, and, to evidence this indebtedness, on that date with his wife, Zula, executed a note secured by a deed of trust on an undivided one-fifth interest in two tracts of land situated in White

County, Arkansas. Suit was brought for judgment on the note, and for foreclosure of the mortgage. W. D. Watkins died, and the suit was revived in the name of his heirs. An answer and intervention were filed, which in effect defended on the ground that W. D. Watkins, the mortgagor, had no interest of any nature in the lands mortgaged which he could convey or encumber. This defense was based upon the provisions of the will of J. R. Coody, deceased, which, by clause 6 thereof, devised to Dora Watkins, his daughter, who is the mother of W. D. Watkins, the tracts of land mortgaged by said W. D. Watkins. This clause is as follows: "* * * give, devise and bequeath to my daughter, Dora Watkins, as her sole and separate property during her natural life and at her death to her children absolutely, the following real estate: (then follows the description)."

Mrs. Dora Watkins, the devisee in the will of her father, J. R. Coody, is still living and enjoying her life estate. The main question presented for the trial court's decision was whether, by the terms of the devise, W. D. Watkins, as one of the children of Dora Watkins, became seized of a vested remainder in the life-estate devised to his mother, or, was it contingent? The court found: "That, under the provisions of the will of J. R. Coody as interpreted by the court, the said Dora Watkins was bequeathed a life-estate in and to the said lands; that the remainder was bequeathed contingently by the said will to her children at her death; that the said W. D. Watkins had no such interest in the said lands; that the deed of trust in which he and his wife, Zula Watkins, undertook to incumber a part of the said lands is void, and should be cancelled, set aside and forever held for naught."

The appellant contends that the quoted devise created a vested remainder in W. D. Watkins by which he had a present interest in the lands devised, the enjoyment thereof being postponed until the termination of the particular estate. It is insisted that the conveyance involved is similar to that considered in the case of *Landers* v. *People's Building & Loan Association,* 190 Ark. 1072, 81 S. W. (2d) 917, and that this case is controlled

by that. In that case the general rule from Thompson on Real Property, vol. 3, page 193, is quoted as follows: "A vested remainder is a present interest which passes to a party to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after a particular estate terminates. It is an estate to take effect after another estate for years, for life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who was *in esse* and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. * * * A vested remainder exists where real estate is granted or devised to one for life with remainder to another at the death of the life tenant." Applying this rule to the conveyance in question in that case, the court held that it created a vested remainder. That conveyance was a deed by which the grantor conveyed certain land to his daughter, "Willie Milette, and the heirs of her body now born and that may be born unto her" * * *. After a description of the land, the deed continued: "The above property * * * I hereby give, convey and deliver to my said daughter during her life and her children, Leola Wooten Milette and Meredith Milette, now born, and to others that may be born unto her, share and share alike, equally and undivided, after the death of my said daughter, in fee simple forever * * *."

The distinguishing feature between the conveyance in the Landers case and that in the case at bar is that in the former there were *in esse* fixed and determinate persons in whom a present interest in the estate is fixed, namely, Leola Wooten Milette and Meredith Milette, who would become entitled to immediate possession of the estate on the determination of the particular estate. This interest could not be divested upon the happening of some contingency, but might be reduced only to the extent of the interest which might attach to other children of Willie Milette thereafter born. In the instant case the words used in the devise distinguishing those in whom

the remainder is created are not "heirs, or heirs of the body" as in the Landers case, but "children." In *Kelley* v. *Kelley,* 176 Ark. 548, 3 S. W. (2d) 305, we said: "Primarily, the term 'children' is a word of purchase and not one of limitation, and for that reason cannot be construed as an equivalent of the word 'heirs' or 'heirs of the body' unless there is something in the context showing that the testator intended to use the term in the sense of heirs. 'Children' is a broader term than the word 'heirs' and may include adopted children as well as the children of one's body." The devise of Mr. Coody created a remainder in uncertain persons which did not vest in any one during the life of Mrs. Dora Watkins, the life-tenant. A contingent remainder is concisely defined in 2 Blackstone, Com., page 168, as one "where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event."

In *Horsley* v. *Hilburn,* 44 Ark. 458, the remainder was said to be contingent where the conveyance was to a certain person "and the heirs of her body that now are or may hereafter be born," and where the conveyance also provided that neither the person to whom the particular estate was conveyed or any of her children should have power to sell during the natural life of the grantor or until the youngest child of the first grantee shall arrive at full age. The court held: "The estate vested in the surviving children and their issue at the death of her mother and did not vest a remainder at all in any one during her life." It will be observed that no determinate person was named in whom the remainder might vest, as in the Landers case, but rather it is similar in import to the devise involved in the case at bar.

In *Watson* v. *Wolff, etc.,* 95 Ark. 18, 128 S. W. 581, it was held that a conveyance to "Martha Florence and to her bodily heirs" created a contingent remainder in the bodily heirs. In *National Bank* v. *Ritter,* 181 Ark. 439, 26 S. W. (2d) 113, the nature of the remainder interest was held to be contingent created by a devise to a trustee to pay the income to a designated beneficiary, and after the widow's death to divide the estate among

the testator's three children, providing that the issue of any deceased child should take the place of the parent, and that "the issue of any child dying without issue prior to the termination of the said trust shall lapse and revert to the estate," held that the children took a contingent remainder, it being uncertain who would take under the will until the death of the widow. These cases follow the application of the rule relative to contingent remainders made in *Horsley* v. *Hilburn, supra,* and support the construction placed by the court below on the quoted devise.

The decree therefore should be, and is, affirmed. For an extended discussion of the difference between vested and contingent remainders, reference is made to the late cases of *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. (2d) 491; *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. (2d) 810; and *National Bank* v. *Ritter,* 181 Ark. 439, 26 S. W. (2d) 113.

HAMMOND *v.* HAMBY.

4-4052

Opinion delivered November 18, 1935.

Dene H. Coleman, John E. Miller and *C. E. Yingling,* for appellant.

Tom W. Campbell, for appellee.

SMITH, J. It is insisted that the judgment from which this appeal comes should be reversed for the following reasons: (1) That the verdict upon which the judgment was based is unsupported by the testimony; (2-3) that the court erred in giving instructions numbered 1 and 3, and (4) that the verdict is so excessive as to demonstrate that it was the result of passion and prejudice.

The sufficiency of the testimony will be considered in connection with the instruction numbered 1, which recites the theory upon which the case was tried. It reads as follows: "The jury is instructed that if you find from a preponderance of the evidence in this case that on the morning of November the 10th, 1933, B. O. Ward was driving his automobile on Highway 67 at a point a short distance southwest of Donaldson, Arkansas, and that the plaintiff, T. W. Hamby, was then and there riding in said automobile, and that said T. W. Hamby had been employed by the said B. O. Ward to accompany him on said trip, and that the portion of said highway on which the said B. O. Ward was then and there driving his car, if you find that he was then and there driving his car upon said highway, was upon a dump and that the said B. O. Ward was then and there driving said automobile at an excessive, unreasonable, reckless and dangerous speed and at such speed as to endanger the safety of the occupants of said car, and that the said B. O. Ward then and there recklessly failed to keep said car under control and then and there drove said car off the pavement and shoulder of said highway and off of said dump and into the ditch on the right hand side of said high-

way and thereby threw the plaintiff out of said automobile and injured him, and that in driving said automobile in said manner, if you find from a preponderance of the evidence that the said B. O. Ward did then and there drive said automobile in such manner, the said B. O. Ward failed to exercise ordinary care for the safety of the occupants of said automobile, and that the plaintiff was not guilty of contributory negligence, you should find for the plaintiff in this case and assess his damages as hereinafter explained in these instructions."

The first objection made to this instruction is that it is abstract, in that the testimony did not warrant the submission to the jury of the questions of fact there hypothetically recited. We do not think so. That there was such testimony appears from the summary thereof hereinafter made.

Another objection to the instruction is that it is involved, long and confusing. But not sufficiently so as to be confusing and misleading, and it contains no erroneous declaration of law.

It is not open to the objection made that it required Ward, the driver of the car, to exercise a high degree of care, rather than to exercise ordinary care. The instruction required the jury to find that Ward failed to exercise, not a high degree of, but ordinary, care before finding for the plaintiff.

The insistence that the instruction was abstract, in that there was insufficient testimony upon which to predicate it, may be answered by saying that the testimony in appellee's behalf was to the following effect: The concrete pavement at the point where appellee was injured is 18 feet wide, with dirt shoulders 8 feet wide on each side, making the highway 34 feet wide. The shoulders were on a level with the concrete. The road was on an embankment about 15 feet high. The car was owned and driven by Ward. Appellee rode on the front seat with Ward. Roy Boles and Clyde Alfrey sat on the rear seat of the car. Ward and Alfrey were killed when the car ran off the road.

Boles testified that a truck approached coming from the opposite direction, and that its driver flashed its

lights just before reaching the car in which they were riding. It was very early in the morning. The truck was being driven to the left of the center line of the highway, but Ward had 14 feet of level space between the passing truck and the right-hand edge of the highway. When the truck's lights were flashed, Ward turned his car to the right, and its right wheels ran over on the dirt shoulder. Measurements subsequently made show that Ward's car ran 88 feet from the point where its right wheels got on the dirt shoulder to the point where all four of the wheels got on the dirt shoulder, and the truck and the car passed each other in this space.

Appellee's testimony is to the further effect that, after passing the truck, Ward, instead of pulling back upon the pavement, which was then clear of traffic, ran 72 feet farther with all four of the wheels on the dirt shoulder, and that, "after angling back towards the pavement for 30 feet, never getting upon it, his (Ward's) car straddled the north edge of the shoulder 180 feet, and then it made three bounces through space about 87 feet to the side of the dump, where it made a final jump of 50 feet." The car then ran off the road, and two of the occupants were killed and the other two injured, Boles less severely than appellee.

The testimony is in irreconcilable conflict as to why the car left the road. According to appellee, the rapid speed at which the car was being driven was accelerated as the car passed the truck, and Ward lost control of his car. According to the testimony on appellant's behalf, the car was not being driven at an excessive speed, and appellee was drowsing as the car passed the truck. He was suddenly aroused and grabbed the wheel, and this action caused the car to leave the road; otherwise it would have been driven back upon the concrete. The nurse who attended appellee during his confinement in the hospital testified that he gave this account of his injury after he regained consciousness and became rational. Boles testified that he saw appellee reach for the wheel, but did not know whether he grabbed it. Appellee denied making the statement to the nurse, and testified that he did not touch the wheel. These con-

flicts in the testimony were submitted to the jury and are concluded by the verdict.

The testimony thus briefly summarized is sufficient to carry to the jury the question whether appellee was injured as the result of Ward's negligence, and also to support the finding that appellee himself was guilty of no negligence contributing to his injury.

Instruction numbered 3, which was given over appellant's objection and exception, reads as follows: "You are instructed that if you find from a preponderance of the evidence in this case that B. O. Ward was driving on the dump on Highway 67 where the wreck occurred at a speed greater than thirty-five miles an hour, then that would be *prima facie* proof that the said B. O. Ward was then and there driving at a negligent and unlawful speed. By this is not meant that if you find the deceased, Ward, was driving in excess of thirty-five miles per hour, plaintiff would be entitled to recover in this case. It is for the jury to determine from the evidence and all the surrounding circumstances, whether or not this wreck was caused by the negligence of Ward in driving at an excessive, dangerous or reckless rate of speed at the time of the wreck, and as to whether or not the speed at which he was driving was, in fact, excessive, dangerous or reckless."

This instruction was obviously based upon act 223 of the Acts of 1927, pages 721 *et seq.* It is entitled "A Uniform Act Regulating the Operation of Vehicles on Highways," and is a very comprehensive act, consisting of 71 sections.

In the recent case of *Rogers* v. *Woods,* 184 Ark. 393, 42 S. W. (2d) 390, a somewhat similar instruction, based upon this act, was reviewed. What we there said disposes of the objections urged to this instruction numbered 3, and we quote from that opinion at some length for this reason as follows:

"By § 4 of act 223 of the Acts of 1927, subdivision (a), the rule of conduct for persons driving vehicles on the highway is prescribed, *i.e.,* that he 'shall drive the same (vehicle) at a careful and prudent speed not greater than is reasonable and proper having due regard to the

traffic, surface and width of the highway, and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such speed as to endanger the life, limb, or property of any person.'

"By subdivision (b) of the same section it is provided that in all cases where the speed at which a vehicle is driven shall not exceed the speed limits specified in the act, the driver's conduct shall be *prima facie* lawful.

"By subdivision 8 it is provided that it shall be *prima facie* unlawful to exceed the speed limits, thirty-five miles per hour being the extreme limit.

"Upon the foregoing statute is based the instruction of which complaint was made. As stated by the appellant, it creates no civil liability, but imposes a penalty for its violation. Yet an injured party, in seeking redress by common-law action, may base such action on the evidence found in its violation; and, as such action is based not on the statute but on the evidence found in its violation, a literal adherence to its language is not essential, though perhaps to be desired.

"According to the statement made in Huddy's Enc. on Automobile Law, vol. 3-4, page 61, the great weight of authority is to the effect that a violation of the statute such as the above is negligence *per se,* but in this State the rule is that it is not negligence *per se,* but is evidence of negligence (*Mays* v. *Ritchie Gro. Co.,* 177 Ark. 35-37, 5 S. W. (2d) 728), which casts upon the defendant the burden of proof to establish a compliance with the rule of conduct fixed by the statute, and which would be ordinary care within its meaning. *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. (2d) 676."

It is finally and very earnestly insisted that the verdict, which was for $10,000, is excessive. The same irreconcilable conflict appears in the testimony upon this issue as is found in that relating to the question of liability. The undisputed testimony shows that appellee was violently shocked, and that he was rendered profoundly unconscious. He was carried to the hospital at 7:35 on the morning of November 10, 1933, and remained as a patient in the hospital until the afternoon of December 4, 1933, when he was carried to his home in an

ambulance. For several days and nights appellee was constantly attended by two nurses, and was visited daily by two physicians. During this time he was either unconscious or only semi-conscious. His kidneys acted involuntarily, and the hospital record of appellee's ninth day in that institution recites that he "voids freely, but can't tell when he needs to." These records also recite that on the sixth day appellee recovered consciousness sufficiently to ask where he was and how he came there. The record of the tenth day recites "Mind clearer today. Complains of hurting when he turns over. Restless during latter part of night." The record of the fourteenth day recites that appellee was given a hypodermic to relieve his intense pain, and that he unsuccessfully tried to get out of his bed.

Appellee testified that prior to the injury he weighed 210 pounds, but that he had lost 50 pounds in weight. He testified that his memory had become poor, and his vision impaired, and that he was unable, because of his nervousness, to do any kind of work for any considerable length of time.

Appellee is 29 years of age, and lives with his father, who testified that if his son worked in the morning he would be unable to work in the afternoon, and that his son's mind was affected, this being manifested by the fact that his son would sometimes begin to tell something, when he would become confused as to the continuity of his ideas and of the events which he was relating.

Appellee became the patient about the 1st of March, 1934, of Dr. E. T. Ponder, who makes a specialty of mental and nervous diseases, and had consulted this physician an average of once every two weeks since that time up to the date of the trial, which occurred January 23, 1935. This doctor stated that "It has been my experience that the man that has received the terrific injury that the hospital record showed he did receive that his injury is permanent. There is a change in the brain caused by this accident."

Upon a consideration of this testimony we are unable to say that the verdict is so excessive that it must

be reduced, and, as no error appears in the record, the judgment must be affirmed, and it is so ordered.

HUTTO *v.* ROGERS.

4-4082

Opinion delivered November 18, 1935.

R. W. Robins, for appellants.

Clark & Clark and *Culbert L. Pearce,* for appellees.

HUMPHREYS, J. This suit was brought by taxpayers, appellees, against J. A. Hutto, county judge, John Griffith, county clerk, and members of the duly appointed election commissioners in the chancery court of Faulkner County on November 14, 1934, to review their several actions resulting in a failure to place on the several ballots to be used in the general election on November 6, 1934, the ballot title furnished said board of proposed initiative act No. 1, entitled, "An act for the purpose of fixing the compensation and expenses of certain officials of Faulkner County, Arkansas, and of fixing the number of their deputies, assistants and clerks, and of fixing the manner in which such compensation and salaries shall be paid, and for the purpose of effecting economies in the expense of government in said county."

It was alleged in the complaint that the petition conforming to all the requirements to initiate said act was filed with the county clerk and county judge on August 21, 1934, which was receipted for by them, and that on the 29th day of September, 1934, a certificate was issued to the petitioners by the county clerk stating that the requisite number of legal and qualified electors had signed the petition which authorized said act to be placed upon the ballot in accordance with Amendment No. 7 to the Constitution of Arkansas; that a certified copy of the petition was published according to law, and a certified copy thereof served upon the election commissioners; that on October 29 the county clerk issued a second certificate without notice to petitioners that the original petition did not contain the signatures of a sufficient number of legal and qualified electors to entitle the ballot title of said initiative act to be placed upon the ballots which were to be used in said election; that learning of action of the clerk and the intention of the election commissioners on November 1, 1934, to leave off of the official ballots the ballot title of said act, they informed the people of Faulkner County through the press and by circulars that they were entitled to vote on the proposed salary act and that rubber stamps would be furnished them on election day with instructions how to use them; that on November 3, the board of election commissioners authorized the publication of and statement to the effect that the election commissioners would not count votes so cast; that on election day, November 6, 1934, rubber stamps with the ballot title of said act with "for the act" were furnished to the voters so that they might stamp their votes for the act on the back of the ballots; that on the day of the election, 2,101 ballots were legally cast by the qualified electors, and that 1,187 were imprinted and stamped with the rubber stamps bearing the ballot title of said proposed act; and that the election board refused to take notice and certify the votes thus cast for the proposed initiative act.

The prayer of the complaint is as follows: "Wherefore, premises being seen, plaintiff prays the court

to require the county clerk to send up said initiative petition and the certificate, both first and second, issued by him concerning the sufficiency thereof; that the board of election commissioners be required to send up a certificate showing the number of votes cast in the said general election and the number of ballots on which the electors stamped and imprinted their vote for said initiative act; that full and complete review be made of the sufficiency of said initiative petition, as provided in paragraph 16 of Amendment No. 7 of the Constitution, to the end that the true facts may be ascertained, declared and enforced.

"And, finally, that the acts of the county clerk in issuing said second certificate and of the board of election commissioners in leaving the ballot title of said act off of the ballots used in said election, be declared wrongful, illegal, fraudulent and amounting to a denial of a constitutional right; that all votes cast for said proposed initiative act by the use of said rubber stamps be declared regular and legal in all respects; that the board of election commissioners be required to count and certify all such votes, same as if the ballot title had in fact been printed on said ballots that said proposed initiative act be declared duly adopted and enforceable, and that plaintiffs be granted all other and proper equitable relief, both special and general, legal and equitable."

A demurrer was filed to the complaint and carried forward in the answer challenging the jurisdiction of the chancery court to try the case. An answer was then filed by appellees denying the material allegations of the complaint. The demurrer was overruled on the ground that the chancery court had jurisdiction to try the cause, and the court proceeded to try same on an agreed statement of facts and oral testimony. The trial court rendered a decree to the effect that said proposed act had been legally adopted and was a law, from which decree is this appeal.

Under our view of this case, it is unnecessary to incorporate the agreement of facts and the substance of the oral evidence. The complaint was filed after the election for the purpose of determining whether initiative

act No. 1, relative to fixing the salaries of certain county officers and their deputies, had been legally adopted by the qualified electors voting in said election. It is well settled in this State that equity has no jurisdiction to try election contests. *Hester* v. *Bourland*, 80 Ark. 145, 95 S. W. 992; *Gladish* v. *Lovewell*, 95 Ark. 618, 130 S. W. 579; *Davis* v. *Wilson*, 183 Ark. 271, 35 S. W. (2d) 1020.

It is contended by appellees that jurisdiction was vested in chancery courts by the Constitution of the State, and in support of their contention call our attention to §§ 16 and 17 of Amendment No. 7 to the Constitution, commonly known as the "I and R" Amendment. The sections referred to, in so far as applicable, are as follows:

"Section 16. * * * the sufficiency of all local petitions shall be decided in the first instance by the county clerk * * * subject to review by the chancery court.

"Section 17. If the sufficiency of any petition is challenged, such cause shall be a preference cause and shall be tried at once * * *."

It will be observed that the only jurisdiction conferred by these sections on chancery courts is to review the action of the county clerk in determining the sufficiency of all local petitions for initiating local laws. This is the extent of the jurisdiction conferred on chancery courts. It is true that it is alleged that the first certificate issued by the county clerk was valid and his second certificate was void. Had the latter certificate been challenged before the election, the chancery court would have had jurisdiction to review the action of the county clerk relative thereto. Section 17 of said amendment, cited by appellees, provides that such a cause shall be a preference cause and shall be tried at once. The sufficiency of the petition was a moot question when the suit was filed, and courts will not take and decide questions that are moot.

The decree rendered by the chancery court is reversed, and the cause is dismissed.

MEHAFFY, J., dissents.

LEDBETTER *v.* HALL.

4-4149

Opinion delivered November 18, 1935.

June P. Wooten and *John W. Newman,* for appellant.

Graham R. Hall and *Cockrill, Armistead & Rector,* for appellees.

Walter L. Pope, Abe Collins and *Rose, Hemingway, Cantrell & Loughborough,* amici curiae.

MEHAFFY, J. The appellant, a property owner in Street Improvement District No. 508, city of Little Rock, which is a municipal improvement district, organized under the ordinances of the city of Little Rock, for the purpose of paving certain streets, about 5¼ miles in length, filed suit against the appellees in the Pulaski Chancery Court, to restrain said appellees, their attorneys, agents, servants and employees, from undertaking to comply with the order of the State of Arkansas Refunding Board, and to restrain appellees from selling any of the refunding obligations at a price that would yield less than par. The suit was brought by appellee for his benefit and for the benefit of all other real property owners, similarly situated.

The complaint is quite long, and we do not think it necessary to set it out in full.

The appellees filed a demurrer which the court sustained, and the appellant elected to stand on his complaint, refused to plead further, and the complaint was dismissed for want of equity. The case is here on appeal.

The complaint and exhibits allege and show that the street which Street Improvement District No. 508 was organized to improve, is a continuation of State Highway No. 10. Said district, on March 1, 1930, issued and sold bonds in the sum of $534,000, with 5 per cent. interest coupons attached. Assessment was levied on the lands of the district, held in annual installments, and the bonds maturing in annual amounts until the year 1940. The district had received from the State certificates of indebtedness amounting to $661,321.91. It deposited these certificates with the State of Arkansas Refunding Board, and the Refunding Board, on July 9, 1935, delivered to the improvement district State of Arkansas Refunding obligations, or certificates of indebtedness, in the sum of $428,000, which was the amount of the district's unmatured and unpaid costs as of January 1, 1934, said issue being described as follows:

"400 State of Arkansas Refunding Obligations or Certificates of Indebtedness in denominations of $1,000 each, numbered M-2945 to M-3344, inclusive, each bear-

ing interest at 3 per cent. per annum, payable January 1 and July 1 of each year, and the principal maturing January 1, 1944;

"56 State of Arkansas Refunding Obligations or Certificates of Indebtedness in denominations of $500 each, numbered D-4987 to D-5042, inclusive, each bearing interest at 3 per cent. per annum, payable January 1 and July 1 of each year, and the principal maturing January 1, 1944." The district, in compliance with act 166 of 1935, advertised in the Arkansas Gazette and Arkansas Democrat for tenders to the district for the purchase of its bonds. It received but one response, which was an offer to sell $20,000 at par, plus accrued interest. The commissioners of the district then offered for sale the district's State of Arkansas refunding obligations. The highest bid received was 77 cents on the dollar.

Thereafter, the district filed a report of its proceedings with the Refunding Board, and asked authority of the board to sell the $428,000 refunding obligations at the highest and best price that could be secured for the purpose of paying the district's indebtedness, so far as the proceeds would go. The Refunding Board, after a hearing of the report and petition, entered an order authorizing and empowering the district to sell the State of Arkansas refunding obligations at the best price obtainable in the market.

The complaint alleges that it was the intention of the Legislature that the refunding obligations should be in full liquidation of the indebtedness as of January 1, 1934. It is alleged that, if the refunding bonds are sold at less than par, a large portion of the bonded indebtedness of the district would be left unpaid, and a continuation of the taxes would be in violation of the intention of the Legislature.

The only questions for our consideration are, as stated by appellant, "the interpretation of act 166 of the Acts of 1935, and the validity of an order of the Refunding Board of September 4, 1935."

Attention is called by the parties to the several acts passed by the Legislature beginning with the Harrelson

act, which is act No. 5 of the Acts of 1923. These acts are considered for the purpose of arriving at the meaning and purpose of act 166 of 1935.

It is a matter of common knowledge that, when the 1923 act was passed, improvement districts had been formed all over the State, the property within said districts was assessed for the purpose of paying bonds or indebtedness of the district, and the indebtedness of practically all the improvement districts in the State had become so burdensome that the property owners could not pay their assessments.

It was the manifest intention of the Legislature in all these acts to give the property owners in the districts mentioned relief, to give them such assistance as would enable them to pay the assessments and save their lands.

We said in a recent case: "It was the manifest purpose of the Legislature to relieve the owners of real property from taxes on assessed benefits levied for the purpose of constructing streets in cities and towns which form continuations of State highways. * * * The State had the right to pay so much of the indebtedness of municipal improvement districts as it pleased. It was under no obligation to pay any of it." *Board of Street Improvement District No. 315* v. *Ark. Highway Commission,* 190 Ark. 1045, 83 S. W. (2d) 81.

In construing statutes, we should give effect to the intention of the Legislature. We said: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and to seek for that intent in every legitimate way. But * * * first of all in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation." *Refunding Board of Ark.* v. *Bailey,* 190 Ark. 558, 80 S. W. (2d) 61.

These statutes were also construed in *Smith* v. *Refunding Board of Arkansas, ante* p. 1.

In speaking about the construction of statutes, 59 C. J. states the rule as follows: "For the purpose of construction, resort may be had not only to the language

and arrangement of the statute, but also to the intention of the Legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws. * * * A rational, rather than an arbitrary construction is to be accorded all statutes. The court must consider the rule of public policy, that all laws shall be certain in their terms and applications." 59 C. J. 944.

"While the intent of the Legislature is to be found primarily in language of the statute, where such language is vague, ambiguous or uncertain, the court may look not only to language, but to the subject-matter of the act, the object to be accomplished, or the purpose to be subserved; it may also look in this connection to the expediency of the act or its occasion and necessity, the remedy provided, the condition of the country to be affected by the act, the consequences following upon its enactment, or various extrinsic matters which throw some light on the legislative intent." 59 C. J. 959-960.

The commissioners of the district, in this case, were unable to pay the bonds of the district, unable to sell the refunding bonds, and the situation was such that it was impossible to make any arrangement by which they could be relieved from the entire indebtedness. It was certainly not the intention to deprive the taxpayers of some relief because they could not get all.

Act 166 of the Acts of 1935 is entitled "An Act to Facilitate the Payment of Bonded Debts of State Improvement Districts Entitled to State Aid, and for Other Purposes." It authorizes the commissioners of municipal improvement districts to advertise for tenders. The complaint shows the district did this. The act also authorizes the commissioners to negotiate for the sale of State of Arkansas refunding obligations, if they can sell said refunding obligations at a price equal to or greater than the price at which their own bonds are tendered to them. The law authorizes them to sell the refunding obligations and use the proceeds in purchasing the district bonds so tendered. The act, however, also provides that, in case any district is unable to sell or exchange its refunding

obligations on the terms mentioned in the act, it may then apply to the Refunding Board for aid in refunding its own bonds, in which event the Refunding Board may investigate the financial status of such district and recommend a settlement between the district and its bondholders, which may be made.

If the Refunding Board could not recommend a settlement, as it did in this case, could not recommend any settlement except for the sale of the bonds for par, it would be perfectly useless to apply to the Refunding Board, because the commissioners themselves are given express authority to sell if they can get par. If the Refunding Board cannot recommend a settlement other than the sale of the bonds at par, then the clause with reference to making application to the Refunding Board and the Refunding Board recommending a settlement would not mean anything.

In construing statutes, courts are not only required to get at the intention of the Legislature, and give effect to that intention, but effect must be given to every part of the act.

"It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every section, clause, word, or part of the act." 25 R. C. L. 1004.

As we have already said, to hold that the Refunding Board could not make any settlement or recommend any settlement except where the bonds sold for par, the part of the statute to which we have called attention would not mean anything.

It is earnestly insisted, however, that the word "settlement," used in the statute, contemplates a final settlement; a settlement of the district's indebtedness, thereby relieving the burdened property in the district. It is contended that if the refunding obligations are sold for an amount less than that required to pay the district's bonds, this would not be a settlement, but simply a payment upon account.

The word "settlement" does not necessarily mean payment or satisfaction, though it may mean that. It frequently means "adjustment, arrangement." *Beall* v.

Hudson County Water Co., 185 Fed. 179; *Austin Bros. Bridge Co.* v. *Love,* (Tex. Com. App.), 34 S. W. (2d) 574.

If act 166, in providing that the commissioners may apply to the Refunding Board, and the Refunding Board may recommend a settlement, is given any effect at all, it would authorize advising the settlement which it did in this case, and, if so advised, the law expressly provides that such settlement may be made.

We are of opinion that the chancellor correctly sustained the demurrer, and the decree is therefore affirmed.

BUTLER, J., (dissenting). The question presented is whether under act No. 166, approved March 21, 1935, a municipal improvement district has the right, with the approval of the Refunding Board, to dispose of refunding obligations issued to it after the passage of said act for less than par or for an aggregate sum which will not completely pay off the outstanding bonds of such district.

The State of Arkansas has donated to the district four hundred and twenty-eight thousand ($428,000) dollars of its bonds, a sum equal in amount to the present outstanding bonded indebtedness of the district. This being a gratuity, the State, of course, has the power to limit and define the manner in which its refunding obligations may be used by the commissioners of the district. Act 166 provides: "They are authorized to negotiate for the sale of Arkansas refunding obligations, * * * and if they can sell said State of Arkansas' refunding obligations at a price equal to, or greater than, the price at which their own bonds are tendered to them, then they may sell said * * * obligations and use the proceeds in the purchasing of bonds of the district so tendered. * * * The commissioners of all such districts shall have the authority to exchange their State * * * obligations at par for the bonds of the district, but said refunding obligations shall not be sold except by and with the consent of the commissioners * * *, provided, that in case any district is unable to sell or exchange its refunding obligations on the above terms, it may apply to the Refunding Board for aid in refunding its own bonds, in which event the Refunding Board may investigate the financial status

of such district and recommend a settlement between the district and its bondholders which may be made."

It is upon the interpretation of the last clause of the act quoted, *supra,* providing for an application by the district to the Refunding Board for aid in refunding its bonds, etc., that the majority bases its conclusion to the effect that, with the consent of the Refunding Board, the district may go upon the open market and sell the State's refunding obligations for the best price obtainable. The permission given the district to exchange the State's obligations at par for bonds of the district and the authority to sell said obligations at a price equal to, or greater than, the price at which its own bonds are tendered and from the proceeds thus obtained purchase its tendered bonds negatives the disposition of the bonds in any other manner. It is a cardinal rule of statutory construction that the intention of the Legislature is to be discovered from the language used in its enactments, and that the express mention of one thing implies the exclusion of the other. Clearly, it was the intention of the Legislature that the aid afforded the districts was for the purpose of completely discharging the indebtedness of such districts. It was not contemplated that the commissioners would in any state of case be authorized to sell the State's obligations on the open market for whatever price might be obtained, and there is nothing in the clause last quoted which, by any just implication, could give the district that authority. If the Legislature had intended to authorize the Refunding Board to permit the district to sell at less than par when it provided, if the Board of Commissioners was unable to exchange or sell the State's obligations at par, it might apply to the Refunding Board for aid in refunding its bonds, it would have said so in plain language, and for us to interpolate such authority into the statute would be no more nor less than legislating by way of judicial construction, which cannot be justified on the ground of expediency, as the majority seem to believe.

I therefore respectfully dissent to the opinion of the majority and am authorized to say that Mr. Justice Baker concurs in the views here expressed.

GEORGE *v.* GEORGE.

4-4051

Opinion delivered November 18, 1935.

John E. Miller and *C. E. Yingling,* for appellant.

T. E. Abington and *Gordon Armitage,* for appellee.

BAKER, J. Evan George, appellee here, sued his brother, John L. George, appellant, to recover damages on account of an injury alleged to have been suffered on the early morning of November 23, 1932, in an automobile accident. The parties to the suit were living at

Beebe, in White County. About midnight John L. George and a Mrs. Garner, with whom he was boarding, invited Evan George to go with them upon a ride from Beebe to Austin in Lonoke County. On their return trip from Austin to Beebe, two or three miles out of Ward, in Lonoke County, while the appellant was driving at a high rate of speed, the automobile struck a cow, which caused the car to swerve from its course and run into the sidewall of a bridge, and then turn over and roll down an embankment, lodging on top of a stump. Evan George says that after he got into the car, he went to sleep and did not awake until the accident occurred.

The theory upon which this case is presented to us is that the cause of action was one voluntarily made or built up, and that the parties to the litigation were expecting the recovery to be made from an insurance company, which issued a policy of insurance upon John L. George's car. Whatever may be the suspicious circumstances and conditions prevailing at the time of the accident, we must pass that contention without extensive comment for the reason that such matters must be settled by the trial court.

Upon proper submissions of issues to the jury, the determination by a jury of the facts is binding upon us, when supported by any substantial evidence. This must be true, notwithstanding the fact that we might probably feel that we would have decided otherwise, had such issues been presented to us sitting as a trial court. We cannot believe that a discussion of the facts in this suit will be of any material benefit to the parties or to others who may now, or hereafter be interested in similar litigation, but we content ourselves with the suggestion that if the facts were properly submitted to the jury, that there was sufficient testimony to warrant the jury in determining liability. So the first proposition which we discuss is that of objections to instructions. Whatever facts we deem pertinent to a discussion of the instructions under which the cause was submitted will be stated in relation to the particular matter under consideration.

The appellee had driven with his brother on occasions before this accident, both day and night, and at the

time of the accident, according to the testimony, appellee was asleep. Of the parties in interest, only the appellee and Mrs. Garner testified. Mrs. Garner had also filed a suit for injuries, which she alleged she suffered, and it may be said she was interested in the result and trial of this case, as was the appellee, as any adverse verdict rendered might ultimately affect her chances later upon a recovery on her own part. The appellant alleges that the evidence is not sufficient, or is entirely inadequate to support the verdict of the jury in this case. We do not agree to the proposition, unless it should be determined that the plaintiff was guilty of contributory negligence, which proximately caused the injuries. Unless we should hold, as a matter of law, that the one fact, that the appellee went to sleep immediately upon his entering the car at the beginning of the trip and continued to sleep until the time of the accident, contributed to his injuries, the verdict must stand. This was an affirmative defense with no disputed fact. The effect is that we must treat the matter as one of law, or leave it open for speculation.

Mrs. Garner, a witness for appellee, testified that immediately prior to the accident, which occurred about 1 or 2 A. M., the defendant was driving about sixty miles an hour, and it was while so driving that the collision was had with the cow and the bridge. The appellee was upon the rear seat, wholly inactive in all particulars as to the operation of the automobile. He made no protest as to the speed or manner in which the appellant operated the car. Mrs. Garner testified that she protested, that the appellant to some extent slowed down the car just before the collision.

In the case of *Ragland* v. *Snotzmeier,* 186 Ark. 778, 781, 55 S. W. (2d) 923, we find a somewhat similar situation, different, however, in some of the essential facts. In the cited case, Snotzmeier testified that he had told the driver that he was going too fast, and the driver advised that he would watch out. In that case it does not appear that the driver reduced the speed of the car. Snotzmeier went to sleep, and the accident occurred while he was sleeping. It was not held in that case that the

fact Snotzmeier went to sleep was in law contributory negligence that would prevent a recovery. We say here, as a matter of law, that Evan George, was not guilty of contributory negligence simply because he went to sleep. It was not error therefore on the part of the trial court to refuse to direct a verdict for defendant upon this theory of the case.

Although we might think the verdict not supported by a preponderance of the evidence, that is not the test. If the verdict is supported by any substantial evidence, we must and do accept the verdict as the correct determination of the actual facts.

The next controversy to which we have given rather serious consideration is instruction No. 3, given by the court. Without quoting the instruction in full, let it be said that by it the court told the jury that "if the jury found from a preponderance of the evidence that the defendant was driving his car at a speed in excess of the lawful and reasonable speed, that this is *prima facie* evidence of negligence, and cast the burden upon the defendant to prove that he was exercising ordinary care, notwithstanding the violation of this law, if you find he was violating said law, and that said violation of the law was the direct or proximate cause of running into the bridge banister, and the resulting accident and the injuries resulting therefrom, if any, then you must find for the plaintiff."

It must be conceded that this instruction is open to a very serious objection in that it was a direction to the jury to find for the plaintiff upon a determination favorable to the plaintiff of the conditions therein stated, that it omitted from the jury's consideration the defendant's plea of contributory negligence. It is sufficient comment to say that ordinarily such an instruction would be erroneous and prejudicial. *St. L. I. M. & S. Ry.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199. If contributory negligence was a real issue under the undisputed facts, there was error when that matter was ignored. *Temple Cotton Oil Company* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676; *Postal Telegraph-Cable Co.* v. *White,* 188

Ark. 361, 66 S. W. (2d) 642. Numerous authorities support the doctrine.

An instruction of this kind which is positive in its direction to the jury to return a verdict in favor of one of the parties to the litigation, omitting all references to the pleadings and testimony of the adverse party, is ordinarily erroneous. We disapprove of the form of this instruction No. 3. Here, however, since we say, as a matter of law, that simply because Evan George went to sleep he was not guilty of contributory negligence on that account under all the facts proved, therefore we must say that this particular instruction was not prejudicial. We do not conceive it to be our duty, under conditions such as we are here confronted with, to rely upon a matter of this kind as an excuse to reverse and remand. The error complained of must be more than an excuse. It must supply a reason for such reversal. If we could say in this particular case that the instruction ignores a material issue about which evidence is conflicting, and that it permits the jury, or directs the jury, to find a verdict without considering that issue, we should not hesitate to declare the error prejudicial. *St. L. I. M. & S. Ry. Co.* v. *Rogers, supra.* Further citations would only unduly extend this opinion. The rule is a fixed principle and should be followed.

It is also objected that instruction No. 2 does not tell the jury that its findings must arise from a preponderance of the evidence. There is another instruction, however, advising the jury that plaintiff must prove his case by a preponderance of the testimony. This same objection was urged as to other instructions, but that seeming error was corrected by the general instruction that plaintiff could recover only by proving his case by a preponderance of the testimony.

It is further urged that the recovery in this case for $3,500 is excessive. Appellant minimizes the effect of the testimony as we view it, and we must consider it in the light most favorable to the appellee. Here we have the testimony, not only of the appellee himself, as to his injuries and the extent thereof and the suffering occasioned on account of them, but one of the physicians who

treated him testified that the injury to his neck was permanent, and that he might continue to suffer. There is also evidence that the appellee has lost a great deal of time. If his injuries continue for any appreciable length of time, and his suffering is as detailed by him, we do not think we can say as a matter of law that the recovery is excessive. These witnesses were in the presence of the court and jury when they gave their testimony. The jurors saw each of the witnesses, observed the manner and conduct of them at the time of the trial, and must be said to have been in a better position to determine the actual value of this testimony than we are. Besides that fact, the trial judge who is not merely a moderator or a presiding chairman, has given judicial approval of this verdict, first by its acceptance when returned by the jury, and again by refusing to disturb the finding of the jury upon a motion for a new trial.

"It is duty of trial court to set aside verdict against preponderance of evidence." Crawford's Civil Code of Arkansas, § 371, pp. 302, 306. See cases there cited.

A careful examination of this entire record discloses no really prejudicial error. Since that is our conclusion we affirm the judgment of the circuit court.

ARKANSAS POWER & LIGHT COMPANY *v.* MASON.

4-4015 and 4-4135

Opinion delivered November 25, 1935.

House, Moses & Holmes and *Eugene R. Warren,* for appellant.

V. D. Willis, Ben Henley, Sam Robinson and *Sam T.* and *Tom Poe,* for appellees.

SMITH, J. J. M. Mason brought this suit in his own name and for his own benefit and also as father and next friend of his infant son, John Henry, to recover damages to compensate an injury to his infant son which resulted in the loss of both his son's hands and a part of both arms. The injury complained of necessitated the amputation of both arms just below the elbows. The plaintiff recovered judgment for his own benefit in the sum of $5,000 and for the benefit of his son in the sum of $55,000 from which is this appeal.

The case was tried upon the theory that the boy, who was 12 years old, had come in contact with a defectively insulated guy wire attached to a pole of appellant, Arkansas Power & Light Company's, electric line situated on land leased to the father of the child. Testimony was offered to the effect that the Power & Light Company had negligently allowed its defectively insulated guy wire to become charged with a heavy voltage of electricity. The defenses were made (a) that the guy wires of the pole, which was No. 465, where the boy was said to have been injured, were not and could not have been charged with electricity, and (b) that the boy was not burned at this pole but was in fact burned on a pole constructed, owned and operated by the city of Conway on a line running to the city's pumping station, which supplied the city with water pumped from Cadron Creek some miles

from the city. The power lines will hereinafter be distinguished by referring to one as the city's line and to the other as the company's line. The city's line is located between the house occupied by the plaintiff, Mason, and his family, and the company's line. The company's pole No. 465 measures 48 feet from the ground to the top and is 28 feet from the ground to the first cross-arm and 10 feet from the first cross-arm to the second cross-arm. It is eight feet from the lower cross-arm to the point where the guy wires are attached to the pole. There are two wires on the top arm and one on the lower and each carry 66,000 volts of electricity. The city's pole where the appellant contends the boy was burned is about 400 feet distant from the light company's pole, and is 22 feet, 9½ inches out of the ground and carries a 6,600 voltage. There is no guy wire attached to it.

In going from the house occupied by the Mason family to appellant's pole, which is in a wood lot controlled by the plaintiff on top of a hill where it is claimed the boy was burned and in returning from that pole to the house one must of necessity walk under the city's electric line.

On the day of the injury, which occurred between 4 and 5 P. M., February 12, 1934, the injured boy, who is 12 years old, accompanied by his younger brother, James, was on top of the hill engaged in sawing up a fallen tree into blocks with a cross-cut saw. This tree was near pole No. 465. After the blocks were sawed, they were hauled in a little iron wagon to the Mason home. Returning from one of these trips the younger brother started to lie down to rest when the older boy walked over to the defectively insulated guy wires attached to the company's pole No. 465 and while standing on the ground took hold of the guy wire and was burned on his hands and arms. This is the account of the injury as testified to by the plaintiff's two sons.

Opposed to this testimony was that in behalf of appellant to the effect that John Henry, the injured boy, was not found under pole No. 465, belonging to the company, but was found 400 feet down the hill and near one of the poles belonging to the city. The younger boy

testified that he assisted his older brother to walk this distance after he had been burned. Mrs. Lucille Martin, a neighbor of the Mason's, testified that she saw John Henry on top of the city pole. She heard a noise like an airplane and looking up saw two balls of fire. She saw the little boy fall from the pole and roll down the hill out of her sight. She saw Mr. Turner go to the boy. Mr. Turner was the first person to reach the boy.

Turner testified that when he came to the boy he thought the boy was dead, but found by running his hand in the boy's bosom that he was not. He found the boy some feet from the city's pole. On the morning following the accident Turner pointed out to J. C. Smith the pole where he found the boy. Smith testified that he was the lineman in charge of the city's electric lines, and that he climbed the pole which Turner had pointed out to him and upon reaching the wires he found on one of them some freshly burned flesh. Ferrell F. Fulmer testified that he lived near the scene of the accident. He heard a loud noise on one of the city's poles and a few minutes later saw Turner carrying the boy away from the city pole.

Certain rebuttal testimony was offered touching the opportunities the defendant's witnesses had had to see the things about which they testified.

Under the instruction of the court, the jury was required to find, before returning a verdict in favor of the plaintiff, that the boy was burned at the company's pole and not at the city's pole. Under the testimony herein summarized the jury returned a verdict for the plaintiff.

The complaint was filed in the Boone Circuit Court on November 16, 1934, about which time the plaintiff removed to that county. There was a trial to a jury beginning on January 18, 1935, and the verdict was rendered on January 19, 1935. A motion for a new trial was filed January 22, 1935, and overruled on the same day. On June 6, 1935, and after the expiration of the term of court at which the verdict was returned and the judgment herein entered, the defendant Power & Light Company filed a second motion for a new trial on the ground of newly-discovered evidence. A demurrer was

filed to the motion attacking the sufficiency of its allegations. The demurrer was sustained, and, the defendant declining to plead further, the motion was overruled and the new trial was refused. As a majority of the court think this was error, we discuss no other question.

The motion for a new trial with the supporting affidavits covers 30 pages of the transcript, and it is therefore too long to be copied into this opinion but excerpts from it read as follows:

"Petitioner stated that, since the trial of this action and since the overruling of its motion for a new trial, it has discovered new evidence which will justify this court in granting to it a new trial. Petitioner states that it did not know of the existence of this newly-discovered evidence at the time of the former trial and could not have known of such evidence by the exercise of due diligence; that the new evidence is relevant and material to the issues involved and of such character and cogency that it will change or at least probably change the outcome of this litigation. Petitioner states that when the accident to John Henry Mason occurred on February 12, 1934, it was reported as having occurred upon the electric line of the city of Conway and the newspapers, in reporting the news of the accident, stated that John Henry Mason had received electric burns on the city of Conway lines. It was not until many months later, when the suit was filed at Harrison, Arkansas, in November, that the petitioner knew that an effort would be made to place the liability for this accident on it. Because of the limited time prior to the trial of the suit, the petitioner did not come into the possession of the evidence which it now presents to the court in this petition. * * *

"Petitioner states that the said newly-discovered evidence is material for it in the trial of this cause of action, and petitioner could not, with reasonable diligence, have discovered and produced any of said evidence at the trial of the damage suit; that it used diligence in an attempt to discover any evidence that would be material to the issues in said trial, but that it was unable to discover any of the aforesaid newly-discovered

evidence, because at the time of the trial it did not know of the existence of such evidence."

The motion recites the substance of 18 affidavits which are attached to and made a part of it. Several of these are merely cumulative of testimony offered at the trial. For instance, Mrs. Ada Padgett makes affidavit that she "saw a man pick the boy up where he was injured." This is merely cumulative of the testimony of Mrs. Martin and of Turner set out above, and such testimony alone did not require the granting of a new trial, although it would be within the discretion of the trial judge to do so.

Other affidavits however are more significant and of greater importance. Their purport, if true, is to the effect that the plaintiff has perpetrated an egregious fraud upon the court by suing upon a cause of action which he knew did not exist. We copy one of these:

"I, W. H. Prince, state on oath, that I am acquainted with J. M. Mason, father of John Henry Mason, whose son was injured here in Faulkner County, Arkansas, by coming into contact with an electric wire; and further state that, some time after the accident to his son, he came to me and wanted to know if he could recover anything out of it, and I asked him who it was that injured his son, and he told me the Conway Light, Power, Water System here in Conway; and I told Mason he could not recover anything if that was the case, as it was a municipality, and he seemed like he was not satisfied with my advice, and then I told him I would go and see Mr. Hartje and Mr. Robins, attorneys here, and talk the matter over with them, but I knew he had no right of action. I then went to Mr. Robins and Mr. Hartje and told them about the matter, and they said there could be no right of action if that was the case. The reason Mr. Mason came to me about the matter was, Mr. Hartje and myself had settled a damage suit for him against the Conway Cotton Oil Company. The next thing I heard of the matter was suit was filed against the Arkansas Power & Light Company at Harrison, Arkansas.

"W. H. Prince."

There are other affidavits to the effect that the plaintiff, Mason, had stated before the trial that his son was burned on one of the poles owned by the city, and not on a pole owned by the power and light company. If this is true, it would be an abuse of discretion not to afford relief if this may be done without violating the statutes or settled rules of practice.

By the seventh paragraph of § 1311, Crawford & Moses' Digest, it is provided that a new trial may be granted for "Seventh. Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

Section 1316, Crawford & Moses' Digest, prescribes the practice where the evidence was not discovered, and the motion was not filed until after the expiration of the term of court at which the trial was had and the judgment rendered. The motion in this case was filed in conformity with this section after the adjournment of the trial term of court.

These sections of the statute have been construed and applied in many cases, and it is not the purpose of this opinion to impair their authority to any extent. The statute requires that the newly-discovered evidence shall be material and that the moving party shall have used reasonable diligence to discover it. We have interpreted this statute to mean that the newly-discovered evidence, to be material within its meaning, shall not be merely cumulative or impeaching in character, and it must appear that it was discovered after the trial and would probably have changed the result had it been offered at the trial. It is insisted that under this practice the action of the trial court was correct in sustaining the demurrer to the motion for two reasons, (a) no diligence was shown, and (b) the testimony is merely cumulative of other testimony offered at the trial.

It is to be remembered that the complaint in this case was filed in the Boone Circuit Court on November 16, 1934, and that the trial was had on January 18, 1935, which was two months and two days later. It is true this accident occurred in February, 1934, but it is true

also that after its occurrence, as the motion alleges, the local papers published accounts of the accident, relating that the boy was burned on one of the city's poles. Of course, no one was bound by these newspaper reports, but on the other hand the light company would not be expected to investigate an injury for which it apparently was not responsible.

The trial did not occur in Faulkner County where the plaintiff had resided for many years and in which the city of Conway was located, nor in an adjoining county. Therefore the personal attendance of witnesses could not be compelled. Section 4161, Crawford & Moses' Digest.

Now the plaintiff had the legal right to sue and to have the case tried in the Boone Circuit Court, but every one knows, and this court may therefore judicially know, that the short intensive terms of circuit court in the smaller towns and cities attract many persons who are not litigants, and are not in attendance in response to subpoenas requiring their presence. Had this trial occurred in Faulkner County where the plaintiff had lived for many years and where the accident had occurred, there might have been a discussion of the case there which could not have occurred in Boone County where the parties were unknown. The defendant might have thus acquired the information set out in the motion in time to have used it at the trial. Of course, this circumstance is not conclusive of the question of diligence, but it is not without some value in considering whether the defendant was diligent. The defendant's opportunity of acquiring this information was lessened by the fact that the trial did not occur in the place where the information could have been had.

The father is the actual and responsible litigant in the case, although he did not sue or recover for his own benefit only. The allegations of the motion which the affidavits fully support are to the effect that he caused the suit to be brought upon a cause of action which he knew did not exist. Such evidence is not merely cumulative or impeaching in its character. It goes to the very basis of the suit. No investigation of the accident

itself could have disclosed this fact. The persons by whom it is now proposed to make this proof did not see the accident. The motion alleges this evidence was not discovered and could not have been until after the trial. There does not therefore appear to have been a lack of reasonable diligence.

The instant record is not unlike that of *Baldwin* v. *Pilgreen,* 188 Ark. 131, 64 S. W. (2d) 336. In that case the plaintiff testified that he had been injured by having the wheels of a train run over two of his fingers. The opinion recites there was testimony to the effect that plaintiff had been injured in the manner alleged, but that there was also testimony to the effect that he had been injured by being knocked off the running board of an automobile. A supplemental motion for a new trial was filed on the ground of the newly-discovered evidence reciting that two persons saw the plaintiff riding on the running board of an automobile, the door of which was slammed on the plaintiff's fingers. This testimony supported the theory upon which the case had been defended. It was cumulative of other testimony which had been offered at the trial but its effect was to show that the plaintiff had perpetrated a fraud upon the court by suing on a cause of action which he knew was nonexistent. The court said: "This testimony was relevant and material to the issues involved and was of such character and cogency that it might have had the effect of changing the result, and, on this account, the court should have granted a new trial." The case of *Fosgren* v. *Massey,* 185 Ark. 90, 46 S. W. (2d) 20, is cited to support the decision.

The case of *Fosgren* v. *Massey, supra,* was one in which the controverted question was whether the plaintiff had been injured and the extent of the injury. A motion for a new trial was filed upon the ground that the plaintiff's injury was simulated, and it was held that such testimony was not cumulative merely, "as it tended to break down the evidence of appellee," the plaintiff.

The case of *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438, was cited as authority for this decision. This last cited case was submitted to a jury upon conflicting

evidence as to adverse possession. A motion for a new trial for newly-discovered evidence was filed in which it was alleged that a party to the litigation had made statements in direct conflict with her testimony at the trial. The motion was resisted because first it was not shown why the new evidence was not discovered before the trial and second that diligence was not used in discovering it before the trial. In disposing of this motion it was said:

"The evidence was not of that character which could be discovered before it was disclosed by the witness, W. H. Duff. It is stated in the motion that W. H. Duff did not communicate the fact to appellant until after the rendition of the judgment. The motion also states that for that reason the same was not obtained and used in the trial of said cause. We think the motion sufficiently shows why the evidence was not discovered before the trial, and, inferentially, why more diligence was not used than was used in procuring it. Again, appellee suggests that the evidence is cumulative, and for that reason the court properly overruled the motion for a new trial. The newly-discovered evidence was in the nature of an admission made by appellee that her sister, Sallie Winston, owned an undivided one-third interest in the land. It tended to break down the evidence of appellee. Appellee's whole case rested upon the truth of her own testimony." The judgment was therefore reversed, and the cause remanded for a new trial on account of the error in refusing the new trial because of newly-discovered evidence.

The evidence here is of the same character, and has the same effect, and we are therefore of the opinion that the motion for a new trial should have been heard upon its merits. The judgment is therefore reversed, and the cause remanded.

HUMPHREYS and MEHAFFY, JJ., dissent.

CONTINENTAL OIL COMPANY *v.* FORT SMITH.

4-4065

Opinion delivered November 25, 1935.

[redacted]

James B. McDonough, for appellant.
Fadjo Cravens, for appellee.

SMITH, J. The city of Fort Smith brought suit against the Continental Oil Company to enforce the specific performance of a contract relating to the sale of a small but valuable tract of land owned by and being in the city. An answer and cross-complaint was filed to which a demurrer was sustained. The material allegations of the answer are as follows: Admits that the plaintiff and the defendant entered into a contract for the sale and purchase of a tract of land hereinafter described. The contract consisted of a written bid dated October 17, 1932, reading as follows:

"Bid.

"Fort Smith, Arkansas, October 17, 1932.

"To the City of Fort Smith, Arkansas:

"We hereby bid, and offer to pay, to the city of Fort Smith the sum of four thousand five hundred ($4,500) dollars for that part of block SS of Fitzgerald Addition to the city of Fort Smith, Arkansas, said premises to measure at least 116.5 feet on the west end, and to embrace the premises lying between North 'B' Street and Rogers Avenue in said city, of at least the length just stated, and said premises being more particularly described as follows, to-wit: That part of block SS, Fitzgerald's Addition to the city of Fort Smith, Arkansas,

described as follows: Beginning at a point on North 'B' Street, thence southwesterly at right angles 7.3 feet to Little Rock Avenue; thence northwesterly 116.5 feet to point of beginning, on condition that a formal contract will be executed by said city for the sale of said premises and on the following further conditions: That within 10 days after the acceptance of this bid said city will deliver to us a complete abstract of title to said premises brought down to date showing fee simple title to said property to be vested in said city, free and clear of liens, incumbrances and objections;

"We deposit with you herewith our certified check for five hundred dollars ($500) to the order of the city of Fort Smith, such check to be applied to said purchase price if this bid is accepted and if warranty deed and proper title is furnished to us as herein provided; otherwise, said check to be returned to us;

"Within 30 days after delivery to us of said abstract we shall pay you the balance of said purchase price and simultaneously with the making of said payment you shall deliver to us a warranty deed executed by the proper authorities of said city conveying to us the fee simple title to said premises free from liens, incumbrances and objections.

"During the same period last-mentioned you shall cause an ordinance to be passed by the governing body of said city, and made effective, vacating said premises for street, alley and park purposes and other public purposes, and authorizing the execution and delivery of said warranty deed upon compliance by us with the terms hereof.

"Said deed to be so authorized shall provide that said premises are, and shall be, free from any and all restrictions in the nature of zoning and/or building line restrictions restricting the use of such premises for the purpose of a gasoline filling and service station and/or business ordinarily conducted in connection with such a station.

"If said premises are, or at any time prior to the time fixed for payment of balance of said purchase price shall be subject to any restriction or covenant, by deed,

dedication, ordinance, or otherwise, which purports to prevent the construction, maintenance and/or operation thereon of a gasoline filling station, or any such business ordinarily conducted in connection therewith, or if the construction, maintenance and/or operation of a gasoline filling station on said premises shall, prior to the time last-mentioned, be prevented in any way, we shall not, except at our option, be obligated to purchase said property, and at our option said certified check shall thereupon be returned to us.

"If examination of title discloses defects in the title which in the opinion of our attorney, or attorneys, can be removed within a reasonable time, you shall, at our option, use your best efforts to perfect said title in the manner required by said attorney, or attorneys, and in such case the time for payment of the purchase price as hereinabove provided shall be extended for such reasonable time as may be necessary for any or all of the above purposes. If such objections cannot be removed, we shall, nevertheless, have the option to receive conveyance of said property subject to said objections.

"It is further agreed that, if any suit or litigation is commenced to prevent the purchase and sale of said property, that the time or times during which said suit or litigation is pending shall be added to the times above expressed; and it is further agreed that the company will not be compelled, except at its option, to take said property in the event that litigation is brought to prevent said sale."

The answer further alleged that the city had previously invited bids and the bid of the defendant above copied was on October 18, 1932, at a regular meeting of the City Commission, adopted and agreed to as a contract between the city and the defendant oil company.

The minutes of this meeting of the City Commission recite that the city attorney had given the opinion that the city had the right to sell the property. It was alleged that this bid and this action of the Commission constitute a contract, and was the only contract between the parties.

It was alleged that the defendant was and at all times had been ready and willing to comply with said contract, and it was admitted that an abstract of the title had been furnished as agreed, but it was denied that the abstract showed a fee simple title free and clear of all liens and incumbrances. It was alleged that certain citizens of the city brought a suit to enjoin the sale, but a nonsuit was later taken. It had been made to appear that a portion of the lot above described has been used as a street since 1919, and the city is therefore unable to convey all the land as required by the bid of the defendant hereinbefore set out. By way of cross-complaint, it was prayed that the city be required to convey so much of the said land as had been worked and was now maintained as a street after ordering a reduction in the purchase price from the sum of $4,500 to the sum of $2,000; it being alleged that this latter amount was the proportionate value of the land which had not become a part of the street.

The city offered to dismiss its suit, but the oil company would not consent, and it is now insisting that the city be required to convey so much of the land as has not become a part of the street at a price proportioned to the area, the title to which the oil company approves, bears to the total area.

Appellant cites a number of cases in support of its contention. The one chiefly relied upon, and which appears to be more nearly in point, is that of *Bonner* v. *Little,* 38 Ark. 397. That was a bill by purchasers under a title bond against the vendor who had no title to a part of the lands sold. The bill prayed specific performance as to the parts of the lands which the vendor could convey with compensation for the deficiency. It was held that the relief prayed was not inconsistent and would be granted in a proper case. But we do not think that case warrants the granting of the relief here prayed. There a complete contract had been entered into which was evidenced by the title bond sued on. Here the contractual relation is evidenced by a proposal to buy, and it was this proposal which the city commission has accepted. It is alleged that a portion of the premises may not be

used for the construction, maintenance, and operation of a filling station by reason of the use of a portion thereof as a street. The bid contemplated this contingency and provided for it, the provision being that the oil company should not be obligated to purchase the property, but should have the option of having its check for $500 returned.

The City Commission in accepting the bid or the offer to buy accepted it according to its terms. Four thousand, five hundred dollars was the price it agreed to take. This was the price the oil company agreed to pay. The agreement to buy was absolute, if there were no defects in or failure of the title. If there were defects in or failure of title, the oil company reserved the option to buy, notwithstanding the defects. If it did not so elect, the right was reserved to demand the return of the $500 earnest money and to cancel the contract. Defects having appeared, the oil company has the option to buy or to decline to buy. It may take the property or it may leave it; but it cannot impose terms not contained in its original proposition.

The city has offered to take a nonsuit. It no longer asks the specific performance of the contract. It recognizes that the oil company has an option which it may accept or reject. If the oil company does not elect to proceed with its purchase, it may have the return of its earnest money, but it is entitled to no other relief.

The demurrer to the answer and the cross-complaint was therefore properly sustained, and the decree so ordering is affirmed.

HERRON *v.* SOUTHERN TRACTOR COMPANY.

4-4053

Opinion delivered November 25, 1935.

James G. Coston and *J. T. Coston,* for appellant.

G. B. Segraves, for appellee.

McHaney, J. Appellee brought this action against appellant to recover a balance on an installment note executed by appellant to appellee for one Caterpillar-D-11,000 Diesel cotton gin engine. Appellee filed an affidavit and bond for attachment, and appellant executed a forthcoming bond and kept possession of the property. Appellant answered the complaint, alleging that said engine was purchased for the purpose of operating a four-stand cotton gin which was known to appellee; that, as an inducement to the purchase of said engine, appellee represented that said engine could and would successfully operate a four-stand cotton gin; that said engine failed to operate such a gin for any length of time until it would give down; that complaint was made to appellee of the failure of said engine to properly operate said gin, and appellee did make adjustments and repairs, but that same refused to operate satisfactorily after the repairs were made, and that he suffered loss on account thereof; that, after it became apparent that said engine would not operate said gin successfully, appellant offered to return said engine to appellee and rescind said sale, which offer was refused, and that the same offer was made after the repairs were made but the offer was refused. Damages were prayed in the sum of $4,700 on a cross-complaint. A demurrer was interposed and sustained to said answer and cross-complaint, and judgment was rendered against appellant and said forthcoming bond in the sum of $2,749.76 with 6 per cent. interest thereon from January 18, 1935, until paid and all costs of the action. This appeal is from that judgment.

Appellant contends that appellee's demurrer should have been overruled and proof heard upon his answer.

The record reflects that appellee signed a written order for the machine in controversy which contained the following provisions: "The above-described machine is furnished by us only in accordance with the manufacturer's standard warranty, which is as follows: 'The manufacturer warrants all machines sold by the manufacturer, together with equipment and parts manufactured by the manufacturer for six months after the date of shipment; this warranty being limited to the replacing (without charge, except for transportation) at either its Peoria, Illinois, factory, or its San Leandro, California, factory, upon inspection at either factory, of such parts as shall appear to the manufacturer to have been defective in material or workmanship. The manufacturer's warranty does not obligate it to bear the cost of labor or replacement of defective parts. No warranty is made or authorized to be made by the manufacturer other than that herein set forth. The manufacturer makes no warranty in respect to trade accessories, such being subject to the warranty of their respective manufacturers.' * * *

"It is further understood that no representative or agent has any power to make any additions to or to vary the terms and conditions hereof. This order shall not be binding until it is submitted to and duly accepted by Southern Tractor Company at its office in Memphis, Tennessee, U. S. A., and that, when so accepted, it shall become a Tennessee contract and construed in accordance with the laws of the State of Tennessee." The record further reflects that the order was accepted by appellee and thereafter a written conditional sales contract was entered into which was signed by both parties. Said conditional sales contract contains this clause: "Seller agrees to sell all 'Caterpillar' products described herein and buyer agrees to buy the same without warranty of any kind except the manufacturer's standard warranty printed on the reverse hereof, which warranty buyer hereby accepts in lieu of any warranty by the seller, whether express or implied. No warranties of any kind, whether express or implied, are made by seller with re-

spect to any other products described herein unless indorsed hereon and signed by the parties hereto."

It will be noticed that the parties expressly agreed that the order for the machinery in controversy, when accepted by appellee, should become a Tennessee contract and construed in accordance with the laws of said State. A review of the Tennessee decisions in connection with § 7205, of the 1932 Tennessee Code, convinces us that the trial court correctly sustained the demurrer to appellant's answer, as the alleged misrepresentations amounted to nothing more than express oral warranties, and since the contract between the parties excluded any such oral warranties, appellant cannot contradict the written contract by oral testimony, as to do so would violate one of the fundamental rules of evidence. The answer was therefore open to demurrer. In *Litterer* v. *Wright,* 151 Tenn. 210, 268 S. W. 624, the lessee, under a written contract of lease, attempted to set up a parol agreement that the lessor had bound himself to repair the roof on the building, and that the roof caved in, to his damage. The written lease executed by the parties provided that the "lessee rents the property herein rented in its present condition," and that the lessee "agrees to make all necessary repairs on the premises herein rented in order to keep same in a proper and safe state of repair." In holding that the written lease could not be contradicted by the alleged oral agreement, the court used this language: "Evidence that the lessor had agreed to make necessary repairs on the premises is directly contradictory of the terms of the writing and clearly inadmissible. Parol proof of inducing representations to the making of a contract reduced to writing must be limited to matters not otherwise plainly expressed in the writing. No well-considered case will be found holding otherwise. The fundamental distinction should be kept clearly in mind between the denied right to contradict the terms of the writing, and the recognized right without so doing to resist recovery thereon, or to rely upon matters unexpressed therein. The ultimate test is that of contradiction, which is never permissible." See also *Deaver* v.

Mayhan Motor Company, 163 Tenn. 429, 43 S. W. (2d) 200.

The distinction in the cases made by the Supreme Court of Tennessee, under the Uniform Sales Act, is that if the alleged oral representations made at or prior to the sale for the purpose of inducement, amounting to express oral warranties, do not contradict the written contract, they may be proved. But if such representations contradict the writing, then they run afoul of the fundamental rule, and cannot be proved to contradict the express provisions of the written contract.

We therefore hold that the court correctly sustained the demurrer to the answer, and the judgment is accordingly affirmed.

STOCKBURGER *v.* CRUSE.

4-4058

Opinion delivered November 25, 1935.

John Mayes and *Oscar E. Williams,* for appellant.

Rex Perkins and *Karl Greenhaw,* for appellee.

BUTLER, J. Prior to February 13, 1933, Troy Stockburger was a member of the police force of the city of Fayetteville, holding the position of assistant chief of police. There was also a chief of police and three or

four patrolmen. On the date mentioned the city council of Fayetteville, by proper resolution, provided for four policemen, a chief of police, a motorcycle man, and two night men, one at a salary of $60 and the other at $40 a month. The effect of this resolution was to eliminate the position of assistant chief of police. The mayor of the city suffered Stockburger to remain on the police force until May 22, 1933, when the chief of police, acting under the order of the mayor, served Stockburger with written notice that he was no longer in the employ of the city. After some inquiry made to the city council, Stockburger presented a petition to the circuit court for a writ of certiorari. He alleged that the action of the mayor and council was in violation of act No. 28 of the Acts of 1933, approved February 13, 1933, which act provides for the creation of a board of civil service commissioners for cities of the first class. This act, among other things, provided that no member of any police department affected by the act should be discharged without being notified in writing, and that such discharge would only be for cause.

The trial court heard the testimony of witnesses, and denied the prayer of plaintiff's petition, from which action of the court this appeal has been prosecuted.

The testimony introduced by the appellant established the fact that his services had always been satisfactory, and that he had been an able and faithful officer; also, that he was not advised prior to his dismissal that such was contemplated, and no reasons were ever given him for this action by the governing body of the city. The evidence on behalf of the city was to the effect that the sole reason for the abolition of the position of assistant chief of police was to effect a saving in the expense of the police department, and that the fact that the position was abolished was the cause of the appellant's dismissal.

On appeal it is urged that the trial court should have complied with § 1309 of Crawford & Moses' Digest, by making a separate finding of fact and conclusions of law as requested by the appellant, and that the undisputed evidence in the case disclosed a plain violation of

the provisions of act No. 28, *supra.* Other questions are argued by counsel for the respective parties, none of which need be discussed, as we agree with the appellee in the contention that the act relied upon by the appellant was not in operation at the time the city council abolished the position of assistant chief of police, or when Stockburger was formally notified on May 22d, following, that his services had been dispensed. If we give any effect to § 18 of said act, this conclusion necessarily follows. That section provides: "If within ninety (90) days from the passage of this act, the requisite number of qualified electors of any city affected by said act shall file a petition with the city clerk of said city requesting said act to be submitted to a vote of the people, then said act shall be suspended until same is voted on and approved. Upon the necessary petition being filed with the city clerk, it shall be his duty to certify said act at the next city general election to be voted for or against, and the result shall be determined as now provided by law in such cases."

The record discloses that within ninety days the requisite number of electors of the city filed a petition requesting the submission of the act to a vote of the people, and the same was voted on at the following city general election on the.....day of April, 1934. At that election the act was adopted, and subsequently the board of civil service commissioners was appointed, and thereafter and not before, was the act effective as to the city of Fayetteville.

In *Fiveash* v. *Holderness,* 190 Ark. 264, 78 S. W. (2d) 820, it was suggested in argument by counsel that § 18 of act No. 28, *supra,* offended against a part of the I. & R. Amendment (No. 7) to the Constitution of 1874. This question was pretermitted by the learned trial court and not noticed by this court in its opinion upholding the trial court's decision on other grounds. That part of Amendment No. 7 (I. & R.) is as follows: "This section shall not be construed to deprive any member of the General Assembly of the right to introduce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitu-

tional amendment or amendments as provided for in this Constitution."

The Legislature did not attempt, by the section of the act quoted, to submit the act to the people, but simply recognized the constitutional right of municipalities to regulate their local affairs by a majority vote of the qualified electors of the municipality. The act was general in its scope, but, by § 18, could be localized so as to meet the needs of the individual municipalities of the State. This section was in recognition of Amendment No. 14 to the Constitution prohibiting the General Assembly from passing any local or special act, and had in mind also that section of Amendment No. 7, which reserves to municipalities and counties the right to enact local and special legislation. This being the purpose and effect of § 18, there was therefore no violation of the inhibition on the Legislature contained in the section of the I. & R. Amendment above quoted.

The result of our views necessarily compels an affirmance of the judgment of the trial court, and it is so ordered.

DENNIS *v.* EQUITABLE LIFE ASSURANCE SOCIETY.

and

DENNIS *v.* STANDARD OIL COMPANY OF LOUISIANA.

4-4054

Opinion delivered November 25, 1935.

A. L. Rotenberry, for appellant.

Rose, Hemingway, Cantrell & Loughborough and *Moore, Gray, Burrow & Chowning,* for appellees.

D. K. Hawthorne, for cross-appellant.

BAKER, J. On November 18, 1934, Ernest E. Dennis died in Little Rock from a self-inflicted gunshot wound. He left surviving him Pearl Dennis, his widow, the appellant in both of the cases on appeal here, and eight children by a former marriage. The children are all minors. The suits for their interests are prosecuted by their respective guardians. The subject-matter in the suit against the Equitable Life Assurance Society was the amount alleged by the plaintiff to be owing to her by reason of a group insurance contract made by the insurance company insuring employees of the Standard Oil Company of New Jersey and its subsidiaries, including Standard Oil Company of Louisiana. The second suit grew out of a contract, whereby the Standard Oil Company of New Jersey provided for certain benefits to be paid upon the death of employees to surviving

beneficiaries. The litigation in both of these cases does not arise out of any denial of liability on the part of the insurance company, or of the Standard Oil Company of Louisiana, of which company the said Ernest E. Dennis was an employee at the time of his death. Premiums were paid to the insurance organization by an authorized deduction from the salary of the employee. The Standard Oil Company of New Jersey and its subsidiaries, including Standard Oil Company of Louisiana, sued here, made no charge against its employees for such benefits as might accrue upon the death of the employees who had been employed for a sufficient length of time to be entitled to these benefits. No deductions were made from salaries or wages, though the amount of the benefits was determined by the length of time the employees had been in the service of the Standard Oil Company.

At the time Ernest E. Dennis agreed to accept the benefits of the group policy of insurance, he was a widower, and the same statement may be made in regard to the other fund created by his employer. Mr. Dennis' application for insurance in the group policy was in the following form:

"S. O. Form G. 214

"Group Life Insurance Plan

"Acceptance of Preference Beneficiary Schedule

"To Standard Oil Co. of La.

"(Name of employing Company)

"Name of Employee Ernest E. Dennis Ck. or P. R. No. 775

"Marital Status—Widower

"(Married, single, widowed, divorced)

"No. of children living—8

"No. of natural parents living. Father.

"I hereby agree that in the event of my death while insured under the 'Group Life Insurance Plan' of the Standard Oil Company (N. J.), the insurance shall be payable to the person or persons in the first of the following classes of preference beneficiaries of which a member or members shall survive me:

"(a) Widow or widower
"(b) Children
"(c) Parents
"(d) Brothers and sisters
"(e) Executors or administrators.

"I reserve the right to change this beneficiary agreement.

"Date December 11, 1931.

"Witness W. M. Rogers.

"Ernest E. Dennis, signature of employee."

The principal issue to be determined arises out of the acceptance of this preference beneficiary schedule. It is apparent that the beneficiary must be determined as of the date of the death of the insured, when the rights of the proper beneficiary would become fixed or vested, but prior to that time no particular individual or designated beneficiary had any vested right or interest in the policy. The order of preference of the beneficiary is set out in the schedule, the benefits being payable first to the widow or widower, or, that beneficiary failing, to the children of the insured; that class failing, then the parents of the insured. It is apparent that beneficiaries could not be determined by the insurance organization by a mere examination of the policy of insurance, but recourse must be had to extraneous proof for a determination of the preferred beneficiary in the class surviving the insured. The children of Ernest E. Dennis, through their proper guardians, were insisting that, since their father was not married at the time this policy was issued, they were the first of the preference beneficiaries then in being; that the contract was made for their benefit, and that, without some affirmative act on the part of the insured, their father, they continued as preferred beneficiaries, that he had the right to change beneficiary, but not having done so, the proceeds of the insurance policy were payable to them.

Mrs. Dennis made proof of death, insisting upon payment of the policy to her and upon the insurance company's delay in paying over the money filed suit in the circuit court of Pulaski County, Arkansas, to recover the proceeds of the insurance policy, for the 12 per cent.

penalty and for attorney's fee. The appellee insurance company then filed its answer, wherein it admitted the liability for the amount of the insurance, but stated that the children of Ernest E. Dennis, through their respective guardians, were asserting claims to the proceeds of the insurance policy, and asked that its answer be treated as an interpleader, for a transfer to the chancery court, and offered to pay the money into the registry of the court, and also asked that it be discharged.

Substantially the same procedure was had as to the fund in controversy for which the Standard Oil Company of Louisiana was sued, and that company in like manner interpleaded and paid into the registry of the court the amount of money there involved, a small indebtedness owing by Dennis to the company having been deducted from the amount sued for.

The difference in the two cases arises out of a slight difference in the designation of preference beneficiaries. That difference will be shown later in this opinion.

The chancery court, upon a final hearing of the case, discharged the insurance company without requiring it to pay the 12 per cent. penalty or attorney's fee, but required it to pay interest from the date proof of death was filed until the fund was deposited. Mrs. Dennis, appellant, has appealed from the action of the court in refusing to charge the penalty and attorney's fee in her favor against the insurance company, and the insurance company has cross-appealed on account of the charge of interest, and the minor children of the insured have prayed a cross-appeal, alleging that the court erred in awarding the fund to Mrs. Dennis, their step-mother.

The first matter with which we deal is a determination of the proper beneficiary under this insurance policy. As intimated above, the vague, uncertain, and indefinite designation of a beneficiary makes it necessary to determine or decide certain facts and then to declare the law in relation thereto.

Mrs. Pearl Dennis and Ernest E. Dennis were married shortly after this insurance policy was issued. Mrs. Dennis says that they discussed as between themselves, prior to her marriage, the fact that he had applied for

this insurance, and that upon their marriage it would be for her benefit in the event of his death. It is not necessary that we decide the case upon this kind of claim or presentation, as all of the matters here in controversy may be put upon a more substantial footing for a determination of the facts necessary to a decision and the declaration of law in relation thereto.

The answer of the guardians alleged that the second marriage of Mr. and Mrs. Dennis, which occurred on October 14, 1934, was illegal because the license therefor was issued upon Sunday. This question of legality, however, has not been briefed and, we assume, has been abandoned. From the evidence, it may be said that Dennis and his wife had been married a little more than a year prior to his death, although they were divorced in July, 1934, and were again married on October 14, 1934, and lived together after the second marriage continuously until Dennis' death.

After the insurance policy was issued, had Dennis then died prior to their marriage, the proceeds of the policy would have been payable to his children. Upon their marriage, however, a preferred class was created. The wife, upon his death, would have been the widow mentioned in the policy. Upon the divorce that class was no longer preferred, and, had he died prior to October 14, 1934, the date of his second marriage to appellant, the children would have stood then as the preference beneficiaries. Upon the second marriage, however, the status was again changed, and the class of surviving spouse came into being and continued until the death of the insured.

Some proof is offered to the effect that, after Dennis was taken to the hospital, on the day he was shot, that he advised Dr. Bennett and Mr. Broadaway that the insurance money should be paid to his children. These matters are argued here.

It is unnecessary to decide or determine the competency or relevance of this testimony. It was within the power and control of the insured to determine and fix definitely, under his policy, the beneficiary, instead of leaving the uncertain and vague condition to continue

under the preference beneficiary agreement. Certainly announcement of desires or preferences cannot determine beneficiaries. That matter has been decided by this court on several occasions. *Lincoln Reserve Life Ins. Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; *Brotherhood Railroad Trainmen* v. *Meredith,* 146 Ark. 140, 225 S. W. 337.

The policy seems to contravene no well-settled principle of law, and must be enforced according to its terms and conditions. *Standard Life & Accident Insurance Company* v. *Ward,* 65 Ark. 295, 45 S. W. 1065; *Maryland Casualty Company* v. *Chew,* 92 Ark. 276, 122 S. W. 642.

A case, however, perhaps more nearly in point is that of *Runyan* v. *Runyan,* 101 Ark. 353, 142 S. W. 519. In this case the policy of insurance was payable to the widow and heirs, or such beneficiary as he might designate on the reverse side of the policy. Since none was designated, it was held to be payable to the widow. The expression of an opinion, by officers of the insurer, or desire on the part of the insured will not operate to modify or change the policy in any respect. *Gibson* v. *Moore,* 187 Ark. 897, 63 S. W. (2d) 344.

We take the following announcement from vol. 2, Couch's Cyclopedia of Insurance Law, page 997, § 336:

"The marriage of a member of a mutual benefit association will, however, render a former designation of a beneficiary inoperative, where the one named as beneficiary would not be eligible to be named after the member's marriage, and, upon the member's death without an express change of beneficiary, the benefit will go to his wife, or those of the classes entitled to be named, in the order specified."

The text indicates that several jurisdictions support this theory. None seems opposed to it.

In the case of *Davin* v. *Davin,* 99 N. Y. Supplement 1012, we find that it is a contest for the proceeds of an insurance certificate. James J. Davin was insured in the Knights of Columbus. His certificate had been made payable to his father, and the designated beneficiary had not been changed in the certificate of insurance at the time of the death of the insured, but the insured had

married after taking out the insurance and left a widow at the time of his death. This certificate of insurance was payable to a preference beneficiary in the following order, to-wit: "(a) To such person or persons of the immediate family of said member as by him designated. (b) To such person or persons, in default of such family, of the blood relatives of such member as by him designated. (c) In default of any designation by said member, or out of the order named, except by permission of the board of directors or their successors, for cause shown, then such aid shall be rendered by said corporation to such family or relatives who are heirs at law of such member, in the manner above arranged, upon their proof of being such family or such heirs at law." At the time the certificate was issued the father was of the immediate family, and as such was designated as the beneficiary. Under paragraph (a), above set out, it was determined that upon the marriage of James J. Davin, he ceased to reside with his father and maintained a separate residence with his wife, and so lived apart from his father until his death. In other words, he and his wife constituted a new family, and she became a member of that immediate family to whom the proceeds of the insurance was payable.

Another class beneficiary was determined according to the same principles in the case of *Lister* v. *Lister,* 73 Mo. App. 99. Practically the same conditions prevailed, and the same ruling was made in the case of *Knights of Columbus* v. *McInerney,* 153 Mich. 574, 117 N. W. 166, 126 Am. St. Rep. 541.

To the same effect see *Larkin* v. *Knights of Columbus,* 188 Mass. 22, 73 N. E. 850, and the case of *Knights of Columbus* v. *Rowe,* 70 Conn. 545, 40 Atl. 451.

It must appear from the foregoing that by the weight of authority the wife is favored as the preferred beneficiary under the above preferred beneficiary provision.

Therefore there was no error in the decree of the court awarding to her the amount of insurance provided under the group policy and paid into court by the Equitable Life Assurance Society.

From the foregoing discussion, it is seen that the question of a proper beneficiary was a real one. It was a matter that the parties to this controversy could not determine or settle among themselves.

The cross-appellants, minor children of Ernest E. Dennis, by their guardians, were asserting their claim in good faith, and prior to the filing of the suit were insisting that the money should be paid over to them to the exclusion of the widow. The appellant insurance company could not, without involving itself in serious danger, assume the responsibility of deciding disputed facts and controverted propositions of law. We hardly think any responsible attorney would have assumed to advise the insurance company to make such settlement, when at a comparatively small expense it could interplead the parties, pay the fund into court, where the controversy could be settled at the expense of the contesting parties, even after the insurance company was discharged. The interpleader was a proper proceeding, though we think the appellant is somewhat warranted in a complaint on account of the unnecessary delay on the part of the insurance company before interpleading and paying over the fund.

The only expense of the insurance company was the employment of its attorney. It waited until it was sued, but this expense even then had to be incurred. Since it had nothing to lose, it should have, within a reasonable time, after the dispute arose, have filed the interpleader and paid the fund over. On account of its failure to do so, the chancellor required the insurance company to pay interest on the fund. We cannot say that this was improper.

Since the insurance company, however, made no dispute as to its liability for the fund, and was not attempting in any respect to defeat a recovery thereof, it was not error to refuse to impose the penalty or to charge attorney's fee against it. As between the appellee insurance company and other appellees, or the appellant, there was nothing to litigate. Hence, appellant's complaint that she was entitled to a jury trial is without merit. See "Interpleader," 15 R. C. L. 220, 237, § 19.

The decree rendered therefore in the proceeding of *Appellant* v. *Equitable Life Assurance Society* is affirmed on appeal and cross-appeal.

The basis of the controversy in the proceeding of *Dennis* v. *Standard Oil Company of La.*, arises in like manner out of the designation of preference beneficiaries.

"Under this subdivision (b) payment of the Death Benefit shall not be made as outlined in subdivision (a), but the total Death Benefit shall be payable to the first of the following classes of preference beneficiaries of which a member or members shall qualify at the death of the employee, omitting, however, any person or persons who shall have been previously excluded at the request of the employee, and with the written approval of the company.

1. Widow or widower if living with or dependent upon the decedent at the time of his death to the extent of at least 20 per cent. of his pay.

2. Surviving children, regardless of dependency, and each stepchild if living with or dependent upon decedent at the time of his death to the extent of at least 20 per cent. of his pay, in equal shares."

It was decreed by the trial court that Mrs. Dennis, the appellant here, was not living with her husband at the time of his death, and that he was not contributing to her 20 per cent. of his salary, and that she was therefore ineligible as beneficiary under the foregoing preference beneficiary designation.

From the foregoing authorities above cited and set out, it must be said that, if she as widow could otherwise qualify, this fund payable by the Standard Oil Company of Louisiana should have been paid to her.

However, we are impelled to agree in one particular, at least, with the announcement of the trial court, to the effect that the proof does not establish the fact that her husband was contributing at least 20 per cent. of his wages to her. It is true the proof may show that she was dependent upon him.

The proof shows that he was paying rentals upon apartments at Helena, while they lived there and later at Little Rock, where they lived at the time he died and

just prior thereto, but these payments were not contributions solely for the benefit of his wife. He was also receiving a part of the benefits of such payments. It also appears from her testimony that he had impaired his credit to the extent that he could not borrow money; that she was borrowing for him. It was argued that while he was in the hospital he contributed $81 or gave his wife that amount. We do not so regard the testimony as tending to prove that alleged fact. The appellant testified that he commanded her to "get my money." Only a short time before, perhaps an hour or so, he had made a sole voluntary contribution of $5. He had given her $5 while she was in the beauty shop. If he were intending to give her the full $86, the opportunity to do so was then present. Appellant argues that the fact, if it be such, the insured did not want her present in the room after he was taken to the hospital, is not such an abandonment or proof that they were not living together, as would preclude the appellant from continuing in the status of a preferred beneficiary. We agree with that proposition. The conditions that prevailed at that time, perhaps did not warrant an announcement that the parties separated during the period intervening between the time the insured shot himself until his death, about twenty-four hours. By the same token it cannot be said that at the time when he was expecting death momentarily, when he knew that whatever money he possessed was in the pocket of the clothes he had worn to the hospital, and when he was, perhaps, disturbed about the prospect of its loss and advised his wife to "get my money," the fact that she got from his pockets the $81 would not be treated as a contribution or donation to her. The chancellor decided that she did not qualify under the preference beneficiary provision for the reason that the evidence does not show that he had contributed to her to the extent of 20 per cent. of his earnings. The burden was upon appellant to establish such facts as would entitle her to recover. The decision was not against the preponderance of the testimony.

Since the next in the preference beneficiary schedule are the children, and the decree gave this fund paid into

court by the Standard Oil Company of Louisiana to the children, upon their cross-complaint. The decree was correct.

In that respect, the decree of the chancery court is also affirmed.

RENNER *v.* PROGRESSIVE LIFE INSURANCE COMPANY.

4-4001

Opinion delivered December 2, 1935.

John W. Nance, for appellant.

E. M. Arnold and *Duty & Duty,* for appellees.

JOHNSON, C. J. On the threshold of this appeal we are confronted with appellees' motion to dismiss the appeal or to affirm the judgment of the lower court because not prosecuted from a final judgment or appealable decree. The history of this litigation necessary to an understanding of the merits of the motion is: In the early part of 1932 appellant brought suit against appellees in the circuit court of Benton County to recover an alleged balance due under a contract of sale of the assets and physical properties of an insurance company. Thereafter the complaint was amended, and at the September, 1932, term of said court a demurrer was interposed and sustained with leave to appellant to amend. Subsequently the complaint was again amended, and at the March, 1934, term of said court appellant dismissed his complaint as amended, without prejudice. Thereafter and within one year after said dismissal this suit was instituted by appellant in the Benton Chancery Court. The complaint thus filed in effect alleged a cause of ac-

tion for recovery of the balance due on a contract of sale; secondly, that appellees had unlawfully converted the assets of an insurance company which in the main belonged to appellant and his associates. A demurrer to this complaint was interposed by appellees, and upon hearing the court treated same as a motion to transfer to the law court, and upon this theory it was sustained. When the cause reached the law docket, a demurrer was again filed by appellees and also a motion to dismiss was interposed, and upon a hearing the trial court made and entered the following order:

"It is therefore by the court considered, ordered and adjudged that defendant's demurrer to plaintiff's complaint be, and the same is hereby, sustained; that defendant's motion to dismiss the complaint is sustained as to that part of same which seeks to recover the balance due on the contract sued upon, and leave is granted to the plaintiff to amend that part of his complaint which seeks recovery for wrongful conversion of the property, and it is further ordered and adjudged that the part of plaintiff's complaint which seeks to recover the balance due on the contract sued upon be, and the same is hereby, dismissed; and, to the ruling of the court in sustaining said demurrer and dismissing that part of plaintiff's complaint seeking recovery of the balance due upon the contract sued upon, the plaintiff duly objected and excepted and prayed an appeal to the Supreme Court of Arkansas, which appeal is granted, and the plaintiff is given thirty days in which to file a motion for new trial and sixty days in which to file his bill of exceptions."

The effect of the foregoing order was to dismiss appellant's complaint in part only, and to retain a substantial part thereof for trial. In *Security Mortgage Company* v. *Bell,* 175 Ark. 128, 298 S. W. 865, reading from the second headnote, we stated the applicable rule as follows: "An appeal from an order dismissing a cause as to certain paragraphs but leaving the paragraph which presented a triable issue, *held* prematurely taken, since the issues should have been tried and objections to the demurrer urged on the final appeal from the whole action."

Appellant's cause being dismissed in part only this appeal is prematurely prosecuted, and must be dismissed.

PAVING IMPROVEMENT DISTRICT NO. 51 OF TEXARKANA *v.* REFUNDING BOARD OF ARKANSAS.

4-4157

Opinion delivered December 2, 1935.

U. A. Gentry, amicus curiae.

B. E. Carter, for appellant.

Carl E. Bailey, Attorney General, *Walter L. Pope* and *Leffel Gentry,* for appellee.

JOHNSON, C. J. By complaint in mandamus, this suit was instituted by appellant, Paving Improvement District No. 51 of Texarkana, Arkansas, against appellee, the Refunding Board of the State of Arkansas, in

the circuit court of Pulaski County, and, in effect, alleged: that prior to June 1, 1927, appellant had caused to be paved and actually paid the costs thereof for all that part of Seventh Street in the city of Texarkana located within the boundaries of appellant district; that said street was and is a continuation of State Highway No. 67; that on January 1, 1933, appellant had outstanding bonds representing the actual costs of improving said State highway continuation; that no application for State aid was made within 60 days from the effective date of act 11 of 1934; that appellant is entitled to State refunding obligations in the sum of $5,635.16; that appellee, State Refunding Board, has declined to issue State refunding obligations for the amount due or any part thereof. To this complaint a demurrer was interposed and sustained, and from a consequent judgment dismissing the complaint this appeal comes.

The question of law presented for determination is whether the State is liable under the facts pleaded.

Prior to the passage and approval of act 184 of 1927 municipal improvement districts made their local improvements and paid the costs thereof locally. This act, however, changed the long existing rule to the extent that where the State became the joint promoter with the municipal improvement district in effecting improvements upon streets which were continuations of State highways through the district and the city, the State offered to assume and become equally liable with the improvement district for the total costs thereof. Act 184 of 1927 was amended by act 8 of 1928. By this amendatory act it was provided that the State should assume one-half of all indebtedness incurred by municipal improvement districts where such improved streets were continuations of duly designated State highways, provided, however, such improvements were made subsequent to June 9, 1927. By act 85 of 1931 the State offered to assume the payment of one-half of the costs or improving continuations of State highways upon city streets made prior to June 9, 1927. In other words, by act 8 of 1928, when supplemented by act 85 of 1931, and upon the conditions therein stipulated, the State offered to assume

one-half the outstanding bonded indebtedness of municipal improvement districts to the extent of the actual costs of effecting such improvements upon continuations of State highways through cities and towns. By act 248 of 1931 the State highway commission was authorized to issue certificates of indebtedness to municipal improvement districts to cover the costs to such districts for constructing continuations of State highways through cities and towns, as provided in the acts *supra*.

Sections 11 and 12 of act 11 of 1934 provide: "Section 11. In instances where municipalities or street improvement districts have improved streets through cities and towns, which streets are continuations of State highways, and said municipalities or districts were given aid or are entitled to aid by the issuance of certificates of indebtedness under act No. 248 of 1931, it shall be the duty of the State Highway Commission to ascertain and report to the Refunding Board by municipalities or districts the amount of said certificates, together with the interest unpaid thereon to January 1, 1934, and the amount of aid to which any of said municipalities or districts may be entitled in instances where certificates have not been issued to them which represents the actual cost of improving streets which are now the actual continuation of a State highway. Any municipality or street improvement district entitled to aid under said act 248 for which no certificates have been issued shall apply to the State Highway Commission for aid within sixty days from the effective date of this act or thereafter be forever barred from the benefits hereof.

"It is the purpose of this and the next sections of this act to authorize the issuance of refunding certificates of indebtedness to municipalities and street improvement districts, in an amount equal to the actual cost of improving streets which are now continuations of a State highway through cities and towns, irrespective of the validity or invalidity of any previous statutes upon the subject.

"Section 12. Refunding certificates of indebtedness are hereby authorized to be issued in exchange for and in an amount not exceeding the aggregate of the out-

standing valid certificates of indebtedness issued under act No. 8 of the General Assembly, approved March 3, 1931, together with the accrued interest thereon to January 1, 1934, and the amount reported to the Refunding Board under § 11 hereof. Said refunding certificates of indebtedness shall be negotiable, direct, general obligations of the State, for the payment of which, principal and interest, the full faith and credit of the State and all its resources are hereby pledged. They shall be dated January 1, 1934, and shall be payable ten (10) years from their date, and shall bear interest at the rate of 3 per cent. per annum. Interest upon said refunding certificates of indebtedness as shall be evidenced by the interest coupons payable semi-annually upon the interest-paying dates of the bonds issued by said municipalities or districts. Said refunding certificates of indebtedness shall be delivered to the municipalities or districts entitled thereto, upon the surrender of the original certificate to the Refunding Board for cancellation in instances where certificates have been issued, and to municipalities or districts entitled to aid to which no certificates have been issued. The trustee, paying agent or other person holding original certificates shall surrender the same for cancellation upon the issuance of certificates as herein provided. No refunding certificates shall be issued and delivered to any municipality or district until all original certificates issued to or in aid of said municipality or district are surrendered for cancellation." It is certain that §§ 11 and 12 of act 11 of 1934 at least amend all prior acts in reference to the grant of aid by the State to municipal improvement districts and express the terms and conditions upon which the State is willing to grant such aid. *Refunding Board* v. *Bailey,* 190 Ark. 558, 80 S. W. (2d) 61.

It is also manifest by §§ 11 and 12 of act 11 of 1934, act 184 of 1927, act 8 of 1928, act 85 of 1931 and act 248 of 1931, that the State intended and had the purpose of making gratuities to all municipal improvement districts which conformed to the conditions prescribed in said acts; but such aid cannot be demanded as a legal right save in such cases where the applicant has com-

plied with all conditions of the grant. See *Street Improvement District* v. *Arkansas Highway Commission,* 190 Ark. 1045, 83 S. W. (2d) 81. Primarily, the State of Arkansas had no legal obligation to pay for improvements effected by municipal improvement districts. The acts heretofore discussed provide an exclusive remedy to municipal improvement districts for payment or refunding of their obligations incurred in effecting improvements of continuations of State highways. Since the State had no legal obligation to fulfill in reference to municipal districts, it could attach such conditions to its grant or gratuities as it saw fit. A part of § 11 of act 11 provides: "Any municipality or street improvement district entitled to aid under said act 248 for which no certificates have been issued shall apply to the State Highway Commission for aid within sixty days from the effective date of the act or thereafter be forever barred from the benefits hereof." This provision amends all prior acts on this subject and is a condition precedent to the legal right of any municipal improvement district to assert a legal claim against the State. These observations seem axiomatic.

Appellant's primary contention seems to be that act 11 of 1934 does not expressly provide that municipal improvement districts' indebtedness incurred in improving continuations of State highways as provided in act 85 of 1931 shall be barred at the expiration of sixty days, and that such construction should not be implied. When act 11 of 1934 is considered and construed as a whole, it is manifest that the Legislature had the intention and purpose to deal with all State obligations for expenditures made by municipal improvement districts upon continuations of State highways through cities and towns, and, when the act is so considered, it is apparent that the Legislature intended to require all municipal improvement districts to file claims for State obligations within sixty days after the effective date of act 11 of 1934. The mere fact that moral obligations created by act 85 of 1928 were omitted from express designation is not important when it is considered that the subject-matter was being dealt with as a whole. Upon no other theory could

the State ascertain its final and ultimate obligations. Undoubtedly, had appellant filed its claim under the authority of act 85 of 1931 or as supplemented by act 248 of 1931 or as amended by act 11 of 1934, it would have been favorably considered and decided by the State agencies, but such is not its status. We conclude therefore that when appellant failed to file its claim with the State Highway Commission within 60 days after the effective date of act 11 of 1934, it lost any right it previously had to such State aid.

Appellant's next contention is, conceding the point just decided, that by act 76 of 1935 its claim was revived and extended, and that it may now file its claim for State aid, regardless of the limitation contained in act 11 of 1934. Act 76 of 1935 was passed and approved subsequent to the adoption by the people of Amendment No. 20 to the Constitution of 1874, which provides:

"Except for the purpose of refunding the outstanding indebtedness of the State and for assuming and refunding valid outstanding road improvement district bonds, the State of Arkansas shall issue no bonds or other evidences of indebtedness pledging the faith and credit of the State or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the State voting on the question at a general election or at a special election called for that purpose."

Granting appellant's contentions that the State has a moral obligation to pay appellant district the actual cost of making the improvements upon Seventh Street in Texarkana which was an extension of State Highway No. 67, it does not follow that this moral obligation may be converted into a legal one without running counter to Amendment No. 20. This amendment provides in express terms that the State shall not issue bonds or other evidence of indebtedness except by and with the consent of a majority of the qualified electors except for the purpose of refunding existing indebtedness of the State. Appellant's claim is not an existing indebtedness of the State, but is only a moral obligation to be discharged upon such terms and conditions as may be prescribed

by the donor. It follows from this that any allowance to appellant district by the State Refunding Board would be an increase of the State's obligations or the pledging of the faith and credit of the State without a previous vote of the people authorizing it. We conclude therefore that act 76 of 1935 is violative of Amendment No. 20 and is unconstitutional and void.

We take notice of the argument made that practically all other municipal improvement districts in the State similarly situated to appellant have received State aid as provided by the Legislature in the various acts, heretofore discussed, and that appellant district should not be denied the privilege except upon the clearest grounds. We subscribe to this doctrine, but for the reasons heretofore stated we are of the opinion that appellant has lost its right to State aid by its own negligence and delay in filing claim therefor.

The circuit court's views, conforming to these expressed herein, are in all things affirmed.

COLEMAN *v.* LITTLE ROCK.

4-4168

Opinion delivered December 2, 1935.

E. W. Moorhead, for appellants.

Ed I. McKinley, Jr., and *Carl Jaggers,* for appellee.

SMITH, J. Appellants who operate dairies near the city of Little Rock brought this suit to restrain the city from collecting an inspection fee from them. The relief prayed was denied, and they have appealed.

The fees complained of are collected under the authority of city ordinances No. 4017 and No. 4405, and these are attacked upon the grounds that (a) they were enacted without authority and (b) are unfair, excessive and discriminatory.

Under ordinance No. 4017 dairymen selling milk in the city of Little Rock are required to pay an inspection fee of $1 for each cow milked with a minimum fee of $10. This is the fee applicable to grade A dairymen of whom there are 110. Grade B dairymen are charged $3 for the first cow milked and 25 cents for each additional cow. Pasteurizing plants of which there are three in the city pay a flat fee of $100. Testimony was offered to the effect that these plants handled more milk than do all the grade A dairymen. It is finally insisted that ordinance No. 4017, which fixes the inspection fees, has been repealed by the later ordinance which contains no provisions requiring fees to be paid.

The power of the city to enact the ordinances in question is settled by the opinion in the case of *Carpenter* v. *Little Rock,* 101 Ark. 238, 142 S. W. 162, where the validity of a similar ordinance was upheld, notwithstanding the provisions of the act of the General Assembly approved May 31, 1911, which appears as § 7533 of Crawford & Moses' Digest. This is conceded, but we are asked to overrule that case. This we decline to do, as

the opinion appears to be sound and to be fully sustained by the authorities.

The argument that the fees are excessive and that the ordinances were passed not for the purpose of regulation but as revenue measures may be answered by saying that the undisputed testimony shows that the duties imposed by the ordinances are discharged at a cost in excess of the revenues produced.

In answer to the argument that ordinance No. 4017 discriminates against grade A dairymen in favor of grade B dairymen and against both classes in favor of the pasteurizing plants in the city, it may be said that the grade A dairymen sell direct to the consuming public whereas the grade B dairymen sell to pasteurizing plants where the milk is treated for the purpose of insuring purification. No laboratory tests are required by the ordinance of milk from grade B dairymen while such tests are required and are frequently made of the milk from the grade A dairymen. It does appear that the inspection of the cows is the same at both classes of dairies, including the tuberculosis test, and that the same inspection is made of the dairy plants and the appliances there in use. The pasteurizing plants are all in the city, whereas the dairies are located in various directions and distances from the city. This testimony is not sufficient to authorize and to require the finding that the classification of dairies is so unreasonable as to be arbitrary and discriminatory nor that there has been any discrimination in favor of the pasteurizing plants. *Fort Smith* v. *Roberts,* 177 Ark. 821, 9 S. W. (2d) 75.

It is finally insisted that ordinance No. 4017 was repealed by ordinance No. 4405. There is no express repeal of the first by the latter but it is insisted that it was impliedly repealed in that the later ordinance takes up anew the whole subject and covers the entire ground of the subject-matter of the former, and was evidently intended as a substitute for it. If this be true, it has been repealed by implication. *State* v. *White,* 170 Ark. 880, 281 S. W. 678.

Ordinance No. 4017, which consists of 39 sections, is entitled, "An ordinance to protect the health of the citi-

zens of Little Rock by providing for milk and dairy inspection, and providing a penalty for violation, and for other purposes." Ordinance No. 4405, which consists of 19 sections is entitled, "An ordinance defining 'milk' and certain 'milk products,' 'milk producer,' 'pasteurization,' etc., prohibiting sale of adulterated and misbranded milk and milk products, requiring permits for the sale of milk and milk products, regulating the inspection of dairy farms and milk plants, the testing, grading, labeling, placarding, pasteurization, regrading, distribution, sale and denaturing of milk and milk products, providing for the publishing of milk grades, the construction of future dairies and milk plants, the enforcement of the ordinance, and the fixing of penalties."

The later ordinance elaborates the duty of inspections and contains detailed directions in regard thereto but it makes no provision whatever for the payment of the expenses of the vast operations which it authorizes and directs. The undisputed testimony shows that the milk department of the city depends principally upon the fees which the first ordinance authorizes, and, unless the two ordinances are read together, no provision is made for the expenses of the inspection and other operations which the later ordinance requires. The first ordinance was passed in 1926 and the second in 1929, and the city has proceeded since this last date as if the two read together comprised the law of the subject. There appears to be no repugnancy between the later ordinance and the provisions of the first ordinance imposing the fees complained of. On the contrary, these fees appear to be indispensably necessary to the discharge of and the payment for the services which the second ordinance directs, and we conclude therefore that there has been no implied repeal of the first ordinance. The court below refused to enjoin the collection of these fees; and as this action is correct the decree must be affirmed, and it is so ordered.

Ex parte KELLEY.

Crim. 3973

Opinion delivered December 2, 1935.

Reuben Chenowith, for appellant.

Carl E. Bailey, Attorney General, and *Guy Williams,* Assistant, for appellee.

HUMPHREYS, J. This is an appeal from a final order of the circuit judge of the eleventh judicial circuit denying a petition seeking the release or discharge of Louis Kelley, a minor, fifteen years of age, from the Industrial School for Boys of the State of Arkansas, who was committed to said school for his reformation by the judge of the juvenile court of Pope County on September 14, 1935.

It was alleged in the petition for a writ of habeas corpus that the order committing Louis Kelley to said school was void on its face. The order is as follows:

"Now on this day before me, M. L. Turnbow, judge of the juvenile court of Pope County, Arkansas, comes the above-named defendant and delinquent child, and also comes Sol Kelley, the father of said child, after due notice of said hearing had been given him, and upon hearing of the evidence introduced and after examination of the witnesses introduced by Reuben Chenowith, attorney for Sol Kelley, said father, the court doth find from the evidence that said Louis Kelley, aged 15 years, is a delinquent child, is incorrigible and cannot be controlled by his parent, Sol Kelley; that it is found to be to the best interests of the public and of said child that said child be committed to the Industrial School of

the State for Boys for such time as is necessary for his reformation.

"It is therefore considered, ordered and adjudged by the court that the said delinquent child be and is hereby committed to said Industrial School for Boys of the State of Arkansas for such time as may be found necessary for his reformation. And it is further found by the court that said proceedings were held on August 26, 1935, but that said order of commitment did not recite all the findings and facts and was omitted from the record, same is hereby ordered as corrected, now for then, and that said corrected order and commitment be together with said delinquent child immediately delivered to the committing officer to be filed as corrected with the superintendent of said Boys' Industrial School of the State of Arkansas.

"This September 14, 1935.

"M. L. Turnbow,
"Juvenile Judge."

It does not appear in the face of the order that a petition was filed prior to making same in accordance with the provisions of § 5758 of Crawford & Moses' Digest. The filing of a petition in accordance with said section was jurisdictional. Without such a petition, the juvenile court or judge thereof acquired no jurisdiction to commit the boy to the Boys' Industrial School of Arkansas. The judgment or order should have recited all jurisdictional facts, as a proceeding under the Juvenile Court Act is a special proceeding. *Jackson* v. *Roach,* 176 Ark. 688, 3 S. W. (2d) 976. On account of the failure to so recite, the judgment or order is void on its face and subject to collateral attack.

The circuit judge erred in dismissing the petition for *habeas corpus,* and his judgment in dismissing same is reversed, and the cause is remanded with directions to sustain the writ and discharge Louis Kelley from the Boys' Industrial School of Arkansas.

PROGRESSIVE LIFE INSURANCE COMPANY *v.* RILEY.

4-4055

Opinion delivered December 2, 1935.

Duty & Duty, for appellant.

W. S. Atkins, for appellees.

MEHAFFY, J. On December 16, 1934, the appellee, Melvin Riley, filed suit in the Hempstead Circuit Court against the appellant, alleging that in June, 1934, the appellant issued to Alberta and Carrie Riley a policy of life insurance, and that Melvin Riley was named beneficiary under the terms of the policy, and was to receive $333.33 upon the death of Alberta Riley; that Alberta Riley died on August 20, 1934, and that the insurance company had refused to pay said sum. Judgment was asked for above sum together with interest, 12 per cent. penalty, and attorney's fee.

On January 16, 1935, the appellant filed answer denying all the material allegations in the complaint. On January 21, 1935, T. S. Cornelius, R. V. Herndon and

Murl Cornelius Herndon, partners doing business under the firm name of Hope Furniture Company, filed motion to be made parties plaintiff, and in their petition it was alleged that, prior to the filing of the suit by Melvin Riley, the said Melvin Riley had transferred and assigned his claim against the appellant, to the extent of $108.50. The assignment was in writing, and filed with the appellant. The Hope Furniture Company alleged that it was entitled to $108.50 out of any sum collected from the appellant, and entitled to have that sum paid before the appellee, Melvin Riley, was entitled to recover anything in his own name.

The court granted the order and made the Hope Furniture Company a party, but no summons was issued on the complaint of the Hope Furniture Company. On the same day, January 21, 1935, the court granted judgment in favor of Melvin Riley for $224.83 with 6 per cent. interest and 12 per cent. penalty on $333.33, and an attorney's fee of $100. Judgment was rendered without any service in favor of the Hope Furniture Company against the appellant for $108.50.

Two days after the judgment was rendered Claude Rankin and Alfred Featherston, attorneys for appellant, who had filed the answer of appellant, filed a motion for continuance, setting up that they had been employed prior to the session of the General Assembly of the State of Arkansas, and unable to be present at the defense of the cause at that term of court, and Senator Featherston claimed exemption under the law. It was thereupon ascertained that judgment had already been entered, on the 21st day of January. The attorneys, Rankin and Featherston, then filed a motion to vacate the judgment, which motion was heard on January 23 and overruled. Hence this appeal.

The record shows that the attorneys filed an answer to the complaint on January 16, and the judgment recites, and this is not disputed, that the case was regularly set for trial on January 21, and that defendant's attorneys had been notified. The judgment also recites that the cause was submitted to the court upon the com-

plaint of the plaintiffs, answer of defendant, and the evidence adduced, from which the court finds, etc.

In appellant's motion to vacate the judgment, it states that it has a meritorious defense. It does not, however, state what its meritorious defense is. It states in said motion that it had theretofore filed its answer. In the answer it denied all the allegations of the complaint. It included in its answer several paragraphs from the policy, and also states that, at the time of the application for insurance, and at the time of the delivery of the policy, the assured was suffering from hemorrhage and other physical diseases and complications, and that her statement to the effect that she was in good health and free from disease at the time of the application was untrue and well known by her to be untrue; that same was a warranty, and by reason thereof, said policy became void. It was also alleged in the answer that appellee had assigned her policy and had no interest in it, and that, if anything was due, it was due to the Hope Furniture Company.

In appellant's motion to vacate the judgment, it probably meant for the court to take its answer as its allegation of a meritorious defense.

It first contends that the case should be reversed because no service was had after filing the motion or intervention of the Hope Furniture Company. It could not have been prejudiced by this because the Hope Furniture Company only claimed that it was entitled to recover in the event the appellee, Melvin Riley, recovered, and the intervention of the Hope Furniture Company did not in any way increase the demand against the appellant. It was sued for $333.33 by Melvin Riley, and the Hope Furniture Company merely asked a portion of that amount be adjudged due it. If the appellant owed that amount, it was immaterial to it whether Melvin Riley received all of the judgment, or the Hope Furniture Company received part of it. Moreover, the appellant alleges in its answer that the policy was assigned to the Hope Furniture Company, and that the assignment was on file with it. It knew that the case was set for trial on January 21st, and did not suggest to the court

that it desired a continuance for any reason, did not suggest that either of its attorneys was entitled to have the case continued because of the session of the Legislature, and, although it knew when the case was set for trial, it did not make any move for a continuance until two days after the judgment. No reason is suggested why it did not make its motion for continuance before judgment, and, so far as the record shows, there was no reason why it did not do so.

It is contended by the appellant that the attorney's fee and penalty should not be permitted to stand because the appellee did not recover the amount sued for. As a matter of fact, the appellee did recover the full amount sued for, but $108.50 of it was directed to be paid to the Hope Furniture Company.

Appellant also says that there was no proof introduced as to the amount of the attorney's fee. The record is silent on that question. The judgment does recite that evidence was adduced at the trial. What that evidence is, we do not know.

We think that the record in this case clearly shows the right to recover the amount sued for, together with penalty and attorney's fee. Appellant probably would have been entitled to a continuance if it had made the application in time, but it could not wait until two days after judgment was rendered and then get this judgment set aside and get a continuance. There is nothing in the motion to vacate the judgment that would justify the court in vacating it. It is not claimed by the appellant that it did not know when the case was set for trial, nor is it claimed that there was any unavoidable casualty or misfortune or other cause that prevented appellant from being present on the 21st, when the case was tried.

The judgment of the circuit court is affirmed.

WISEMAN *v.* ARKANSAS UTILITIES COMPANY.

4-4063

Opinion delivered December 2, 1935.

[redacted]

Millard Alford and *Thomas Fitzhugh,* for appellant.

Bevens & Mundt, for appellees.

BUTLER, J. This appeal is from a judgment overruling a demurrer of the appellant filed to appellees' complaint, by which it was sought to restrain the appellant from collecting a sales tax on its product, and, the appellant having elected to stand on its demurrer, the appeal is also from the decree adjudging to the appellees the relief prayed.

Appellee Arkansas Utilities Company is a manufacturer of artificial gas at Helena, Arkansas, which it distributes to over six hundred consumers. The gas is manufactured from coke, oil and steam, nothing else being used in its manufacture. Appellant contends that appellee is liable to the payment of a sales tax under the general provision of act 233 of the Acts of 1935 contained in paragraph A of § 4, providing: "The tax imposed by this section shall apply to (a) All sales at retail of tangible personal property," and in paragraph B of § 4, providing: "That the tax applies to 'all retail sales at or by restaurants, cafes, cafeterias, hotels, dining cars,

auctioneers, photostat and blue-print sales, funeral directors, and all other establishments of whatever nature or character selling for a consideration any property, thing, commodity, and/or substance'." Reliance is also placed upon paragraph C of § 3 defining the term "business," and paragraph B of the same section defining the term "sale at retail." The argument is made that as artificial gas is tangible personal property (36 C. J. 737) it comes within the meaning of paragraph A of § 4, and paragraph B of § 3, and, as it is a commodity or substance, it comes within the meaning of paragraph B of § 4.

It is the contention of appellee that paragraph D of § 4 relates to and mentions the specific items of the nature of the article manufactured and sold by it upon which consumers are required to pay a sales tax, and that this provision controls other more general provisions. That paragraph is as follows: "All retail sales of electric power and light, natural gas, water, telephone use and messages and telegrams." It is argued that since manufactured gas is not referred to in the paragraph quoted, the general provisions would not authorize the collection of a tax upon its sale. We agree with the appellee in this contention and conclude that the decree of the court below was properly rendered. Natural gas possesses many of the properties of the manufactured article, but is different in origin, and manufactured gas would not come within the definition of the former. *Osborn* v. *Arkansas, etc., Co.*, 103 Ark. 175, 146 S. W. 122. The only authority therefore for the tax sought to be imposed would be the general provisions. Paragraph D, quoted above, contains the definite expression of the legislative intention with respect to the item of the nature of appellee's product, and controls the general expression in the act. It is well settled that where there is, in the same statute, a particular, and also a general enactment, the latter including what is embraced in the former, the particular enactment is operative, and the general enactment must be taken to effect only that which, within its general language, is not within the provisions of the particular enactment. *Hodges* v. *Dawdy*, 104 Ark. 583,

149 S. W. 656; *U. S.* v. *Chase,* 135 U. S. 255; 25 R. C. L., 1010 and 1011.

It is the general rule that a tax cannot be imposed except by express words indicating that purpose. The intention of the Legislature is to be gathered from a consideration of the entire act, and where there is ambiguity or doubt it must be resolved in favor of the taxpayer, and against the taxing power. *McDaniel* v. *Byrkett,* 120 Ark. 295, 179 S. W. 491; U. S. Merriam, 263 U. S. 179; 59 C. J., 1131. This rule fortifies the appellee in its contention, and, regardless of whether manufactured gas was omitted by accident or design, the fact remains that under any construction of the act it is doubtful whether the tax was intended to be imposed, and, with this doubt resolved in favor of the taxpayer, the decree of the trial court must be affirmed. It is so ordered.

WEST *v.* WALL.

4-4059

Opinion delivered December 2, 1935.

John C. Sheffield, for appellant.

A. M. Coates, for appellee.

BAKER, J. J. T. Wall sued West-Hornor Motor Company, composed of M. E. West and E. T. Hornor,

and also Rose-Jacobs Machine Works, a partnership composed of C. E. Jacobs and Robert Rose, alleging that on or about July 1, 1934, while driving upon the highway, south of Helena, as he approached and was ready to drive upon a narrow bridge, he observed another car approaching the same bridge from the direction opposite to that he was pursuing. He stopped until the approaching car had passed over the bridge, and then proceeded upon his journey. A short time prior to the accident, and at a point a short distance south of the bridge, Wall had passed Rose upon the road, going north toward Helena, the same direction Wall was traveling. Rose was driving a truck at a speed of forty miles or more, according to the undisputed testimony. Before Wall had left the bridge at which he had stopped, and had gained sufficient speed to be out of danger from the approaching truck driven by Rose, Rose ran the truck into the rear of Wall's car, causing considerable injury to the car and also injuring Wall. At the place of the accident Rose could have driven from the road into a field as there was at that place no ditch or other obstruction to prevent him from so doing. Rose and Jacobs were operating a machine shop, and desired to purchase a truck for use in their business.

On Saturday afternoon prior to this accident above stated, Jacobs procured this truck from the West-Hornor Motor Company in order that he might try it out to determine whether it would be suitable for the business of the Rose-Jacobs Machine Works. The brakes upon the truck were in very bad condition. In fact perhaps wholly inadequate. Jacobs knew of this fact, but he drove the truck away from the West-Hornor Motor Company's place of business on the afternoon prior to the accident.

It is undisputed also that Jacobs advised Rose on the next morning of the bad condition of the brakes, and Rose, with full knowledge of this condition, on that Sunday morning, took the truck to drive six or eight miles south to get a cable, and take it to their shop. He had gone to the place where the cable was located, loaded it into the truck, and was returning to the shop at the time the accident occurred. He had a friend riding with him

in the truck, whose testimony is to the effect that at the time of the accident the truck was running between 40 and 45 miles an hour. This witness was wholly disinterested, had no connection with any of the parties, except that he was the guest rider of Rose. Rose and Jacobs made no defense to the suit. Upon the final trial, judgment was rendered against all of the defendants for $1,000. The appeal to this court by West and Hornor, operating as West-Hornor Motor Company, is to test the correctness of the judgment as against them.

There is no dispute that Rose was traveling at a high rate of speed, nor is there any question about the extent of the injuries, nor the amount recovered therefor. The case went to trial upon the appellee's testimony. Appellants asked the court to direct a verdict in their favor.

Do the facts above stated legally justify the rendition of the verdict and judgment against the appellants West and Hornor? We think that the appellants who were dealers in automobiles knew or ought to have known the actual condition of the truck at the time it was delivered over to Jacobs, who tried to test it before buying it; that these appellants knew, or ought to have known, that the truck would be used upon the streets or highways in making this test, and that they may be charged with knowledge of the danger of operating a truck or motor vehicle without brakes in sufficiently good condition to enable the operator to control it.

Whatever the negligence imputed to the appellants from facts stated here, it must be treated as admitted or confessed.

We think, however, that the above facts under the circumstances in this case do not warrant the rendition of the verdict and consequent judgment. These appellants, defendants below, were entitled to have the court direct a verdict in their favor.

The appellee attempts to evade the fact that the truck was driven by Rose, who was in no way connected with the appellant company, by arguing that Rose was demonstrating the truck to himself to determine whether he would buy it. At least, it must be said that the appel-

lants were not demonstrating the truck. The most favorable statement that could be made for the appellee was that Rose was testing the truck to determine whether he and Jacobs would become purchasers of it. Moreover, he was doing more than making a mere test. He had put it to use and was operating it upon a business trip made for his company. He was one of the partners of the Rose & Jacobs Machine Company. He was using the truck to haul the cable to the shop. His work at that time was wholly independent of the West-Hornor Motor Company.

It must also be admitted that Rose was driving at a very high rate of speed, when it is considered that the truck was without brakes. It may also be urged with equal propriety that since the proof shows that Rose could have left the road and have driven the truck into a field by the side of the road, without trouble or danger of doing injury to himself or any of the other parties, and thereby have prevented the collision or accident, he may be said to have been rather grossly negligent. He was competent to appreciate the danger as he was a machinist. The proximate cause of the injury was negligence of Rose upon the business errand for the partnership of which Rose was a member.

As was said by this court in the case of *Pittsburg Reduction Company* v. *Horton,* 87 Ark. 576, 579, 113 S. W. 647: "It is a well-settled general rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. The difficulty arises in each case in applying the principle to a given state of facts."

We think in the proposition before us there can be no difference of opinion upon the matter that Rose's negligence was in itself sufficient to cause the injuries suffered, and necessarily was the proximate cause of them. *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898; *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816.

Therefore whatever may have been the negligence of the appellants, that negligence was too remote and cannot be treated here as a concurring cause. Rose and

Jacobs were both machinists, both experts, both knew of the condition of the truck. Neither was connected in any particular with the West-Hornor Motor Company. They were not demonstrating for that company. They were testing the truck for themselves, looking after their own business interests for their own profit.

Many authorities could be cited supporting our conclusions above set out. *Bizzell* v. *Hamiter,* 168 Ark. 476, 270 S. W. 602; *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229; *Keller* v. *White,* 173 Ark. 885, 293 S. W. 1017.

We must conclude that the court erred in not directing a verdict for the appellants. The judgment against them is therefore reversed, and the cause as to the appellants is dismissed.

BASS *v.* STATE.

Crim. 3970

Opinion delivered December 9, 1935.

Otis Nixon and *E. W. Brockman,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

MCHANEY, J. Appellant, on May 26, 1930, was, upon his plea of guilty, convicted of murder in the first degree in the Benton Circuit Court and sentenced to life im-

prisonment in the State penitentiary, where he is now and has been since said date confined. On December 16, 1934, he filed in said court his petition for a writ of error *coram nobis,* in which he sought to set aside the judgment entered on his plea. The court, after hearing the testimony offered, dismissed his petition, and the case is here on appeal and certiorari.

Appellant first insists that the writ should have been granted because the Benton Circuit Court was without jurisdiction of the offense, since, as he says, the murder was committed in the State of Missouri, and the dead body was thereafter brought into Benton County, Arkansas; and, second, that he pleaded guilty through fear of mob violence, and because of duress and undue influence practiced upon him by his counsel, who refused to do anything for him unless a plea of guilty was entered in the Benton Circuit Court.

It is admitted by appellant that his guilt or innocence cannot be inquired into in this proceeding. As said by this court in *Howard* v. *State,* 58 Ark. 229, 24 S. W. 8: "The office of the writ is to correct an error of fact in respect to a matter affecting the validity and regularity of the proceedings in the same court in which the judgment was rendered, and where the record is, when the error assigned is not for any fault of the court; those errors which precede the judgment—as error in the process, or through default of the clerk; where an infant appears by attorney, and not by guardian; where the defendant was insane at the time of the trial, or died before judgment. And this writ has been sustained where the defendant was induced to plead guilty to a charge of felony through fear and by reason of the threats of a mob.

"But it will not lie to contradict or put in issue any fact that has been already adjudicated in the action. An issue of fact wrongly decided is not error, in that technical sense to which the writ refers. If the error lie in the judgment itself, it must be corrected by appeal or writ of error to a superior court." Citing a great many cases.

In 16 C. J., p. 1327, the rule is also stated as follows: "The writ of error *coram nobis* does not lie to

correct an issue of fact which has been adjudicated, even though wrongly determined; nor for alleged false testimony at the trial; nor on the ground that a juror swore falsely as to his qualifications; nor for newly-discovered evidence. Further, it is not available when the facts complained of were known before the trial, and where advantage could have been taken of the alleged error at the trial. The writ will not lie to vacate a judgment because of defendant's inability to prepare the record on appeal within the statutory time." See also *State* v. *Hudspeth, post* p. 963.

Under these rules, it is difficult to see how the writ can afford appellant any relief. The court was a court of original and exclusive jurisdiction of the crime charged. The question of venue was one of proof. The fact, if it be a fact, that the crime was committed in the State of Missouri was known to appellant before the trial, and he could have taken advantage of it at the trial. The same thing is true in relation to his alleged fear of mob violence and the alleged coercion and undue influence of his attorneys. Moreover, the proof taken on his petition for the writ does not support his allegations. It is not alleged nor attempted to be proved that he could not get a fair trial in Benton County, nor that the people of that county were prejudiced against him, but only that some of his confederates in the commission of the murder had threatened him. His attorneys were men of high professional standing, and no doubt advised him to enter his plea of guilty in the best of faith, in order to save his life. The writ, in a proper case, will be issued to set aside a conviction on a plea of guilty forced by fear of mob violence. See footnote 93 to 16 C. J., page 1327, for the cases so holding. But see also *Alexander* v. *State,* 20 Wyo. 241, 123 P. 68, Ann. Cas., 1915 A., p. 1282, holding the petition for the writ was insufficient to show that the petitioner's plea of guilty was entered under a fear of mob violence based on reasonable grounds. The petition and proof in this case are both insufficient to show that his plea of guilt was based on a well-grounded fear of mob violence.

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

DOSS *v.* GEPHART.

4-4064

Opinion delivered December 9, 1935.

Ross Mathis, for appellant.

Jonas F. Dyson, for appellee.

JOHNSON, C. J. This action was brought by appellees, Mrs. Jewell Gephart, executrix of the estate of Dr. R. T. Gephart, deceased, and Dr. W. T. Wilkins, against appellant, C. T. Doss, to recover judgment for services rendered as physicians during the years 1930 and 1931, aggregating $271.

The testimony adduced in behalf of appellees, when viewed in the light most favorable to them, as we are required to do under repeated opinions of this court, is to the following effect: Appellant owns and operates a farm situated in Woodruff County, upon which reside a number of tenants or share-croppers. Dr. Gephart, the husband of appellee, Mrs. Jewell Gephart, died in 1931, but prior thereto was a practicing physician in the vicinity of appellant's farm. Beginning about the year 1920, Dr. Gephart, deceased, began rendering professional services to appellant and his tenants, and these professional serv-

ices were continued up to and until his death, at which time the total charges for such services were the sum heretofore stated. Dr. Gephart kept these accounts by what is known as the "card system," and the accounts reflect that the actual book charges were as follows: "Doss Farm," then specifically to the tenants to whom the professional services were actually rendered. At various times between 1920 and 1930 statements of tenants' accounts were rendered by Dr. Gephart to appellant, and the sums called for therein were promptly paid by appellant. Substantially, this is all the competent testimony adduced by appellees in support of their contentions that the professional services rendered by Dr. Gephart and Dr. Wilkins were so rendered at the special instance and request of appellant. The testimony referred to above is wholly insufficient to support the judgment of liability. The charges made by Dr. Gephart in his bookkeeping system were in effect against tenants and not against appellant. The charge, "Doss Farm," was not in fact a charge against appellant, but was merely an identification used for the purpose of locating the tenants to whom the charges were actually made, and the mere fact that appellant paid to Dr. Gephart sums due by his tenants would not render appellant liable for all other sums not due, and neither would such circumstances be sufficient to infer a contract therefrom.

Appellees rely upon *Grayson Lumber Co.* v. *Talley,* 190 Ark. 37, 76 S. W. (2d) 950, as support for the recovery, but such is not its effect. There positive testimony was adduced establishing the contract of hire, whereas in the instant case there is no testimony showing or tending to show that Dr. Gephart rendered professional services at the instance or request of appellant.

The question of differentiating between an original undertaking and a collateral promise as presented and decided in *Millsaps* v. *Nixon,* 102 Ark. 435, 144 S. W. 915, and *Grady* v. *Dierks Lumber Co.,* 149 Ark. 306, 232 S. W. 23, is not presented in this record for consideration, as the sole question here is: Is the testimony sufficient to show an original undertaking on the part of appellant to

pay for the professional services rendered to his tenants?

There being no substantial testimony to support the verdict of the jury and the consequent judgment, the cause will be reversed and dismissed.

MARATHON OIL COMPANY *v.* SOWELL.

4-4025

Opinion delivered December 9, 1935.

H. G. Ross, Hardin & Barton and *Henry E. Spitzberg,* for appellant.

Joe Horton and *Evans & Evans,* for appellee.

MCHANEY, J. Appellee, Robert Sowell, is the administrator of the estate of his late son, Montie Sowell. He brought this action as administrator, in which he and his wife joined, to recover damages against appellant and John O. Adney for the death of said intestate, caused by the operation of a truck driven by said intestate. It is alleged in the complaint that both Adney and Montie Sowell were employees of appellant, which is denied by the latter. Adney was operating and had for several years operated a distributing station at Booneville, sell-

ing appellant's products at wholesale. Montie Sowell, a young man 26 years old, was employed by him to drive his truck in making deliveries of appellant's products. He had been in such employment for several months. On the afternoon of March 20, 1934, decedent, under instructions from Adney, delivered a truck load of gas to the C. C. C. camp near Blue Mountain, some fourteen miles distant east of Booneville. About 7:30 in the evening, on his return trip, after passing through Magazine, going west on highway No. 10, at or near Scott Creek, some six miles from Booneville, the truck was turned over on the highway, throwing him therefrom to the ground, from which he received such severe injuries that he died about 2:45 A. M. that night in the hospital at Paris. The truck was a 1929 model "A" Ford, 1½ ton capacity. It had been bought new by Adney in December, 1929, and it had been used in the service all of that time, having run, according to the speedometer, about 35,000 miles. At the point of the accident, the road approaching Scott Creek from the east is down grade and curves to the north as it approaches the creek, and then, after crossing the culvert over the creek, curves back to the left or south, making an "S" curve in the road. Just west of the creek, where the new highway turns to the left, the old highway went straight forward. Montie Sowell was alone on the truck, and no person, as far as this record discloses, witnessed the accident. Several persons appeared upon the scene shortly after the accident, and they testified that they traced the tracks of the truck and found that some distance east of the culvert, instead of following the curve of the road to the right or north, the truck pursued a straight course up almost to the abutment of the culvert, and that the left wheels of the truck were almost off the south side of the highway, when there was a quick turn to the right and on to the culvert, which it crossed. Instead of taking the south curve, after crossing the culvert, the truck went straight ahead and went off the new road and onto the old road when it turned suddenly to the left toward the new road, where it turned completely over, alighting on its wheels with the front headed to the southwest and with the lights still on. The gravel was loose

and kicked up. They judged that the truck had turned completely over because the cab was demolished. A passing motorist picked up Montie Sowell and took him to Booneville, where he received treatment and was later taken to the hospital in Paris, where he died. He does not appear to have made any statement regarding the cause of the accident, although several witnesses said he was conscious.

Appellees based their action against appellant and Adney on the ground that Adney was an employee of appellant, and that Montie Sowell was also its employee, having been employed for it by Adney; that Adney, acting for himself and as agent and employee of appellant, was guilty of negligence in furnishing Montie a "defective and worn-out truck with which to perform his duties of his employment"; and that the latter was injured "by reason of the negligence of the defendants in permitting and maintaining the use of such a defective truck in its business." Appellant and Adney denied these allegations. They defended on the ground that Adney was an independent contractor of appellant, and that Montie Sowell was his employee, and that there was no relation between appellant and Sowell of either master and servant or principal and agent.

Trial to a jury resulted in a verdict and judgment in favor of appellees in the sum of $6,000. For a reversal of the judgment against it, appellant argues a number of assignments of error with much reason and force. In view of the disposition we make of this case, we find it necessary to discuss only one of them, for we are of the opinion that the evidence fails to show any actionable negligence which is shown to be the proximate cause of the injuries to and death of Montie Sowell. For the purposes of this decision, we assume without deciding that Adney and Sowell were both employees of appellant, and that the truck driven by the latter was in a worn and defective condition, and that the risk of operating it in such condition was not assumed as a matter of law. Even so, there is no evidence in this record that the condition of the truck caused the accident. Repeating the facts briefly, the undisputed evidence shows that the deceased was

driving the truck west, going down grade, as he approached an "S" curve across the culvert of Scott Creek; that he almost failed to make the turn as he crossed the culvert, where he sharply swung his car to the right; that he failed to take the turn to the left as he crossed the culvert, but permitted the truck to run off the road where it turned over. The evidence further shows that, after the accident, the truck was driven into Booneville on its own power, not steering perfectly because a bolt in the front spring had been freshly broken. The mechanic who examined the car found that the top of the spring bolt had been freshly sheared off, in the accident. There is no evidence that the truck was steering badly prior to the accident. On the contrary, one witness, Mr. Balkman, testified that the truck passed him shortly before the accident as he was driving with his wagon and team along the highway in the same direction, and that the truck showed no evidence of bad steering as it passed him. If presumptions are to be indulged in, and they are not, it is just as reasonable to presume that the method and manner of driving the truck was the cause of the accident as it is to presume that the defective condition of the truck caused it. It might have been caused by the speed of the truck in the loose gravel. It might have been caused by the negligence of the driver in failing to watch the road and to observe the curve which he was approaching on a down grade. It might have been caused by any number of reasons as well as the defective condition of the truck. The law, however, does not permit verdicts and judgments to rest upon speculation and conjecture. *Nat. Life & Acc. Ins. Co.* v. *Hampton,* 189 Ark. 377, 72 S. W. (2d) 543. It is the general rule in this State that in an action for personal injuries caused by the negligent conduct of another, no recovery can be had, in the absence of evidence showing it to have been the proximate cause of the injuries complained of. As stated by Judge HART in *Mays* v. *Ritchie Grocery Co.,* 177 Ark. 35, 5 S. W. (2d) 728: "It is also the general rule in this State that, in order to warrant a finding that negligence was the proximate cause of an injury, it must appear that the injury was the actual and probable consequence of the negligence and that it ought to have been foreseen in the

light of attending circumstances." Also, as we said in *Wisconsin & Arkansas Lumber Company* v. *Scott,* 153 Ark. 65, 230 S. W. 391, quoted with approval in *Alaska Lumber Company* v. *Spurlin,* 183 Ark. 576, 37 S. W. (2d) 82: "To constitute actionable negligence, there must be negligence and injury resulting as the proximate cause of it. Proximate cause has been defined as a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue."

Here there is no evidence to show that the injury and death of Montie Sowell were caused by the alleged defective condition of the truck. For this reason the judgment must be reversed, and the cause remanded for a new trial.

THOMAS *v.* WASSON.

4-4068

Opinion delivered December 9, 1935.

Ernest Briner, for appellant.

McDaniel, McCray & Crow and *Trieber & Lasley,* for appellee.

BUTLER, J. On January 3, 1933, the Citizens' Bank of Benton undertook to accept deposits of Albert Thomas as treasurer of Saline County under a written agreement by which it was stipulated "that all public funds deposited in the Citizens' Bank, Benton, Arkansas, by the said Albert Thomas, as treasurer of Saline County, Arkansas, where deposit receipts are marked 'Special,' shall be a preferred claim and an express trust, and Citizens' Bank becomes trustee, and said deposits shall at all times be considered a prior and preferred claim in said bank." Thereafter, and to February 28, 1933, there was deposited by the appellant, Thomas, $15,398.06. The bank functioned in the ordinary way until February 28, 1933, when it restricted the withdrawal of deposits. By this action five per cent. of the public funds of Saline County, amounting to the sum of $777.08, was subject to withdrawal, and the remainder of the deposit in the sum of $14,620.98 was frozen. This action of the bank was validated by § 1 of act No. 96 of the Acts of 1933. From February 28th the bank operated on the "restricted basis" until March 2, 1933. During this interval, Thomas, as

treasurer, deposited $54.75, and there were presented to the bank on February 28th two of his checks drawn February 27th on the deposit of the public funds, these checks aggregating the sum of $768.60, being paid and charged against the unrestricted balance of $777.08 and leaving a balance of $8.48. On March 2d, following, the bank closed its doors and was taken over by the Bank Commissioner for liquidation as an insolvent bank on the 22d of that month. Between these dates the cashier of the bank absconded, taking with him approximately $6,344.54 of the bank's cash, leaving $447.05, which was the only cash coming into the hands of the Bank Commissioner when he took possession. After the Commissioner took over the bank, the defaulting cashier sent his wife various money orders, amounting to the sum of $500, which were delivered immediately by her to the Bank Commissioner. Afterward the Commissioner received from the surety on the cashier's fidelity bond the sum of $6,206.47.

During the process of liquidation appellant filed a petition in the Saline Chancery Court which in effect asked that $4,265.37 of Saline County warrants, owned by the bank and for which the county was liable, be offset against the restricted deposit, and the warrants delivered to the appellant as county treasurer. As a further offset, he prayed that three personal notes of his own for $237, $200 and $686.25, respectively, be allowed against the said deposit; also, that the two checks aggregating $768.60 presented February 28, 1933, be charged against the restricted deposit, and the unrestricted deposit be credited with this sum. Finally, it was prayed that the restricted deposit be declared a prior and preferred claim upon the sums remaining in the bank as augmented by the amount paid by the surety on the cashier's bond and the $500 in money orders delivered to the Commissioner by the wife of the cashier.

The court granted so much of the prayer of the petition as related to the offset of the county warrants and two personal notes of Thomas amounting to the sum of $437, but refused to offset his personal note amounting to $686.25 for the reason that the same had been hypothe-

cated and delivered to secure a loan to the insolvent bank. With respect to the priority claim, the court restricted that to the amount of cash actually on hand in the insolvent bank when the Bank Commissioner took charge, and to the $54 deposit and the item of $8.48 of the unrestricted deposit.

The appeal questions the action of the lower court in refusing to grant the prayer of the petition in its entirety. The appellee has prosecuted no cross-appeal, and therefore the action of the court allowing as offsets against the public funds on deposit two personal notes of the county treasurer is not before us. Certainly, however, the court properly refused to allow as an offset the personal note for $686.25. That note was not the property of the bank, but was in the hands of third persons who acquired it for value. There is no merit in appellant's contention that there was no evidence to establish this fact. The schedule filed by the liquidating agent disclosed this, and it appears not to have been disputed in the course of the proceeding.

The court also properly upheld the application of the two checks presented on February 28, 1933, at the time when the bank had gone on a restricted basis. To do otherwise would have been in plain contravention of the basis upon which withdrawals were restricted and would have created a preference in favor of the appellant. The amount subject to check was $777.08. Therefore, any checks tendered after the bank was on a restricted basis were necessarily payable from the unrestricted fund. The contention that the cashier agreed that the checks could be drawn on the restricted balance can have no effect, as this promise would serve to nullify the restrictions on the withdrawals validated by § 1, act 96, *supra*.

Doubt is expressed by counsel for appellee of the sufficiency of the agreement of January 3, 1933, as interpreted by the conduct of the parties to create such a trust relationship as would entitle appellant to any priority. This position seems not to have been advanced in the court below, and, as no cross-appeal has been taken by the appellee, that question has been settled by the

decree. Therefore the status of appellant's deposit must be determined on general principles as modified by § 1 of act No. 107 of the Acts of 1927 (§ 717h, Castle's Supp. to Crawford & Moses' Digest), and by act No. 96 of the Acts of 1933.

Section 1 of act 107, *supra,* provides as follows: "All prior creditors as in this section hereinabove defined, except only employees, laborers and clerks of said bank and the Commissioner and said prior creditors under an act of Congress, who shall be paid in full out of any assets of said bank available therefor after the payment of the expenses of administration, shall have such priority to the extent that they respectively may specifically identify their property in its original or traceable form into the hands of the Commissioner, and, if unable so to identify such property, to the extent that the assets in the hands of the Commissioner, in the form of the lowest amount of cash on hand, exclusive of deposits in other banks and all other assets, remaining in said bank continuously after their said respective priorities arose, were necessarily increased by such property * * *, and, if such cash on hand is not sufficient to pay all such prior creditors in full, the same shall be prorated among them. Beyond the extent of the priority of any such prior creditor respectively as aforesaid, and so far as his priority to such extent cannot be paid in full, but not otherwise, the said creditors shall be general creditors of said bank."

The general rule defining the right of a *cestui que trust* to follow trust property, or the proceeds thereof, has been stated thus: "As a general rule, if the property may be distinctly traced and identified, and superior rights of innocent third persons have not intervened, a *cestui que trust* may, in equity, follow and recover, or impress a trust on, trust funds or property which have been diverted, no matter what the form into which they have been converted nor into whose hands they have come. If it can be traced and identified, this rule applies, although the subject-matter of the trust consists of money. * * * The right to follow trust property in equity being based on the theory that a right of property still exists in the *cestui que trust,* the equitable right of recovery or

reclamation generally does not exist, or no trust or lien can be enforced, if the trust property cannot be identified, or traced into some specific fund or thing, which is sought to be charged, and into which the original trust property has gone in some form or other." 65 C. J., pages 963, 965, §§ 888, 889; *Rainwater* v. *Wildman,* 172 Ark. 521, 289 S. W. 488; *Redbud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Hill* v. *Miles,* 83 Ark. 486, 104 S. W. 198. As illustrative of this rule, our court, in the case of *Oswego Milling Co.* v. *Skillern,* 73 Ark. 324, 84 S. W. 475, quotes an expression of Sir George Jessel in Re Hallett's Estate as follows: "If these trust funds went 'into the bag of money' held by the receiver, the court could compel him to take out an equal amount, and the general creditors would not be injured, for the balance left would be the same as if these trust funds had never been put in. But we must first know that the money went in before we order it taken out; otherwise the rights of the general creditors may be prejudiced."

The statute quoted, *supra,* extends the rule only to the extent that, where the fund "in its original or traceable form" cannot be identified, the trust shall, nevertheless, attach "to the extent * * * of the lowest amount of cash on hand * * * remaining in said bank continuously after their said respective priorities arose" where the assets of the bank were necessarily increased by said property.

The necessary effect of §§ 3 and 4 of act 96, 1933, is that, where a bank has begun to operate on a restricted basis, the fund out of which prior or preferred claims are to be paid is the cash on hand at that time, and that the priorities and the extent thereof of the depositors are to be determined by conditions at the time of the placing of restrictions on withdrawals. The applicable part of act 96, *supra,* to the question under consideration is found in §§ 3, 4 and 5, as follows:

"Sec. 3. In all instances in which any bank * * * has restricted the withdrawal of deposits or may hereafter restrict such withdrawals, the amount allowed to be withdrawn by a depositor under the terms of said restriction

* * * shall, in the event of the Bank Commissioner taking charge of said bank, be classed as a prior claim, and, as such, shall be paid out of the assets of the bank of every nature owned by it at the date said restriction was imposed, and shall be paid before all other prior claims which are payable out of the said then owned assets, except (a) the claim of an employee, laborer or clerk of said bank; or (b) the Commissioner as to deposits made by him in said bank as a depository of moneys of another bank of which he has taken charge; or (c) a prior creditor who is such by virtue of an Act of Congress applicable to the said bank, as and to the extent in each such excepted instance as provided by law.

"Sec. 4. Such deposits so accepted (while the bank is on a restricted basis) shall either be held in cash in the vaults of the bank accepting such deposits, or shall be deposited, subject to withdrawal on demand, with another bank. * * * Depositors and other contract creditors of the said bank who have become such since the imposing of a restriction on the withdrawal of deposits, and whose property has increased its cash assets, shall, respectively, to the extent of such increase, be prior creditors of said bank in the event the Bank Commissioner thereafter takes charge thereof, and as such shall be entitled to payment of their claims against the said bank out of the assets representing the deposits and other contract claims ahead of all other creditors of said bank.

"Sec. 5. All creditors * * * who became such prior to the imposing of any restriction on the withdrawal of deposits shall have the same priorities, and to the same extent, as now provided by law, except as by this act otherwise provided."

From these provisions it will be seen that permissible withdrawals, in cases where the Bank Commissioner takes charge, become prior to all other prior claims and are to be paid first except as to certain classes of claims which are not involved in this action. The payment of the permissible withdrawals are guaranteed by "the then owned assets of the bank." The deposits made while a bank is on a restricted basis "shall either be held in cash

in the vaults of the bank accepting such deposits or shall be deposited, subject to withdrawal on demand, with another bank."

As all the cash in the bank in question, at the time it closed its doors, was pledged to the payment of the withdrawal balances and to the payment of deposits made on and after February 28, 1933, it is questionable whether any of the cash on hand when the bank closed on March 2, 1933, could have been appropriated to the payment of prior claims arising and existing before February 28th, and, certainly, to no more than the cash on hand when the Commissioner took charge. The contention that the money paid by the surety and the $500 in money orders delivered to the Commissioner should be treated as money on hand when the Commissioner took charge and subject to the appellant's prior claim cannot be sustained. To do so would violate the rule quoted *supra* and the intent of § 1, act 104, *supra.* The amounts paid by the surety company and the wife of the cashier did not exist at the time the bank went on a restricted basis; they were the proceeds of choses in action. The appellant has been unable to trace any of the trust fund into these items, and is therefore not entitled to a preference in them. Applying the general rule, quoted *supra,* to insolvent bank, this court, in *Hill* v. *Miles, supra,* held (quoting headnote): "The mere fact that an insolvent bank owes one for trust funds does not entitle such creditor to a preference, to obtain which he must show that the receiver or person having charge of the assets of the insolvent bank has in his hands some of the trust funds or property purchased by such funds or into which such funds have been changed or invested."

We are of the opinion that the trial court correctly applied this rule to the developed facts, and that its decree should be, and is, affirmed.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* EUDY.

4-4069

Opinion delivered December 9, 1935.

S. Hubert Mayes, Gustave Jones and *J. Hugh Wharton,* for appellant.

Fred M. Pickens and *H. U. Williamson,* for appellee.

BAKER, J. Mrs. Ella Eudy sued the Coca-Cola Bottling Company of Arkansas in the circuit court of Jackson County. She alleged that on or about November 18, 1933, she purchased from a man named Taylor, who was running a restaurant in Newport, a bottle of Coca-Cola, manufactured and put up by the defendant; that she drank about two-thirds of the contents of the bottle at the time of the purchase and immediately became nauseated;

that upon an examination of the remaining portion of the contents of the bottle she discovered therein a spider. She was sick for several days, and had a physician who administered to her, and that she was not really well for a considerable time thereafter.

Upon a trial of the case, on February 5, 1935, there was a verdict by the jury for $600 and consequent judgment was rendered. From this verdict and judgment is this appeal.

Immediately after this trial, motion for a new trial was filed and overruled, and appeal was prayed and granted.

The only matters raised upon this first motion for a new trial were as to the sufficiency of the evidence offered in support of the complaint, which charged facts above stated, and in addition thereto that the contents of the bottle from which she drank was poisonous and in an unfit and unwholesome condition for human consumption. It was also charged in said motion that one of the attorneys representing the plaintiff had made improper and prejudicial remarks in the course of his argument. He had said in effect: "You have to be careful in weighing and considering the testimony in this case, because, when you go up against these powerful corporations, you have a hard fight." This remark was objected to at the time made. The jury was cautioned by the court and advised not to consider the remark; that it was improper and should not have been made. These are the only issues appearing in the record at that time. We think it is sufficient to say, without detailing the testimony adduced upon the trial, that a careful examination of this entire record to that point discloses no prejudicial error.

The foregoing statement must not be taken as an approval of the remark made by the attorney, but the remark did not express or allege any statement of fact which would, or might tend to, present the jury any new matter. As we understand the record, the attorney was merely seeking to give advice to the jury by way of caution, and the most that could be said about his remark is

that he was perhaps expressing an opinion that was in no wise warranted.

We think, however, the court properly instructed and advised the jury upon objections made by the appellant. We assume that the jury did not permit itself to be influenced, as the trial court promptly and correctly instructed them in regard to the remarks objected to by appellant. *Hogan* v. *State, ante* p. 437. Cases cited in above case are authoritative and followed by this court.

Later, however, on April 30th, the defendant, appellant here, filed a supplemental motion under the seventh subdivision of § 1311, Crawford & Moses' Digest, praying that a new trial be granted to it upon newly-discovered evidence. To this supplemental motion was attached an affidavit of Mrs. Moore. This affidavit is here copied, omitting only the formal parts thereof.

"On November 18, 1933, Mrs. Ella Eudy, who is now Mrs. Ella McAllister, was staying at my house on Plum Street in Newport, Arkansas. About three or four days prior to November 18, 1933, Mrs. Ella Eudy caught a spider in an old sweater at my house. I was working for Owen and Bowie at that time, and when I came in from work that day Mrs. Eudy had the spider in a glass of water and told me she was going to go to Paul Taylor's Restaurant and buy a Coca-Cola and put it in there and make like she was sick. On November 18, 1933, about 2:30 or 3:00 o'clock in the afternoon, I came home. Mrs. Eudy told me she was going to Paul Taylor's and get a bottle of Coca-Cola and drink part of it and then put the spider in it and make like she was sick. She asked me to go along with her. Alfred McAllister, Mrs. Eudy McAllister's husband, came in and heard her tell me about it. Mrs. Eudy McAllister took the spider out of the glass of water and put it in her handkerchief and took it with her. Before we left the house, Mrs. McAllister took a dip of snuff so, she said, when she swallowed the Coca-Cola she would get sick and vomit. She didn't dip snuff at all that I know of. We went to Paul Taylor's Restaurant, Mrs. McAllister and I, and each ordered a bottle of Coca-Cola. Paul Taylor, I think, waited on us. Paul left out soon

and he gave us the Coca-Colas. Buddy Mink and Henry Tracey were working there. Mrs. McAllister drank about half the Coca-Cola and slipped the bottle down in her lap and put the spider in it. She began to gag and spit and Buddy Mink came and picked up the bottle and looked at it and said there was nothing in it. Then Mrs. McAllister whispered to me that she 'dropped that damned spider.' She then took my bottle of Coca-Cola and put the spider in it, and while Buddy Mink was looking in her bottle, and when he set her bottle down, she switched bottles with me and called Buddy Mink and told him, 'There is something in there.' She then began to act like she was sick and tried to vomit. Henry Tracey said he would call a doctor, and she said to call Dr. Best. Henry Tracey and I took her in the back room of the restaurant and laid her down on a bed. Dr. Best brought her to my house and gave her some medicine, and she wouldn't or didn't take any medicine at all, and I threw the medicine away. Dr. Best came out to see her twice and she went to his office once. She had her doctor bill charged to me, and I paid for the medicine. Never was a dose of it taken. She never was sick, and thirty minutes after she was home from drinking the Coca-Cola she ate some bologna sausage and crackers. When any one would come to the house, she would run and jump into the bed and act like she was sick.

"There positively was nothing in the bottle but Coca-Cola when she bought it. She put the spider in it so she could sue the Coca-Cola Company for some money."

Upon presentation of this supplemental motion for a new trial, Mrs. Moore and other witnesses were sworn and testified. It is unnecessary to repeat in detail the testimony of all of the witnesses, particularly that of Mrs. Moore, whose testimony was substantially in accord with her affidavit.

Lawrence A. Goldman testified that he was employed by the Coca-Cola Bottling Company to investigate this case when the suit was filed. He went to Newport and first obtained permission from counsel for appellee to talk with his client, Mrs. Eudy. From her he learned that

Mrs. Moore was with Mrs. Eudy at the time Mrs. Eudy went to the restaurant and drank the Coca-Cola. Mrs. Eudy also advised him as to the location of the place where Mrs. Moore lived in Newport. He called at that place twice on that day and failed to find Mrs. Moore there. On two or three other occasions, later on, when he was in Newport, perhaps on other business, he attempted to find Mrs. Moore to interview her in regard to facts concerning this suit. He was never able to find her. He also testified that Mrs. Eudy informed him that Mrs. Moore would testify to substantially the same facts that Mrs. Eudy had stated to him. On account of these statements, he was led to believe that Mrs. Eudy would have Mrs. Moore present when the case came on for trial. It was not implied by this statement that Mrs. Eudy had attempted to deceive him in this matter, but it was merely a conclusion he had reached from her statements. This conclusion was justified when it is considered that the two women were friends and associated, going about together, and living together in the same house. It was also shown that, at the time the parties announced ready for trial, counsel for the appellant announced that he desired to have Mrs. Moore present for the trial of the case as his client had insisted that she be called as a witness for her, but that he had been unable to find Mrs. Moore as she had left Newport and gone to Hot Springs; that he had been so anxious to procure her attendance that he had had a long-distance telephone call for her with the telephone company for several days. At the time of the presentation of this motion Mr. Pickens, appellee's attorney, made substantially the same statement.

Without going more into detail as to the testimony, we think the facts were perhaps clearly stated by the trial judge after hearing the motion and all of the testimony in relation thereto.

"This, as I see it, is rather an unusual matter. This affidavit goes right to the merit of the lawsuit. While I think it is somewhat of a discretionary matter with the court, it is not really corroborative evidence. This party was living with the plaintiff at the time, and they went

to this place together, as their testimony shows, and this woman took the spider, already had it prepared, and took snuff in order to make herself sick in order that she might vomit, so this witness says here. It seems to me that both sides have been trying to get hold of this particular witness to see what she was going to say about it. I realize that very often after a case is tried that it is not a very difficult matter to discover some new evidence. However, this is a different proposition that the court is confronted with here. If the jury believe this statement, of course, they would—and that is for them to say—there would be a different result in the lawsuit. There is no question about that. I will say this, gentlemen, it would not take long to try it, but I would say that you have to pay all those costs in this last suit. I would think you ought to do that if it is tried."

The foregoing is a substantial compliance with the law as the same is set forth in the seventh subdivision of § 1311, Crawford & Moses' Digest. We suggest that the trial court's announcement upon this hearing of his findings and conclusions warranted the relief prayed for in this supplemental motion.

On the matter of diligence, it would seem that both plaintiff and defendant were anxious to secure the attendance of this witness, and nothing that has been suggested to us that tends to show a dereliction of duty, except the fact that several months elapsed after the filing of this suit before it was tried, and that this time was apparently sufficiently long that one might have found or located the absent witness, but this conclusion is met with the undisputed proof that neither party was able to locate the witness during this interval, and we accord to both sides under their statements full credit, as the trial court did, that each was making an effort to do so. Therefore, it seems that the requirement of the exercise of diligence has been fully met.

Without attempting further argument, let it be said that we approve the statement of the trial court as to the materiality of this testimony.

The court had present all of the witnesses. He observed them, and this testimony must have been convincing to him. It was not cumulative. No one presented any such facts upon the trial.

Moreover, if this testimony is to be believed, it clearly indicates that the plaintiff had no cause of action at all. The trial court fully understood all of these matters and frankly and clearly stated the effect thereof, but he ruled adversely to what we think was practically the irresistible conclusion from his findings. No fact was announced that justified this ruling, not even the testimony that Mrs. Moore had been somewhat discredited by an officer's statement reflecting seriously upon her reputation in the community.

This court said in the case of *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922: "The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused."

The above quotation was cited with approval in the case of *Twist* v. *Mullinix,* 126 Ark. 427, 428, 190 S. W. 851. In the case of *Twist* v. *Mullinix,* however, the trial judge announced with reference to a motion for a new trial: "While the jury determined by their finding that the defendant, Twist, did not make a full and complete statement of all the facts within his knowledge when consulting said attorney, in my judgment the finding upon that question was against the preponderance of the evidence."

It is likewise true in the present case, as in the case of *Twist* v. *Mullinix,* the court announced the finding of fact contrary to and not supporting the ruling he made thereon, and, on account thereof, the judgment in the case of *Twist* v. *Mullinix* was reversed.

Under subdivision 6, § 3219, Crawford & Moses' Digest, there is a provision for the granting of a new trial to a defendant who has discovered important evidence in his favor since the verdict. Upon this paragraph or sub-

division, relating to criminal procedure, the ruling of this court has been substantially the same as under the provision relating to civil procedure. This is made clear by the opinion in the case of *McCullars* v. *State,* 183 Ark. 376, 382, 35 S. W. (2d) 1030.

In the McCullars case, *Twist* v. *Mullinix* is cited as authority, and also the case of *Mueller* v. *Coffman,* 132 Ark. 45, 200 S. W. 136. There the court, as in this case, expressed a view as to the value and effect of the testimony, expressing his surprise at the jury's verdict and otherwise indicating his conclusions of certain facts contrary to the decision announced in denying a motion for a new trial.

These are not all of the authorities, by any means, which might be gathered together in relation to this interesting subject, but certainly a sufficient number to illustrate the rule.

Let it be said in conclusion that the law is well settled and of long standing, and, we think, well exemplified in the cited cases, all of which were well presented and thoroughly considered. It is our duty to follow this well-defined rule of decisions. The trial court was not in the proper exercise of that vested discretion in overruling this supplemental motion for a new trial after he had reached conclusions announced. A determination of the facts by the trial court, as made and announced, justified only one result, that the appellant was entitled to a new trial.

Therefore the judgment is reversed, and the cause is remanded for a new trial.

Mr. Justice MEHAFFY dissents.

AUTO SALES COMPANY, INC. *v.* MAYS.

4-4071

Opinion delivered December 16, 1935.

K. T. Sutton, for appellants.

J. M. Jackson and *Peter A. Deisch,* for appellee.

SMITH, J. Appellee, Mays, brought this suit to rescind a contract for the purchase of an automobile, and also to recover certain expenses incurred in putting the car in first-class condition, as it was represented to be when sold, and from a decree in his favor is this appeal.

The sale was evidenced by a written contract signed by C. N. Summers, who was designated therein as the seller, and by A. L. Mays, who was designated as purchaser. Mays testified that he purchased the car as he supposed from the Auto Sales Company, and that his copy of the contract named that corporation as the seller. This copy was not produced at the trial. The copy which was produced, and which was signed by Mays referred to only Summers as the seller.

But, regardless of this conflict in the testimony, Mays insists that the car was purchased from Summers as the agent of the sales company, which company was in fact the seller.

The Hudson Motor Car Company was made a defendant along with the Auto Sales Company, but there was no service upon or entry of appearance by it, and the decree, as we interpret it, was not rendered against the Hudson Company, and, of course, should not have been.

The Auto Sales Company is a corporation domiciled in Memphis, Tennessee, and insists that proper service was not had upon it, but, before raising that question, it had filed in the cause an answer, a demurrer and a motion for a continuance. The filing of any one of these pleadings operated to enter the appearance of the company and renders unimportant the question of the sufficiency of the service. *Chapman & Dewey Lbr. Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. (2d) 80.

The decree of the court below was based upon the finding that Summers was the agent of the Auto Sales Company, hereinafter referred to as the company, and had made a sale of the car for his principal. It is insisted that this finding is unsupported by the testimony.

We think, however, the testimony does support that finding. It was admitted that Summers had previously been the agent of the company, but he and the manager of the company testified that he did not occupy that relation at the time of the sale. It was shown, however, that Summers had been arrested at Helena for failure to pay an occupation tax as an automobile salesman in that city. He was released from arrest upon the payment of the tax by the company, the receipt for which tax was issued in its name on January 12, 1934, and the sale in question was made while this receipt was effective. When Mays bought what he supposed to be a new car, he traded in an old one. This old car was delivered to the sales company by Summers, and it was admitted that this was done pursuant to an arrangement to that effect under which Summers made sales of cars. The company was shown to have paid storage on a wrecked car, which had been sold by Summers. One McMillan testified that he bought a similar car about the time Mays purchased his, and that Summers could not close the deal until the sales company gave assent to certain of its details. When the defects in the car appeared, the sales company directed that it be brought to Memphis for repairs; and several trips were made to the garage of the sales company for that purpose. The proof of these facts suffice to establish the existence of Summers' agency, and that in making the

sale he had acted for his principal, the Auto Sales Company.

We do not recite the testimony as to the defects in the car. They were shown to have been of such a character as to have entitled Mays to a rescission of the sale. Indeed, the testimony appears to show that a car sold as new, and for the price of a new car, was in fact a used car when sold to Mays. He was asked by the company's attorney, "Did Mr. Summers offer to give you a brand new car, a 1935 model, for this car and $100?" He answered that Summers did not, but that the manager of the sales company had.

Mays might have asked a rescission of the sale of the car upon discovering that it was not the car which it was sold and warranted to be, but he did not elect so to do. On the contrary, he continued to use it without tendering its return. The measure of Mays' damages, therefore, was the difference between the value of the car in good condition, or new as it was represented to be, and the value in its defective condition as it was at the time of the sale. *Fine* v. *Moses Melody Shop,* 182 Ark. 155, 30 S. W. (2d) 317.

The purchase price of a new car was $676, which was the price Mays contracted to pay. The decree appealed from permits Mays to retain the automobile and directs that the defendant, "pay to the plaintiff, A. L. Mays, the sum of $603.76, the amount which is found to be due the plaintiff with interest at the rate of 6 per cent. from date until paid. If the unpaid notes for the purchase price are surrendered and cancelled, then the defendants are to be given credit for the amount thereof."

It is obvious from these recitals, that the court did not attempt to grant relief by way of rescission. Mays had not elected to exercise that option, and in this the court was correct. But we are of the opinion that excessive damages were awarded. The manager of the sales company was asked by the court, "What is the depreciated value of the car?" He answered, "About $250." There was no amplification of this statement, and we interpret it to mean that this was the value of a car for which Mays had agreed to pay $676. Mays was there-

fore overcharged $426 for the car, for which excess he should have judgment; but this judgment may be satisfied *pro tanto* by the surrender and cancellation of any outstanding and unpaid purchase money notes.

SINCLAIR REFINING COMPANY *v.* DUFF.

4-4085

Opinion delivered December 16, 1935.

Malcolm W. Gannaway, for appellant.

Majors, Robinson & Boyer, for appellee.

BAKER, J. R. N. Duff sued the Sinclair Refining Company in the circuit court of the Dardanelle District of Yell County, alleging that he had suffered injuries occasioned by the alleged defective condition of the pumping machinery used in the refining company's plant at Dardanelle to pump gasoline and kerosene from tank cars into stationary tanks. He recovered a judgment, and the refining company has appealed. Without detailing the evidence, it must suffice to say that the facts are substantially as follows:

Duff had worked at the same place for the Pierce Oil Company, the predecessor of the Sinclair Refining Company. At the time he was injured he had been at

the same place of business for ten years or more. The pumps that were first used to transfer the kerosene and gasoline from tank cars to the stationary tanks were operated by hand. Later Duff used his own gasoline engine, which he placed on a concrete block just outside the building. A belt from this engine passed through the wall to a pulley upon a power shaft. This power shaft rested upon a frame in the shape of inverted V's. There was a wheel upon this shaft at one end about twenty-eight or thirty inches in diameter. Near the edge of this wheel another shaft or pitman rod was attached by a bolt with a large nut that would come below or outside of the lower edge of this wheel when the pumping appliance was in operation. The other end of this shaft or pitman rod was attached to and operated the pump.

In June, before this accident occurred in October, the refining company had a new floor put down over the old floor that had been in use for many years. When this new floor was placed under this pumping apparatus, the nut upon the bolt holding the pitman rod upon the wheel would strike the new floor, and would not permit the wheel to turn beyond that point. In order to use the pump, Duff cut away the floor under the wheel at the point where the nut holding the pitman rod would strike. At least a sufficient amount of the flooring was cut away so as to permit the free operation of the pumping machinery, as it had been used prior to the putting in of the new flooring.

The testimony as abstracted here does not show to what depth or width this hole was cut under the wheel, or under the pitman rod where the nut would strike the floor, and as to that particular proposition we can only assume that there was only a sufficient amount cut away to allow the free turning of the wheel.

Kerosene or gasoline was received at this station, perhaps not oftener than once in each three or four weeks, and after the new floor was down the pumping appliances were used perhaps only five or six times prior to the date of the injury. There is no proof abstracted as to who installed that particular bit of pump machinery. Duff testifies that the parts were prepared

by a local blacksmith or mechanic, and he says that he did not install this appliance and did not own the parts. It is admitted, however, that Duff owned the engine that furnished the power for the pumping; that he furnished the gasoline to operate the engine; that the company owned the pumps. We proceed upon the assumption that the Sinclair Refining Company was the owner of this alleged defective appliance. It had been in the place of business for ten or twelve years, operated exclusively, as we understand, by Duff.

After the Sinclair Refining Company had bought the Pierce property, it put down the new floor. Shortly thereafter Duff said that he complained to one of the traveling agents or superintendents of the Sinclair Refining Company, a Mr. Wood, about the fact that the floor had been built up so closely under the wheel that it had become dangerous, and that a guard should be placed over or at the wheel on that account. He said that there was a promise to repair or correct this defect. According to his pleadings, this promise was made some three or four months prior to his injury. In his testimony he says that on occasions when he would see this traveling agent for the company, he would complain about this condition. However, he continued to use the appliances until about October 6th. At that time he says he was leaning over the machine to oil some of the parts thereof, when he unconsciously slipped his foot under the edge of the revolving wheel, and his foot was caught by the nut on the bolt, holding the pitman rod, that the bones were broken in some of his toes, and the arch broken down.

The negligence really relied upon was the failure to place or supply a guard for this wheel after the floor had been built up close or near to the bottom side or rim of the wheel. It is contended that the promise of appellant's agent to supply this part or make this repair prevents the application of the doctrine of assumed risk to defeat a recovery.

It is argued in the brief that one could observe the condition of the floor at the point where the wheel was revolving only by stooping low and making a careful

investigation. This may be true, but, even though it should be, the appellee knew more about the bad condition that existed than anybody else. He had been in daily contact with this machinery. He had operated it once or twice a month for many years. When it was changed by putting in another floor an inch and three-fourths in thickness, he was perhaps the first to observe this changed condition. If that created a defect, he was the only one that attempted to correct it. If these facts are not undisputed, they, at least, constitute the most favorable statement that can be made to support the judgment here.

The only proposition the appellant really insists upon as error is that the trial court should have instructed a verdict for the defendant, but refused to do so. This is the only matter we will consider upon this appeal. Appellee did not make the contention, and, of course, could not do so, that appellant owed him any duty to instruct him or advise him as to any dangerous condition of this pumping appliance. There is no pleading or proof abstracted as tending to show what kind of guard should have been provided according to appellee's contention. Appellee knew the exact condition of the wheel and its relation to the floor when in operation. He had helped in part at least to bring about that condition. He negligently placed his foot at the point or place where it would be hit and injured. This was not the conduct or act of the appellant or any of its agents. To argue that the appellant company should have anticipated an injury arising out of the condition above stated is to insist that the appellant company was negligent in not foreseeing or anticipating the negligence of the appellee. Appellee was acting deliberately. There was no emergency. He knew no guard had been placed there, although he said that one had been promised. If the appellee made his complaint about the condition that prevailed within a reasonable time after he had cut away part of the floor with his chisel, then it was approximately four months later before the injury occurred.

We cannot presume and do not presume that the guard contemplated was of such kind or character that

it could not have been made and put in use within a very short time after complaint was made in regard thereto. If it were the duty of the appellant company, under the conditions here stated, to make, construct, or place a guard about the wheel, which point we do not decide, appellee knew within a reasonable time after he had made his complaint whether he might rely any longer upon the promise alleged to have been made by Mr. Wood, the traveling agent who visited Duff shortly after the repairs were made creating the alleged dangerous condition.

Duff was a man of normal mind and intelligence, thoroughly well experienced in the operation of this plant, and hence there was no duty to warn. We are unwilling to say, under the facts developed here that there was negligence as a matter of law to fail to place a guard at this wheel. *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83; *Wilcox* v. *Hebert,* 90 Ark. 145, 148, 118 S. W. 402.

If we should hold that appellant should have placed or constructed a guard, we would be impelled to hold, from the undisputed proof tendered, that the sole negligence causing the injuries was that of the appellee who, without looking, put his foot in the place of known danger.

The only difference between this case and that of *Ward Ice Company* v. *Bowers,* 190 Ark. 587, 80 S. W. (2d) 641, is that in the Ward Ice Company case Bowers, in attempting to kick a piece of ice in the scoring machine, kicked or inserted his foot farther into the machine than he intended it should go and thereby suffered the injuries he complained of. He could see the saws and knew if his foot came in contact with them it would be cut. In this case Duff not only could see the revolving wheel, but he knew exactly what it would do to his foot if he inserted his foot in the hole he had cut out. He knew whether or not the place was so dangerous as to need or require a guard for his own safety. If the guard was a simple one he might have made it himself with no particular trouble or expense. If it were expensive, or complicated, so as to require expert workmanship in making or placing it, and the danger was such as to warrant it, then, after a reasonable time had elapsed after the alleged promise

to repair, if the danger justified, and he did not want to assume the risk, he should have quit rather than to have worked under the menace of such imminent danger.

However, we do not believe such condition prevailed. We assume, according to the verdict of the jury, that he complained to Mr. Wood, and asked about a guard for the wheel. It was not placed within a reasonable time, and at the time of the injuries he knew that it was not there, and, having continued to work under the conditions, he assumed the risk. *Togo Gin Co.* v. *Hite,* 190 Ark. 454, 79 S. W. (2d) 262; *Ward Ice Co.* v. *Bowers, supra; Williams Cooperage Co.* v. *Kitrell,* 107 Ark. 341, 155 S. W. 119; *La. & Ark. Ry. Co.* v. *Miles,* 82 Ark. 534, 103 S. W. 158; *Headrick* v. *H. D. Cooperage Co.,* 97 Ark. 553, 589, 134 S. W. 957.

Under the foregoing conditions as established by the undisputed evidence, the appellee not only assumed the risk incident to his employment, but his own negligence was the proximate cause of his injuries.

The case has been fully developed, thoroughly well tried, and it would seem that the appellee has presented the strongest phases of his case of which it is susceptible.

The court erred therefore in a failure to direct a verdict for the defendant.

Judgment is reversed, and the cause is dismissed.

WORD *v.* SPARKS.

4-3826

Opinion delivered April 22, 1935.

Brundidge & Neelly, for appellant.

S. F. Morton, Cul L. Pearce and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

HUMPHREYS, J. Appellee brought suit on May 9, 1934, against Galloway Woman's College in the chancery court of White County to obtain judgment against it, and an equitable lien upon all its trust funds for the amount of a conditional endowment of United States Liberty Bonds delivered by her husband, Dr. J. E. Sparks, to said college under the allegations that the condition in the endowment contract had been broken, which entitled her to the return of the bonds or their value together with accumulated interest thereon until November, 1923.

It was alleged in the complaint that the bonds were delivered under a conditional written contract by the terms of which her husband, J. E. Sparks, was to deliver appellant $14,000 in United States Liberty Bonds bearing interest at the rate of 4¼ per cent. per annum, with accumulated interest of $149.27, as an endowment, provided that, when the interest added to the principal should amount to $17,143, said college should pay to the donor, as interest on said sum, $600 semi-annually during his life and, in the event of his death, the same amount semi-annually to appellee during her life, and upon her death, that the bonds and interest thereon should vest in said college on condition that, in case said college should fail to make the semi-annual payment of $600 to the donor or appellee, if she should survive him, then either might revoke the donation and retake possession of the

funds conditionally given to the college upon written demand therefor if the college should remain in default in the payment thereof for sixty days after demand.

It was also alleged that, in violation of the trust agreement, appellant sold the bonds and used the proceeds in the construction of a heating plant in the buildings owned and used for college purposes, thereby enhancing the value thereof, and that the plant cannot be removed without great damage to the buildings, and to the heating plant, practically destroying said heating plant.

It is also alleged that, after the heating plant was completed and became a part of the buildings, the college borrowed $90,000 from Booth Brothers and mortgaged almost all of its buildings and other real estate to secure the payment of the loan, and that the mortgagees made said loan with full knowledge of the existence of said written endowment contract between her husband, J. E. Sparks, and the college, and that they knew the proceeds from the sale of the bonds were used in the construction of the heating plant. It was also alleged that appellant began, in the year 1923, to make the semi-annual payment of $600 to her husband and continued to make the payments until his death on the 16th day of August, 1932, and continued to make them to her until January, 1934, at which time it made default and continued in default more than sixty days after written demand to pay same.

It was also alleged that the college owned endowment funds in large amounts not included in the mortgage to Booth Brothers.

The prayer of the complaint was for a judgment for the amount of the bonds and accumulated interest until the year 1923, and that a lien be declared on all the trust or endowment property owned by the college to pay same, superior to the lien of the mortgagees or other creditors.

Shortly after appellee filed her complaint, the Security Bank and the Bank of Searcy filed a suit in said chancery court against Galloway Woman's College alleging that it was an insolvent corporation and praying that its affairs be wound up and that a receiver be ap-

pointed to take charge of all its property. A receiver was appointed, who took charge of all of its property, including the property mortgaged to Booth Brothers.

The receiver filed an answer stating that, after the execution of the written endowment contract between Dr. Sparks and the college, Dr. Sparks agreed that the bonds might be sold and the proceeds used in the construction of a heating plant for the college, and that, by doing so, he lost any equitable lien he might have under said contract on the assets of the college.

Booth Brothers intervened and set up their mortgage and prayed for a foreclosure against the property described therein to satisfy the indebtedness the college owed them, alleging that they knew nothing of the written endowment contract between Dr. Sparks and said college at the time the mortgage was executed to them. The suits were consolidated and tried upon the several pleadings and the testimony adduced, resulting in a decree of foreclosure in favor of Booth Brothers against the property described in the mortgage to satisfy the indebtedness of the college to them, from which there is no appeal; also a decree for a lien on all the other trust funds owned by the college and evidenced by the trust account of the college in favor of appellee to pay for the bonds and accrued interest up to 1923, which had been used in the construction of said heating plant, from which the receiver of said college has appealed.

The endowment contract was introduced in evidence and bears date of January 9, 1920. It was signed in triplicate by J. E. Sparks as party of the first part and the college, by its president and secretary, as party of the second part. It provided for the proper transfer of $14,000 of United States Liberty Bonds bearing interest at the rate of 4¼ per cent. per annum in trust for the college upon condition that, when the interest added to the principal should amount to $17,143, then the college should begin and continue to pay 7 per cent. per annum thereon, payable semi-annually, to Dr. Sparks during his life and to appellee, his wife, for her life, should she survive him, and that, when both should die, the funds and accumulated interest should vest in the college, provided

the interest of $600 semi-annually had been paid, but, in the event that the college should default in the payment thereof for sixty days after written demand, the donee, if living, and his wife if she survived him, should have the right to revoke the donation and retake possession of the funds. It was specifically provided in the contract that the bonds were a gift to the endowment fund and should be held in trust and used for that purpose only in case semi-annual interest had been paid. The bonds were transferred and delivered to the executive committee of the college, and soon thereafter were sold and the proceeds used for the construction of a heating plant for the college, which greatly enhanced the value of the buildings in which it was installed, and it would be impracticable and destructive to the heating plant to tear it out, and would reduce the value of the buildings to do so. The buildings in which the plant was installed were included in the mortgage to Booth Brothers. J. M. Williams, who was the president of the college on January 9, 1920, testified that Dr. J. E. Sparks wrote him a letter on January 6, 1920, stating that for a limited time they might convert and use the proceeds of the bonds in constructing a heating plant for the college, something like two or three years; that he, Williams, suggested attaching the letter to the contract as a part thereof, but it was never attached and cannot be found; that he always regarded the funds derived from the sale of the bonds as a sacred trust fund. It appears that the endowment fund was kept in one account on the books of the college, and that all the property of every kind belonging to the trust or endowment fund was taken over by the receiver. In 1923 the college paid the first semi-annual installment of interest to Dr. J. E. Sparks and continued to pay same promptly to him until his death, and paid it to his wife, appellee, until January 1, 1934, when it made default, and continued in default more than sixty days after demand to pay same before she brought this suit to revoke and retake the funds.

Appellant contends for a reversal of the decree making appellee a preferred creditor to the extent of her

claim in the trust or endowment funds belonging to the college in the hands of the receiver.

The letter of Dr. Sparks referred to by Dr. Williams authorizing the sale of the bonds, and his oral testimony to the effect that Dr. Sparks agreed for him to sell the bonds and use the money for three or four years in order to construct a heating plant for the college did not, and could not in any wise change the written contract. The consent and letters relating thereto occurred, according to the testimony of Dr. Williams, before the contract was signed. All agreements reached between the parties prior to the execution of a written contract are presumed to be incorporated therein. Again, written contracts which have been completed cannot be contradicted or materially changed by oral evidence. The oral evidence as to the use of the bonds is in open conflict and contradictory of the use to be made of the bonds in the writing. Again, a trustee cannot sell the trust fund unless such authority was conferred on him by the creator of the fund, or unless all the beneficiaries consent thereto. 65 C. J. 730; 26 R. C. L. 1283. According to the undisputed evidence, appellee did not consent to a sale of the bonds, and never knew they had been sold until after the college defaulted in the payment of interest to her in January, 1934. It is argued, however, that appellee's remedy and only remedy was and is to enforce a lien upon the heating plant which was constructed with the money derived from the sale of the bonds, and that she cannot now do that because the buildings served by the heating plant have been mortgaged to an innocent and *bona fide* purchaser for value; that for these reasons appellee must be treated as a general and not a preferred creditor. Appellant relies upon the rule announced in the case of *Rainwater* v. *Wildman,* 172 Ark. 521, 289 S. W. 488, as supporting this argument or contention. The Rainwater case cited is unlike the instant case in that the trust fund in the Rainwater case was not traced in any form into the hands of the receiver; whereas all property of the college, including the heating plant, came into the possession of the receiver. In the Rainwater case, the notes claimed were not among the assets of the bank when the receiver

took the property over, and never swelled the assets of the bank. In the instant case, the heating plant constructed with the trust funds greatly enhanced the assets of the college and necessarily swelled them. This plant could not be torn out and removed without destroying its value as well as impairing the value of the buildings. The bonds or trust funds were not dissipated and wasted, but are still a part of the assets of the college, and a separation of the funds is impossible. The facts bring it within the rule announced in the case of *Cavin* v. *Gleason,* 105 N. Y. 262, (11 N. E. 506) as follows:

"So, also, if it appears that the trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with the equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into or constituting a part of the assets." This rule was quoted with approval in the Rainwater case, *supra.*

The trial court was correct in declaring a prior lien to that of general creditors upon all the trust funds belonging to the college in the hands of the receiver to satisfy appellee's claim, except the property mortgaged to Booth Brothers, and the decree will therefore be affirmed. It is accordingly done.

BAKER, J., (dissenting). It is not my purpose in writing this dissent to attempt any elaborate display of authorities.

I mean only to show my disapproval of the majority opinion. I think it is demonstrably unsound.

The undisputed evidence in this case shows that the fund or money sued for as a trust fund had been misapplied, or at least used in the installation of a heating plant. It may be that not all of the fund was so used, but such a substantial portion thereof as would make it unnecessary to attempt any discovery of the small remainder or balance.

Upon the tracing and location of this fund in the heating plant, which was a part of the real property, there was but one remedy open to the claimant, Mrs. Sparks. She had a right to follow this fund and the further right to have enforced against it, or against any property in which it was invested, a lien in order that she might be protected. It is no answer to this contention to say that there was a first mortgage upon this real property in which the heating plant was located. That would not give her any lien or right against any other property into which this fund had never entered.

This conclusion of the majority must be recognized as erroneous when we consider that other parties have claims, not inferior in any respect to that of Mrs. Sparks, and which they can rightfully assert against the property in the hands of the receiver, which funds make up the entire property against which Mrs. Sparks was given a lien. The majority did not intend, by declaring this lien in her favor, to make it against all of the other property in the hands of the receiver superior to any other claim, but such is the effect of the decision, and it results in the same degree of unfairness as if the intention did exist. When all other claims to this fund in the hands of the receiver are paid, claimants must take proportionally less than what is due them, because their money has been taken to pay Mrs. Sparks in full, while her money must remain lost in the heating plant after she shall have been paid. In addition, that balance that remains will be charged with the costs of all the proceedings, including a receiver's fee, before other claimants will share therein.

Therefore the error of the majority makes Mrs. Sparks the favorite beneficiary, preferred over other claimants occupying relatively no worse position than she does, who must lose by reason of this error.

Moreover, in addition to not being warranted by law, the result is grossly inequitable.

SMITH, J., concurs in this dissent.

DENT *v.* ADKISSON.

4-3991

Opinion delivered November 11, 1935.

Barber & Henry and *J. A. Tellier,* for appellants.

R. W. Robins, for appellees.

JOHNSON, C. J. This is the fourth appearance of this case here. On the first appeal, 184 Ark. 869, 43 S. W. (2d) 739, we held that appellants' (who are also appellants here) exceptions to the report of sale under the mortgage foreclosure were sufficient, if sustained by the testimony, and remanded the cause for this determination. Pending the first appeal, appellants instituted an independent action in the Faulkner Chancery Court setting forth facts almost identical with those set forth in the exceptions to the report of sale considered on the first appeal, save that they alleged that appellee had been in possession of the mortgaged premises, enjoying rents and profits, for which an accounting should be had. The trial court sustained a demurrer to the complaint in this independent action, and on appeal we reversed and remanded this cause, see 185 Ark. 1188, 51 S. W. (2d) 523. While the last-mentioned case was pending on appeal here, the trial court heard evidence upon appellants' exceptions to the report of sale as directed upon remand in the first appeal. This hearing resulted in the confirmation and approval of the report of sale. An appeal was duly prosecuted by appellants from this determination which resulted in an affirmance, 186 Ark. 912, 56 S. W. (2d) 768. The opinion in the last-mentioned case was

handed down on February 6, 1933. On April 4, 1933, the trial court at the motion of appellees, dismissed appellants' complaint in the independent action, which was pending on remand from this court, for want of prosecution. The litigation thus rested until May 8, 1934, when appellants filed the present proceeding seeking the vacation of the previous order of dismissal. This motion to vacate alleged a complete history of the litigation as reported and that the dismissal was effected without notice to appellants; also that by agreement or understanding between the parties the matters involved in said suit were passed for trial until a decision was had on the appeal in this court in reference to appellants' exceptions to the report of sale. To this motion to vacate, a demurrer was interposed and sustained by the trial court, and this appeal comes from that order.

The judgment of dismissal was entered on April 4, 1933, and the motion to vacate was filed May 8, 1934, or more than one year thereafter. The judgment of dismissal therefore had become final and conclusive save that it might be vacated for one or more of the reasons stated in § 6290 of Crawford & Moses' Digest. The fifth subdivision of § 6290 is the only provision that could possibly, under the most favorable view, have any application to the facts alleged in appellants' motion to vacate. This subdivision provides: "For fraud practiced by the successful party in the obtaining of the judgment or order," such judgment or order may be vacated. We have always held that the fraud referred to in this subdivision was fraud practiced upon the court in the procurement of the judgment or order and not upon the party or parties to the litigation. See *Holland* v. *Wait, ante* p. 405, and cases there cited.

The only allegation of the motion to vacate which presents even a remote allegation of fraud is that the parties agreed that the pending case would not be tried until the appeal in the pending case in this court was determined. Accepting this allegation as true, it appears that this agreement ended on February 6, 1933, the date on which our opinion was handed down in said case or approximately two months before the order of dismissal

was entered. This length of time afforded appellants ample opportunity to take some affirmative steps looking to the final disposition of the cause on its merits. Appellants urge, however, that no notice was given them that application would be made for the dismissal of said cause on April 4, 1934. We know of no rule of law or statute, and none has been cited to us by counsel, which requires notice in advance of proceedings similar to these under consideration. It is fundamental that parties litigant must take notice of the convening of the court in which they have pending litigation. *Papan* v. *Nahay,* 106 Ark. 230, 152 S. W. 107.

For the reasons stated, the trial court was correct in dismissing appellant's motion to vacate, and the judgment must be affirmed.

PRATHER *v.* STATE.

Crim. 3964

Opinion delivered November 18, 1935.

Floyd Terral, for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* for appellee.

BAKER, J. Ike J. Prather, Otto Ray Bingham, Fred Williams, alias Fred Harvey, and James Edward McCauley were jointly indicted in the Pulaski Circuit Court under § 2438 of Crawford & Moses' Digest upon a charge of possessing burglar's tools. That section of the statute reads as follows: "Possession or manufacture of burglar's tools. Any person who makes, mends, designs or sets up, or who has in his custody or concealed about his person, any tool, false key, lock pick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement or other mechanical device whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door shutter, or window of a building of any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two years, nor more than ten years."

Upon a separate trial, Prather was convicted and has appealed. The material part of the indictment is as follows: "The said Otto Ray Bingham, Fred Williams, alias Fred Harvey, James Edward McCauley and Ike J. Prather, in the county and State aforesaid, on the 30th day of March, 1935, did unlawfully, wilfully, and feloniously have in their possession certain tools, hammer, punches, screwdriver, pliers, wrench, caps and fuses, nitroglycerine, flashlight, gloves and bag, and implements and mechanical devices adapted, designed, and commonly used for breaking into vaults, safes, railroad cars, boats, vessels, warehouses, stores, shops, offices, dwelling houses, door shutters and windows of buildings."

The principal contention made upon this appeal is to the effect that the particular tools, appliances, or devices found in the possession of the appellant were not such that they might be called or designated as burglar's tools and on that account, without regard to the use the defendant might have intended to make of them, he was not guilty.

The rule in the case of *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63, is invoked by appellant to substantiate and make good his contention that tools, appliances and devices found in his charge or possession were of such kind and character that he had the right to have them in possession, as being the every-day working tools of mechanics, plumbers, carpenters, or other persons following lawful pursuits in every community, and he argues that to prohibit the possession of such tools, devices, appliances and materials, as were found under his control and in his possession would be violative of common rights, which are so clearly recognized as being possessed by all citizens, as to make any such attempt to regulate or prohibit the use or possession thereof illegal and void. In the Satterfield case, cited above, it was said: "This statute was passed in 1915, and has never before been before this court for construction. It is notable that the statute does not require an intent to commit the crime of burglary to make the possession of such tools or implements unlawful. The bare possession thereof, without anything more, is made a felony. In this respect it is unlike the statute of some of the other States. This being a criminal statute, it must be strictly construed."

We are in accord with the foregoing announcement. It must be observed, however, that the above statement does not amount to a prohibition of proof or evidence that would establish facts proving or tending to prove that the defendant had in his possession such a group or selection of tools, devices, or materials as might be found to be more nearly suitable for breaking into houses, or opening locked doors and windows, or by explosive forces opening safes or strong boxes, where valuables might be stored or kept, than for any lawful purpose.

The statute does not attempt to describe burglar's tools. Indeed, we doubt if there are any particular or peculiar tools made, used, or adapted solely for burglary. It prohibits the possession of a false key, lock, pick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement or other mechanical de-

vice whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door, shutter, or window of a building of any kind.

The word "bit," used twice in the section, means perhaps the common or ordinary bit possessed by every carpenter and wood workman. We know that it is not in every instance in which one may have a false key that the law is violated, as many large enterprises, particularly those like hotels, possess or have what are called skeleton keys, or master keys, which will unlock all rooms in the building, or maybe just those on a particular floor. Automobile mechanics have force screws with which they separate or draw apart pieces of the machinery upon which they work. Locksmiths have different kind of tools which are designed to pick locks. Practically all workmen use nippers, and wood workmen and smiths use punches. Explosives, such as nitroglycerine, are in common use in every community. Those traveling upon highways frequently find men using these high explosives to move rock, trees or stumps.

Therefore, should we follow the theory upon which this case is presented to us by appellant, that is to say, if the tools, devices, appliances, or materials, were such as might be reasonably used on proper occasions by honest workmen in the prosecution of their respective vocations, then the statute would most probably be futile, so far as its enforcement is concerned. At least, courts and juries would be unable to convict any burglar or any man who might be indicted, unless there was found in the possession of such person some tool, manufactured for or used by burglars, and which would be unsuited for use otherwise. Such construction of this statute would be unwise and would tend to defeat its beneficent purpose in the protection of society against professional lawbreakers.

Perhaps, no fixed rule or announcement should be made as a criterion for guilt or innocence, except that in every instance the matter under investigation should be determined as a matter of fact, controlled or ex-

plained by all of the conditions, circumstances, and such pertinent collateral matters as might be present.

What the writer has just said above may be illustrated by some comparisons and contrasts. No one would think that a man should be indicted or convicted because he had in his possession a sledge hammer, or because he had in his possession a punch, or even pistols or revolvers upon a charge of possessing burglar's tools, though perhaps no other implements or instruments are in more common use by those engaged as burglars than small firearms.

The evidence in this case may be said to be substantially to the following effect, without quoting the exact language of witnesses.

There was found in one of the compartments of a grip or handbag belonging to these parties, who had been indicted, a sledge hammer, with a shortened handle, and a short punch, an ordinary screwdriver, caps used to set off high explosives, nitroglycerine, gloves or mittens, electric fuses, four pistols, with extra cartridge clips for holding cartridges for immediate reloading of pistols, and a flashlight. All of the parties were arrested at or about the same time and had been at rooming houses in two or three different places in the city of Little Rock, prior to their arrest, where they had registered and given fictitious names at the time of registering at the several places where they stopped. The foregoing is a list of the working tools they had in their possession, and we are unable to recognize all of these different articles as being the necessary working tools of any class of labor with which we are acquainted. It is true, as suggested by questions asked of police officers arresting these men, that the pistols are such as used by peace officers and nitroglycerine might be used by oil well drillers, or by some one working in a quarry, or upon a highway.

One other item in possession of the parties, or at least found in the handbag with the other tools and appliances, may be listed as a household necessity, the possession of which is perhaps highly commendable and as civilization rises to its highest pinnacle, perhaps more

in use than any other article described or found in possession of appellant and his associates, and that article is soap. The pistols and soap were not mentioned in the indictment.

All of these facts were properly presented to the jury. Under proper instructions the jury had the right to determine the question or fact as to whether these many different articles and appliances, tools, and materials were kept and held by those in possession thereof, as burglar's tools or appliances, having in view useful and lawful purposes for which they might be used.

There is perhaps no fact better known among enforcement officers at this particular time than the one that burglars use nitroglycerine to blow open vaults and safe doors, that they use soap to build a receptacle at the edge of the door in which the nitroglycerine is poured, so that it flows between the edge of the door and the body or wall of the safe or vault. When the crevice is filled, the "soup" is exploded by a dynamite cap, or at least a cap of explosive force, which sets off or detonates the nitroglycerine.

It is equally well known that hammers are used to knock off combinations on safes, that punches are then used to drive out the spindle, on which are fixed the tumblers which keep the bolts in place to prevent the opening of the door; that those who follow such crimes as burglary and larceny attempt to escape detection by wearing gloves while plying their nefarious trade, thereby preventing the discovery of finger prints which might later cause detection. It is significant in this case also that the testimony shows that one of the guns or pistols had the palm print of the appellant upon it, and also his finger print appeared upon the bottles of nitroglycerine.

This case differs materially from *Jones* v. *State,* 181 Ark. 336, 25 S. W. (2d) 752, wherein an indictment was found under the same section of the Digest.

From the foregoing it must be seen that a charge of this kind is like any other charge, one that may be or may not be susceptible of proof; in other words, it is a question of fact, which, when proved beyond a reason-

able doubt, and so determined by a jury, there is little left for review on appeal.

We are not saying that any tool that could or might be used by a burglar would be such as would justify a conviction, but we are saying that a combination of tools, materials, appliances and devices indicating as clearly as the facts herein shown that such instrumentalities were gathered together and kept in possession, handled by those whose business is such they are unwilling to be known by their own names in strange communities, justify juries in awarding convictions upon proper trials. It must not be understood from the foregoing enumeration of facts, that all of the facts above stated should in any given case be necessarily proved in order to warrant a conviction. We have only attempted to show what the jury was warranted in finding by the verdict. The evidence excites more than a mere suspicion.

The judgment is affirmed.

YELVINGTON *v.* MITCHELL.

4-3982

Opinion delivered November 25, 1935.

W. W. Sharp and *George W. Clark,* for appellant.

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

JOHNSON, C. J. W. H. Robinson died in 1884 and left surviving, his widow and four children, namely: James, Olivia, Minerva and Vee. At the time of his

death he owned and was in possession of 80 acres of land situated in Monroe County. Sometime prior to 1895 the widow of W. H. Robinson, deceased, married a Doctor Boals, and there was to this marriage, one child, Elmer Boals, born. Mrs. Boals died in 1895 and left surviving her husband, Dr. Boals, and Elmer Boals, issue of this marriage, and the children of her former marriage. Mrs. Boals at the time of her death owned, in her own right, 180 acres of land situated in Monroe County and also in addition, some city property located in Clarendon. James Robinson died without issue and unmarried in 1902. After the death of James Robinson in 1902, Minerva E. Yelvington, nee Robinson, took possession of 100 acres of the land belonging to the estates of her father and mother and has continuously since that time occupied same up to the filing of this suit. About the same date last mentioned Olivia Hawkins, nee Robinson, took possession of an 80-acre tract belonging to said estates, and Vee Littleton, nee Robinson, took possession of another 80-acre tract belonging to said estates, and they respectively have continued to occupy same. Dr. Boals died in 1915, and the estate property located in Clarendon was taken possession of by Elmer Boals, and he has continuously collected rents and profits therefrom. Olivia Hawkins, nee Robinson, died some time prior to 1921 and left surviving, Virginia Tichenor, nee Hawkins, and her husband, R. E. Hawkins. In 1921 Minerva E. Yelvington and Vee Littleton acquired by purchase in equal parts the curtesy estate of R. E. Hawkins in and to the 80-acre tract previously occupied by Olivia, or her undivided interest as heir-at-law, in the estates of her father and mother. In 1925 Vee Littleton acquired by purchase the reversionary interest of Virginia Tichenor, nee Hawkins, in and to said estates; Vee Littleton subsequently acquired by purchase from Minerva E. Yelvington the undivided curtesy estate of R. E. Hawkins. In September, 1927, Vee Littleton conveyed her interests in the estates of her father and mother to her two daughters, Nancy and Roselle Littleton for a recited consideration of $1. This suit was filed by Nancy Mitchell, nee Littleton and Roselle Littleton in the Mon-

roe Chancery Court seeking partition of said estates and all interested parties therein were made parties thereto.

Minerva E. Yelvington, appellant here, filed her answer to said complaint in which she affirmatively pleaded a family partition and settlement of the estate belonging to her father and mother and actual occupancy and possession by the respective distributees for a long period of years. She also filed a cross-complaint against the plaintiffs and their mother, Vee Littleton, in which she alleged that she furnished and paid the purchase money to R. E. Hawkins and Virginia Tichenor at the special instance and request of Vee Littleton for their respective interests in and to said estates and for these advances and others to Vee Littleton; that she had in 1921 filed suit in the circuit court of Faulkner County against the said Vee Littleton to recover judgment for the sums advanced, and that on the 21st day of July, 1933, she recovered judgment for the sum of $2,376.97; that the conveyances from Vee Littleton to plaintiffs were colorable and fraudulent, same having been executed with the intention to cheat, hinder and delay cross-complainant and other creditors in the collection of their debts.

The issues thus stated present the decisive issues on this appeal. On the trial the chancellor determined that there was a family settlement of the estates among the interested parties many years prior to the filing of this suit, and each heir was decreed, in kind, the respective interests in the estates heretofore stated. No serious contention is made in reference to this finding of fact. The chancellor determined also that the conveyance from Vee Littleton to plaintiff was not fraudulent and dismissed the cross-complaint in this respect, and this is the principal contention urged on this appeal. On this issue the testimony in behalf of appellant reflects that over a period of years prior to 1927 appellant, Minerva E. Yelvington, loaned or advanced to Vee Littleton various sums of money, some of which was used to purchase the curtesy interest of R. E. Hawkins, deceased; some of which was used to purchase the reversionary interests of Virginia Tichenor, nee Hawkins, in said estates, and

some of which was used for general family purposes, and aggregating more than $2,000; that in the early part of 1921, appellant was urging payment by Mrs. Littleton of her demands or that she be secured to this end; under these circumstances the deed was executed by Vee Littleton to plaintiffs for a nominal consideration, and that this conveyance denuded Vee Littleton of all her visible property save a house and lot situated in Clarendon, of little value. The testimony on behalf of appellees tended to show that the deed from Vee Littleton to her daughters was made at the direction and with the knowledge and consent of appellant; also that the city property retained by Vee Littleton at the time of this conveyance was amply sufficient to pay all her outstanding debts. Without further detailing the testimony adduced on these issues, which would serve no useful purpose as a precedent, it may be said that the chancellor's findings do not appear to be against the clear preponderance of the testimony. *Townes* v. *Krumpen,* 184 Ark. 910, 42 S. W. (2d) 1083; *Moore* v. *Brasel,* 188 Ark. 550, 66 S. W. (2d) 1068.

True it is that Mrs. Yelvington's acts in advising her sister to convey this property to her daughters seem to be inconsistent with all her other acts in the circumstances of this case, yet this seemingly inconsistent attitude is established by credible witnesses, and we are unwilling to disbelieve where the chancellor has given full credence.

It is an established rule of law, adhered to by all courts, so far as we are advised, that a party cannot maintain an action for a wrong where he or she has consented to its commission. This rule finds support in our own cases where we have many times held that money voluntarily paid cannot be recovered merely because such claim was grounded on an invalid or unenforceable demand. *Gates* v. *Bank of Commerce & Trust Company,* 185 Ark. 502, 47 S. W. (2d) 806; *Dickinson* v. *Housley,* 130 Ark. 259, 197 S. W. 25; *White River Lumber Company* v. *Elliott,* 146 Ark. 551, 226 S. W. 164; *Board of Directors* v. *Dunbar,* 107 Ark. 285, 155 S. W. 96. For a general statement of the doctrine, see 1 Amer. & Eng.

Enc. of Law and Practice, § 1022. See also *Beckerle* v. *Danbury,* 80 Conn. 124, 67 Atl. 371.

Moreover, the testimony is in irreconcilable conflict in reference to the value of the property retained by Vee Littleton at the time she executed this alleged fraudulent conveyance to her daughters and we are unwilling to say that a clear preponderance of the testimony shows that this conveyance denuded Vee Littleton of property to the extent that she retained insufficient to pay her creditors at that time. *Jackson* v. *Banks,* 182 Ark. 1185, 33 S. W. (2d) 40; *McDonald* v. *Dorfman,* 182 Ark. 1185, 32 S. W. (2d) 443.

It is also urged that appellant advanced various sums of money to Vee Littleton for the purpose of effecting improvements which the chancellor either overlooked or ignored in stating the accounts between the parties. The testimony on this phase of the case is unusually voluminous. As may be expected in litigation between close kindred, the testimony on this question is in irreconcilable conflict. The parties to maintain their respective positions have related most trivial matters at great length and many charges and counter-charges were advanced and studiously maintained with great zeal; all of which in the last analysis is without value save to extol the contempt and hatred entertained by the one against the other. It suffices to say that the findings of the chancellor on this issue do not appear to be against the clear preponderance of the testimony.

No error appearing, the judgment is affirmed.

STEWART *v.* STATE.

Crim. 3968

Opinion delivered December 2, 1935.

Golden Blount and *Thomas J. Carter,* for appellant.

Carl E. Bailey, Attorney General, and *Guy Williams,* Assistant, for appellee.

SMITH, J. Appellant was tried under an indictment containing two counts. The first count charged him with the crime of burglary, the second, with that of grand larceny alleged to have been committed by stealing thirty dollars, the property of O. J. Clark. He was convicted upon the second count and given a sentence of one year in the penitentiary, from which is this appeal.

For a reversal of this judgment, it is insisted (a) that the indictment does not charge the commission of the crime for which appellant was convicted, (b) that, if he is guilty of any offense, the crime was that of accessory before the fact, whereas appellant was indicted as a principal; and (c) that the testimony is insufficient to sustain a conviction of any offense.

The second count of the indictment upon which appellant was convicted, charging him with the crime of grand larceny, contains allegations sufficient to charge the crime of robbery also. It alleges that appellant "did violently and forceably take thirty dollars from the person of him, the said O. J. Clark." This is a sufficient charge of the asportation required to constitute the offense of larceny. In vol. 2, Wharton's Criminal Law, (12th ed.), § 1163, it is said: "The taking of another's goods out of the place where they were put, though the taker be detected before they are actually carried away, is larceny. To taking it is essential that the thing should be moved from the particular portion of space which it occupied before the alleged taking, although the whole of it need not be moved from the whole of such space. To

take a thing from a person it is necessary that the taker should at some particular moment have adverse possession of the thing. But this independent, absolute control need endure only for an instant."

In the case of *Routt* v. *State,* 61 Ark. 594, 34 S. W. 262, the facts were that the appellant had snatched money from another's hand, without force or putting in fear, but had subsequently used a pistol to prevent the owner from retaking the money. The appellant was indicted and convicted of the crime of robbery and given a sentence of ten years in the penitentiary. In the opinion on the original submission the conviction was reversed because, as was said, the testimony did not sustain the indictment. On rehearing, a motion of the Attorney General to modify the judgment was sustained, and, it was ordered that the appellant be sentenced for the crime of grand larceny. In so doing it was said that "the charge of robbery made against the appellant in this case included larceny. The indictment alleges the value of the money taken to be $100, and under this indictment the appellant might have been convicted of grand larceny." The case of *Haley* v. *State*, 49 Ark. 147, 4 S. W. 746, is to the same effect. The reasoning of the court in announcing this conclusion was that the jury must have found the appellant guilty of larceny to have found him guilty of robbery, but had further found the aggravating circumstances of force and intimidation and the taking of the property from the person of the owner. The testimony in the instant case is to the effect that Clark was robbed of his money by men named Corbis and Ferguson, but appellant was in an automobile one-quarter of a mile away at that time. The testimony is also to the effect that appellant drove in his car from Cave City to Bald Knob where the robbery was committed (a distance of about 100 miles) the two persons were identified as the actual robbers and who confessed their guilt and implicated the appellant as their confederate. Appellant and one McLain remained in the automobile with their lights turned off but with the motor running while Corbis and Ferguson went into the filling station, committed the robbery and returned, running toward the

car, calling to the occupants as they approached the car, "Get the engine running," or words to that effect.

This testimony is sufficient, upon the authority of the case of *Crow* v. *State,* 190 Ark. 222, 79 S. W. (2d) 75, to sustain the finding that appellant was present and therefore was properly indicted as a principal. He performed essential functions in the commission of the crime. He brought the actual robbers to the approximate scene of its commission, and he carried them away after it had been committed, and in the interval had kept his motor running to avoid delay.

As to the sufficiency of the testimony, it may be said that appellant's own witness testified that appellant drove from Cave City to Bald Knob on the day of the robbery, and that Corbis and Ferguson were in the car when it was driven into Bald Knob. Appellant did not testify, but testimony in his behalf was offered to the effect that he picked Corbis and Ferguson up south of Batesville and was paid $3.50 by them to drive them to Bald Knob. One of the principal roads in the State runs from Little Rock through Bald Knob and on to and beyond Newport. When the automobile left Bald Knob, it was driven a mile and one-half toward Augusta, which is not on the road to Newport and then was turned around into the road to Newport. Corbis and Ferguson testified that upon reaching the car after the robbery the money was split four ways and appellant was given one-fourth of it less a few cents in change—which Corbis testified he did not divide. He stated that after the division the purse was thrown out onto the road. The purse was found early the next morning and was returned to and identified by Clark. Corbis and Ferguson testified that, before committing the robbery, they first cooked supper on the side of the road near Bald Knob at a place called "The Jungle" where tramps frequently resorted, and that appellant went for and purchased a loaf of bread. Appellant admitted buying the bread and that he bought nothing to eat with it. He told the sheriff he was alone while in Bald Knob. This testimony is sufficient corroboration of that of the admitted accomplices to sustain the conviction.

No error appearing, the judgment must be affirmed, and it is so ordered.

HURLEY *v.* GUS BLASS COMPANY.

4-4038

Opinion delivered December 2, 1935.

W. R. Donham, for appellants.

Isgrig & Robinson, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellee in the circuit court of Pulaski County to recover damages for an injury received by one of appellants, Mrs. Blanche B. Hurley, in a fall when about to enter one of the elevators in the business house of appellee, on account of the alleged defective condition of the floor in front of the elevator which she was about to enter. The specific allegation as to the

condition of the floor and the manner in which it caused her to fall is as follows:

"Said floor, at the time plaintiff fell and received her injuries, was sloping in places. Some of the floor boards were cracked, and there were raised joints in the floor, the ends of some of the boards being raised higher than the boards adjoining them. Because of said defects, the sole and heel of plaintiff's shoe caught upon the floor, and she was thereby violently thrown and caused to fall, which fall resulted in her injuries."

Appellee filed an answer to the complaint denying each and every material allegation therein, and also pleaded contributory negligence on the part of appellants as a bar to recovery, even if injured in the manner alleged.

The testimony introduced by the respective parties upon the questions of negligence and contributory negligence was conflicting, and the issues of fact relative to both questions were submitted to the jury under instructions of the court, resulting in a verdict for appellee and a consequent judgment dismissing appellant's complaint, from which is this appeal.

Appellants first contend for a reversal of the judgment because the court gave appellee's requested instruction No. 2, which is as follows:

"Reasonable or ordinary care as used in these instructions means that degree of care which a careful and prudent person would exercise under like or similar circumstances."

It is argued by the use of the word "careful" in the instruction, a higher degree of care was required on the part of Mrs. Blanche B. Hurley than the law requires. It perhaps may have been more accurate to have omitted the word "careful." The words "careful" and "prudent," in referring to the conduct of an ordinary person, are commonly used in the same sense and could not have misled the jury. " 'Prudent' and 'cautious' are used interchangeably in defining negligence; the difference, if any, between the two being infinitesimal." *Malcolm* v. *Morresville Cotton Mills,* 191 N. C. 127, 133 S. E. 7, 9; *Southwest T. T.* v. *Sanders,* Tex. Civ. App.,

138 S. W. 1181-1184. Appellee's requested instruction No. 2 was not inherently erroneous.

Appellants also contend for a reversal of the judgment because the court gave appellee's requested instruction No. 5, which is as follows:

"You are instructed that you are not to indulge in the presumption that the defendant was guilty of negligence simply because the plaintiff, Mrs. Hurley, sustained a fall and injury in defendant's store, but the burden of proof is upon the plaintiff to show by a preponderance of the evidence that her fall was occasioned solely through a defective condition of the floor of defendant's store, and that the condition of defendant's floor was such that a person of ordinary prudence would not have allowed it to exist."

It is argued that this instruction is erroneous because, by using the word "solely," the right of appellants to recover is restricted to the defective condition of appellee's floor. The restriction was proper because this was the only allegation of negligence set up in the complaint against appellee, and the only thing which Mrs. Blanche B. Hurley testified caused her to fall. Appellee's requested instruction No. 5 was a correct declaration of law applicable to the facts.

Appellant's next and last contention for a reversal of the judgment is that the court erred in giving appellee's requested instruction No. 10, which is as follows: "You are instructed that it was the duty of Mrs. Hurley to exercise ordinary and reasonable care for her own safety while in defendant's store, and if you find that she negligently failed to use reasonable care for her own safety and her failure to use such care, if any, contributed in any degree, however slight, to her injury, then she cannot recover damages from the defendant."

Appellants argue that the instruction is inherently erroneous because it contains the words "any degree, however slight." The words were correctly inserted in the instruction. This court said in the case of *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298-332, that:

"The test of contributory negligence is, did the negligence contribute in any degree to produce the injury complained of?"

Appellee's requested instruction No. 10 was a correct declaration of the law applicable to the facts.

No error appearing, the judgment is affirmed.

MANHATTAN CONSTRUCTION COMPANY *v.* ATKISSON.

4-4061

Opinion delivered December 2, 1935.

Atkinson & Atkinson and *Karl Greenhaw,* for appellant.

George A. Hurst, for appellee.

MEHAFFY, J. Appellee filed his complaint in the Washington Circuit Court against the appellant to recover damages for injury to his right hip, alleging that he was in the employ of the appellant, working under the orders of appellant's superintendents and foremen, and alleges the duty of the master to use reasonable care to furnish a safe place to work and reasonably safe machinery, and to maintain the place to work in reasonably safe condition; that it was its duty to inspect the machinery and to discover and remedy defects. It is alleged that the appellant carelessly and negligently failed to perform each and every one of its duties owing to appellee, and permitted the appellee to crank the air-compressor when the same was in a dangerous condition, and the condition was unknown to appellee. He also alleged that, the appellant knowing the dangerous condition of the machinery, it was its duty to warn the appellee; that it negligently failed to inspect the air-compressor when an inspection would have disclosed its unsafe condition, and failed to warn the appellee of the dangerous condition, and failed to have said condition remedied. He alleges that, under the orders and directions of his foreman, he undertook to crank the air-compressor, and that, on account of its defective condition,

the compressor kicked back, threw appellee against said compressor with violent force, striking him on the right hip and other parts of his body; that said lick on his hip caused a deep and serious bruise, produced an aggravated sore; that the ligaments and muscles were torn and bruised, and caused his right limb to perish and permanently injured and disfigured him; that he was caused to suffer severe physical pain and mental anguish, and on account of said injuries that he would never be able to engage in manual labor as he did before the injury; that before the injury he was a strong, able-bodied man and capable of earning $5 a day or more; that since the injury he had lost his earnings, amounting to $780 to date; that he was damaged in the sum of $2,500.

The appellant filed its answer denying all the material allegations in the complaint and pleading specifically the assumption of the risk and contributory negligence.

Appellant contends first that the complaint was insufficient, and that, construing the evidence in the light most favorable to appellee, it falls far short of showing any defective or dangerous condition of the air-compressor. Appellant made no objection to the complaint in the lower court. It contends now that it stated conclusions of law and not the facts which constituted the negligence. If appellant thought that the complaint was insufficient or defective, it was its duty to either demur or file a motion to make more definite and certain. It did not do either.

Pleadings, under the code, are liberally construed and every reasonable intendment is indulged in favor of the pleader. *Holcomb* v. *American Surety Co.,* 184 Ark. 449, 42 S. W. (2d) 765.

Where plaintiff's testimony made out a case for damages, a judgment in his favor will not be set aside because his cause of action and the measure of his damages were defectively stated, in the absence of demurrer or motion to make his complaint more specific. *St. L. S. W. Ry. Co.* v. *Tucker,* 161 Ark. 140, 255 S. W. 553; *Wright Motor Co.* v. *Shaw,* 171 Ark. 935, 287 S. W. 177. Moreover, the evidence was introduced in this case without ob-

jection, and the complaint, if defective, would be treated as amended.

The appellee testified that he worked for the appellant on the library building at University Campus, that he operated a jack-hammer that rotates a drill for drilling rock; it was his duty to crank the machine. He had been doing this four or five weeks before he got hurt, and always had trouble starting the machine in the morning. He reported this to Dick Burgin, foreman over him, and Mack Trowbridge, who was over him. Both Trowbridge and Burgin testified that they were foremen, and Trowbridge testified that he reported the injury to Hamblin, the boss. The appellee testified that he was injured by the machine and tried to work on a few days; that he was requested by Burgin to get along some way until he could pick up a man that could take his place; he worked about a week, and could not go any longer; after he got hurt, the company put in a new magneto and got it so it would crank. He testified at length about his injury and suffering. He sought and obtained work as a skilled man, and they gave him the same kind of work that he had been doing before. He undertook to crank the machine in the same way that he had always cranked one. He knew the machine had been overhauled quite a while before, while on the same job. He went to see Dr. Harrison and later went to see Dr. Walker, the company physician. He stated that he was willing to be examined by any number of doctors.

Dick Burgin testified that appellee was working under him; he does not remember whether it was the same day or the next morning that appellee told him he got hurt; does not remember what he said to him, but thinks he told him to go ahead and do the best that he could. Burgin also testified that it was an old machine, and they had had trouble with it all along on cool mornings; he believed if the spark was retarded enough it would not have back-fired.

Mack Trowbridge testified that appellee was working under him; and that the day before appellee got hurt he complained to him and said he would quit if they did not get the motor fixed; witness reported it to Mr. Ham-

blin, and he got a man to fix it; took a timer off the shovel and put it on the machine; next morning when appellee went to work and undertook to crank it, it kicked back, struck his hip, and knocked him on the radiator; he could hardly walk.

E. C. Edwards testified in substance that they had two magnetos, one on the shovel and one on the air-compressor, and one, he did not know which, was hard to get timed. They gave him orders to change the magneto from the shovel to the compressor, which he did. He took the motor loose and it ran, and he then connected it after it got warmed up and started off. The appellant instructed him to change the magnetos. He himself advanced the spark and then moved it back down.

Nelson Pulp, a witness, testified in substance that he saw appellee when he was injured; he pushed the crank in, started down and it back-fired and threw him into the radiator. He said on cross-examination that he did not know it back-fired, but it did something.

The undisputed evidence shows that the day before appellee was injured he not only called attention to the defect in the machine, but stated that he would quit work if it was not remedied. It was an old machine with which they had been having trouble, and immediately before appellee was hurt he was told by his boss that the machine had been fixed. The evidence also shows that, after the accident the company got a new magneto. It also shows that, if in fixing the machine they had retarded the spark, it would not have back-fired or kicked, and he would not have been injured. It is true one of the witnesses swears that he did retard the spark, but, according to other evidence, if he had done so, the injury would not have happened.

While the evidence is not satisfactory, we think it was sufficient to submit the question of appellant's negligence to the jury, and the jury's finding on questions of fact is conclusive.

"The fact that the appellate court would have reached a different conclusion had the judges thereof sat on the jury, or that they are of the opinion that the verdict is against the preponderance of the evidence,

will not warrant the setting aside of a verdict based on conflicting evidence." 4 C. J. 859-860.

"We must also keep in significant view the rule that, the verdict of a jury cannot properly be disturbed on appeal, merely because of its appearing to be against the clear weight of the evidence, or because, if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did.

"If the verdict has any credible evidence to support it—any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations—it is proof against attack on appeal, and that must be applied so strictly, on account of the superior advantages of court and jury for weighing the evidence, that the judgment of the latter approved by the former is due to prevail, unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving legitimate effect to the presumption in its favor and the make-weights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record." *Barlow* v. *Foster,* 149 Wis. 613, 136 N. W. 822; *Baldwin* v. *Wingfield, ante* p. 129.

"Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given." *Cunningham* v. *Union Pac. Ry. Co.,* 4 Utah 206, 7 Pac. 795; *Equitable Life Assurance Society* v. *Felton,* 189 Ark. 318, 71 S. W. (2d) 1049; *Healy & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. (2d) 242; *Brown* v. *Dugan,* 189 Ark. 551, 74 S. W. (2d) 640; *Chicago R. I. & P. Ry. Co.* v. *Britt,* 189 Ark. 571, 74 S. W. (2d) 398.

As we have said, while the evidence is not satisfactory, we cannot say that there is no credible or substantial evidence to support the verdict.

"We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physically impossible that appellee was injured as a result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner." *Mo. & N. Ark. Ry. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478.

There was some conflict in the evidence as to whether the injury was caused by appellee's getting hit in the manner in which he testified he was hurt, but these were questions for the jury.

Appellant contends that the court erred in giving instruction No. 1. That instruction merely defines the issues and states the contentions of the parties.

It is next contended by appellant that the court erred in giving instruction No. 5. That instruction told the jury that it was the duty of the master to warn his employees, when operating a machine having latent defects, of the dangers incident to the operation of said machine, if said defects render the operation of the machinery dangerous. There was no error in giving this instruction. The appellant itself requested an instruction on the duty to warn. We think there was no error in the court's modifying two instructions.

Appellant next complains of the closing argument made by the attorney for the appellee, and this argument is set out at length, but no objection was made to this argument, except when the appellee's attorney stated why he brought the suit for $3,000 only, the appellant objected, and the court promptly sustained its objection. It then asked that the statement be stricken from the jury, and the court said to the jury: "You are instructed that you are not to consider that part of the argument as to where the suit was filed."

The master is not liable for injuries resulting to a servant by reason of latent defects about which the master did not know and which could not have been discovered by the exercise of reasonable care and diligence.

It is argued that the appellee was as familiar with the machinery as the master, but the record shows that the appellee called attention to the defect and was advised by his foreman that it had been remedied, and, relying on this, he undertook to crank the machine and was injured.

It is true that a servant, on entering employment, assumes all the risks and hazards usually incident to the employment, but when he has complained about machinery and has been advised that the defect has been remedied, he had a right to rely on the statement of his foreman, and does not assume the risk in so doing.

It is contended also that the verdict is excessive. There was a verdict for $2,000. There was some conflict in the evidence as to the extent of the injury, but if the jury believed appellee's testimony about his injury, which they had a right to do, the verdict was not excessive.

We find no error, and the judgment is affirmed.

City National Bank *v.* McGraw.

4-4062

Opinion delivered December 2, 1935.

James B. McDonough and *Joseph R. Brown,* for appellants.

Warner & Warner, for appellee.

McHaney, J. On July 16, 1929, appellee had on deposit in appellant bank upwards of $22,000 in a savings account at 4 per cent. interest. On that date, the bank purchased for his account 22 bonds of $1,000 each of G. T. Cazort, paying therefor the sum of $22,282.26, which included the accrued interest on the bonds to that date. The bonds were secured by a deed of trust on approximately 4,000 acres of lands belonging to said Cazort, and also all the gas rights of both Mr. and Mrs. Cazort under the lands owned by them. The total amount of the bond issue was $200,000, and appellant bank was the trustee of the bond issue. Gas in large quantities was produced from some of the lands in said mortgage and was sold to the Gas Company in Fort Smith. The royalties paid to Cazort by the gas company in previous years had amounted to more than $50,000. The royalties paid to the bank in 1929, from July to December amounted to $13,665.31. For the year 1930, the gas royalties amounted to $27,971.44, but thereafter the consumption of gas gradually declined until, in 1934, the royalties amounted to only $11,120.73. At the time that appellant bank invested appellee's funds in said bonds, July 16, 1929, appellant Nakdimen wrote appellee a letter advising him of this fact as follows: "I have this day invested for you $22,000 bearing 6 per cent. The bond is dated May 1st, and the interest will be due semi-annually, and the next interest will be due November 1st.

"I have charged your account with $22,282.26, the $282.26 being for accrued interest. In other words, the bond has been bearing interest since May 1st. We carried it for two and one-half months."

Appellee did not reply to this letter in any way. On October 21, 1929, appellant, Nakdimen, for the bank, wrote appellee the following letter: "I have today credited your account with $660, being interest for six months on Cazort bonds for $22,000, and herewith enclose duplicate deposit ticket covering same." On May 1, 1930, and on November 1, 1930, like letters were writ-

ten to appellee by appellants advising him of the collection of the interest in said sum and enclosing a duplicate deposit ticket to cover same. Appellee did not respond to any of these letters in any way. On January 2, 1931, appellee, who lived in Clarksville, was in Fort Smith and received from the bank, at his request, a receipt for the bonds. He says that on this occasion, appellant Nakdimen made certain statements to him regarding the value of the bonds, that they were as good as gold, being secured by 4,000 acres of the best Arkansas River bottom lands and gas royalties that brought in from $40,000 to $50,000 a year, and that appellants promised him that at any time that he needed the money on the bonds he could get it. Thereafter, default was made in the payment of both principal and interest on some of the bonds, and certain of the bondholders instituted suit to foreclose in the Crawford Chancery Court, and appellee was made a defendant in this action. After considerable delay, appellee filed an answer and cross-complaint. He alleged the ownership of the bonds and sought a foreclosure thereof because of delinquencies in payment of interest and taxes, etc. His cross-complaint was against appellants in which he alleged that they had converted his funds on deposit in the bank and used same in purchasing the Cazort bonds; that this purchase was made by appellants without any authority or permission from him, and that he had been induced to acquiesce in the purchase by the false and fraudulent representations of Nakdimen made to him on January 2, 1931. He prayed judgment against appellants for the $22,000 with interest, and for a decree rescinding the agreement wrongfully procured from him by the fraudulent representations of appellants, and the wrongful concealment of material facts from him with reference to the nature and value of the property securing said bonds. Upon appellant's motion, appellee elected to rely upon his cause of action against appellants rather than upon the security of the bonds, and the case was transferred to the Sebastian Chancery Court, where, upon a trial of the issues joined, a decree was rendered against appellants for the sum of $22,000, with interest.

For a reversal of the judgment, counsel for appellants make two contentions that we think deserve consideration. One is that appellants were authorized by appellee to make the investment for him and the other is that the appellee, by his silence, must be held to have ratified the act of appellants in the making of the investment for him, even though done without his authority.

As to the first proposition, that is, whether appellee authorized appellants to make the investment, the evidence is in dispute. H. S. Nakdimen, son of appellant Nakdimen, and one of the officers in the bank, testified that appellee told his father in his presence to invest his money for him when he had anything good to invest in. Appellee had long been a customer of the bank and a long acquaintance and friend of appellant I. H. Nakdimen. The proof shows that he had great trust and confidence in Nakdimen's ability and integrity. He had in the past purchased through appellants Liberty bonds, and had sold same through them. He had again invested through appellants, in what is called the O'Leary bonds, which latter had been paid off through appellant bank, and the funds of appellee were deposited in a savings account at 4 per cent. As stated, these transactions had been handled for appellee by the bank and its president I. H. Nakdimen. Whether appellants had the authority from appellee to make this investment or not, it is undisputed that they thought they had the authority, for, immediately upon making the investments, they wrote appellee notifying him thereof. The trial court found on disputed evidence that appellants had no actual authority to invest these funds for appellee, and we cannot say that this finding is against the preponderance of the evidence, as appellee testified very positively that no such authority was given.

Now, as to the second point, we are of the opinion that it makes no difference under the circumstances of this case whether appellants had the actual authority to make the investment for appellee or not. Appellee admits receiving the letter dated July 16, 1929, advising him of the fact, and he admits that he did nothing to advise the appellants that the investment was not satis-

factory to him. All of the circumstances tend to show that, on the contrary, it was satisfactory to him. At the time this $200,000 loan was negotiated with Mr. Cazort, by the bank, it is undisputed in this record that the value of the property securing the indebtedness was greatly in excess thereof, and that it was considered as a good loan. Gas royalties on the land alone were thought to be amply sufficient to pay the principal and interest as it matured. In addition to this, the lands were thought to be of great value for farming purposes. There is nothing in this record to show that appellants negotiated this loan with Mr. Cazort in any way except in the best of faith and with the honest opinion that the security was amply sufficient to pay the debt. The fact is that the interest had been paid to the time of the bringing of this suit, and $49,000 of the principal had been retired, although some $60,000 in principal is in default. Not only was appellee notified immediately of the investment, but appellants collected the interest on the loan every six months for appellee's account, notified him thereof, and sent him a duplicate deposit slip showing such collections and credits. Not only this, but appellees' pass book was balanced after this investment was made, showing that his account had been charged with the amount thereof, and showing the credits for interest collections. Appellee appears to have been perfectly satisfied with his investment until the bonds began to default in the interest, at which time he became concerned about his security, and sought to hold appellants for his investment. In the meantime, the value of the security covered by this mortgage along with all other property began to decline and continued to decline. The royalties from the gas rights declined from upwards of $50,000 to about $13,000 per year, and the farm lands had greatly depreciated in value. We think the case of *Bank of Hatfield* v. *Clayton*, 158 Ark. 119, 250 S. W. 347, is an authority against appellee under the facts of this case. There Mrs. Clayton sued the bank for $1,000 she had on deposit in the bank, and which had been withdrawn by the check of the vice president of the bank. The vice president made a visit to the home of Mrs. Clayton and proposed that, if she

would permit him to withdraw $1,000 of the funds to her credit in the bank and lend it out, he could get 10 per cent. interest for her. The vice president testified that she consented to that arrangement, but she testified that she refused to do so for the reason that she needed the money for another purpose. The jury settled that issue of fact in favor of Mrs. Clayton. The vice president drew a check on the bank for $1,000 and signed Mrs. Clayton's name to it, withdrew the money and executed his own note to Mrs. Clayton with another as surety for that amount. He did that on June 5, 1921. On June 11, 1921, he wrote Mrs. Clayton that he had placed $1,000 for her at 10 per cent., and, if she happened to need it and would let him know a couple of weeks ahead, he would replace it. She received this letter but made no reply. Thereafter, on July 30, the bank gave her a statement of her account which showed the withdrawal of these funds. On October 1, 1921, she wrote the vice president a letter asking him to put the money back into the bank as she would need it by November 1st. She made no objection to the use of the funds until some time in November. The court submitted the question to the jury upon instructions which told the jury that she was entitled to recover unless it was found, from a preponderance of the evidence, that she authorized the loan of her funds, "or that thereafter, being fully informed of all material facts with respect thereto, plaintiff expressly ratified said transaction either orally or in writing, or in her conduct to said defendant." In reversing the judgment, this court held that there was no evidence to submit to the jury as to whether she had objected to the statement of her account within a reasonable time; that the statement rendered to her by the bank at the end of July, 1921, constituted an account stated within the meaning of the law. The court said: "The rule seems to be universal that the furnishing of a statement by a bank to a depositor where the items are sufficiently shown to put the depositor upon notice constitutes an account stated, to which objection must be made within a reasonable time, otherwise the account is final." The court further said: "There was a delay of between two and three months

before any objection was made, and it was more than three months before it was insisted that the money had been wrongfully withdrawn. There were no undisclosed facts which might or might not have affected plaintiff's decision in repudiating the withdrawal of the fund. She says that she thought that Johnson was acting for the bank in making the loan, but she knew to a certainty that the money had been withdrawn from the bank, which had the effect of changing the status of the bank as her debtor, and the only fact which she claimed to misunderstand was that the money had been loaned out by Johnson instead of the bank; but she was aware of the precise method in which her money had been withdrawn from the bank, and it was her duty to object to this, if it was unauthorized."

Appellee contends that there is no question of an account stated in this case, and that appellee was under no duty to speak. While it is true that there was no account stated, just as in the Bank of Hatfield case, there was notice to appellee of everything that was done, in addition to the fact that his pass book was balanced which reflected the actual condition of his account. We think appellee was under the duty to speak within a reasonable time after the withdrawal of his funds from the savings account, and that his objection made on January 2, 1931, if in fact he made any objection at that time, comes too late. It was his duty to act promptly on receipt of the letter of July 16, 1929, if he wished to repudiate the action of those who presumed to act as his agents, whether rightfully or wrongfully, and that he must have done so within a reasonable time. Not having done so within a reasonable time, he must be held to have ratified the act of his supposed agents, and cannot at this time recover against them. Appellee must be held to be the owner of said bonds and entitled to all of the rights given him under the mortgage securing same together with other bondholders.

The decree against appellants will be reversed, and the cause dismissed.

CASUALTY RECIPROCAL EXCHANGE *v.* BOUNDS.

4-4057

Opinion delivered December 2, 1935.

[redacted]

Warner & Warner, for appellant.

Partain & Agee, for appellee.

BUTLER, J. The appellee, Joe Bounds, recovered judgment against F. W. Dickson in the sum of $2,500 for personal injuries. After the affirmance of that judgment in this court, he sued out an execution against Dickson which was returned *nulla bona.* At the time of his injury, Dickson was a member of the Casualty Reciprocal Exchange of Kansas City, Missouri, and, as such, had been issued "an indemnity agreement" by which he was indemnified against loss from liability for damages on account of bodily injuries occasioned from accidents occurring during the life of the contract in a sum not to exceed $5,000 for injury or death to any one person. After the return of the execution, Bounds brought this suit against the appellant, basing his authority on act

No. 196, of the Acts of 1927. Appellant answered admitting the injury suffered by Bounds, the recovery of the judgment, the issuance of the execution against Dickson, and its return *nulla bona.* Appellant also admitted that Dickson was a subscriber of the Casualty Reciprocal Exchange, and, as such, had been issued a contract of indemnity against loss from liability for damages arising from injuries such as had been suffered by appellee. It denied that it had issued to Dickson any liability insurance or that it was an insurance company. It alleged *in extenso* the nature of the business engaged in by it, the agreement between its subscribers, and particularly the contract executed and delivered to Dickson. Appellant further alleged that it was operating in the State of Arkansas by virtue of the provisions of act No. 152 of the Acts of 1915, appearing in Crawford & Moses' Digest as §§ 6045 to 6057, both inclusive. It pleaded, as a defense to appellee's action, § No. 8 of its contract with Dickson, which is as follows:

"No action shall lie against the attorney or any subscriber at the Exchange, to recover for any loss under this contract unless brought by the subscriber himself, nor to recover for any loss arising under clauses (A), (B) or (C) of the special agreements or under any indorsement attached hereto unless brought by the subscriber himself to recover for moneys actually paid by him in satisfaction of a judgment after trial of the issue in a suit instituted within the period limited by the statute of limitations, and in no event shall any action lie unless brought within ninety days after the right of action accrues as herein provided." Appellant denied that it was subject to the provisions of act No. 196, *supra,* or bound by any of the provisions thereof.

A demurrer to the answer was interposed which was sustained by the court, and the appellant electing to stand upon its answer, judgment was rendered for the sum sued for, and this appeal followed.

The appellant contends that its contract with Dickson was one of indemnity which justified the incorporation into the contract of § 8 quoted. It contends that act No. 196, *supra,* has no application to contracts of this

nature entered into between its subscribers (1) because act No. 196 applies only to corporations doing an insurance business, and that, as it is not an insurance corporation, the act would have no application, and (2) because it operates under a special statute, and act No. 196 does not repeal any part thereof.

Act No. 196 is as follows: "Section 1. On and after the passage of this act no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicles drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this State by any corporation authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of the policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

"Section 2. Whenever any policy of insurance shall be issued in this State indemnifying any person, firm or corporation against any actual money loss sustained by such person, firm or corporation for damages inflicted upon the property or person of another, such policy shall contain a provision that such injured person, or his or her personal representative, shall be subrogated to the right of the assured named in such policy, and such injured person, or his or her personal representative, whether such provision be inserted in such policy or not, may maintain a direct cause of action against the insur-

ance company issuing such policy for the amount of the judgment rendered against such assured, not exceeding the amount of the policy.

"Section 3. All laws, and parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage."

The occasion for the passage of this act was doubtless the decision of this court in *McBride* v. *Ætna Life Insurance Co.,* 126 Ark. 528, 191 S. W. 5, holding that in contracts of indemnity the insured must sustain an actual loss by reason of an enforced payment of a judgment liability by him before the obligation of the insurer matures. In that case an insurance corporation was the insurer, but the principle there announced applied to all contracts of insurance by whomsoever issued, whether a corporation, or an insurer which was not a corporation. Thereafter the Legislature enacted the above-quoted law, § 1 appearing to have been copied from the New York statute, but in that statute there was no section corresponding to § 2 of our act. It will be observed that either of the sections of act No. 196, standing alone, is a complete enactment, so that if, for any reason, one of the sections might be inoperative, the other would stand.

Section 1 relates to policies of insurance issued by any corporation authorized to do business in this State and prohibits the issuance of policies unless a provision be inserted to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages, and that where there is such insolvency or bankruptcy, a direct action may be maintained by the injured person against the insurer for the amount of the judgment previously obtained against the insured, not to exceed the amount of the policy.

Appellant contends that § 2 of the act relates solely to § 1, and that "any policy of insurance" is such as is issued only by insurance corporations, and that "the insurance company" mentioned in said § 2 means only a corporation organized for the purpose of doing an insurance business. We are of the opinion that this construction is entirely too narrow and manifestly not warranted by the broad language of § 2. In the case of *Universal*

Auto Insurance Company v. *Denton,* 185 Ark. 899, 50 S. W. (2d) 592, we said: "It thus appears that § 2 of this act (act 196) writes into the policies named in § 1 the provisions of § 1, whether they are recited in the policies or not." This provision in § 2 was altogether unnecessary, for the provision would have been impliedly written into the policy by the law itself. But § 2 does more than was noticed in the case of *Universal Auto Insurance Company* v. *Denton, supra.* By its express language it extends its application to any policy of insurance issued in this State, and provides for a direct cause of action against the insurance company issuing it. The remedy would be inadequate if restricted to corporations only and would not correct the mischief which prompted the enactment of the statute. It was not any particular class of insurance companies in the mind of the Legislature, but the nature of insurance contracts. When the act is considered as a whole, we think that the intention of the Legislature is readily discoverable, to which intention we must give effect under settled rules of construction. *Rural Special School District* v. *Special School District,* 186 Ark. 370, 53 S. W. (2d) 579; *Dulaney* v. *Continental Life Ins. Co.,* 185 Ark. 517, 47 S. W. (2d) 1082; *Berry* v. *Sale,* 184 Ark. 655, 43 S. W. (2d) 225.

It is insisted, however, that, should the act under consideration apply to all insurance companies, it would still have no application to the appellant company because it operates under a special act which exempts it from the application of laws relating to other agencies doing an insurance business within this State. As authority for this position, appellant relies upon the presumption announced in 25 R. C. L., § 177, p. 927, against implied repeals of local or special acts by later or general acts, and especially on the cases of *Knights of Maccabees* v. *Anderson,* 104 Ark. 417, 148 S. W. 1016, and *Phillips* v. *Mosaic Templars,* 154 Ark. 173, 241 S. W. 869, where it was held that the statute relating to the imposition of penalty and attorney's fees provided by the statute in certain cases against insurance companies had no application to fraternal benefit societies. These decisions were based upon the language of the statute relating to

such societies which is, "that 'such orders, societies or associations shall be exempt from the provisions of all insurance laws of this State, and no law hereafter passed shall apply to said societies, orders or associations unless it be expressly designated therein'." Crawford & Moses' Digest, § 6071. Reliance is also placed upon the case of *Schmid* v. *Automobile Underwriters,* decided by the Iowa Supreme Court and reported in 215 Iowa 170, 244 N. W. 729, 85 A. L. R. 4, where it was held that an act similar to act 196, *supra,* did not apply to contracts between members of a reciprocal insurance exchange. This decision was grounded on the last section of chapter No. 408 of the Iowa Code relating to reciprocal or inter-insurance contracts which provides that contracts of that nature "shall not be subject to the laws of this State relating to insurance unless they are therein specifically mentioned."

The exemption of reciprocal contracts from the operation of other laws in our statute relating to reciprocal insurance is quite different from the statute under consideration in *Knights of Maccabees* v. *Anderson; Phillips* v. *Mosaic Templars,* and the Iowa case, cited, *supra.* Section 6056, Crawford & Moses' Digest, provides for the exemption, and is as follows: "Except as herein provided no law of this State relating to insurance shall apply to the exchange of such indemnity contracts." There is nothing in this provision which exempts policies issued by reciprocal insurance associations from the operation of subsequently enacted insurance laws. This was the conclusion reached by the Supreme Court of Oregon in construing a section of its reciprocal insurance law which provided: "Except as provided in this section, no law of this State relating to insurance shall apply to reciprocal or inter-insurance contracts or the exchange thereof, unless they are specifically mentioned." *Whitlock* v. *Individuals, etc.,* 138 Ore. 6 Pac. (2d) 1088.

If, then, the appellant is an insurance company, act No. 196 applies to it. That it is such there can be no question. In *Lewelling* v. *Manufacturing Woodworkers Underwriters,* 140 Ark. 124, 215 S. W. 258, the reciprocal

insurance statute was construed, and it was held that the subscribers constituted a voluntary unincorporated association for the purpose of conducting an insurance business, and might be sued by the name adopted by the association to carry on its business. There is no distinction between the words "association" and "company" when referable to a number of persons joined for the conduct of a business enterprise. When so used, the meaning of "association" and "company" is identical. 12 C. J., 220, and cases cited in note No. 64A. The only business conducted by the appellant, in so far as the record discloses, was the business of insuring its members, and it is immaterial whether the subscribers were both insurers and insured.

We conclude that the judgment of the trial court in sustaining the demurrer to appellant's answer was correct, and it is therefore affirmed.

KITCHENS *v.* PARAGOULD.

4-4108

Opinion delivered December 2, 1935.

W. J. Stone, Maurice Cathey and *Wm. F. Kirsch,* for appellant.

W. W. Bandy and *Jeff Bratton,* for appellees.

Ed I. McKinley, Jr., Joe Morrison, W. S. Atkins, Russell Elrod, C. L. Polk, Jr., G. D. Walker, Leo J. Mundt and *Edwin Bevens, amici curiae.*

BAKER, J. B. M. Kitchens as a taxpayer filed this suit against the city of Paragould in the chancery court of Greene County. He sought an injunction against the city and its officers to prevent the issuance of bonds, the selling or pledging of the same for the purpose of constructing a light plant and distribution system within the city, without first having procured from the Department of Public Utilities a certificate to the effect that public necessity and convenience required the construction and operation of such plant.

The complaint, the effect of which will be stated below, was met by a demurrer which was sustained, and the complaint was dismissed, plaintiff declining to plead further after demurrer was sustained.

To save time and space, the city of Paragould and its officers, the Department of Utilities, Amendment No. 13 to the Constitution of the State of Arkansas and act No. 324 of the Acts of 1935, will be hereinafter designated respectively as "city" or "Paragould," "Department," "Amendment" and "act No. 324."

Proceeding under the amendment, Paragould, in 1932, by ordinance and election held thereunder, voted to issue bonds of the par value of $100,000 to construct a light plant and distribution system. Before the bonds were issued a suit was filed by Arkansas Utilities Company against the city. That company was already in the field supplying the requirements of the city, and it challenged the right of the city to construct its own plant and system, and to operate same.

Some of the problems in that litigation are akin to those here presented. The Arkansas Utilities Company was operating under an indeterminate permit issued in 1921, under act No. 571 of the Acts of 1919. This inde-

terminate permit was issued just a few days prior to repeal of said act No. 571. The repeal, however, did not destroy the permit which was alleged by the utilities company to be perpetual and exclusive. Upon appeal of this case, the issues were decided in favor of Paragould in April, 1934. *Paragould* v. *Arkansas Utilities Co.,* 70 F. (2d) 530.

This bit of legal history and citation is given in explanation of the fact that only one matter appears on this appeal for our consideration. After the decision above cited, Paragould was free for a time to proceed with her enterprise of acquiring and operating a municipally owned light plant.

A careful and extended study of the several briefs filed here by attorneys of the interested parties and by friends of the court convinces us that it is impracticable and perhaps unnecessary to attempt a discussion and detailed analysis of act No. 324. If that course were pursued, this opinion would be unduly prolonged and extended. We shall content ourselves with an announcement of our conclusions omitting practically all of the mentioned details and provisions of said act.

Before any substantial progress was made after the decision above cited, the General Assembly of 1935 passed act No. 324. Certain provisions of that act became impediments to progress in the development of the city's local lighting system.

It is conceded, or, at least, not disputed, that Paragould was proceeding under the Amendment adopted in 1926. The regularity and sufficiency of these proceedings were not questioned in the former litigation nor here. During all the intervals wherein all these things have occurred, Paragould was a city of the first class, with the right to act under the Amendment.

Said Amendment is self-executing, complete, needs no statute or legislation in aid thereof. It grants the power and right to cities of the first and second classes to construct certain improvements and to issue interest-bearing bonds to pay therefor. It authorized the imposition of a limited tax of 5 mills to repay bonds issued for all these improvements. For water plants and light

plants, however, the tax may be doubled, when necessary, under the conditions therein stated.

The right to invoke or use this grant of power is or may be exercised only by a majority vote of the qualified electors in such cities of the first and second classes.

Without setting forth more specifically the details of the Amendment, let it suffice to state that under this Amendment to the organic law, the scheme and machinery, including power and methods of procedure, are apparently complete in all details. Without the aid of statutory law, but under the amendment, exclusively, municipal plants may be established and put into operation.

But it is urged in this suit that act No. 324 makes it necessary that Paragould obtain from the department a certificate of necessity and convenience before further proceedings may be had. In other terms, license must be procured before any new construction may begin. Section 41, act No. 324.

For the purpose of the consideration of matters here involved, we are going to assume, as appellant probably has, that the department would not issue the certificate.

The effect of this contention must be said to result in a conclusion that the General Assembly has power to make of no effect provisions of the Constitution by endowing some bureau or commission, with discretion to determine the expediency of obedience to that part of organic law. To state such a proposition is a refutation of its soundness.

The result of the election in Paragould on the question of constructing a light plant and distributing system when declared supplied and furnished the only certificate of convenience and necessity that could be required.

However, we do not agree with learned counsel for appellant in all particulars upon their interpretation of act No. 324. Said act No. 324 is not free from ambiguity. Its definitions are not clear; they do not define. "Public utilities" mentioned therein, mean and include all privately owned organizations supplying or furnishing water or electricity or other service usually so supplied

by agencies and organizations possessing a monopoly of the commodity; but exclusive of municipally owned utilities engaged in similar enterprises.

This conclusion, we think, is based upon the soundest principles. Experience has taught the necessity of regulation of utilities. These regulatory bodies have taken many forms, all springing from the necessity of regulatory power supported by the State to protect local communities and individuals from unjust and unfair exactions. In some form or other regulatory schemes have permeated the whole country.

In 1933 Arkansas adopted a Fact-finding Tribunal, act No. 72. From it was evolved the Department of Utilities, act No. 324.

Such bodies are the public arbiters for municipalities, for the citizenship, more particularly in matters wherein expense, lack of information, etc., would make individual and even municipal protest and action puerile and futile.

Not so with the municipal utility. It has no office far away or inaccessible. Its business is conducted by those whose interests are common to all who are served. Once its capital investment is repaid, it does not have to earn except to make extensions and improvements, and to meet obsolescence and decay. So long as people are capable of local self-government, they would not find it necessary to appeal to a utility commission for aid in the operation of a municipally owned utility. Such utility is local, its problems are local. We accord to every community the ability, the right and authority to initiate, operate, and manage all local concerns, without interference from outside agencies, wholly disinterested and possessing probably no understanding of the peculiar conditions.

We must and do give the legislative bodies credit for honest effort at proper service, without making vain requirements. We think therefore act No. 324 is a part of a regulatory system to give aid where and when needed, but it does not create or foster a gratuitous concern not far removed from meddling, in matters purely local. Such are the general purposes of act No. 324. We

are not prepared to say any considerable part of it is void under any and all conditions.

It must follow however that act No. 324, in so far as it may stop, hinder, or frustrate the employment, use or execution of the power and rights made available under the amendment, is not enforceable for such purposes. A right granted by the Constitution, when unconditional, cannot be defeated, even in part, by statute. The power to impair would be the power to destroy.

We are not concerned with the supposed beneficent effects of act No. 324. The policy of legislation is a legislative function. We must say, when the issue is properly presented, whether legislation is in conflict with provisions of the Constitution. Ordinarily we look only to the statutes to determine what powers have been delegated to cities and towns. We regard as axiomatic that cities and towns are creatures of the Legislature, subject to its control, and that they can function only within the limits fixed by law. *Eagle* v. *Beard,* 33 Ark. 497.

But it is no less true that all law, whether in relation to municipalities or otherwise, must not be in conflict with the Constitution. All preconceived ideas or notions must yield in recognition of such limitations. We have already expressed the view that the amendment is self-executing. It meets all the requirements of a self-executing instrument as defined in *Cumnock* v. *Little Rock,* 168 Ark. 777, 781, 271 S. W. 466. No enabling act was therefore necessary to the enforcement of Amendment No. 11. *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22.

The same rule obtains in the instant case. *Wright* v. *Ward,* 170 Ark. 464, 280 S. W. 369; *Martin* v. *State ex rel. Saline County,* 171 Ark. 576, 286 S. W. 873.

Since there is no necessity for statutory law in aid of the amendment, act No. 324 is not to be regarded as a part of the machinery or scheme as authorized. This is the more apparent from the seeming conflicts. Since it is conceivable that conditions could arise, differing from those under consideration, wherein some of the provisions of act No. 324, apparently conflicting with the Amendment, might be invoked, we hesitate to declare such

conflicting provisions wholly void. However it is certain Paragould has the right and power to proceed under the Amendment, unhampered by any of the provisions of act No. 324. If the questioned provisions of act No. 324, such as § 47, are not void, they are, at least, not applicable, or enforceable for purposes as contended by appellant. Since the legality or availability of these provisions of act No. 324 as they may be invoked in the government or regulation of rival or competing privately owned public utilities is not before us, we do not determine such questions now. We have attempted the decision of the sole question here presented without the impairment, by any announcement of ours, of any part of act No. 324, wherein it may properly be invoked. This position we have taken is supported by numerous decisions. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; *Arkansas Railroad Commission* v. *Castetter,* 180 Ark. 770, 22 S. W. (2d) 993.

The decree of the chancellor was correct in holding that a certificate of convenience and necessity was unnecessary in this action, and could not be required.

Decree is affirmed.

DICKINSON *v.* MINGEA.

4-4066

Opinion delivered December 9, 1935.

Miles & Amsler, for appellant.

S. J. Reid and *Rowell, Rowell & Dickey,* for appellees.

SMITH, J. Waterworks Improvement District No. 1 of the incorporated town of Sheridan was created by an ordinance of the town council on July 2, 1930. The ordinance was passed pursuant to, and in conformity with, the laws of the State authorizing that action. Coupon bonds, which the ordinance authorized, were issued totaling $75,000 with interest at 5 per cent. per annum,

payable semi-annually. To guarantee the payment of these bonds and the interest thereon, a pledge of the betterment assessments was made.

One of the acts of the General Assembly, pursuant to which the bond issue was authorized (and in force when the bonds were sold and delivered) was act No. 64 of the Acts of 1929 (vol. 1, Acts 1929, page 241). This was an act entitled "An act to simplify the system of organizing and administering improvement districts in cities and towns." Section 22 of the act provides that, "if any bond or interest coupon on any bond issued by any such improvement district is not paid within sixty days after its maturity, it shall be the duty of the chancery court, on application of the trustee for the bondholders or of the holder of any such bond or coupons overdue, to appoint a receiver to collect the taxes of said district." This section further provides that the proceeds of the taxes and collections made by the receiver "shall be applied, after payment of costs, first, to overdue interest, and then to the payment *pro rata* of all bonds issued by said board which are then due and payable." It is further provided that the receiver may be directed to institute suits to foreclose the lien of said taxes on said land, and a suit so brought by said receiver shall be conducted in all matters as suits by the board, and with like effect; and the decrees and deeds therein shall have the same presumption in their favor, with a proviso that when all overdue principal and interest has been paid, the receiver shall be discharged and the management of the affairs of the district resumed by the board of commissioners.

On February 2, 1935, W. A. Mingea filed a complaint in the chancery court of Grant County, in which the town of Sheridan is located, alleging that he was the owner of $1,000 of the bonds issued by the improvement district, upon which default in paying interest thereon had been made for a period of more than 60 days before the filing of the complaint. He prayed that, for the benefit of himself and of all other bondholders who desire to be made parties, a receiver be appointed to take over the affairs and the assets of the improvement district, with direc-

tions to the receiver to collect taxes due the district, and to foreclose the lien for the delinquent taxes.

On the same day the improvement district entered its appearance, and an order was made appointing receivers who were directed, after taking oath and giving bond, to take possession of the records and assets of the district and to collect taxes and institute suits as prayed. The commissioners of the district were restrained from further action except to comply with the order by delivery to the receivers, after their qualification, of the assets and records of the district.

On June 15, 1935, a day of the term of the chancery court, a petition was filed by the receivers, alleging that they had been offered nine bonds of the district in denominations of $1,000 each due and payable on the first day of September, 1946, 1947 and 1948. On the same day the receivers "were authorized and ordered and directed to pay fifty cents on the dollar flat for said nine bonds of the said district for $1,000 each with all the interest coupons attached thereto, said payment to be made out of the funds now in the hands of the receivers, and they are directed to take credit for such expenditures in accordance with the order."

On July 10, 1935, Glynne Cook Dickinson filed a petition for leave to intervene. She alleged her ownership of bonds Nos. 10, 11 and 12, which mature September 1, 1935, and of bonds Nos. 13, 14 and 15, which mature September 1, 1936. She averred default in the payment of the interest thereon since March 1, 1933. She alleged the suit was collusive and was filed by the plaintiff, Mingea, "for the purpose of deterring and preventing other bondholders from pursuing any appropriate remedies which they might have against said district for the enforcement of its valid obligations." It was averred also that the appointment of the receivers was void as being in conflict with the provisions of act No. 79 of the Acts of the General Assembly of 1933 (Acts 1933, page 230).

A demurrer to this pleading was filed, and an answer also, in which collusion was denied and the act 79 aforesaid was alleged to be contrary to the Constitution of this

State and contrary to the Constitution of the United States.

The court heard testimony upon the intervention on July 29, 1935, and in the course of the hearing it was agreed that "those men who sold the bonds sold them in good faith to the receivers * * * at a price which was thought fair to the property owners, and after that action had been approved by the court." After hearing the testimony, which we think it unnecessary to recite, the court declined to discharge the receivers or to compel them to otherwise account for the money which they had paid for the bonds, and this appeal is from that decree.

Section 1 of act 79 of the Acts of 1933 reads as follows:

"Section 1. Hereafter all taxes in municipal, bridge, suburban and road maintenance improvement districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to properly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided for shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect municipal, bridge, suburban or road maintenance district taxes."

The provisions of a similar act were involved in the recent case of *Rodgers* v. *Carson Lake Road Improvement District No. 6, ante* p. 112, in which case it was prayed that receivers for a road improvement district be discharged upon the authority of act No. 46, passed at the same session of the General Assembly of identical import as act 79 except that the former applied only to levee, drainage and road improvement districts, whereas act 79 applies to municipal, bridge, suburban and road mainte-

nance districts. In the decree from which that appeal came, the chancellor had discharged the receivers of the road improvement district upon the authority of act 46, but we held that the act was not retroactive in its operation, and did not apply to receivers appointed before the act became effective, as was true in that case, and for that reason we declined to pass upon the constitutionality of act 46 or its effect, if constitutional.

We did, however, review the ancient jurisdiction of chancery courts in the matter of appointing receivers, and we said: "The Legislature is without power to add to, limit or abridge the jurisdiction conferred on chancery courts or circuit courts acting as such by the Constitution of this State"; but it was there also said that it had never been held that the Legislature was without power to regulate the exercise of the jurisdiction. We there quoted from the case of *Marvell* v. *State,* 127 Ark. 595, 193 S. W. 259, as follows: "The act in question has not conferred upon the chancery courts of this State any additional jurisdiction. It has merely prescribed a new condition upon which this ancient jurisdiction may be exercised. The act is remedial in its nature, and, while the Legislature cannot enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the Legislature to prescribe the procedure for the exercise of this jurisdiction and to prescribe new conditions under which that jurisdiction may be exercised."

The chancery courts have not been deprived of their jurisdiction in regard to improvement districts, and neither act 46 nor act 79 manifests such intention. The provisions of these acts, even to their preamble, are identical except as to the designation of the kinds of improvement districts to which they respectively relate.

There appears in the preamble to each of these acts the following paragraph: "Whereas the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties." The significance of the phrase "if they (the commissioners of the district) are made to discharge their duties" is not

to be overlooked. The verb "made" as here employed means to require or compel. But how are the commissioners to be "made" to discharge their duties? Section 1, above quoted, answers "by mandamus or by a mandatory injunction in equity." There is therefore no abridgment of the court's jurisdiction. The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were "made" to discharge the duties imposed upon them by law. The receivers could do no more than to follow and be governed by the law.

Section 22 of act 64 of the Acts of 1929 above referred to designates the persons who might apply to the chancery court for the appointment of a receiver for municipal improvement districts. This section provides that the application may be made by the "trustees for the bondholders," or "the holder of any bond or coupons overdue." Act 79, *supra,* provides that its provisions may be invoked "at the instance of any landowner in the district, the trustees in any deed of trust securing the bonds of the district, the owner of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the districts." It appears therefore that the provisions of the latter act are more comprehensive than those of the earlier one in enumerating the creditors who may make application to the court for the assistance which the Legislature provides to enforce the payment of debts due them.

In this connection it may be said that § 22 of act 64, *supra,* provides how the receivers are authorized to disburse the district's revenues which shall come into their hands. It is provided that they "shall be applied after payment of cost first to overdue interest and then to payment *pro rata* of all bonds issued by said board, which are then due and payable."

The order of the court directing the receivers who had been appointed to purchase bonds not then due at a great discount was a wise thing to do, if authorized by

law. But it was not. The order was contrary to the provisions of the section above quoted which requires that overdue interest shall first be paid after the payment of cost. It was error therefore not to apply the money which came into the receivers' hands derived from the collection of taxes in that manner.

In this connection it may be said that this provision of § 22 of act 64 was unaffected by act 79, and its provisions must be followed by the commissioners whose districts are being supervised by the courts.

It is very earnestly insisted that act 79 impairs the obligations of the contract pursuant to which the bonds were issued and sold by depriving the owners of the bonds of a remedy existing at the time of the sale to enforce their payment and therefore violates both the State and Federal Constitutions. We think, however, that it sufficiently appears that the act 79, as we have construed it, is not open to this objection. We have frequently and recently had occasion to consider when and under what conditions the obligations of a contract had been impaired. The most recent of these cases is that of *Worthen* v. *Delinquent Lands,* 189 Ark. 723, 75 S. W. (2d) 62, which was reviewed by the Supreme Court of the United States in a case reported under the style of *Worthen* v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. ed. 638, 97 A. L. R. 905. Certain legislation passed by the General Assembly of this State was there held invalid as impairing contractual obligations, but that legislation was utterly unlike the act 79. That case, as well as an innumerable number of others, recognizes the power to enact legislation which merely affects the remedy existing at the time of the execution of the contract for its enforcement without affecting the substance of the contract itself.

The case of *Gibbs* v. *Zimmerman,* 290 U. S. 326, involved the constitutionality of a statute of the State of South Carolina. The statute repealed a law providing for the appointment of receivers for insolvent banks, but also provided that the Governor of the State should appoint a conservator to take over and to liquidate such

banks. In the attack upon this legislation, it was insisted that the legislation was void in that it deprived creditors of the right to the appointment of a receiver who should proceed to enforce the stockholders' statutory liability to depositors. In upholding the validity of the legislation, Mr. Justice ROBERTS, speaking for the court, said: "But, although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton,* 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." (Citing cases.)

The case of *Drainage District No. 2* v. *Mercantile-Commercial Bank and Trust Co.,* 69 Fed. (2d) 138, is exactly in point. The question there involved was the constitutionality of act 46 of 1933, *supra,* which, as had been said, is of identical purport as act 79 passed at the same session of the General Assembly. The opinion by the Court of Appeals of this circuit is not conclusive on us, but it is highly persuasive. *State* v. *Meek,* 127 Ark. 349, 192 S. W. 202. It announces the conclusion, in which we concur, that the remedies provided by these acts, 46 and 79, cannot be said to be either inadequate or unavailing. A petition for certiorari was denied in this case by the Supreme Court of the United States. 293 U. S. 566.

We conclude therefore that the court below was in error in appointing the receivers and in not discharging the receivers as prayed, and also in approving the purchase of the bonds as herein stated. The decree of the court below will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion.

AMERICAN REFRIGERATOR TRANSIT COMPANY *v.* STROOPE.

4-4056

Opinion delivered December 9, 1935.

R. E. Wiley, Fletcher McElhannon and *Henry Donham,* for appellants.

Pace & Davis, J. H. Lookadoo and *Tom W. Campbell,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $30,000 rendered in favor of appellee against appellants in the circuit court of Clark County on account of

an injury received by him on July 29, 1934, through the alleged negligence of appellants in allowing a piece of ice to fall from a loading dock or platform, that struck him on the back while he was on the ground below inspecting and unchoking a drain pipe of a refrigerator car that was being iced by employees of the American Refrigerator Transit Company at Gurdon.

Appellant Tate was served with summons in Clark County, where he resided, and the American Refrigerator Transit Company was served with summons by delivering a copy thereof to its designated agent for service in Pulaski County. The American Refrigerator Transit Company filed a motion to quash the service upon it, which was overruled by the court over its objection and exception, and its rights thereunder, if any, were properly saved throughout the trial.

An answer was filed by appellants, denying the material allegations of the complaint.

When the case was called for trial, appellants filed a motion to quash the panel of the petit jury, alleging that one of the jury commissioners which selected the petit jury had served in that capacity within four years and was ineligible under act 161 of the Acts of 1933 to again serve. It was also alleged in the motion that the three jury commissioners had selected, upon the panel, naming them, several persons who had served upon petit and grand juries within the past two years and were ineligible under said act to again serve. The court excused from the panel those persons who had served on grand and petit juries within two years previous and overruled the motion of appellants to quash the entire panel, to which latter action of the court appellants objected and excepted.

Appellants first contend that the judgment should be reversed because the trial court erred in overruling the motion to quash the entire panel of petit jurors. It is argued in support of this contention that one of the commissioners who had assisted in the selection of the panel had previously served in this capacity within four years prior thereto, and that, under the provisions of act 161

of the Acts of 1933 he was ineligible to serve as a jury commissioner within four years from the date of his previous service. This depends on whether the act relates to the service of a commissioner prior to its passage or whether to his service in that capacity after its passage. The language of the act is as follows:

"From and after the passage of this act, no citizen of this State shall be eligible to serve as a jury commissioner oftener than one term every four years."

The general rule is that statutes should be construed as having prospective operation only, unless it is definitely expressed or clearly and necessarily implied in such statutes that they are to have retroactive effect. *Fayetteville Building & Loan Association* v. *Bolin,* 63 Ark. 576, 40 S. W. 710; *Black* v. *Special School District No. 2,* 116 Ark. 472, 173 S. W. 846-1104; *Dulaney* v. *Continental Life Insurance Co.,* 185 Ark. 517, 47 S. W. (2d) 1082; *Lacefield* v. *Taylor,* 185 Ark. 648, 48 S. W. (2d) 832.

There is no language or clear and necessary implication in act 161 of the Acts of 1933 supporting the construction that the Legislature intended for it to operate retrospectively. The language used is clear and unambiguous that a citizen shall be disqualified from serving as a jury commissioner oftener than once every four years after the passage of the act. The undisputed evidence shows that the jury commissioner in question in the instant case never served in that capacity after the passage of the act until he assisted in the selection of this particular panel of petit jurors. The trial court did not err in overruling appellants' motion to quash the entire panel.

Appellants next contend for a reversal of the judgment because the trial court erred in giving appellee's requested instructions Nos. 1 and 6, and in refusing to give appellants' requested instructions Nos. 2 and 3.

The giving of instruction No. 6 was not made a ground of the motion for a new trial, and the alleged error in giving same cannot be considered on this appeal. Appellants argue that it was error to give appellee's requested instruction No. 1 and to refuse to give appellants'

requested instructions Nos. 2 and 3 because no evidence was adduced to support a finding of negligence on the part of Raymond Tate, who was appellee's co-employee and who was sued jointly with the American Refrigerator Transit Company, their employer, for negligently causing the injury inflicted upon appellee. The evidence adduced, stated in the most favorable light to appellee, in substance, (adopting, in part, appellee's statement of facts) is as follows:

The appellee, who was in the employ of appellant American Refrigerator Transit Company on the night of the 29th of July, 1934, with a crew of seven other men, engaged in re-icing a refrigerator car at Gurdon, was injured. The car was being re-iced at a loading dock or platform at the junction of the Womble Branch Line with the main line of the Missouri Pacific Railroad. The loading dock was built for the purpose of re-icing cars, and was about 250 feet long from north to south and was about thirty feet wide. The railroad tracks ran on either side of the dock. The dock on the east side was about 17 feet high, the platform of the dock being about even with the top of the refrigerator car standing on the track, making it convenient to put ice in the top of the car from the platform of the dock. In the roof of the car there were four holes to receive the ice, two at each end of the car. Over these holes there were lids that were opened when the car was to be re-iced. On the west side of the dock, the railroad tracks were built up so that the doors of the refrigerator cars carrying ice were even with the platform. The ice in these cars came in blocks weighing 300 pounds each. When this ice was removed to the platform, the 300-pound blocks were cut into three 100-pound blocks by the crew, to enable them to more easily put the ice into the refrigerator car. Between the top of the refrigerator car and the top of the platform there was a space about 16 inches in width. The method adopted to put the ice in the refrigerator cars was by using pike poles to push the ice across the platform and by giving it enough momentum to cause the ice to leap over the space between the platform and the car and go into the

hole in the top of the car. The pike poles were of wood, four or five feet long, with a metal pike in the end of them, the end being inserted in the ice while pushing it. There are four drain pipes near the corners of the refrigerator car, and these pipes are used to drain the water out of the car made by the melting ice, and frequently these pipes become stopped up or clogged, and it is then necessary to open them up. On the night of the injury there was only one car to be re-iced. This car was brought in on the Womble branch, and the dock crew, while waiting for it to arrive, were engaged in taking the ice out of the cars and cutting the same into smaller blocks. When the car was seen approaching, Mr. Kinman, the foreman of the gang, directed appellee, Stroope, to go down and examine the drain pipes of the car and open up any of them that might need it. This instruction to appellee was given in the presence of appellant Tate and the other members of the crew, and they all saw him go below to perform this task. It had been the rule, promulgated by the foreman of the crew, and universally observed in the past, that no ice should be moved from the platform to the car while any one was below inspecting the drain pipes, and appellant Tate testified that he knew this to be the rule. The drain pipes were located directly beneath the hole where the ice was put in the top of the car. While appellee Stroope was at the northwest corner of the car, bent over and engaged in inspecting the drain pipe, appellant Tate attempted to move a piece of ice from the platform to the car, and in so doing broke the ice in two pieces, and one piece weighing between 25 and 50 pounds fell a distance of about 17 feet, striking appellee in the back and injuring him so that he will be a permanent cripple. The block of ice that Tate was trying to put across the open space between the dock and car was lying about three feet from the edge of the platform, and, in order to give it enough momentum to make it clear the space between the platform and the car, he struck the ice too hard with his pike pole and broke it in two pieces, one piece of ice going into the hole in the car and the other piece falling below and striking appellee. He could and

should have moved the piece of ice back on the platform far enough so that he could have given it sufficient momentum to cause it to go from the platform into the hole in the car without striking it too hard with his pike pole in an effort to put it over from where it was lying within three feet of the edge of the platform.

The evidence thus summarized was sufficient to warrant the jury in finding that Tate was negligent in moving the ice while appellee was on the ground inspecting and unchoking the drain pipes, as well as in the manner he handled the ice when he attempted to put it in the car.

Since learned counsel for appellants admit that there is sufficient evidence in the record to establish liability against the American Refrigerator Transit Company, and since the record discloses ample evidence to sustain the finding of the jury that Tate was a joint tort-feasor with it, the service upon the American Refrigerator Transit Company in Pulaski County was good, so the trial court did not err in refusing to quash the service upon the American Refrigerator Transit Company, and did not err in submitting the issue of whether Tate was guilty of negligence causing the injury to appellee.

The next and last contention of appellants for a reversal of the judgment is that the judgment is excessive. At the time of the injury, appellee was 29 years of age, strong and healthy, with an expectancy of 36 years, and had been earning $250 a month continuously for eight years. According to the testimony introduced by appellee, which the jury accepted as true, appellee is a complete physical wreck as a result of the injury, and is continuing to grow worse instead of better. His suffering was intense from and after the injury for a long period of time. In view of his helplessness and the pain he has suffered, we are of opinion that the judgment is not excessive.

No error appearing, the judgment is affirmed.

Mr. Justices McHaney and Baker dissent as to the construction of the act, and Mr. Justice Smith is of opinion the verdict is excessive.

BENTON *v.* PHILLIPS.

4-4067

Opinion delivered December 9, 1935.

Ernest Briner, for appellant.

Sid J. Reid and Arthur C. Thomas, for appellees.

HUMPHREYS, J. This suit was brought by appellees, who owned lots 8, 9 and 12 in block 7, in North Benton, in the city of Benton, Arkansas, against appellants to prevent them from interfering with the construction of an ice plant and other business buildings on said property under the provisions of ordinance No. 1, zoning this and other property as strictly residential property, which was passed by the city council on February 26, 1935, alleging that the ordinance was void for several reasons, among them the failure to comply with act 108 of 1929 of the Acts of Arkansas authorizing cities of the second class to pass zoning ordinances.

Appellants filed an answer to the complaint, denying the invalidity of the ordinance.

An intervention was filed by A. S. Henley and a number of the other property owners in the vicinity of said property, alleging that the construction of an ice plant on said property and the operation thereof would be a nuisance and result in irreparable damage to the inter-

veners in the enjoyment of their homes as well as the value thereof. A demurrer to the intervention was filed and overruled.

In the course of the trial, the appellants offered evidence to sustain the allegations contained in the intervention, which the court excluded. The record does not disclose whether an answer was filed to the intervention, so it is perhaps pending as an independent proceeding for further action by the court.

The court then proceeded to hear the case upon the sole issue of whether the ordinance was invalid, and found that it was, and rendered a decree restraining appellants from interfering with appellees in the erection and construction of said ice manufacturing plant and the peaceful enjoyment of their property, from which decree is this appeal.

The undisputed evidence shows that, in passing the zoning ordinance, the city of Benton failed to file the plan together with all maps, plats, charts and descriptive matter in the office of the city clerk and a certified copy thereof by the city clerk in the office of the recorder of Saline County.

The only authority cities of the second class have to pass zoning ordinances is that conferred upon them by act 108 of the Acts of 1929. Of course, in exercising this special authority, they must comply with the act in order to render their ordinances valid relative to zoning the city. Section 4 of said act reads as follows:

"The plan, and any amendment, change, addition to or alteration thereof, together with all maps, plats, charts and descriptive matter, shall be filed in the office of the city clerk, and a copy thereof, certified by the city clerk, shall be filed in the office of the recorder of the county in which the city is located."

The purpose of this provision was to give every one notice of the plan so that they might make suggestions and objections thereto as well as to acquaint every one purchasing lots with the use to which they might be put. In placing restrictions of this kind upon the use of real estate, notice was necessary and should have been given

in the manner prescribed in the act conferring the power to do so upon cities. It is necessarily a mandatory provision in the law, and must be followed in the passage of the zoning ordinance.

Having failed to comply with the act in the passage of the zoning ordinance, same is void, and the decree is correct, and must be and is affirmed.

STATE *v.* HUDSPETH.

Cr. 3967

Opinion delivered December 9, 1935.

[redacted]

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellant.

John L. Carter, Sam Rorex and *Edward H. Coulter,* for appellee.

MEHAFFY, J. The appellee was indicted January 15, 1932, for receiving deposits into an insolvent bank. On April 30, 1932, he made bond in the sum of $750 for his appearance in court. On July 18, 1932, he filed motion for a change of venue. This motion was overruled by the court. On July 18, 1932, appellee entered his plea of guilty, and it was ordered and adjudged by the court that the cause be continued until the January term of court, 1933, for sentence and judgment.

On July 17, 1933, appellee filed the following motion:

"Comes the defendant, A. T. Hudspeth, and respectfully represents to the court:

"That at the January, 1932, term of the circuit court of this county an indictment was returned against him in the above-entitled cause, said indictment was returned, being No. 7; that at the same term of said court an indictment was returned against him, No. 13, charging him with the crime of embezzlement of money from said Citizens' Bank & Trust Company; that at the same term of said court an indictment was returned against him, No. 16, charging him with the crime of embezzlement of funds of J. H. Fowler; that at the same term of said court an indictment was returned against this defendant's son, W. A. Hudspeth, charging him with the crime of receiving deposits in the People's Saving Bank of Harrison, Ark., knowing said institution to be in an insolvent condition, and a similar indictment was returned against G. C. Coffman, charging him with the crime of receiving deposits in said People's Saving Bank, knowing said institution to be in an insolvent condition; that similar indictments were returned against G. C. Alexander, Dan Holmes and T. E. Milburn, officers of the said Citizens'

Bank & Trust Company of Harrison, Arkansas, charging them with receiving deposits and assenting to the receipt of deposits in said Citizens' Bank & Trust Company, knowing said institution to be in an insolvent condition; that all of said indictments were pending in the Boone Circuit Court at the July, 1932, term of said court; that at the same time an indictment was pending in the circuit court of Searcy County, Arkansas, against A. A. Hudspeth, charging him with the crime in connection with the failure of the First State Bank of Marshall, Arkansas, and that at said time it was contemplated that efforts to secure indictments against this defendant and other persons theretofore associated with him and in his employment in various banks in this judicial district would be made, this defendant having been the chief officer and managerial head of eleven banks in this judicial district, all of which had theretofore been declared insolvent.

"That at the said July, 1932, term of the Boone Circuit Court this defendant filed a motion for a change of venue in the causes pending against him, which motion was supported by the affidavits of W. T. Raley, S. D. Jones, A. H. Boyd, W. H. Watkins, Ralph Jefferson, W. E. Halbrook and W. H. Pettit, reputable citizens of this county, to the effect that the citizenship of this county was so prejudiced against this defendant that he could not obtain a fair and impartial trial here; that said motion was overruled by the court and exceptions saved to said action by the defendant on the ..... day of July, 1932; that said cause was set for trial the following day to be called at 8 o'clock A. M.; that, prior to the calling of said cause as above stated, this defendant was approached by officers of the court and those interested in the prosecution for a compromise of all of said cases, and that the following agreement was finally arrived at and entered into by and between the court and the prosecuting attorney and the defendant and his attorneys, to-wit:

"That all the above-mentioned indictments, except the indictments in this cause referred to herein as No. 7, should be dismissed against all of defendants upon defendants paying the costs in each action, including a

prosecuting attorney's fee of $25 in each case; that no further indictments or prosecutions would be instigated against any of the officers or employees of any of said above-mentioned institutions in this judicial district; that this defendant would enter his plea of guilty in this particular cause, which plea was at said time entered; that he should receive a sentence in the penitentiary of this State of the term of one year, and that, prior to the pronouncement of said sentence and judgment of the court, all the above-mentioned cases should be dismissed, and that at this defendant's own option he might receive his sentence at the October, 1932, adjourned term of this court, which it was then contemplated would be held, or defendant might elect to receive his sentence at the January, 1933, term of this court, or, at defendant's election and option, the pronouncement of said sentence would be deferred until the July, 1933, term of this court; that all of said agreements on the part of the officials of the court and those interested in the prosecution were conditions precedent to the entering of said plea of guilty and were to be performed prior to the pronouncement of sentence and judgment upon said defendant.

"That at the January, 1933, term of said court this court, in an open statement to a reporter of the *Harrison Daily Times,* a newspaper published at Harrison, Boone County, Arkansas, and having a general circulation, therein indicated that the court did not intend to abide by certain portions of that agreement as hereinbefore set out, which statement was in substance as follows:

" 'That he (Judge Koone) would leave the cause up to Hudspeth either to present himself at the present session and accept sentence of a year in the penitentiary, or delay until the July term of court and be sentenced to ten years.'

"That said agreements, on the part of the officials of the court and the prosecution, have not been performed, and that further indictments have been procured by the prosecution and court officials, and are now pending against this defendant and other officials connected with said banking institutions; that the court and the prose-

cuting attorney, in public and private statements, have indicated that they do not intend to perform said agreement in the future.

"That therefore this defendant desires to withdraw his said conditional plea of guilty and to enter his plea of 'not guilty' to this cause; that he is innocent of the charge herein and entered said plea of guilty solely for the purpose of protecting his friends and former business employees and associates, as well as himself, from further trouble or prosecutions in connection with said bank failures.

"That he is entitled to withdraw said conditional plea of guilty because, (1) said plea was conditional as hereinbefore set out, and (2) the said agreement on the part of the court officials and the prosecution has not been performed or kept.

"Wherefore defendant prays that he be permitted to withdraw his conditional plea of guilty herein and enter his plea of not guilty to this charge, and that he be granted leave to adduce testimony in support of this motion."

On July 18, 1933, appellee filed a motion to disqualify the presiding judge. Evidence was heard on this motion, and the motion was overruled. The court then overruled appellee's motion to withdraw his plea of guilty, and sentenced him for three years in the penitentiary. The appellee filed his motion for a new trial, which was overruled, and an appeal was prosecuted to this court.

The case was decided by this court on December 4, 1933, and is reported as *Hudspeth* v. *State,* 188 Ark. 323, 67 S. W. (2d) 191.

On February 4, 1935, appellee filed in the Boone Circuit Court a petition for a writ of error *coram nobis.* In the petition he made a lengthy statement about the financial condition of the country and about the condition of banks, and alleged his indictment, and motion for change of venue, and the agreement that he claimed to have had with the officers, and stated, among other things, that he was convinced that his life would be in danger if he proceeded to trial, and entered a plea of guilty, and that he

would not otherwise have entered such a plea; that upon entering his plea, the cause was continued for the term without the pronouncement of sentence; that he thereafter filed his petition asking that the judgment of conviction be set aside, and that he be permitted to go on trial in the case on its merits; that his petition was overruled and sentence passed on him condemning him to serve three years in the penitentiary; that an appeal was taken, and that the judgment was modified by the Supreme Court by reducing the penalty to one year; that he had been denied his constitutional rights; that preliminary steps for perfecting his review before the United States Supreme Court were taken, but that said action had been abandoned; that, because of the high state of feeling against him, he was prevented from producing the facts, and he asked for the writ of error *coram nobis,* and for a record of the proceedings in the case, and that said judgment be set aside.

The court made an order directing the issuance of the writ and directing the clerk to certify and bring forth the record, proceedings and judgment in the cause of the State of Arkansas against appellee. Then on February 4th the court issued an order to the clerk directing him to certify and bring into court the record of the proceedings and the judgment in this cause made and entered in said court on July 18, 1933.

The prosecuting attorney filed a response to the petition for a writ of error *coram nobis.* The appellee's attorney then filed an assignment of error. Judge Holt was prosecuting attorney at the time appellee was convicted, and is now the regular circuit judge, and was at the time this petition was filed. He certified his disqualification, and the Honorable W. T. Mills was selected as special judge to try the case.

A writ of error *coram nobis* lies for the purpose of obtaining a review and correction of a judgment by the same court which rendered it, with respect to some error of fact, not of law, affecting the validity and regularity of the judgment. 34 C. J. 390.

The appellee brings petition for this writ and alleges that his plea of guilty was entered because of threats of

violence against him and to save himself from mob violence.

It is first contended by the appellant that the writ of error *coram nobis* does not lie where the facts were known at the time of the trial. This is generally true, but, if he entered his plea of guilty because he feared mob violence, as he claims in this case, he could not have entered the plea of guilty because of threatened violence unless he did know of it. If one is caused to enter a plea of guilty in a criminal case from fear or duress, he is entitled to the writ, but he is not entitled to the writ to correct any error at law, but only error as to the facts. It appears that he was indicted and afterwards made bond and entered his plea of guilty six months after the indictment, and about three months after his arrest. After the plea of guilty was entered, he filed an application to be permitted to withdraw his plea of guilty and enter a plea of not guilty, and have his trial. There was not a word in his application about threats or violence of any kind, and his petition conclusively shows that he entered the plea of guilty, not because he feared violence, not because of any threats, but, as he stated in his application to withdraw his plea of guilty, said plea of guilty was entered solely for the purpose of protecting his friends and former business employees and associates, as well as himself. This petition by him was sworn to, and he testified that he had made an agreement with the officers of the court to enter a plea of guilty to one indictment, and that the other indictments against himself and friends should be dismissed. He alleged that the agreement was that he was to be sentenced to one year in the penitentiary. He knew at the time he made the application all the facts that he now knows, and he could have made them known to the court, and it was his duty to do so if he desired to urge them as a reason for setting aside the judgment on his plea of guilty. The court overruled his motion to set aside the judgment after hearing the evidence, and he prosecuted an appeal to this court, and the judgment of the Boone Circuit Court was affirmed. All of his statements and his conduct show beyond question that he did

not enter the plea of guilty because he feared mob violence. He not only swore himself that he did not, but he asked the court to set aside the plea and permit him to go to trial. He was ready and willing to go to trial. He would not have been if he feared mob violence as he now claims. The trial court in this case directed the clerk to bring all the proceedings of the former case into court and the transcript of those proceedings showed beyond dispute that he claimed that the plea of guilty was entered solely because he wanted to protect himself and friends, and not because he feared mob violence. If mob violence had had anything to do with his entering the plea of guilty, he should have made that plea at the time he asked the court to permit him to withdraw his plea of guilty.

"The writ will not lie where the party complaining knew the fact complained of at the time of or before the trial, or by the exercise of reasonable diligence might have known, or is otherwise guilty of negligence in the matter. The court will not consider any facts which might have been presented to the court on the trial of the cause." 34 C. J. 394.

His claim of mob violence and fear for his safety are disproved in his sworn application and in his request for a trial.

It is next contended by the appellant that a writ of error *coram nobis* does not lie after appeal. Appellee calls attention to a number of cases, but they do not decide the question outright. However, numbers of cases have come to this court after the judgment was affirmed here, and this court has heard and decided such cases, thereby tacitly approving the rule that the writ will lie after the judgment is affirmed in this court. The authorities are in conflict on this question, some courts holding that, where a criminal case has been appealed and affirmed by the Supreme Court, a writ of error *coram nobis* cannot be filed in the trial court until application is made in the Supreme Court for leave to file the petition; but that rule has never been adopted by this court. *Hydrick* v. *State,* 103 Ark. 4, 145 S. W. 542; *Adler* v. *State,* 35 Ark. 517; *Sease* v. *State,* 157 Ark. 217, 247 S. W. 1036; *Kelley*

v. *State,* 156 Ark. 188, 246 S. W. 4; *Beard* v. *State,* 81 Ark. 515, 99 S. W. 837. We think, however, that the better rule is that, when a judgment has been affirmed by this court, no application for the writ of error *coram nobis* may be made to the trial court without permission to make such application has been given by this court, and hereafter this rule will be enforced.

It is contended by the appellee that setting aside the judgment of conviction is not appealable. The cases cited in support of this contention have no application here. In cases of this character the legal sufficiency of the evidence to justify the court in setting aside the judgment is a question of law, and we have many times decided that on questions of this sort, the finding of the trial court is not binding on this court like the verdict of a jury. If the setting aside of a judgment, as in this case, was not appealable, a trial court could set aside the judgment of this court where the overwhelming weight of evidence was against his finding, if there was any substantial evidence to support his finding. *St. L. I. M. & S. Ry. Co.* v. *Colman,* 97 Ark. 438, 135 S. W. 338; *Catlett* v. *Ry. Co.,* 57 Ark. 461, 21 S. W. 1062.

Moreover, if the case were not appealable, this court has held in cases like this that, where the record is all here, we will treat it as if here on *certiorari.* It is unnecessary to decide whether appeal was proper, for in any event we have the entire record before us, and will treat it as if here on *certiorari. Kelley* v. *State,* 156 Ark. 188, 246 S. W. 4.

It is next contended by the appellee that the undisputed facts of the case at bar would support no other judgment than the one rendered by the trial court. We do not agree with this contention of appellee. The facts are, as shown by the record, that after the indictment in January, 1932, appellant was at liberty without bond for about three months. He then surrendered and made bond, and was at Harrison often from that time on. He entered his plea of guilty six months after the indictment. After his plea was entered, he then filed the motion above set out, asking to be permitted to withdraw his plea of guilty

and have a trial. This motion was denied, appeal taken to this court, and the judgment of the lower court affirmed on December 4, 1933. During all this time he was at liberty and does not claim that any one ever molested him or offered any violence at all. The record also shows that six months after the indictment he filed a motion, to which he made affidavit, that the sole ground for his plea of guilty was the protection of himself and friends and the agreement that he had with the officers of the court. He contended that the officers violated their agreement in refusing to dismiss all the cases against him and his friends except this one case. This was disputed, and this question of fact was tried, and the verdict was against him. He appealed to this court, where the judgment was affirmed. There were other indictments against him, as shown by the record, indictments against his son, and against other persons who had been his employees, and his testimony was to the effect that it was to get these indictments dismissed that he pleaded guilty. There were a number of charges dismissed, it being contended by the officers that they did not agree to dismiss any charges in the other counties. We therefore think that, when the whole evidence is considered, it shows that the fear of violence had nothing to do with his plea of guilty, and that the trial court erred in setting aside the judgment.

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

STANDARD OIL COMPANY OF LOUISIANA *v.* MILNER.

4-4075

Opinion delivered December 16, 1935.

Moore, Gray, Burrow & Chowning, for appellant.

B. R. Bogard and *Tom W. Campbell,* for appellee.

JOHNSON, C. J. This action was instituted by appellee, Aubrey A. Milner, against appellant, Standard Oil Company of Louisiana, in the circuit court of Pulaski County to compensate a personal injury, alleged to have been received by and through the negligence of appellant, its servants, agents and employees. The answer denied the material allegations of the complaint and affirmatively pleaded contributory negligence and assumed risk. Upon trial to a jury the issues were determined in favor of appellee, and his damages were assessed at $5,000, for which sum a judgment was duly entered, from which this appeal comes.

It is tacitly conceded that the testimony in behalf of appellee is sufficient to support the jury's finding of liability, therefore the testimony on this phase of the case will not be reviewed by us. It is contended, however, that the jury's verdict is excessive, therefore it will be necessary to notice the testimony in this regard. Appellant's primary contention for reversal is that the circuit court erred in giving to the jury in charge appellee's requests numbered, one and three, by which the jury was told to return a verdict in favor of appellee without conditioning such finding upon its defense of contributory negligence, and *Postal Telegraph Co.* v. *White,* 188 Ark. 361, 66 S. W. (2d) 642, is cited as decisive of this contention. Such is the effect of the case cited, but, when properly analyzed, it does not necessarily have this effect. In the cited case, *supra,* three defenses were interposed, namely: release from liability, assumed

risk and contributory negligence. All three of these defenses were ignored in the finding instruction there condemned. We there held that it was error to give the finding instruction for plaintiff without conditioning such instruction upon the three defenses there interposed. Our attention was not called to, and we did not consider or discuss the effect of the Master and Servant Act of 1913, which now appears as §§ 7144 to 7150, inclusive, of Crawford & Moses' Digest, which has modified the defense of contributory negligence, therefore we now feel free to consider and decide this question upon its merits.

By the sections of the statutes heretofore referred to and in all actions arising thereunder, contributory negligence is not a complete defense thereto. We have so decided many many times. *Ward Furn. Mfg. Co.* v. *Pickle,* 174 Ark. 463, 295 S. W. 727; *Bradley Lbr. Co.* v. *Tarvin,* 181 Ark. 1145, 27 S. W. (2d) 520; *Miss. River Fuel Co.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255; *Dierks Lbr. & Coal Co.* v. *Tollerson,* 186 Ark. 429, 54 S. W. (2d) 61; *American Co. of Ark.* v. *Baker,* 187 Ark. 492, 60 S. W. (2d) 572; *W. P. Brown & Sons Lbr. Co.* v. *Oaties,* 189 Ark. 338, 72 S. W. (2d) 213; *Hartman-Clark Bros.* v. *Melton,* 190 Ark. 1001, 82 S. W. (2d) 257.

Since contributory negligence is not a complete bar to appellee's cause of action, it necessarily follows that the court did not err in refusing to modify appellee's finding instruction to negative contributory negligence. It is only in cases where the defense or defenses interposed are complete and not partial that finding instructions must be conditioned upon such defenses, and the corollary of this proposition is that partial defenses only should not be stated as conditions to recovery. *Temple Cotton Oil Company* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676; *Coca-Cola Bottling Co. of Blytheville* v. *Doud,* 189 Ark. 986, 76 S. W. (2d) 87; *National Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395; *Garrison Company* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396.

The views here expressed are not in conflict with those stated in *Garrison Company* v. *Lawson, supra,* and cases there cited. In all the cases there referred to we

were dealing with finding instructions which ignored defenses which were available to appellant as a complete bar to liability.

We conclude therefore that no error was made to appear by this assignment.

Appellant next urges that the trial court erred in giving to the jury in charge appellee's request number 2, as follows: "If the jury find from a preponderance of the evidence that the plaintiff, Aubrey A. Milner, and W. E. Scott on April 1, 1934, were employees of the defendant, Standard Oil Company of Louisiana, and that the construction foreman for said company under whom they were working ordered or directed them to leave El Dorado, Arkansas, on the evening or night of April 1, 1934, and go to Hampton, Arkansas, so as to arrive at Hampton on the morning of April 2, 1934, to assist in doing certain work for said defendant at Hampton, and ordered or directed the plaintiff and said Scott to make said trip in a truck belonging to the defendant, Standard Oil Company of Louisiana, and that, while plaintiff and Scott were riding in said truck from El Dorado toward Hampton, and while the said W. E. Scott was driving said truck, if you find that he did drive said truck on such trip, the said Scott failed to keep a reasonable lookout ahead and failed to keep said truck under reasonable control, and that, on account of his failure so to do, if you find from the evidence he did fail so to do, the said Scott caused or allowed said truck to leave the highway and run into a ditch and injure the plaintiff, and that, in failing to keep a reasonable lookout, and in failing to keep said truck under reasonable control, he failed to use ordinary care for the safety of the plaintiff, and that the plaintiff had not assumed the risk of such injury, you should find for the plaintiff in this case and assess his damages as hereinafter explained in these instructions."

The contention is that there is no testimony to support this instruction. A witness for appellee on this point testified: "Q. Tell the jury what your foreman instructed you people to do? A. Our foreman instructed us to take what material, and Arthur Wallace to El

Dorado, and unload and come back to Hampton that night, or part of the way, so we could be on the way early the next morning at eight o'clock. Q. Up on the job at eight o'clock the next morning at Hampton? A. Yes, sir. Q. Did he tell you whether or not to take the truck back with you to Hampton? A. Yes, sir. Q. What did he tell you to do at Hampton? A. We were to dismantle a storage tank and get it ready to ship to Hope, Arkansas."

This testimony is amply sufficient to support the submission of this question.

Lastly appellant contends that the jury's verdict and consequent judgment for $5,000 is excessive. The testimony on this phase of the case warranted the jury in finding that prior to appellee's injury he was a stout, able-bodied young man, 37 years of age, and in perfect health, fully capable and competent to perform all kinds of manual labor; that he had an expectancy of more than 30 years and was earning at the time of his injury $16 per week; that his earning capacity on account of his injury has been reduced to almost nothing. Dr. McGill testified that appellee's knee was permanently injured to the extent that he could never successfully do work that required walking or standing. This testimony is amply sufficient to support the verdict and judgment.

No error appearing, the judgment is affirmed.

ALLISON *v.* WILLIAMS.

4-4070

Opinion delivered December 16, 1935.

Beloate & Beloate, for appellants.

Cunningham & Cunningham, for appellee.

JOHNSON, C. J. On September 19, 1933, a default decree of foreclosure was entered in the Lawrence County Chancery Court, wherein Claud R. Williams, executor, was plaintiff and R. E. and Mollie Allison and others were defendants, by the terms of which decree certain described real estate, the property of the Allisons, was ordered sold. In obedience to this decretal order, the sale was duly made by the commissioner and subsequently was reported to and approved by the court. The plaintiff in the case was the purchaser. Thereafter in April, 1934, possession of the foreclosed premises not having been surrendered by the Allisons to the purchaser, a petition for a writ of assistance or possession was filed by the purchaser at the sale against those in possession of the premises. To this petition Mrs. Allison responded that her continued possession of the premises was lawful because of a contract of purchase consummated subsequent to the foreclosure sale and decree, and that therefore the chancery court was without jurisdiction to grant the relief prayed in the petition. The uncontradicted testimony adduced upon a trial of the petition for a writ of assistance was to the effect that, subsequent to the foreclosure decree and sale, the purchaser and Mrs. Allison entered into a written contract for the sale and purchase of the foreclosed premises, and that considerable acts and dealings were performed by the parties in furtherance thereof. Notwithstanding this uncontradicted testimony, the chancellor retained jurisdiction of the petition and granted the prayer thereof. In this reversible error was committed. The rule is universally accepted that a writ of assistance or possession will not lie against one who has acquired a new and independent right or title subsequent to the original litigation. See 5 C. J., § 6,

p. 1320, and cases there cited. Also see 2 R. C. L., § 4, pp. 729, 730.

The office of the writ of assistance has ever been confined, not only in this country, but in England as well, to lend aid to the original equity jurisdiction, and such writ can not be employed as a substitute for other common law or statutory actions. See authorities cited, *supra.*

The new right, if any, acquired by Mrs. Allison subsequent to the original litigation can be inquired into and about only in independent litigation instituted for that purpose, and we pretermit any discussion of the jurisdiction or the merits of the alleged rights. It suffices to say that the chancery court erred in granting the writ of assistance under the undisputed facts here considered.

Appellant also urges that the original proceedings in foreclosure were irregular in many particulars, and that these alleged errors should be reviewed on this appeal. This appeal was perfected in this court on August 2, 1935, or almost two years subsequent to the entry of the original foreclosure decree. Under repeated opinions of this court the foreclosure decree became final and conclusive between the parties and their privies long prior to this appeal. See cases cited in volume 4, title "Judgment," § 173, Crawford's Arkansas Digest.

For the error indicated the cause is reversed, and the petition for a writ of assistance is dismissed.

PAGE *v.* POLK.

4-4179

Opinion delivered December 16, 1935.

Carl E. Bailey, Attorney General, and *J. F. Koone,* Assistant, for appellant.

C. L. Polk, Jr., for appellees.

Henry H. Rightor, Jr., amicus curiae.

HUMPHREYS, J. This is a suit by appellee, a common school district, to enjoin appellant, the State Treasurer, from crediting all the tobacco tax (cigar and cigarette tax) now being collected, to the State Equalizing Fund until said fund shall receive one-half of the amount to which it and the common school fund are entitled in equal parts under the provisions of act 152 of the Acts of the General Assembly of 1929 as amended by act No. 19 of the Acts of the General Assembly of 1931.

It was alleged in the complaint that appellant was unlawfully and wrongfully diverting moneys received from the cigar and cigarette tax to the Equalization Fund instead of dividing the tax on a fifty-fifty basis under said act in violation of §§ 11 and 12 of article 16 of the Constitution of the State of Arkansas.

Appellant filed an answer denying the material allegations of the complaint, and the cause was tried upon an agreed statement of facts, which is as follows:

"It is agreed by and between the parties hereto that the defendant herein has, since the first of the year 1935, credited the Equalizing Fund with all moneys arising from the taxes imposed by act 152 of 1929 and act 19 of 1931, less one-ninth of the moneys arising from the tax on cigarettes; that, as a result of said action by defendant in failing to credit the common school fund with fifty per cent. (50%) of said moneys since that date, the Helena School District No. 1, one of the plaintiffs herein, has failed to receive approximately the sum of $3,331.46, which it would have received had said defendant divided

said moneys equally between the common school fund and the Equalizing Fund; that both plaintiffs are entitled to bring and prosecute this action; that said district will not receive several thousand dollars under the present action of defendant which it would receive should said defendant divide said moneys equally between said funds hereafter, the loss of plaintiff being approximately $375 per month so long as the present action of defendant is continued.

"It is further agreed that the sum of moneys collected under the above-mentioned acts and credited to the common school fund and the equalization fund from March 20, 1929, until September 30, 1935, is $5,397,763.97; that of said sum $3,747,047.59 has been placed to the credit of the common school fund and $1,650,715.38 to the credit of the equalization fund; that approximately the sum of $100,000 has been received by plaintiff school district in excess of what it would have received had said moneys been at all times divided equally between said funds; that defendant intends to place all of said moneys to the credit of the equalization fund until the amount credited to said fund equals that credited to the common school fund and thereafter to divide said moneys equally between said funds."

The trial court permanently enjoined appellant, Treasurer of the State of Arkansas, from placing to the account of the equalization fund all of the moneys received from the taxes on cigars and cigarettes until a parity shall exist between the two funds, from which is this appeal.

The object of the creation of the State Equalization Fund was to help and aid needy school districts in Arkansas, and the levy of tobacco taxes in this State was made to furnish means to both this fund and the common school fund in equal parts in order that all school districts in the State might function, and especially the needy ones.

The clear and unequivocal intention of act 152 of the Acts of 1929 and the amendatory act of 1931 was that, after setting aside one-ninth of all the moneys collected from the cigarette tax for buildings for schools of higher

education, the balance collected from that and other tobacco taxes should be equally divided by the State Treasurer between the common school fund and the State Equalizing Fund.

Paragraph B of § 29 of act 152 of 1929, as amended, reads as follows: "B. The State Treasurer shall place all remaining money coming into his possession on account of the sale of the tax stamps and permits and all other revenue under the provisions of this act to account as follows:

" '1. The first seven hundred fifty thousand dollars ($750,000) to the common school fund; and

" '2. The next seven hundred fifty thousand dollars ($750,000) to the State Equalizing Fund; and

" '3. All the remainder of such revenue shall be credited fifty per centum. (50%) to said common school fund and fifty per centum. (50%) to said State Equalizing Fund.' "

It is obvious from reading the statute that the levy is a continuing one, and the duty is imposed by the act upon the Treasurer of the State of Arkansas, whoever he might be, to divide the remainder of the money derived from the levy for an unlimited time or as long as the levy stands between the common school fund and the State Equalizing Fund. The moneys derived from the continuing levy cannot be denominated as appropriations of certain and definite amounts to either fund for a definite period of time, and are not governed and controlled by §§ 11 and 12 of article 16 of the Constitution of Arkansas, which are as follows:

"Article 16, § 11: No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of same; and no money arising from a tax levied for one purpose shall be used for any other purpose.

"Section 12: No money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation."

Maintaining the parity between the two funds in the division of moneys derived from the levy cannot be, in

any sense, regarded as a diversion of a tax levied for one purpose to another purpose, and the Treasurer, in so doing, did not violate the Constitution. The Treasurer of the State, irrespective of who he has been, has allowed these moneys to get out of balance on a basis of a fifty-fifty division, and can and should balance the two funds out of moneys derived, and being derived from the continuing levy. No other action on the Treasurer's part would work a just and equitable result as between the two funds, and not destroy the intent of the Legislature.

The decree, granting a permanent injunction, is therefore reversed, and the cause is dismissed.

Justices SMITH, MCHANEY and BUTLER, dissent.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* PEOPLE'S LOAN & INVESTMENT COMPANY.

4-4079

Opinion delivered December 16, 1935.

James B. McDonough, for appellant.

Miles, Armstrong & Young, for appellees.

MEHAFFY, J. The appellant brought this suit in the Sebastian Circuit Court against the appellees, alleging that on January 6, 1926, Fred Browne, Lee G. Sims and Charles S. Holt entered into a lease contract whereby Fred Browne leased to Lee G. Sims and Charles S. Holt a building at 1100 Garrison Avenue on corner of Garrison and Townson avenues, in Fort Smith, Arkansas. The building consisted of a basement, occupied by the People's Loan & Investment Company, and the first floor, occupied by it. The lease was for five years, beginning February 1, 1929, at a rental value of $2,400, payable $200 on the first of each month. It was alleged that, by the terms of the lease, Lee G. Sims and Charles S. Holt agreed and obligated themselves to pay Fred Browne $2,400 a year for said premises, said payments to be made in the sum of $200 for each month. At the time the lease was made the People's Loan & Investment Company was occupying the premises, and has continued to occupy said premises from that date down to the commencement of this action. During the time covered by the lease, the People's Loan & Investment Company has paid, by its own checks, the sum of $100 per month, less a deduction of $22.92, which appellant alleges was wrongfully deducted.

On May 10, 1932, Fred Browne executed and acknowledged an assignment of the rents to the appellant.

It is alleged that the appellant accepted said payments as payments on the contract, and advised the appellees that said payments would be accepted as payments on the contract, and that appellees were liable to

the appellant for the total sum of $200 per month. The lease contract terminated January 31, 1934. For the period ending on that date, the People's Loan & Investment Company paid to the appellant the sum of $1,200 less $22.92. It alleged appellees were indebted to it in the sum of $1,222.92 for the year ending January 31, 1934. Appellant also alleged that, since the termination of the lease, the appellees have occupied, and are now occupying said premises, and are indebted to appellant for the month of February, 1934, the sum of $200. Appellant asked judgment of $3,022.92. Appellant foreclosed its mortgage upon the premises and bought the premises at the foreclosure sale, and is now owner of the same, and Fred Browne has no interest in said premises or the rent, and no interest in this lawsuit.

The appellees filed answer in which they stated that they had never seen the original assignment from Browne to appellant; did not know whether the copy attached was correct, and therefore denied same; denied that on June 1, 1932, Fred Browne was without authority to collect the rents, and denied that the appellees were without authority to pay Browne; admitted that they paid Browne the rents up to January 31, 1933; denied that they became indebted to the appellant, and were indebted to it. They admit that they paid Bailey, agent of appellant, the sum of $100 per month less a deduction of $22.92, but deny that said deduction was wrongful; deny that the appellant accepted the payments on contract, and advised appellees that said payments would be accepted as payments on contract, and that appellees were liable to appellant for the total sum of $200 per month; admit that for the period ending January 31, 1934, they paid appellant the sum of $1,200 less $22.92; deny that for said period of time they were indebted to appellant in the sum of $2,400; deny that they are indebted to appellant in any sum.

They allege in their answer that on January 13, 1932, they entered into an agreement with Fred Browne, that, for and in consideration of paying Fred Browne twelve months' rent in advance, the rent should be reduced to the sum of $175 per month, making a total of $2,100.

They alleged that, at that time, it was agreed that a further reduction would be made if business conditions warranted, and that they then and there paid Fred Browne the sum of $2,100; that on May 12, 1932, they received notice from Bailey, agent of appellant, that the rents under said lease was to be paid to appellant; that on the same day they received a letter from Fred Browne confirming same; that under the agreement set out there were no rents due under the lease until February 1, 1933, and Bailey was so notified by letter. They state that on January 24, 1933, they entered into another agreement with Fred Browne whereby the rents were reduced under said lease to $100 per month, which agreement was effective to February 1, 1933. By the terms of said agreement the reduction was to continue to November 30, 1933, and that said agreement was in force and effect until the termination of the original lease. In May, 1932, appellees were served with notice by the electric inspector of the city of Fort Smith that certain changes were necessary in the electric wiring in the building; that the repairs amounted to $22.92; that this is a just debt against the owner of the building; that on February 28, 1933, they paid to Bailey, agent for appellant, the amount of $77.08, which was the rent for February, less the $22.92. They allege that they paid the rent at the rate of $100 per month under the terms of the contract, and that they are not indebted to the appellant in any amount.

An amendment was filed to the answer in which it was alleged that they paid rent for the building for the months of February, 1933, to January, 1934, $100 per month, and that these payments were made by check, on which was the notation, "rent in full," and alleged this as an accord and satisfaction.

There was a jury trial, a verdict and judgment for appellees, and the case is here on appeal.

Appellant contends first that under the facts there was no dispute as to the rents, and the amount thereof becoming due after January 31, 1933. The lease agreement was made for five years, to commence on February 1, 1929, and was for $200 per month. Fred Browne, the owner of the property, being indebted to the Massachu-

setts Mutual Life Insurance Company, appellant, on May 10, 1932, made an assignment of the rents to the appellant. Prior to the assignment, on January 13, 1932, appellees entered into an agreement with Fred Browne by which the rent would be reduced if they would pay a year's rent in advance. It was reduced for that year to $175 per month, and they thereupon paid Fred Browne $2,100. The evidence shows that, at the time they made this agreement, it was agreed that a further reduction would be made if business conditions warranted.

There were no rents due after the payment of the $2,100 until February 1, 1933, and the agent of the appellant was notified of this. On January 24, 1933, Fred Browne reduced the rents to $100 per month, effective February 1, 1933. This was carrying out the original agreement made at the time the rent was paid in advance. After the assignment in May, 1932, Mr. Bailey, agent for appellant, wrote to appellees notifying them of the assignment, and stated that the rents due, or that hereafter may become due, were to be paid to Bailey, agent of appellant.

Fred Browne, on May 12, 1932, also wrote appellees advising them that all rents due would be paid by them to Mr. Bailey.

On May 16, 1932, the appellees wrote to Mr. Bailey acknowledging his letter about the assignment, in which letter they stated that, as Mr. Browne had already advised Bailey, the rent on the property had been paid to January 31, 1933, and that at the expiration of that period, unless otherwise notified to the contrary, all rents would be paid to Bailey.

There can therefore be no question about the rent to the period ending January 31, 1933. On February 20, 1933, Bailey wrote to the appellees that he had on February 8 written to Sims, calling his attention to the rent in the sum of $200 being due, and payable February 1. Bailey stated to them that he was advised by his company to collect the rent. On February 23, 1933, the appellees wrote to Bailey stating that they thought they had already made it clear that the rent was not due on the first of the month, but due on the last day of the

month, and a check would be sent at that time. On February 20 appellees had written a letter to Bailey that the rent would be paid in the future as it had in the past. In that letter the appellees also stated that from the check for rent they had deducted $22.92 which they had paid to the electric company for repairs to electric wiring, which they were forced to pay or have the lights cut off.

On January 24, 1933, Fred Browne wrote appellees a letter calling attention to the former agreement when rent had been paid in advance, and agreeing to reduce the rent to $100 per month, effective with the rent of February, 1933. On February 28, 1933, appellees wrote Bailey a letter inclosing a check for $77.08, and calling his attention to the deduction of $22.92 which they stated they had previously explained to him.

On March 1, 1933, Bailey wrote to appellees acknowledging the receipt of the check for $77.08, advising them that he could not accept the check as payment of the rent, but accepted the same as a credit on the rent. Bailey testified, however, that, after holding the check for a week, he deposited it. On March 31, 1933, appellees wrote to Bailey inclosing a check for $100, the letter stating that the amount covered rent for the month of March, 1933, in full. On May 8 Bailey cashed his check. On April 1, 1933, Bailey wrote appellees, acknowledging the receipt of the check for $100, and again advising them that it was not accepted as a payment in full, but only as a credit on the rent. Appellees wrote to Bailey about the rent in the future, calling his attention to the fact that they had learned that some of the checks for rent had been changed by Bailey, before cashing them. All of the checks showed that they were for rent "in full" for the previous month.

It appears from the evidence that, before Browne assigned the rents to the appellant, he had reduced the rents to $175 per month with an agreement that, if conditions warranted it, he would thereafter reduce the rent to $100 per month. After the assignment he did reduce it to $100 per month.

There was a dispute between the parties as to the amount of the rent. Of course, before the assignment

Fred Browne had a right to reduce the rent, and if he did that the amount stated in the lease was no longer controlling. As to whether the acceptance of the checks and the conduct of the parties was an accord and satisfaction, was a question of fact for the jury. There was a dispute about the amount of the rent. We do not agree with the appellant in its contention that there was no dispute about the amount of the rent. The evidence shows that the appellees contended all the time that the rent had been reduced to $100 per month, and the appellant contended that the rent was $200 per month. Checks were sent to the appellant for $100, which had the notation that it was for the rent "in full."

At the same time that the appellees sent the check they wrote a letter in which they stated that that was payment of the month's rent in full. The appellant contended that it accepted the check as a credit on rent, but not as payment of the rent in full. And no matter which one was right, if there was a dispute or controversy about the amount of the rent, as to whether the actions and conduct of the parties amounted to accord and satisfaction, was a question for the jury.

At the time the agreement was made to reduce the rent to $175, it was also agreed that there would be a further reduction if conditions warranted. Thereafter Browne made a further reduction. This, however, was after the assignment. Whether the appellees were right in claiming this reduction is immaterial if it were made in good faith.

"While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be made in good faith." 1 C. J. 554.

We think from the evidence in this case there can be no question, but that the appellees acted in good faith.

"When a claim is disputed or unliquidated, and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted in full satisfaction of the claim or not at all, the retention and use thereof by the creditor constitutes an accord and satisfaction." 1 C. J. 562; *Pekin Cooperage* v. *Gibbs,* 114 Ark. 559, 170 S. W. 574; *Cunningham*

Company v. *Raugh-Darragh Grain Company,* 98 Ark. 269, 135 S. W. 831; *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394; *Cannon* v. *Hope Fertilizer Company,* 176 Ark. 435, 2 S. W. (2d) 1100.

The appellant next contends that the court erred in placing the burden of proving the payments upon the plaintiff. There was no dispute about the payments. The appellant admitted every payment that the appellees claim to have made, and the instruction requested by the appellant was not proper. It was as follows: "The defendants claim partial payment on the rents, and the court instructs the jury that the burden of proving payments rests upon the defendants."

The defendants did not claim partial payment, but each time they made a payment, they claimed it was a payment in full. If there had been any dispute about the payments, then the burden would have been on the defendant to prove payments. The court refused to give the above instruction, and gave the following: "The burden of proof is upon the plaintiff to make out its case by a preponderance of the evidence." This was correct, since there was no dispute about the amount of the payments.

It is next contended by the appellant that the assignment of the rent and the acceptance of the assignment by defendants, as a matter of law, substituted the plaintiff as the lessor in the lease, and obligated the defendants to pay to the plaintiff $200 per month, beginning February 1, 1933. What we have already said answers this contention.

It is then contended by the appellant that the court erred in giving, on motion of the defendants, their requested instruction No. 7. That instruction simply told the jury in effect that if there was a dispute between the parties, and if the check was sent and had a notation, "rent in full," and said check was accepted, and the proceeds kept, that would constitute an accord and satisfaction. We do not think there was any error in giving this instruction. If there was a dispute in good faith as to the amount, and the check was marked "pay-

ment in full," and accepted by the payee, this would constitute accord and satisfaction.

Appellant also contends that the court erred in refusing to give its instruction No. 2. We think the court did not err in this, because the only question, it seems to us, is whether there was a dispute or controversy in good faith, and whether the payments made were accepted by the appellant. We think appellant's instruction No. 3, given by the court, fully covers this matter. What we have already said is a sufficient answer to appellant's objection to the court's refusing to instruct the jury orally that the plaintiff was entitled to recover the sum of $22.92. This is the same situation exactly as the other payments, and the check was made, and the appellant was informed that that was in full payment for the amount of rent for that month.

If there is no substantial evidence, the question of whether there is accord and satisfaction is a question of law, but when there is substantial evidence that there was a dispute about the amount, that checks were sent and, appellant was notified that it was in full payment, and accepted the check, it was then a question of fact for the jury.

We find no error, and the judgment is affirmed.

McHaney, J., concurs.

Watson *v.* Barnett.

4-4199

Opinion delivered December 16, 1935.

Horace Sloan, for appellants.

Arthur L. Adams, for appellee.

MEHAFFY, J. Drainage District No. 18 of Craighead County, Arkansas, was created by order of the county court of said county in the year 1918 as a drainage district under Act 279 of the Acts of 1909, and the acts amendatory thereof and supplementary thereto, commonly referred to as the Alternative System Drainage Law.

H. B. Watson, P. W. Lutterloh and F. E. Miller are the commissioners of said district. The district embraces a large acreage, and the assessments levied aggregate $763,650.87. The district sold bonds in denominations of $1,000 each, bearing interest at a rate of five per cent. per annum, payable semi-annually on February 1st and August 1st of each year, the first maturing August 1, 1925, and the last August 1, 1945. The district has paid all the bonds and interest to date, and, in addition, has purchased in advance of due date $79,000 of its bonds, leaving outstanding bond issue of $172,000.

The commissioners adopted the following resolution:

"Whereas, a large acreage of the land within Drainage District No. 18 of Craighead County, Arkansas, lying in the southern portion of said district, is still practically in the woods without any substantial improvements thereon, and did not receive complete reclamation by reason of the ditches in said district due to the maintenance of a dam in the main channel of St. Francis River by Drainage District No. 7 of Poinsett County, thereby damaging and rendering inadequate the outlet of Drainage District No. 18, and

"Whereas, commencing with the year 1930, practically all the owners of said lands discontinued paying the taxes due this district thereon because, as claimed by them, lands of this description and character constituted, even if cleared up, a hazardous farming operation due to incomplete drainage reclamation, and that such speculative value as they might possess was so largely destroyed by the depression that no person with any financial judgment would continue to pay the drainage taxes thereon; and

"Whereas, it is the judgment of this Board of Commissioners that it is to the best interests of the district, the property owners therein and the bondholders, to devise some plan whereby it will be financially feasible to place back said delinquent lands on the tax books, and continue the collection of drainage taxes thereon;

"Now, therefore, be it resolved by the Board of Commissioners of Drainage District of Craighead County, Arkansas:

"1. That any wild and unimproved tract of land heretofore sold to the said drainage district at its delinquent assessment foreclosure sale held on May 20, 1933, shall be sold by the district for a sum equal to twenty-five per centum of the delinquent installments of assessments that have accrued against it prior to and including the year 1934, the purchaser to assume and pay in full the installments of assessments payable in 1935 and succeeding years. If any purchaser shall not be able at the time of his application to purchase to pay said purchase price in full, he shall be given an option to pur-

chase conditioned on his paying of the date of the option 25 per cent. of the first year's taxes delinquent, and the 1935 tax in full and to pay each year thereafter 25 per cent. of the delinquent taxes for the next succeeding delinquent year plus the current drainage taxes in full until such time as the optionee shall have discharged all 1934 and prior taxes on a 25 per cent. basis, plus interest at six per centum per annum from the date of the option until date of payment on the sum paid on deferred delinquent taxes. When the full purchase price has thus been paid, the optionee shall be entitled to a quitclaim deed from the district subject to all future installments of assessments due the district. If the option-purchaser shall at any time make default (time being of the essence) in paying any portion of the purchase price (whether delinquent taxes or current taxes), then all of his rights under the option shall automatically cease and determine without any notice or demand by the district, and any amounts paid under the option on delinquent taxes shall not then be deemed as having discharged same on the basis of 25 cents on the dollar, but the amounts actually paid shall be credited on the full amount originally due, leaving the land still charged with the full amount of the delinquent taxes as though said option had never been executed, with credit only for the sums actually paid in under the option. A prior owner of land or his successor in interest, as the case may be, shall have the prior right of purchase. The chairman and secretary of the district are hereby directed and authorized to negotiate for, make, execute and deliver deeds or options, as the case may be, to carry out the terms of this resolution. This resolution shall remain in force and effect until January 1, 1936, unless sooner revoked by the order of the Board of Commissioners.

"2. That the purchase price of any lands foreclosed on and sold by the district may be paid in bonds or interest coupons of the district as is provided by Act No. 79 of the 1935 General Assembly.

"3. 'Wild and unimproved' land, within the meaning of this resolution, shall be construed to mean any tract of land comprised within a regular governmental

subdivision of a section and assessed as a separate unit on the assessment books of the district of which not more than 15 per cent. of the acreage therein was cleared at the time said land first became delinquent."

The Mercantile Bank, for itself and other bondholders, brought suit in the Craighead Chancery Court to restrain and enjoin the commissioners from selling any delinquent lands for a sum less than would be required to redeem the same; that is to say, the full amount of delinquent taxes plus interest and costs, and to enjoin and restrain them from selling any lands under an option agreement, and asked that they be directed to sell lands only where the purchase price is paid in full at the time of the sale. It is asked that they be further enjoined from accepting any bonds or interest coupons of the district in payment of the purchase price of lands sold to the district for delinquent assessments. The plaintiff alleged the formation of the district, the assessment of benefits, the foreclosure and purchase of lands, and alleged that the sale of foreclosed lands as provided for in the resolution would be *ultra vires;* that act 79 of the Acts of 1935 is unconstitutional and void. They alleged that the commissioners had no authority to make the sales they were expecting to make and to carry out the resolution adopted.

The appellant answered denying the material allegations in the complaint. The following stipulation was entered into:

"This cause shall be tried upon the following stipulation as to facts:

"(1) That the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8 and 9 of the complaint are true.

"(2) That the allegations in paragraph 3 of the complaint were true as of the date the complaint was filed, but at the time of this stipulation the district has paid, on their respective due dates, all bonds and interest coupons maturing to date and the total of the bonds originally issued by the district, consisting of maturities from August 1, 1936, to August 1, 1945, both inclusive, amounts to the sum of $266,000, of which the district has already purchased $55,000 of said bonds leaving a balance of out-

standing bonds of $161,000. That these bonds were purchased by the District at varying rates of discount, depending upon the proposition offered and maturities of the bonds, said bonds being purchased, some $0.55 on the dollar, some $0.60 on the dollar and some at other prices, but all at a very substantial discount.

"(3) The following constitutes the tax levies made in the main district for the life of the bond issue, to-wit:

Year	Rate of Tax	To Produce
1920	3.5%	$ 26,727.43
1921-1924, inc.	3.0%	22,909.22
1925-1945, inc.	4.1%	31,309.27
Grand total of all levies		$763,640.87

"(4) Subdistrict No. 1, to the main district, having a total acreage of 1,360 acres, and a total assessed benefits of $27,133.20, has the following tax levies:

Year	Rate of Tax	To Produce
1921-1925, inc.	3.5%	$ 945.65
1926-1945, inc.	5.0%	1,356.65

Recapitulation for both Main and Subdistrict:

Combined assessment of benefits: $790,774.07

"(5) The assessment of benefits in said district bear interest at 6 per cent. per annum.

"(6) Several thousand acres of wild land, some of which may have had some small clearings thereon, but most of which were located in the south end of the district, were owned by the Chicago Mill & Lumber Company from the inception of the district, and that company continued to pay the drainage taxes thereon until the year 1930. Sometime thereafter that company got into financial difficulties, and its bondholders or trustees in charge of its affairs directed it to dispose of these and other lands at whatever price could be obtained, that considerable blocks of this wild land were sold for as low as $1 per acre, some were sold at $5 per acre. As an example of some of this land in the southern end of the district may be considered section 36, township 13 north, range 7 east, 640 acres. At the original tax rate of 4.1 per cent. of the assessment of benefits the annual tax on this tract was $944.64 per annum. In the foreclosure suit referred

to in the complaint it was delinquent for 1930, 1931 and 1932 or for a sum of $2,833.92, exclusive of penalty, interest and costs. In the meantime the 1933 and 1934 installments have become delinquent, and the 1935 installment has not been paid. When this tract became delinquent, practically none of the land was improved, it was poorly accessible from the highway standpoint and subject to back water overflow. The annual drainage tax at the rate above specified is $1.47 per acre. In addition, the land is subject to general taxes and to an annual St. Francis Levee District tax of $0.25 per acre.

"The last bonds of this district mature in 1945. If the district should now sell this tract on the option plan for 25 per cent. of the delinquent installments, plus current taxes, the district would receive per acre:

Total delinquent assessments for 1930, 1931, 1932, 1933, 1934, per acre are $10.35, 25 per cent. of which is	$ 2.59
Regular tax for 5 years (1935-1939) at $1.47 per acre is	10.35
Total	$12.94
Purchaser also agrees to pay taxes for 1940-1945, 6 years $1.47	$ 8.82
Total purchaser would finally pay district	$21.76

"This land is primarily adapted to the raising of cotton and the usual grain or pasture crops raised in cotton country. On account of inadequate drainage, however, anything like a wet season crops would have to be planted very late, and if late overflow conditions obtained it would be likely that it would be too late to plant any cotton crops at all. Under such circumstances the market or actual value of this land is, to a great extent, a matter of speculation. There is in truth no fixed market value. A considerable amount of this land in the southern end of the district has been bought at the prices above indicated by small farmers either directly from the trustee of the Chicago Mill & Lumber Company or from other persons who did buy from the Chicago Mill & Lumber Company, and with very limited capital are attempting to clear up and improve parts of this area. Most of them

have purchased the land on long time credit basis, and in a good many instances, instead of paying cash have agreed to deliver so many bales of cotton per annum to the seller. A good many of them have defaulted on the undertaking to deliver cotton. It is the judgment of the commissioners of the district that $10 per acre for this type of land in the southern end of the district would be all that it is worth under existing conditions if sold not for cash and free from all future assessments of this drainage district. Other parties with a more speculative frame of mind might contend that this land would be worth from $15 to $25 per acre if sold for cash and free from all future drainage district assessments and under a good title, but there are no instances of any actual cash trades that would indicate any such value as that last indicated.

"At least 95 per cent. of all of this land in the southern end of the district is now delinquent and has been delinquent since the year 1930.

"(7) That the record of delinquencies in the whole district for the year 1934 and 1935 are as follows:

Year	Total Tax Extended	Total Tax Collected	Total Tax Delinquent
1934	$15,361.23	$4,902.26	$10,458.97
1935	15,127.06	4,761.43	10,365.63

"(8) The lands involved in the southern end of the district are cut-over lands. There is substantially no merchantable timber thereon.

"(9) Of the tax delinquencies in the drainage district for the years 1930 to 1933, both inclusive, substantially 35 per cent. thereof has been finally paid to the district through redemptions, but practically none of these redemptions are on lands in the southern end of the district."

The court entered a decree as follows:

"On this the 9th day of November, 1935, before Hon. J. F. Gautney, chancellor in vacation, this cause is submitted in vacation by consent and agreement of all parties hereto, the same being submitted upon the complaint, amendment to complaint, answer to complaint and amendment thereto and stipulation of facts, from all of which

the court finds that this is a suit by the plaintiff, Mercantile Bank, a bondholder of Drainage District No. 18, Craighead County, Arkansas, against the defendants, as commissioners of said drainage district, to enjoin and restrain the commissioners from selling, pursuant to resolution adopted by the board of commissioners of said district, certain delinquent lands which were sold to the district by a commissioner in chancery at a delinquent assessment foreclosure sale on May 20, 1933, the sale having been confirmed and deed executed to the district on June 7, 1933, that in said resolution the district proposes to sell wild and unimproved land as defined in said resolution for a sum equal to 25 per cent. of its delinquent assessments, plus future assessments in full, and, where purchasers are not able to pay cash, to give them options to purchase upon payment of part of the purchase money in cash. That the district also proposes to accept its bonds or interest coupons in payment of the purchase price of said land and also to permit parties to use bonds as provided by act 79 of the Acts of 1935, in part payment of redemption moneys where redemption is affected.''

The appellants object to that part of the decree enjoining the sale of land until the lapse of the period of redemption, and appealed from that part of the decree.

The appellee objects to that part of the decree holding that the commissioners would have the power, after the expiration of the period of redemption, to sell lands on the basis stated in said resolution of the board of commissioners, or on any other basis than for the full amount of all delinquent assessments, interests and costs, together with undertaking to pay all future assessments.

The court made the following declaration of law: ''The court further finds that the commissioners of the defendant district are without any power to make a sale of any of the delinquent lands in the district either to the original owner or to any third party until after this period of redemption has expired.''

The declarations of law objected to by the appellee are as follows:

"(3) After this period of redemption has expired the court finds that it would be within the power of the commissioners of said district to sell the foreclosed lands acquired by the district for the sum mentioned in said resolution of the commissioners, even though said sum be less than the total amount of delinquent installments of assessments due the said district, together with penalty, interest and costs, and that the making of such a sale would not impair the obligation of any contract between the district and its bondholders or deny to the bondholders due process of law.

"(4) That when the district does acquire the power to sell the foreclosed land, it would likewise, as an incident to fixing the terms of sale, have power to grant options thereon or to make the sale wholly or partly on credit.

"(5) The court further finds that it would be within the power of the commissioners of the district to accept the bonds or interest coupons of the district on the purchase price of lands sold by the district as provided by Act 79, 1935.

"(6) The court further finds that in making redemptions the district has the power, within the discretion of its commissioners, to permit bonds and/or interest accrued on interest coupons to be accepted as part of the redemption money as provided by Act 79, 1935."

It is contended by the appellant that the improvement district may sell foreclosed lands prior to the expiration of the period of redemption. The lands, of course, could be purchased in the first place by a third party, or where the district buys at the foreclosure sale, it may assign its certificate of purchase to a third person. If the certificate may be assigned, or if the land may be purchased by a third person, there is no reason why the district, if it becomes the purchaser, may not sell the land before the period of redemption expires. Of course, in no event could the district or commissioners do anything that would prevent the owner from redeeming the land within the period allowed by law for redemption. The owner can redeem within the time allowed by law from the district, and the fact that the certificates of purchase

of the lands have been sold to some third person would in no way affect the owner's right to redeem it. While the law does not expressly authorize this district to issue certificates of purchase, it has implied power to do so.

We have held that the improvement district may assign the certificates of purchase before the time allowed to redeem. *Crow* v. *Security Mortgage Co.,* 176 Ark. 1130, 5 S. W. (2d) 346.

Act 79 of the Acts of 1935 provides that where the district has purchased at foreclosure sale any lands, it may receive from the owner of such lands at any time within the period prescribed by law for redemption from such foreclosure, bonds or coupons at face value. Of course, if it can sell to the owner, it can sell to any other person, because the one object is to get the lands back on the tax books so that the proceeds of the sale might be used for the payment of outstanding bonds, and the lands would be assessed and bear their part of the burden of the debts.

Section 2 of act 79, *supra,* authorizes the commissioners to sell any lands where title is acquired to any lands within the district.

It is contended, however, that act 79 impairs the obligation of the contract with the bondholders. We do not agree with appellee in this contention. See *Dickinson* v. *Mingea, ante* p. 946; *Drainage District No. 2 of Crittenden County* v. *Mercantile-Commerce Bank & Trust Co.,* 69 Fed. (2d) 138; *Myers* v. *Rolfe,* 71 Ark. 215, 72 S. W. 52.

We agree with the appellee that improvement districts and their commissioners have only such powers as are conferred upon them by statute, either expressly or by necessary implication, but, if the district could not sell the lands that it purchased at foreclosure sale, it would have no other use for them, and the authority to sell is therefore necessarily implied. We do not think the existence of the right of redemption negatives the power to sell during the period of redemption, because it does not in any way interfere with the owner's right to redeem.

The appellee contends that the commissioners cannot sell the foreclosed lands for less than the total amount due the district, and calls attention first to the case of *Chicago Mill & Lumber Co.* v. *Drainage Dist. No. 17,* 172 Ark. 1059, 291 S. W. 810. The court said in that case that the lien for the taxes continued until the taxes were paid or until the lands themselves were acquired by the district through sales for the nonpayment of taxes. In the case before us, the district has acquired the lands, and the price for which they may be sold becomes available at once, and may be used in paying the obligations of the district. The commissioners, of course, are required to act in good faith and sell the lands for the best prices obtainable.

The appellee says: "While it is desirable that the foreclosed land be placed back on the assessment books, it is obviously equally desirable that it not be done in a manner which completely ignores the rights and interests of those taxpayers who have kept their taxes paid."

It would certainly be in the interest of the other taxpayers to get these lands on the tax books and to have them sold at the best price obtainable.

Appellee calls attention to *Oliver* v. *Gann,* 183 Ark. 959, 39 S. W. (2d) 521. It is stated in that case: "When the lands are bought in by the commissioners at the foreclosure sales, they become the property of the district to be used for the purpose of raising revenues to pay the bonds. The lands do not belong to the bondholders, and the district is not entitled to take credit, as contended by counsel for appellees, to any extent until revenues are raised by sale thereof. The lands thus purchased become the absolute property of the district, and express authority is conferred by the statute to sell the lands at prices fixed by the commissioners. The theory is, and the practice should be, in order to comply with the spirit of the scheme, for the commissioners in selling the land, to secure a sufficient price at least to cover the expenses, and all the delinquent assessments up to the time of the resale, so that the lands will bear their full share of the expense of the improvement. * * * But the lands had been acquired by the district under a sale properly made, and

it had the right to dispose thereof for a less amount than would have been required for redemption by the owner in order to get them back into private ownership where they were still subject to the payment of all the other assessments of benefits of the improvement district."

As stated by the appellant, the districts are selling the land, and not the assessment of benefits.

It is next contended by the appellee that the district cannot exchange foreclosed lands for its own bonds as provided in act 79 of the Acts of 1935. He cites the case of *State ex rel. Murphy* v. *Cherry,* 188 Ark. 664, 67 S. W. (2d) 1024. In that case the court held that act 156 of the Acts of 1931 was unconstitutional and void. That act authorized the commissioners for drainage, levee and other improvement districts to accept at their face value past-due bonds or past-due interest coupons issued by said improvement district as full payment for taxes or assessments as they accrued.

It will be observed that act 156, which was held void, provided for the payment of assessments in past-due bonds. Of course, this would be inequitable because the payment of assessments in anything other than money would impair the obligation of the contract of the other bondholders, because the only way to pay bonds is by collecting the assessments from the landowners.

Act No. 79, *supra,* does not authorize the payment of assessments in bonds, but it authorizes the sale of land by the district which it has already purchased, and which this court has held it has a right to dispose of.

It is next contended by the appellee that the commissioners cannot permit the district's own bonds to be used for the redemption purposes as provided in act 79. If the district owns lands, it has a right to sell them for the best price obtainable, and, if no other sale can be made, or no better sale, it would then be the duty of the district and its commissioners to take in payment bonds or coupons as provided in act 79.

The bondholders are not interested in anything but having their bonds paid. It is unimportant to them how the lands acquired by the district are sold, so that suffi-

cient sums be raised by the assessment to protect their bonds.

It follows from what we have said that the judgment on appeal must be reversed and remanded with direction to dismiss the complaint, and that the judgment on cross-appeal must be affirmed.

It is so ordered.

BAKER, J., not participating.

NEW YORK LIFE INSURANCE COMPANY *v.* REDMON.

4-4080

Opinion delivered December 16, 1935.

James B. McDonough and *Louis H. Cooke,* for appellant.

Partain & Agee, for appellee.

MCHANEY, J. Appellee is the beneficiary in a policy of life insurance issued by appellant to her husband in the sum of $1,000. The policy provided for double indemnity in the event "that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and occurred within ninety days after such injury." Another clause in the policy provided: "Double indemnity shall not be payable if

the insured's death resulted from self-destruction, whether sane or insane." The insured died on January 16, 1934, while the policy was in full force and effect, under such circumstances as induced the appellant to believe that he committed suicide. It therefore declined to pay double indemnity, but did pay the principal sum of $1,000 under an agreement that such payment should not prejudice its rights. Appellee brought this action to recover an additional $1,000 under the double indemnity provisions above quoted, and a trial resulted in a verdict and judgment in her favor.

Appellant's principal contention for a reversal of the judgment against it is that the undisputed evidence shows that the deceased intentionally took his own life, and that the court, therefore, erred in refusing to direct a verdict in its favor at its request. The facts, briefly stated, are as follows: Mr. Redmon was the postmaster at Sallisaw, Oklahoma. On the morning of January 16, 1934, the day of his death, two post office inspectors appeared at said post office to examine his records and check up his accounts. Mr. Redmon, who was at the post office, was notified of their presence, met them, and they advised him of the object of their visit. They immediately entered upon their duties. One of them and Mr. Redmon entered the vault to get the records, books, papers, cash, stamps, etc., which they required in making the inspection. The other inspector busied himself at another desk. Immediately after coming out of the vault with the books and papers above mentioned, Mr. Redmon again went into the vault and very shortly thereafter a pistol shot was heard, and the employees and inspectors went to the door of the vault and found the deceased slumped down on the cement floor of the vault with a .45 caliber double action Colt's revolver lying near his right hand. Upon investigation they found that he had been shot, and that the bullet had entered his head just back of the right ear, near the top of the ear, or the middle of it, and had come out of his head about the edge of the hair a little above and back of his left eye. No one witnessed the shooting. The pistol was one of three in the post office belonging to the Government and furnished

to the office by the Government. It was approximately twelve inches long from the muzzle to the butt of the hilt. Concerning the character of the man, counsel for appellant in his brief makes this statement: "As in the Watters' case, the insured in the instant case was in a happy frame of mind. He was a church member, superintendent of Sunday School, postmaster in his town, and, according to those who testified, was a good citizen and an ideal man. His widow testified to his habits of saving and his habits of caring for his family, and his devotion to his family." The inspectors, on completing their check of his accounts, found that he was short in the sum of $1,098.75. No explanation was made concerning this shortage. The employees testified to a lack of knowledge regarding same. His accounts had been checked some eight or nine months previous to that time and were found to be in good order. No evidence was introduced by appellant to show any extraordinary use or expenditure of money by the deceased or what became of the money if he did in fact embezzle it. It was shown that, except for a debt of $100 to a bank, which was not yet due, he was not involved in debt. Except for the shortage in his accounts above-mentioned, there does not appear to have been established the slightest motive for suicide. The undisputed facts in this case show further that there were no powder burns found around the wound where the bullet entered, and that none were disclosed by probing the wound with cotton by the undertaker. No powder burns or carbon inside the wound were found; that it would be very awkward and difficult for Mr. Redmon to have held the pistol in his right hand at or near the point where the bullet entered, and for it to take the range it did take in passing through his head. It appears to us to be reasonable to assume that, had he done so, some visible evidence or powder burns would be shown, or at least a probe of the wound as was done would disclose such fact. When we consider the length of the pistol, and the awkward position in which it must have been held for a shot to be self-inflicted, it is rather remarkable that no powder burns were found, and it is a rather cogent circumstance against suicide. It is not contended by

appellee that any one else fired the shot, but only that it was accidental. It was not incumbent upon her to show how the accident happened. The burden was upon appellant to show that it was suicide. This fact is conceded, and it asked for and was given the right to open and close the case. When we remember that this was a double action pistol, one that could be fired by simply pulling the trigger, and when we remember that such a pistol may be and is frequently discharged accidentally, either by pulling the trigger or by falling, or by moving the pistol and accidentally striking the hammer against an object or in many other ways, we cannot say, as a matter of law, there was no case made for the jury.

The law of the case is well settled. In *Mutual Life Insurance Company of New York* v. *Raymond,* 176 Ark. 879, we quoted from *Grand Lodge A. O. U. W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742, the following: "The only disputed question is whether the shot was accidental or an act of intentional self-destruction. The burden of proving suicide was upon the defendant. It alleged that fact as a defense to the action, and must prove it, for, until that fact is established, liability of the defendant for the amount of the policy is clear.

"There is no dispute about the facts, which were susceptible of direct proof, but the case turns upon the conclusion to be drawn therefrom—whether or not they establish suicide indisputably. For, if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they are properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury."

And as was further said in another quotation from the same case:

"After careful consideration of the evidence, we are of the opinion that this question was properly submitted to the jury, and that there was evidence sufficient to support the verdict. Conceding that the theory of death by suicide finds more rational support in the facts established by direct proof than the theory of death by accident—that there is greater probability from the

evidence that death resulted from a suicidal act than an accident—still we cannot say that death by suicide is the only reasonable conclusion to be drawn from the evidence. The proof does not exclude with reasonable certainty death from accidental shooting, and, the burden being upon the defendant to establish the defense by proof, it was properly left to the jury to say whether or not it was a case of suicide."

It is conceded that there is a presumption of law against a man taking his own life intentionally, even though it be shown that he came to his death by his own hands, as the law presumes that the death was accidental instead of suicide. In this case, this presumption of law is strengthened by the fact that Mr. Redmon was a good citizen, a man of high standing in the community, living happily with his family, holding a position of honor and trust, not an extravagant man and not being indebted in any appreciable amount. The fact that he was short in his accounts may or may not have been due to his own misconduct. No one knows just how the fatal shot was inflicted, whether in moving the pistol from one place to another, it was accidentally discharged, or whether it may have fallen, striking the floor in such a way as to cause it to discharge. Such accidents frequently happen. It is of course difficult to understand just how he received the wound he did receive in such a way, but this, as we view it, was a question for the jury.

Counsel rely upon the cases of *New York Life Insurance Company* v. *Watters,* 154 Ark. 569, 243 S. W. 831; *Ætna Life Insurance Company* v. *Alsobrook,* 175 Ark. 523, 299 S. W. 744; *Fidelity Mutual Life Insurance Company* v. *Wilson,* 175 Ark. 1094, 2 S. W. (2d) 80. These are the same cases relied upon in the case of *Mutual Life Insurance Company* v. *Raymond, supra,* but, as we said in that case, the facts in the cited cases are wholly different, for it was held in those cases "that the undisputed facts unmistakably pointed to suicide, and the death could not be accounted for upon any other reasonable hypothesis than that of suicide."

Some argument is made on errors assigned in the refusal to give certain instructions. We do not discuss

these assignments in detail. It is sufficient to say that we have carefully examined the instructions given and refused, and we are of the opinion that the court fully and fairly instructed the jury as to the law of the case.

No error appearing, the judgment is affirmed.

STATE EX REL. DUDLEY *v.* LYON.

4-4074

Opinion delivered December 16, 1935.

Joe C. Barrett, for appellant.

Robert W. Wilson, for appellee.

BAKER, J. On April 18, 1935, the appellee was appointed notary public in and for Craighead County, Arkansas. At the time of her appointment, the Honorable J. M. Futrell, Governor of Arkansas, and the Honorable Lee Cazort, Lieutenant Governor of Arkansas, were both absent from the State. Senator W. F. Norrell, President *pro tempore* of the Senate, acting as Governor, made this appointment. Thereafter, this suit was instituted by the Honorable Denver L. Dudley, as prosecuting attorney of the Second Judicial Circuit, asking that the appellee be ousted from the office of notary public, and that the commission so issued to her be declared null and void. To this complaint a demurrer was filed by the respondent. The demurrer was sustained, and, the State refusing to plead further, judgment was accordingly entered. This appeal is from that judgment.

The appointment of respondent here is a mere incident. The real contest is a matter that will be settled by our determination of the question of the validity of the appointment of this notary public.

The real matter in issue is whether Senator W. F. Norrell, who was President of the Senate at the time it adjourned, or the Hon. Harve Thorn, who was Speaker of the House upon the adjournment of that body, shall be the chief executive officer, or shall act as Governor, in the event of the absence from the State, death, or other disability of the Governor and Lieutenant-Governor to exercise the functions of that office.

In the briefs furnished us upon this question, we have history and much erudition supplying in logical and highly argumentative form a great deal of information and entertainment.

To us, at the present day, the position of Lieutenant-Governor is a comparatively new office. It was not known under the Constitution of 1874 until Amendment No. 6 was adopted in 1914.

This amendment was proposed by the Legislature of 1913 and was numbered as Constitutional Amendment No. 16 at the time it was proposed, and now appears on page 1527 of the Acts of 1913 as a joint resolution of the House and Senate.

Without attempting an elaborate discussion of the question here involved, let it be said that § 5 of said Amendment No. 6, adopted in 1914, is as follows:

"If during a vacancy of the office of Governor, the Lieutenant-Governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office or be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any of the above causes shall become incapable of performing the duties pertaining to the office of Governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease."

We think that section is the key to the difficulty, and really operates as a solution of the problem here presented. There is little room for interpretation or construction.

The section mentions the Lieutenant-Governor and provides that if he should be impeached, displaced, re-

sign, die, or become incapable of performing the duties of his office, or be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease.

Two different officials are mentioned. The one is the Lieutenant-Governor, the other the President of the Senate. The use of these terms in the one paragraph certainly must refer to the President of the Senate as contradistinguished from the Lieutenant-Governor, who is also President of the Senate.

The Constitution therefore recognizes the President of the Senate, prescribes his duties and sets forth the manner and occasion upon which he may perform the duties or functions of office, just as § 4 of the same amendment sets forth and prescribes the duties of the Lieutenant-Governor, and determines the times and occasions upon which he may exercise or discharge such duties.

It seems that the objection made in this case, that Senator W. F. Norrell may not act, because it is urged he is President *pro tempore,* and that because he is so designated as President *pro tempore,* this court may not hold that he is qualified to act in succession to avoid a vacancy in office, without amending by judicial interpretation the Constitution, by adding, in § 5, after the word "President," in the line that speaks of the President of the Senate, the two words, *"pro tempore."* This contention must be regarded as wholly without merit. Such argument is another instance thoroughly illustrative of the trite proverb, "putting the cart before the horse."

The words, or expression *"pro tempore,"* as frequently used in referring to the President of the Senate, are words of description only, no doubt brought into use solely to distinguish the President of the Senate from the Lieutenant-Governor, who is frequently referred to, particularly during legislative sessions as "President of the Senate."

While it may not be said that there is a mistake in referring to the President of the Senate as "President

pro tempore," the designation is used not improperly as a matter of convenience, though extreme accuracy might require the Lieutenant-Governor to be designated always as the Lieutenant-Governor and the other as the President of the Senate. In other words, the Constitution does not recognize the office of President *pro tempore* of the Senate. The descriptive "*pro tempore*" is surplusage, no more necessary than some other adjective that might indicate some particular characteristic, in relation to the office.

Aside from an analysis of this particular section of the amendment, we have been cited to no act of the Legislature, designating the particular position as "President *pro tempore,*" but it may be said that if the position may be so characterized in obedience to statutory mandate that it could refer to no other position than that mentioned in § 5 of said Amendment No. 6, the President of the Senate.

Therefore, since Senator W. F. Norrell was and is President of the Senate, and the Governor and Lieutenant-Governor were both absent from the State, he was next in line of succession with the full power and authority to act as Governor during that interval, and until the disabilities of the Governor and Lieutenant-Governor ceased.

It follows that the trial court was correct, and the judgment is affirmed.

JOHNSON *v.* PAGE.

4-4197

Opinion delivered December 23, 1935.

John Fogelman and *R. V. Wheeler,* for appellant.

Carl E. Bailey, Attorney General, and *R. E. Wiley,* for appellee.

James G. Coston, J. T. Coston, J. R. Pugh and *Ogan, Shaver & Ogan,* for appellee Road Maintenance Districts.

Sam Rorex, amicus curiae.

HUMPHREYS, J. This is an appeal from the chancery court of Pulaski County dismissing the complaint of appellant seeking to enjoin the appellee, the State Treasurer, from distributing the County Highway Fund, or the so-called County Turnback Fund, in accordance with paragraphs f, g and h of act 63 of the General Assembly of 1931, for the alleged reason that said paragraphs of said act were repealed by act No. 11 of the First Extraordinary Session of the General Assembly for the year 1934.

The sole issue presented by the pleadings and involved in the trial below and on this appeal is whether § 23 of said act No. 11 of the Acts of 1934 repeals paragraphs f, g and h of act No. 63 of the Acts of 1931.

It is conceded by appellant that, if said paragraphs of the prior act are not repealed by the later act, he is not entitled to the relief prayed for in his complaint. The later act does not expressly repeal the paragraphs referred to in the former act but does expressly repeal other prior acts and paragraphs and sections of other prior acts, as will be seen by reference to repealing § 24 of the later act. This court said in the case of *Pace* v. *State,* 189 Ark. 1104, 76 S. W. (2d) 294, that: "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."

Again, this court said in the case of *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649, that: "It is a principle of universal recognition that the repeal of a law merely by implication is not favored, and that the repeal will not be allowed unless the implication is clear and irresistible."

Again, this court said in the case of *Bennett* v. *State,* 161 Ark. 496, 257 S. W. 372, that: "Repeals by implication are not favored and are never allowed unless there is an irreconcilable repugnancy between the later and the older statute."

See also to the same effect *Louisiana Oil Refining Co.* v. *Rainwater,* 183 Ark. 482, 37 S. W. (2d) 96.

There is no irreconcilable repugnancy or conflict between the later act and paragraphs f, g and h in § 1 of act 63 of 1931, but said paragraphs are in harmony with the later act.

The later act provides that:

"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 the 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."

By use of the words "to be apportioned under the existing laws" had reference to the apportionment as provided by paragraphs f, g and h of act 63 of the Acts of 1931, and if the implied repeal of these para-

graphs were intended by the Legislature, there would be no existing laws by which the fund could be disbursed by the State treasurer.

The decree is therefore affirmed.

[redacted]

OWEN *v.* UNION CENTRAL LIFE INSURANCE COMPANY.

4-4073

Opinion delivered December 23, 1935.

[redacted]

R. V. Wheeler, Kenneth Rayner and *Frank Berry,* for appellants.

Herbert Gannaway, A. B. Shafer and *E. C. Gathings,* for appellees.

HUMPHREYS, J. A petition was filed by appellants in the chancery court of Crittenden County within two years from the date of a foreclosure decree in said court, wherein appellee Union Central Life Insurance Company was plaintiff, and appellants were defendants, having been constructively served in the foreclosure proceeding.

In the petition it was alleged that appellants were served constructively as though nonresidents; whereas they were citizens of the State of Arkansas and should

have been personally served with summons. And also alleged that the purpose of serving them constructively was a part of a conspiracy to foreclose the mortgage without their knowing anything about it, so that they might purchase it at the foreclosure sale for an inadequate consideration, and also alleged that, in furtherance of such conspiracy, they advertised the lands under an erroneous description and sold it at a different place than that specified in the decree and notice, and had purchased it at a grossly inadequate price, having induced prospective purchasers not to attend the sale. And also that, although appellees had promised to give appellants an opportunity to buy the property back, the Union Central Life Insurance Company, the purchaser at the sale, pursuant to the conspiracy entered into between it, Oliver and others, conveyed 580 acres, constituting Owen's home place, to Mrs. A. W. Oliver.

Appellees filed separate answers to the petition for a new trial denying the material allegations contained in the petition.

The cause was heard upon the pleadings and evidence introduced by appellees, resulting in a dismissal of appellants' petition, from which is this appeal.

A summary of the facts revealed by the evidence is, in substance, as follows:

In February, 1929, the Union Central Life Insurance Company loaned A. B. Owen $21,000, evidenced by a series of amortized notes, twenty in number, the first being for $905.90, and the remaining for $1,095.88 each, payable November 1, 1929, and annually thereafter, said notes covering both principal and interest and secured by a trust deed on some six hundred thirty-three and one-third acres situated partly in St. Francis County and mainly in Crittenden County, Arkansas. The mortgage contained an accelerating clause in case of default in the payment of any note at maturity. In 1931, Owen defaulted upon the indebtedness and also failed to pay the general and special taxes. At that time he was indebted to F. G. Barton Cotton Company in a large amount secured by a second mortgage upon the lands. The second mort-

gagee, wishing to save the second mortgage if possible, but also as agent for Owen, began negotiations with the Union Central. These continued throughout 1932, both before and after the foreclosure suit was instituted. At no time did Mr. Frank Barton, who conducted these negotiations for the F. G. Barton Cotton Company, offer to pay the Union Central Life Insurance Company the total amount of the delinquencies. Mr. Barton made an offer in the spring of 1932 to pay a portion of the delinquencies, which was refused; and later, conditions becoming gradually worse during 1932, the insurance company, through its representative, Mr. Richmond, agreed to accept the proposition previously refused, but the condition of Owen's crop and general conditions at the time were such that Mr. Barton refused to renew the offer but, on the other hand, made an offer of a less amount, or counter-proposition, which was refused. Mr. Barton communicated to Owen the result and failure of these negotiations. On July 15, 1932, the Union Central Life Insurance Company filed its foreclosure suit, showing that at that time Owen was delinquent in the sum of $1,905.88, due November 1, 1931, and in addition had failed to pay the levee, drainage, road and State and county taxes, which were past due and delinquent, and that there was due the insurance company, exclusive of taxes, the sum of $19,883.09 with interest from November 1, 1931. On October 17, 1932, the chancellor entered a decree of foreclosure for $21,175.49, the amount of the indebtedness with interest to that date exclusive of taxes. Two or three days before the decree of foreclosure was rendered, A. B. Owen received information of the pendency of the suit and employed A. H. Murray, a regularly practicing attorney, to represent him in this suit, and Murray was present in court when the decree of foreclosure was requested and when it was rendered, and had an opportunity to examine the decree and was furnished with a copy, but did not ask for time within which to answer or make any defense and made no objection to the entry of the decree. Owen and Murray were not able to get any one willing to put up the necessary money to stop the foreclosure, although efforts were made with Ralph

May, Shannon Brothers, Eugene Woods, and others in addition to the second mortgagee. The notice of the commissioner's sale was published pursuant to the decree of foreclosure. A slight misdescription of one of the calls of the land was made in the notice. The commissioner's report of sale was filed, showing that the property was sold, at the time and place designated in the decree, for $19,885 to the mortgagee, the Union Central Life Insurance Company. The sale was approved and confirmed by the chancellor in the presence of Owen's attorney on December 20, 1932. No objection was made by said attorney to the sale or confirmation thereof. The court ordered the commissioner to execute a deed to said lands described in the mortgage to the Union Central Life Insurance Company, which was done, and which deed was subsequently approved by the chancellor and duly recorded. Owen testified that he went to the place of the sale on the advertised date thereof and received information that the sale had been made in the clerk's office, instead of being made publicly at the courthouse door, and that for some reason Eugene Woods, who had promised to buy it in for him, did not appear and do so. The Union Central Life Insurance Company conveyed most of the land to Mrs. A. W. Oliver. A. W. Oliver purchased forty acres of the land from Len Turley, who acquired title thereto under a tax deed. The Union Central Life Insurance Company conveyed the balance of the land to W. B. Rhodes. Thereafter, appellants surrendered possession of the lands purchased by Mrs. A. W. Oliver to her, who immediately made improvements thereon, and who has continued to reside thereon and improve same. In 1930 A. B. Owen bought a home in Memphis, and moved his wife and children to that city and visited them week-ends. The children attended school, and his wife became a registered voter in Memphis. He continued to maintain a home in Memphis for them until May or June, 1933, at which time the residence was sold under mortgage. He was maintaining a home in Memphis when the Crittenden County property involved in this suit was foreclosed. At no time, either before or after the foreclosure of these lands, did A. B.

Owen or any one for him ever tender in money the amount of the delinquencies or the total indebtedness to the Union Central Life Insurance Company, but made propositions to get up money to pay part of the delinquencies by way of compromise and settlement. The most that Owen claims is that, if he had been given more time, he had friends who would have helped him if the delinquencies did not figure up more than they were willing to advance for him. It is not made certain by the evidence whether the amount they were willing to advance would take care of the delinquencies, and not made certain whether these friends were dissuaded or in any way prevented from helping him out of his financial troubles. The facts reflect that, at the time of the foreclosure and sale of the lands involved herein, they were intrinsically of greater value than the amount paid at the sale for them, but it does not reflect to a certainty that their market value was materially greater. The evidence rather reflects that the lands had no market value at that time. The evidence reflects that the entire indebtedness was past due, and that A. B. Owens owed the entire amount claimed.

The evidence is insufficient to show that in foreclosing the mortgage appellees entered into a conspiracy to defraud A. B. Owen and acquire his property for a grossly inadequate or inadequate price. In fact, long after the foreclosure and voluntary surrender of the possession of the lands to appellees, A. B. Owen wrote the following letter to the representative of the insurance company:

"Proctor, Arkansas, July 15, 1933.

"Mr. Jerome Clark, Vice-President, Union Central Life Insurance Co., Cincinnati, Ohio.

"Dear Sir:

"As an official of the Union Central Life Insurance Company, in charge of such matters, I write you in my behalf.

"I am a colored farmer. I owed your company $21,000. I was unable to pay it, due to the depression. In January, 1933, you foreclosed the property. I was un-

able to buy it in, although I thought I had made arrangements with a cotton merchant to buy it for me, but he did not do so. This meant that you bought in the property, and, naturally wishing to dispose of it as soon as you bought it in, your local agent sold part of it to a Mr. Rhodes at Marion, Arkansas. This was an absolute sale, and I am not seeking to buy any of the land sold to him. However, there was a remaining 580 acres which was bargained for sale to a Mr. A. F. Oliver, and he has not complied, as I understand it, with his contract of sale. Therefore a default exists, and it is within your power and right, as I understand it, to now cancel this contract of sale for his failure to comply with the terms of said contract of sale. Thereupon, you may resell this property to me. I am anxious to buy it again. It was my property and my home for many years, and I know that you are ready and willing to help me.

"I have talked to your local agent here, and he appears very reluctant to permit me to get my property back, seemingly wishing to show leniency and grant an extension to Mr. Oliver, who entered into the contract of sale.

"I should like very much to have you advise me fully about this matter, and I assure you that it will be appreciated.

"Yours very truly,
"(Signed) Abner B. Owen,
"Proctor, Arkansas.

"P. S.—A description of this land is attached on a separate sheet."

As we view the whole record, appellants are without any remedy at this time. They contend and argue that they have an absolute right to a new trial, not only in the original foreclosure proceedings and decree, but in the subsequent proceedings and confirmation decree under § 6266 of Crawford & Moses' Digest, which is as follows:

"Where a judgment has been rendered against a defendant or defendants constructively summoned and who did not appear, such defendants or any one or more of them may at any time within two years, and not there-

after, after the rendition of the judgment appear in open court and move to have the action retried; and, security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants as if there had been no judgment, and upon the new trial the court may confirm, modify or set aside the former judgment and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant or defendants paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it and yet remaining in his possession and pay to the defendant the value of any property which may have been taken under an attachment in the action or under the judgment and not restored; provided the provisions of this section shall not apply to judgments granting a divorce except so far as relates to alimony."

Our construction of this statute is that it has application to the proceedings up to and including the original judgment of foreclosure, and has no application to the proceedings subsequent to the original judgment. This was the effect of the holding in the case of *Gleason* v. *Boone,* 123 Ark. 523, 185 S. W. 1093. The second syllabus reads as follows:

"Where the suit in which the defendant was constructively served was for the foreclosure of a mortgage, and, pursuant to such foreclosure, the land was sold, the sale will not be set aside, upon the filing of a petition by the defendant for a new trial under Kirby's Digest, § 6259 (Crawford & Moses' Digest, § 6266)."

As stated above, the evidence in this case reflects that A. B. Owen owed the debt and that he was in default in the payment of the indebtedness when the decree of foreclosure was rendered. He had no defense at the rendition of the original decree and has none under the evidence adduced on the trial in this cause. In other words, he has no absolute right to a new trial under said section touching the sale and confirmation thereof. His remedy and only remedy to set aside the sale and confirmation thereof was by appeal, and the time has expired

in which to take an appeal from the decree of confirmation.

This is perhaps a case where the owner of property lost it on account of the depression. That is what he said in the letter quoted above. The courts cannot mold remedies to meet situations of this kind, especially where such remedies would impair the obligation of contracts and enforcement thereof. It may be said in passing, however, that appellants did nothing in the instant case to help themselves when they could have done so. They knew of the sale, how it was advertised, where it actually occurred, and had an attorney present when it was confirmed, and made no objection to any of the proceedings after the rendition of the original judgment. They are really to blame for the situation in which they now find themselves by failing to attack the sale at the proper time.

No error appearing, the judgment is affirmed.

WISEMAN *v.* MADISON CADILLAC COMPANY.

4-4204

Opinion delivered December 23, 1935.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh,* Assistant, and *Millard Alford,* for appellant.

Owens & Ehrman, John M. Lofton, Jr., and *E. L. McHaney, Jr.,* for appellee.

MEHAFFY, J. The appellee brought this suit in the Pulaski Chancery Court, alleging that the General Assembly of the State of Arkansas for 1935 enacted a law known as the Arkansas Emergency Retail Sales Tax Law (act 233 of the Acts of 1935); that the act contained certain exemptions, among others, there was exempt from the provisions of the act, in any case where there is already a privilege tax or a license tax imposed, equal to the amount of such already imposed privilege tax or license. The section relied on is § 15, and is as follows:

"Section 15. Exemptions. There are hereby specifically exempted from the taxes levied in this act: a. Retail sales which are prohibited from taxes by the Constitution or laws of the United States of America or by the Constitution of this State. b. A portion of all retail sales on articles and/or commodities on which a State privilege tax imposed in this act shall be an amount equal to whatever is the excess above the already imposed privilege tax or license. c. If the application of the tax provided in this act on the retail sale of any article or commodity is found to be unconstitutional, it is

specifically understood that the validity of this act shall be affected only as relates to said articles and will not affect the validity of the tax imposed on other articles in this act.

"All foods necessary to life, more specifically defined as follows: flour, meat, lard, sugar, soda, baking powders, salt, meal, butter fats, eggs, and all medicines necessary for the preservation of public health, each of above to be exempt from the provisions of this act."

It was further alleged that at the time of the passage of the sales tax law there was already imposed a privilege or license tax upon automobiles, and that any one purchasing an automobile for use within the State of Arkansas was required by law to pay such license fee before said automobile may be used within the State; that it is the plain import and intention of the act that the amount of such license fee on the use of automobiles already imposed should be deducted from the amount of the retail sales tax payable under act 233, *supra;* that the Commissioner of Revenue had promulgated rules and regulations which provide in substance that the seller of an automobile at retail must collect two percentum of the entire purchase price from the purchaser and remit to defendant, and that no deduction would be allowed for the license fee already paid.

Petitioner prayed for a restraining order, and that upon a final hearing a permanent injunction be issued.

Appellant filed a demurrer to the complaint. A temporary restraining order was issued. Other automobile retail dealers filed interventions.

An amendment to the complaint was filed stating that the Senate bill which afterwards became act 233, as originally introduced contained the following, as § 15:

"Section 15. Exemptions. There are hereby specifically exempted from the taxes levied in this act the following:

(a) Sales of gasoline.

(b) Sales of cigars and cigarettes.

(c) Sales of tickets of admission to State, county, district or local fairs, and educational, religious or charitable activities, where the entire amount of such receipts

is expended for educational, religious or charitable purposes.

(d) Sales at retail which this State is prohibited from taxing under the Constitution or laws of the United States of America, or under the Constitution of this State.

(e) Sales made by persons who produce livestock, poultry and other products of farm, grove or garden, when said sales are made by the producer, or members of his immediate family, or employees selling such products for the producer, in the original state or condition of preparation at the place of production, and before such products are subjected to any process coming within a class of business."

A motion was made to strike the amendment, which was overruled by the court, and answer was filed denying the allegations of the amended complaint.

The appellee introduced Senator E. B. Dillon, a member of the Fiftieth General Assembly, who testified with reference to holding meetings and what the purpose of the amendment was, and testified at length about the passage of the bill through the Senate. He testified about his understanding of the intention of the Legislature and the intention of the committee in adopting § 15 as it now appears in the act.

The court held that the evidence offered was incompetent, and therefore did not consider it. The court then entered a decree to the effect that the Legislature intended that the amount of license fee paid for the use of an automobile should be deducted from the amount of sales tax collected on the sale of a new automobile, and perpetually enjoined the defendant from enforcing or attempting to enforce collecting or attempting to collect a sales tax on sales of a new automobile without first deducting from the amount of the tax the amount of the license fee paid for the use of said automobile to the State of Arkansas.

The chancery court was correct in holding the evidence introduced by appellee incompetent.

The intention of the Legislature, to which effect must be given, is that expressed in the statute, and the courts

will not inquire into the motives which influenced the Legislature or individual members, in voting for its passage, nor indeed as to the intention of the draftsman or of the Legislature so far as it has not been expressed in the act. So in ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person. 59 C. J. 1017.

Wherever there is ambiguity in a legislative act, the court will resort to the history of the statute and of the proceedings attending its actual passage through the Legislature as disclosed by the legislative journals. Courts will take judicial notice of and consider the action of the Legislature as shown by the journals. 59 C. J. 1019; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; *Ruddell* v. *Gray,* 171 Ark. 547, 285 S. W. 2.

Appellee's first contention is that, under the plain terms of § 15 of act 233, *supra,* the sales tax payable on the sale of an automobile is the difference between the license tax paid on said automobile and 2 per cent. of the sale price on said automobile.

Section 15, above quoted, provides: "There are hereby specifically exempted from the taxes levied in this act: (b) A portion of all retail sales on articles and/or commodities on which a State privilege tax or license is already collected."

Appellee argues at length that the license fee paid for the privilege of driving automobiles on the highways is a privilege tax. We agree with appellee in this contention. Numerous authorities are cited to support this argument.

The first case referred to is *Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679. That was a case involving the validity of an ordinance of the city of Fort Smith making it unlawful for any person to keep and use wheeled vehicles without first having obtained a license therefor. The statute authorized cities of the first class to require residents of such city to pay a tax for the privilege of keeping and using wheeled vehicles, etc. It

was contended in that case that the tax on the use of an article is a tax on the articles itself. The court said:

"While this may be true of a piano, bedstead or cooking stove, the use of which involves no injury or detriment to the public or its property, as to wheeled vehicles it is different, for they are made to be used upon roads and streets. The streets belong to the public, and are under the control of the Legislature whose province it is to enact laws for their improvement and repair."

The court in that case held outright that the tax imposed by the ordinance was not a property tax, but a privilege tax. It was not a tax on the vehicle, but a tax the owner was required to pay for the use of the vehicle on the streets.

The automobile tax required to be paid by the purchaser of an automobile is paid for the privilege of using the public highways. Act 134 of the Acts of 1911 provided for the registration of owners of automobiles, and for a registration fee of $5. It also provided that each owner of a vehicle should keep, conspicuously displayed upon the front and back of every such motor vehicle owned by him, the number of his vehicle. He was required to do this under § 3 of the act "whenever the same shall be driven or used upon the public streets, roads, turnpikes, parks, parkways, drives or other public highways in this State."

This act has been amended many times, but in all the acts it is made clear that the tax is paid, not on the car, but for the privilege of using the public highways. The portion of § 15 above quoted shows that the exemption applies only where articles or commodities on which a privilege tax is paid shall be entitled to the exemption. There is no privilege tax or license on the automobile, but it is a tax that the owner must pay for the privilege of using the public highways. The dealer is not interested in any way in this license tax. He does not pay it or collect it. As to a tax on the other articles that appellee mentions, cigarettes, cigars and gasoline, the dealer himself is required to collect the tax. He is not required to do this in the sale of automobiles.

Moreover, the tax on these articles, cigarettes, cigars and gasoline, is not a tax for the privilege of using them, but is a tax on the privilege of possessing the property without any regard to how it is used or whether it is used at all.

Act 11 of the Extraordinary Session of the General Assembly of February 12, 1934, amends paragraph A of § 24 of act 65, approved February 28, 1929. The act of February 28, 1929, was an act to amend and codify the laws relating to State highways, and § 24 of act 65 provides: "The fee for the registration and licensing of all motor vehicles shall be as follows:" Then follows the amount of fees for certain kinds of automobiles, and paragraph M of § 24 reads as follows: "Each of the fees herein authorized is declared to be a tax on the privilege of using the vehicle on the public roads and highways of the State of Arkansas."

It seems therefore clear that the intention of the Legislature was to tax the privilege of using the highways of the State, and was in no sense a tax on the automobile or on the article or commodity. The distinction between taxing property or the possession of property, as whiskey, wines, beer, tobacco, cigarettes, cigars, etc., and a tax for the privilege of using the highway is clear.

It is next contended by the appellee that extraneous aids are permissible to determine the legislative intent, and in this connection, attention is called to *Hartford Fire Ins. Co.* v. *State,* 76 Ark. 303, 89 S. W. 42. In that case the court said: "To ascertain the legislative intention, the court must look to public events which are sufficiently notorious to be known to all men of reasonable information; to public documents, executive messages, proclamations and recommendations; to legislative proceedings and journals, but not to individual views, votes or speeches of legislators; to the result of elections and political issues therein determined; to a well defined and crystalized public sentiment, when so notorious as to be a part of the well-known events of the day. In short the courts may, and, when the statute is not clear, must, take cognizance of the trend of public events which make the 'history of the times,' in so far as the same

touches or furnishes the moving cause for the statute under review. These principles are well established."

To support this declaration the following citations are given: 2 Lewis' Sutherland on Statutory Construction, §§ 462, 470, 471; 1 Elliot, Evidence, §§ 53, 59, 65, 67; *U. S.* v. *Union Pac. Ry. Co.,* 91 U. S. 72; *U. S.* v. *Trans. Mo. Freight Ass'n,* 166 U. S. 290, 17 S. Ct. Rep. 540; *Redell* v. *Moores,* 63 Neb. 219, 88 N. W. 243; *State* v. *Schoonover,* 135 Ind. 526, 35 N. W. 119; *State* v. *Downs,* 148 Ind. 324, 47 N. W. 670; *Williams* v. *State,* 64 Ind. 553; *Prince* v. *Skillin,* 71 Me. 361, 36 Am. Reports 325; *Swinnerton* v. *Columbian Ins. Co.,* 37 N. Y. 188, 93 Am. Dec. 560.

This court has repeatedly held that courts may look to the legislative journals and public documents where there is ambiguity, in order to find the intention of the Legislature, but we have never held that a senator or representative may testify as to what his opinion is, or that evidence may be introduced as to the amendments and the result of said amendments. The court takes judicial notice of these things, and will find out for itself from the journals what the procedure was, and no outside evidence is admissible. But when we have considered all these things, we are of opinion that the tax paid by one who operates a car on the highway of the State for the privilege of so operating it is no concern of the dealer, and the payment of this tax does not justify any deduction from the sales tax due the State from the dealer.

It is contended, however, by appellee that the amendments adopted to § 15, as it was originally introduced, show that it was the intention of the Legislature to credit the tax paid on automobiles with an amount equivalent to the license tax. We have set out above § 15 as originally introduced, and also § 15 as finally adopted by the Legislature. We fail to find anything that tends to show that the intention was as contended for by the appellee.

If the Legislature had intended to exempt automobile dealers, as claimed by appellee, it could have said so in language about which there could have been no

doubt. It did not do this. Appellee, claiming an exemption, the burden is upon it to show that it is entitled to exemption.

"In all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption, bringing himself clearly within the terms of such conditions as the statute may impose." 61 C. J. 391; *Brodie* v. *Fitzgerald*, 57 Ark. 445; 26 R. C. L. 313 *et seq.*

"An intention on the part of the Legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter, or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt. In other words, since taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing is upon him who claims it." Vol. 2, 4th ed., Cooley on Taxation 1403, § 672.

The decree of the chancery court is reversed, and the cause dismissed.

BAUR *v.* GWALTNEY.

4-4207

Opinion delivered December 23, 1935.

[redacted]

James G. Coston, J. T. Coston, Wils Davis and *W. W. Hughes,* for appellants.

Shane & Fendler, for appellee.

McHANEY, J. On October 25, 1934, appellant acquired the outstanding record title by purchase from the former owners of all that part of section 17, township 13 north, range 9 east, lying south and east of Little River in Mississippi County, Arkansas. The land had been permitted to forfeit for the State and county taxes of 1924 and in 1925 was sold to the State. In 1930 J. A. Walker donated the lands from the State, who later sold his title to appellee. Walker and appellee have been in actual possession of the land since 1930, have cleared it and made valuable improvements thereon. In 1934, appellee purchased the land from Grassy Lake & Tyronza Drainage District No. 9, and from St. Francis Levee District, said land being located in both districts, and both districts having foreclosed their liens for improvement district taxes more than two years prior to January 1, 1934. In other words, the land in controversy is situated

in both districts, became delinquent for improvement district taxes, and both districts brought suit against the lands for the delinquent taxes, secured decrees of foreclosure, sales were had under such decrees, and the districts became the purchasers at their respective sales. Appellee secured a deed from the drainage district under date of November 27, 1934, conveying to him the district's title to said land. He secured a deed from the St. Francis Levee District dated November 17, 1934. The statutes in force at the time the sales were had for the improvement district taxes provided for a period of two years in which the owner might redeem. This period of redemption had expired in both cases prior to the passage of act No. 2, of the first extraordinary session of the General Assembly of 1934, approved January 8, 1934. Section 8 of said act reads as follows:

"In any case where any improvement district, however created, and of any kind or character whatsoever, has become the purchaser of any land by virtue of a foreclosure for the nonpayment of any assessment levied against said land by said district, and due to said district, the said land may be redeemed by the owner, his agent, or any person for the owner, or any one or any legal entity or fiduciary having an interest in said land or holding color of title thereto, upon payment to the commissioners of said district of the amount of any assessment or assessments upon which the foreclosure proceedings were based, together with all the costs allocated against said land, but without penalty or interest, and, upon the payment of such sum, the improvement district shall issue a quitclaim deed conveying to such applicant for redemption all of the right, title and interest of said improvement district in said land, acquired by virtue of said sale, provided that if the said improvement district shall have obtained possession of said land by virtue of such foreclosure and sale, and shall have procured any rent therefrom, the amount of such rent so collected shall be credited upon, and deducted from, the sum due to be paid in redemption thereof, and provided further that such redemption shall be made within three years after the passage of this act."

Appellant brought this action to redeem from said improvement district sales under said section of said act, which right of redemption was denied by the court, and in addition the court cancelled an outstanding mortgage executed by appellant, and quieted and confirmed the title to said lands in appellee. This appeal followed.

The trial court held § 8 of act 2, hereinbefore set out, to be unconstitutional and void as applied to the facts of this case. It seems to be conceded that appellant's right of redemption is dependent entirely upon the constitutionality of said act. If the act is unconstitutional and void, then appellant has no right to redeem. We have several times held that the Legislature may enlarge the period of redemption or extend the time in which redemption may be effected at any time during the redemption period as fixed by the former statute where the sale has been to the improvement district and not to a private individual. *Walker* v. *Ferguson,* 176 Ark. 625, 3 S. W. (2d) 694; *McIver Abstract Co.* v. *Slayton,* 178 Ark. 632, 11 S. W. (2d) 447; *Gossett* v. *Fordyce Lumber Company,* 181 Ark. 848, 28 S. W. (2d) 57. In *McIver Abstract Co.* v. *Slayton, supra,* we said: "Said act 346 of the Acts of 1925, (the act extending the period of redemption), became effective on the 10th day of June, 1925, before the two years allowed by the existing law for redemption of the land had expired, and by § 1 thereof, the time of redemption was extended for a period of three years, making a total of five years allowed for redemption from the date of the sale, the land having been purchased by the road improvement district." Citing *Walker* v. *Ferguson, supra.*

In *Gossett* v. *Fordyce Lumber Company, supra,* this language is found: "The time for redemption under the decree expired March 24, 1927, but prior thereto, to-wit, on March 4, 1927, the above act became a law, the effect of § 14 thereof being to extend the period of redemption from sales in all road districts for three years from March 4, 1927." In all the cases coming before this court, so far as we are advised, the act extending the period of redemption was enacted prior to the expiration of such period as fixed under the previous law. In this case we

are asked to extend those cases under the provisions of the act above quoted so long as the title to the land remains in the district without regard to whether the period of redemption has expired or not as fixed by previous law. We are unwilling to do this, for we are of the opinion that such legislation is unconstitutional and void as disturbing vested rights. When land is legally sold to an improvement district, and the period of redemption has expired as fixed by law, the title thereto becomes absolutely vested in the district, which vested rights the Legislature is without power to take away. Such lands are assets in the hands of the district's commissioners for the payment of its obligations, and the Legislature would have no more power to take them away from it than they would any other property of the district. We therefore hold that, in so far as said § 8, above quoted, attempts to extend the period of redemption of lands sold to improvement districts after the redemption period has expired under existing law, it is unconstitutional and void. But in so far as it enlarges the period of redemption given by existing law where the right has not expired, it is a valid enactment.

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

SIMS *v.* HOLMES.

4-4208

Opinion delivered December 16, 1935.

Dennis W. Horton and *Roy D. Campbell,* for appellant.

W. A. Leach, for appellee.

McHaney, J. Appellant and appellee were opposing candidates for nomination for the office of county and probate judge of Prairie County in the Democratic Primary Election held on August 14, 1934. Appellee was certified by the county central committee to be the winner, he having received on the face of the returns as cast up and certified 1,966 votes, whereas appellant was shown to have received only 1,693 votes, or a majority of 273 in appellee's favor.

Appellant contested appellee's right to the certificate of nomination in apt time, alleging many irregularities and actual fraudulent conduct on the part of the election officials, and challenged many ballots as having been cast for appellee illegally. Appellee responded, denying all material allegations of the complaint and making specific challenges of illegal votes having been cast for appellant. Both parties filed pertinent amendments to their pleadings from time to time by permission of the court, alleging additional challenges of votes claimed to be illegal, until, as said by appellant, "a greater portion of the votes cast in the election had been challenged by one side or the other in this proceeding." The original complaint challenged the entire voting precinct of White River township for fraud and misconduct on the part of the election officials, and, after the proof had been taken, this allegation was enlarged to include Belcher township. Early in the trial of the case motions were made to exclude the entire vote in these townships, and also all ballots cast by persons who voted upon poll tax receipts issued after June 15, 1934. It was shown that approximately 1,200 poll tax receipts were issued after said date under facts and circumstances that indicate very strongly that they were paid for after said date, and were issued at the request of appellee and his friends and supporters to such persons as would vote for him. The deputy tax collector who issued these receipts after said date testified they were paid for prior thereto, and that he had not had time to issue them. Be that as it

may, we find it unnecessary to discuss or decide this question. The court overruled the motion to throw out the entire vote of said townships, and this is the first and major point argued for a reversal on this appeal.

As stated above, the vote as certified was 1,966 for appellee and 1,693 for appellant. After 14 months of arduous, painstaking work on the part of court and counsel, on October 24, 1935, judgment was entered finding that a great many illegal votes had been cast for each party, of which appellee had received 922 and appellant 661, and, after deducting these illegal votes each had received from the totals as certified, the result was appellee 1,044 and appellant 1,032, or a majority for appellee of 12 votes. In arriving at this result the court refused to disregard or throw out Belcher and White River townships, as also Upper and Lower Hill townships, which latter had been added to his former motion by appellant. Now, with reference to the vote in these townships, the court found as follows:

	Certified Votes		Illegal Votes		Legal Votes	
	Holmes	Sims	Holmes	Sims	Holmes	Sims
Belcher	160	22	80	5	80	17
White River	661	158	295	63	366	95
Lower Hill	3	161	2	122	1	39
Upper Hill	0	16	0	11	0	5
Totals	824	357	377	201	447	156

It is not disputed in this record that all the votes held to be illegal by the court were in fact so. In fact it seems to be conceded by both sides. The staggering result is that, out of a total of 1,181 votes cast in these four townships, a total of 578 votes were illegal and void, nearly one-half of them. The same ratio, or approximately so, prevailed throughout the county. Out of a total of 3,659 votes cast for county judge, 1,583 votes were held illegal. On a percentage basis 48.8 per cent. of the votes in the four townships were illegal, whereas 43 per cent. of the votes in the whole county were illegal. What was the trouble? What was the reason for this high percentage of illegality?

As to Belcher township, the proof is undisputed that 33 persons whose ballots were found in the ballot box,

listed on the poll books, numbered and counted were not at the polls on election day, and did not vote at all, not even by proxy. It is also shown by the judges of election themselves in this township that in some instances husbands were permitted to vote for their absent wives. In other words, the wives voted by proxy. The proof does not show just how often this occurred, but the poll books or register of voters shows they so voted in pairs in 14 instances. It is also shown that ballots were taken out to people who did not attend the election and were brought back and voted in the names of the absentee. Two persons who lived at Stuttgart and four who lived at Lonoke were permitted to vote. A number of persons testified that they did not attend the polls, nor pay any poll tax, but that a ballot was brought to them and a poll tax receipt given them, and that they marked the ballot, or had it done, and the ballot was later found in the box and voter listed on the poll books. Many of such persons so voting lived miles away from the polling place. One of the judges testified it was the custom in that township, when people did not come to the polls, to send out ballots to them, and that he did not know how many long distance voters of this kind they had. Also a 17-year-old married woman was permitted to vote. All such ballots were cast for appellee, the judges and clerks being his partisans.

As to White River Township, about the same course was pursued. Ballots of 29 persons who did not attend were found in the box, three ladies who did not vote were found to have voted twice, and one ballot was cast that had no name for it on the register. A girl 18 and a boy 17 years old, and two persons who lived in White County were permitted to vote. It is also shown that husbands were allowed to vote for their absent wives in some instances, just how many is not shown, but 55 couples so voted in pairs, and many others were held illegal. In some instances, persons to whom ballots and poll tax receipts were brought refused to vote, yet their ballots were found in the box and their names on the register as having voted. One 18-year-old boy was permitted to vote provided he voted for appellee. The judges, all of

whom were partisans of appellee, admitted that persons were permitted to vote who were not present which was the custom there, and one of the judges took at least 20 ballots out and got people to vote them, brought them back, and put them in the box after the polls were closed. All such votes were counted for appellee. Ballots were in the possession of others than the judges, who were out rounding up votes for appellee. Numerous other irregularities were shown, but those enumerated are sufficient to show a new and unique method of holding a primary election. Such conduct on the part of the election officials, is, in our opinion, so reprehensible and fraudulent as to impugn and destroy the integrity of the whole vote cast in said townships. Under similar circumstances the vote in a township was disregarded in *Rhodes* v. *Driver,* 69 Ark. 501, 64 S. W. 272.

In *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680, Judge RIDDICK quoted from McCrary on Elections, § 539, the following: "There is a difference between fraud committed by officers, or with their knowledge and connivance, and a fraud committed by other persons, in this: the former is ordinarily fatal to the return, while the latter is not fatal, unless it appear that it rendered doubtful or changed the result. If an officer is detected in a willful and deliberate fraud upon the ballot box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of defrauding the electors, and his certificate is good for nothing." *Patton* v. *Coates,* 41 Ark. 113, and *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, are cited to support the quotation. In the latter case it was held that, in order to destroy the result, "it is sufficient to show that wrongs against the freedom of election have prevailed, not slightly and in individual cases, but generally and to the extent of rendering the result doubtful." In *Cain* v. *CarlLee,* 169 Ark. 887, 277 S. W. 551, it was held in a primary election contest that one vote registered in the name of a party who did not vote at such election was not sufficient to impeach the

integrity of the entire vote of the precinct. In that case one lady testified concerning the precinct of Cotton Plant that she had lived in Cotton Plant for six years, was not at the primary election and did not vote, yet her name appeared in the list of votes in the Cotton Plant box. In answer to the contention that that precinct should be thrown out, this court said: "The above is the only testimony in the entire record offered to impeach the integrity of the precincts of Augusta and Cotton Plant. The testimony is wholly insufficient for that purpose, and the trial court ruled correctly in so holding. In *Crawford* v. *Harmon,* 149 Ark. 343, under a precisely similar state of facts as that which occurred at the Augusta box, we said: 'It does not appear that this was done with any fraudulent design, but with an honest purpose on the part of the judges to permit the sick man to cast his ballot. The court properly threw out this ballot as having been illegally cast, but it afforded no ground for discarding the whole vote of the precinct.' The same may be said also as to the Cotton Plant precinct. The testimony of Mrs. Parnell is not sufficient to show any fraud upon the part of the officers conducting the election in that precinct. Fraud cannot be predicated upon the single and isolated circumstance revealed by the testimony of Mrs. Parnell that she didn't attend the election at that precinct, whereas a vote is registered in her name as No. 307. This was a large precinct, having more than 300 registered voters."

Here the situation is entirely different. Numerous persons were counted as voting, and whose ballots were found in the box with their names on the register, who did not attend the election at all. These persons had no right to vote, and the court properly excluded them as illegal. But the proof further shows in instances husbands were allowed to vote for their absent wives, and just how many of these there are is not known and cannot be known without calling all the people in the township who were registered as voting in said election. These facts, together with the other facts and circumstances heretofore set out, are sufficient to constitute fraud upon the part of the election officials which de-

stroys the integrity of the ballot in those precincts and renders it uncertain and doubtful as to who received the majority of legal votes in said election. We think the showing made by appellant was sufficient to impel the court to exclude the entire vote in said townships, and that it should have done so, unless the appellee had offered to call in all the remaining electors in said townships whose votes were not excluded as illegal to show by them that they were legal votes, and that the burden was upon appellee to do so because he was the beneficiary of such votes. Not having done so, we must declare his nomination not sustained. In such case the provisions of § 3776, Crawford & Moses' Digest, applies. This section reads as follows: "Should a proceeding under §§ 3772-3, or a criminal prosecution under § 3774, be not determined finally until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, or the judgment contains a finding that he violated the laws, as provided in § 3774, then such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation."

Appellee's motion to dismiss the appeal will be overruled, the judgment of the circuit court will be reversed, that appellee be removed from the office of county and probate judge of Prairie County, and a vacancy in said office is hereby declared, to the end that such vacancy may be filled "as provided by law for filling vacancies in such office in case of death or resignation." It is so ordered.

SMITH, J., (dissenting). It was said in the case of *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74, that: "The real object of the courts, in all election contest cases, is to determine whether the contestant or the respondent has received the highest number of legal votes." The trial court appears to have made a very painstaking effort to discharge that duty. The court found that 922 illegal votes had been cast for appellee, and that 661 illegal votes had been cast for appellant. The rotten

frauds attending the election appear to have so disgusted the majority that they have washed their hands of it all, before determining whether the contestant or respondent has received the highest number of legal votes. But in their haste and disgust the majority have departed from long and well-established rules for the trial of election contests, and I am therefore constrained to register my dissent.

The law provides and requires that the result of elections shall be certified by the officers holding them. This certificate is clothed with a presumption of verity which is conclusive, until the affirmative showing is made that it is false, and the burden of so showing is, of course, upon the party asserting the falsity of the certificate. The official election returns are *quasi* records and stand until overcome by affirmative evidence against their integrity. *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940; *Powell* v. *Holman,* 50 Ark. 85, 6 S. W. 505.

In ordinary election contests opposing candidates challenge the validity of votes counted for their opponents. After deciding what ballots were illegally cast, these are then put aside, and those remaining are counted and the result is determined. The testimony is thus confined to the challenged votes. When, however, it is shown that frauds were committed, not only by the electors in voting, but the officers of the election in holding the election, the returns which they make of the election are then said to be discredited. The case of *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680, cited in the majority opinion points out the difference in the effect of fraud committed by the electors from that committed by the officers of the election.

Now, it may be conceded that the testimony set out in the majority opinion so far discredits the certificate of the election officers in the four precincts which have been thrown out as to destroy the presumption of verity which would otherwise attend the election returns. It will be observed that two of these townships were carried by appellant, and the other two by appellee. But even so, this is no reason for not counting the legal votes which were not fraudulently cast in those townships.

A motion to throw out the returns of a particular precinct is, in effect, an objection only to the competency of the returns as evidence. To sustain this motion in a proper case (as the instant case may be conceded to be), the effect thereof is to determine that the certificate of the election officers has lost its probative value. Such a ruling does not determine the legality or illegality of any particular vote. It merely decides that the certificate of the election officers to the election returns is not proof as to the number of votes cast for any candidate. The throwing out the returns of any precinct affects only the method whereby the vote of that particular precinct may be established. Each candidate has as many votes after such a ruling as he had before; but he must present other evidence to show such votes; he can no longer rely on the election returns as proof.

I do not understand that the majority question these well-established principles, as they are declared in the cases cited in the majority opinion. The majority say: "We think the showing made by appellant was sufficient to impel the court to exclude the entire vote in said townships, and that it should have done so unless the appellee had offered to call in all the remaining electors in said townships, whose votes were not excluded as illegal to show by them that they were legal votes, and that the burden was upon the appellee to do so, because he was the beneficiary of such votes."

It is this statement, as applied to the facts of this case, which prompts my dissent. It appears to be conceded that appellee has the majority of the legal votes, unless both Belcher and White River Townships are discarded. The returns, as certified by the election officers, gave appellee only three votes in Lower Hill Township and no votes in Upper Hill Township. Of these three votes only one was counted by the court as legal. The majority hold that the entire vote of all these townships must be discarded and disregarded because the appellee had not called in all the electors whose votes were not excluded as illegal.

Now, the trial court did not sustain the motion to throw out entirely the vote of these townships. Had

this been done, the effect thereof would have been only to hold that the returns were not competent as evidence to establish the vote cast. Each party would then have had the absolute right to show by other evidence the vote cast for himself. This right could have been exercised or declined as each party saw fit, but without other evidence the votes cast in those precincts could not have been counted; not because they were illegal, but because they had not been proved to be legal.

It is very evident that each party challenged every vote adverse to himself, which he believed to be illegal, and the court has in fact and in effect determined the number of legal votes and the candidates for whom cast, independently of the election returns. But it should in any event be kept in mind that the trial court declined to throw out the votes of these townships. There was therefore, under this ruling of the trial court, neither necessity nor opportunity for appellee to prove the vote of any elector whose vote had not been challenged. Had the trial court, at the conclusion of all the testimony, excluded these townships, either party would then have had the right to offer other evidence as to the legal votes which he had received. A denial of this right would, under the majority opinion, have been error calling for the reversal of the judgment. The majority are themselves now committing that error. It is now held, for the first time, that the votes of these townships should be thrown out. It being now decided that the trial court should have thrown out these townships, it follows that each candidate should be allowed to show the number of legal votes which he received in those townships. Evidently this is what the trial court thought he was doing and had done; but, if not so, he should be permitted and required to ascertain that fact. The trial court having held that the verity of the election returns had not been discredited, it would not have been competent or necessary for appellee to prove the legality of votes not questioned, but the court did pass upon all the votes challenged.

Had the trial court sustained the motion to throw out the votes of these townships, then, and in that event,

the necessity for other evidence would have arisen, and the opportunity to offer such evidence would of course have been afforded. This opportunity should now be afforded.

The case of *Williams* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024, defines the correct practice in accordance with the views I express. In that case the trial court had held that the fraudulent conduct of the election officers had so discredited the returns as to destroy their value as evidence. The contestant then made proof of the legal votes cast for himself; the contestee did not make this proof. Under those circumstances, only those votes shown to be legal were counted. But here, we have an entirely different case; the court in the instant case overruled the contestant's motion to throw out the townships. There was therefore no necessity for evidence other than the returns, except to prove or disprove the legality of the particular votes challenged. Yet it is held in effect by the majority that contestee should have brought before the court the 160 persons in Belcher township and the 661 persons in White River township, who had voted for him, to prove what the trial court had ruled had already been established by evidence competent and legally sufficient for that purpose.

The majority cite the case of *Rhodes* v. *Driver,* 69 Ark. 501, 64 S. W. 272, but do not follow the practice there laid down. In that case the opinion recites "that the conduct of the officers of election in Fletcher township was such as to make the returns from that township entirely unreliable." It was said therefore that if the contestee would depend upon the vote of that township he would have to show by proof other than the returns themselves how the votes were cast. In that case, as in this, the trial court had not held that the presumption of verity of the election returns had been destroyed. This court reversed that ruling, but did not order that the vote of that township be disregarded, as has been done in the instant case. On the contrary, it was held that the contestee, after that ruling had been made by this court, "should yet have this privilege" of proving the legal votes which he received in that township.

Upon identical facts the same ruling should be made here, and the trial court should be directed to hear, if he has not already heard, testimony as to the legal votes cast for each candidate; and upon such testimony to find, if he has not already found, who received the largest number of the legal votes, thus fulfilling the real purpose of the contest.

KELSO *v.* BUSH.

4-4190

Opinion delivered December 23, 1935.

Buzbee, Harrison, Buzbee & Wright, for petitioner.

J. H. Lookadoo and *Joseph Callaway,* for respondent.

JOHNSON, C. J. This is an original proceeding in prohibition, instituted by Mrs. R. M. Kelso against respondent, Dexter Bush, circuit judge, to restrain proceedings in a certain action pending in the Clark County Circuit Court. The pending action sought to be restrained is for damages for personal injuries sustained in an autmomobile collision which occurred upon a State highway in Clark County and in which petitioner's automobile participated.

Petitioner is a nonresident of the State, and service of process was had upon her in the action pending in the Clark County Circuit Court as prescribed by § 1 of act 39 of 1933. The question presented for consideration in this proceeding is the constitutionality of said act. Section 1 provides:

"Section 1. From and after the passage and approval of this act, the acceptance by a nonresident owner, chauffeur, operator, driver of any motor vehicle, except such nonresident owners as may have a designated agent, or agents, within this State upon whom valid and binding service of process may be had under the laws of this State, of the rights and privileges conferred by the laws of the State of Arkansas to drive or operate or permit or cause to be operated or driven a motor vehicle upon the public highways of said State as evidenced by his or its operating or causing or permitting a motor vehicle to be operated or driven thereon or the operation by a nonresident owner or the causing or permitting by such nonresident owner of a motor vehicle to be operated on such highways in the State of Arkansas shall be deemed equivalent to the appointment by such nonresident owner whether such nonresident owner be an individual, firm or corporation, of the Secretary of the State of Arkansas or his successor in office to be the true and lawful attorney and agent of such nonresident owner upon whom may be served all lawful process in any action or proceeding against him or against any such person, firm or corporation growing out of any accident or collision in which said nonresident owner or any agent, servant or employee of any such nonresident owner may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of the agreement of any such person, firm or corporation which is so served shall be of the same legal force and validity as if served on such person, firm or corporation personally. Service of such process shall be made by serving a copy of the process on the said Secretary of State, and such service shall be sufficient service upon the nonresident owner, provided that notice of such service and a copy of the process are forth-

with sent by registered mail by the plaintiff or his attorney to the defendant at his last known address, and the defendant's return receipt or the affidavit of the plaintiff or his attorney of compliance herewith are appended to the writ or process and entered and filed in the office of the clerk of the court wherein said cause is brought. The court in which the action is pending may order such continuance as may be necessary to afford the defendant or defendants reasonable opportunity to defend the action."

In consideration of the contention urged, it is a cardinal rule of construction that all legislative enactments are presumed to be constitutional and valid. *Patterson* v. *Temple,* 27 Ark. 202; *Leach* v. *Smith,* 25 Ark. 46. And that all doubts in reference to the constitutionality of statutes must be resolved in favor of validity. *Stillwell* v. *Jackson,* 77 Ark. 250, 93 S. W. 7; *Graham* v. *Nix,* 102 Ark. 277, 144 S. W. 214; *Ark. L. & G. Ry. Co.* v. *Kennedy,* 84 Ark. 364, 105 S. W. 885; *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600; *Carson* v. *St. Francis Levee Dist.*, 59 Ark. 513, 27 S. W. 590; *Leep* v. *Railway Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109.

The first contention is that § 1 denies to petitioner due process of law under the State and Federal Constitutions.

The constitutionality of a State statute almost identical in terms to that of § 1 of act 39 of 1933 was sustained by the Supreme Judicial Court of Massachusetts in *Pawloski* v. *Hess,* 253 Mass. 478, 149 N. E. 122, and that it afforded due process of law to the nonresident defendant was sustained by the Supreme Court of the United States in *Hess* v. *Pawloski,* 274 U. S. 352, 47 S. Ct. 632.

Petitioner, recognizing the force of the opinion just cited, contends that § 1 of act 39, *supra,* differs from this legislative enactment in that the Massachusetts statute provides that notice to the nonresident defendant must be sent by registered mail and the Arkansas statute requires only that such notice be sent to the "last known address" of such nonresident defendant; also that the

Massachusetts statute requires the nonresident defendant's return receipt whereas the Arkansas statute is satisfied with the nonresident defendant's return receipt or the affidavit of the plaintiff or his attorney of compliance. That this difference of phraseology is of substance we are cited the case of *Wuchter* v. *Pizzuti,* 276 U. S. 13, 48 S. Ct. 259. The last-cited case arose under a statute of New Jersey, and the court there stated the pertinent inquiry to be, "The question made in the present case is whether a statute making the Secretary of State the person to receive the process must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement, and we have not been shown any provision in any applicable statute of the State of New Jersey requiring such communication."

The court then disposed of the inquiry by saying: "We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the Pawloski case, that the act of a nonresident in using the highways of another State may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner, but the enforced acceptance of the service of process on a State officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the State, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the State official obtain a default judgment against a nonresident who had never been in the State, who had nothing to do with the accident, or whose automobile having been in the State has never injured anybody."

The language of the opinion quoted does not justify petitioner's position that an enactment which does not require a receipt from the nonresident defendant does not afford due process of law. As we view the opinion, the pertinent inquiry is: does the enactment require "such written communication so as to make it reasonably probable that he (the nonresident defendant) will receive actual notice" of the pendency of the suit? In other words if actual notice to the nonresident defendant is provided for with reasonable certainty in the enactment, it will suffice to afford due process. This conclusion is made certain when we consider other language in the opinion where the court was considering the sufficiency of all legislation imposed against all nonresident automobile owners as follows: "Every statute of this kind therefore should require the plaintiff bringing the suit to show in the summons to be served the postoffice or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant."

This language, in our opinion, demonstrates that the court did not intend to restrict all State legislation against nonresident owners of automobiles operated on the highways of the respective States to such only as might sign a receipt showing actual knowledge of the pendency of the suit, but that such actual knowledge or notice might be shown by such receipt or by written communication transmitted by the plaintiff in the suit or by some other method equally effectual. It must be remembered that the New Jersey act condemned by the court provided no method or means by which actual notice was required to the nonresident car owners, and in this respect act 39 of 1933 is substantially and materially different. In act 39 of 1933 the evidence of actual notice to the nonresident car owner is expressly provided for either by the receipt of the car owner or by the written affidavit of the plaintiff or his attorney of record. Admittedly the notice provided for in act 39 of 1933 may be sent to the last known address of the nonresident car owner, but this does not militate against

actual notice to him. It is a rule of universal application that, when a letter addressed to the last known address of a person, properly stamped, is not returned in response to a return direction, it is presumed that it was received by the addressee. See 22 C. J., p. 101, § 43, and cases cited in note 35.

The Supreme Court of New Hampshire in *Poti* v. *New England Road Machinery Co.*, 83 N. H. 232, 140 A. 587, approved and held constitutional against constitutional attack a statute almost identical with § 1 of act 39 of 1933. The court in the body of the opinion states the substance of this act as follows: "that a nonresident's operation of a motor vehicle on any highway within the State shall be deemed equivalent to the appointment of the commissioner of motor vehicles as his agent, upon whom may be served process in any action arising out of any accident in which he may be involved while thus operating his motor vehicle, and that such operation signifies his agreement that such process so served shall amount to personal service on him within the State, provided the commissioner mails him notice of it." It will be especially observed that the New Hampshire statutes only require that the notice of the pendency of the suit be mailed to the nonresident car owner defendant, whereas our statute requires either a return receipt from the nonresident car owner defendant or an affidavit of the plaintiff or his attorney showing that such notice has been forthwith sent by registered mail to such nonresident owner, or to his last known place of address.

Under a Pennsylvania statute substantially similar to the Massachusetts statute and more nearly identical with § 1 of act 39 of 1933 in that it directed notice of the pendency of the suit to the "last known address" of the nonresident car owner defendant, the Federal district court of Pennsylvania in *Carr* v. *Tennis*, 4 F. Supp. 142, held the statute valid as against constitutional attack grounded upon denial of due process. The third headnote of the opinion reads: "A statute authorizing service on nonresident motor vehicle owners in accident cases by serving secretary of revenue and sending a copy of process to defendant's last known address by

registered mail held not denial of due process (75PS., Pa., § 1201 *et seq.*; Const. Amend. 14)."

A statute of Minnesota almost identical in terms with the Pennsylvania and Arkansas statutes was held valid against constitutional attack in *Jones* v. *Paxton*, 27 F. (2d) 364.

The subject under consideration and related subjects are exhaustively treated in the case notes appended to *State* v. *Davison*, 96 A. L. R. 589, and the curious are referred thereto.

We conclude that § 1 of act 39 of 1933 provides for probable actual notice to nonresident car owner defendants of pending suits in this State, and therefore does not deny to such defendants due process of law under State or Federal Constitutions.

Next petitioner urges that § 2 of said act, which confers upon any of the courts of this State, where service of process is obtained in the manner provided in § 1 of said act, is repugnant to the equal protection afforded by the Fourteenth Amendment to the Constitution of the United States. *Powers Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 47 S. Ct. 678, is cited as decisive of this contention.

In the case last cited this court and the Supreme Court of the United States were dealing with a foreign corporation doing business in this State by express statutory authority. In conformity to and compliance with State law, the appellant designated an agent at Stuttgart in Arkansas County for service of legal process and its principal and only place of business in this State was there located. The suit was instituted at Benton in Saline County against said foreign corporation and service of process was had in Arkansas County. To justify this service of process in the litigation, § 1829 of Crawford & Moses' Digest, as then existing was relied upon. This statute provided for the service of process upon the designated agent of the foreign corporation and after such service conferred jurisdiction upon any court of the State to try and determine the controversy. At that time State statutes did not permit domestic corporations to be sued in a county in which it did no business and had

no office, officer or agent, neither did State statutes permit a natural person to be sued in a county in which he did not reside or was not found for service of process. State-wide venue against foreign corporation as conferred by § 1829 of Crawford & Moses' Digest was condemned because arbitrary and unreasonable when applied against foreign corporation doing business in this State upon the theory that natural persons and domestic corporations were not similarly burdened.

The difference between petitioner's status and that of appellant in *Powers Manufacturing Company* v. *Saunders, supra,* is that petitioner has no place of business or domicile in this State at which to fix local venue or by which to compare her status with that of a domestic corporation or a natural person, and we believe that this difference is substantial and controlling. Petitioner by entry into this State driving an automobile upon its highways impliedly consented that she might be sued in any of the courts of this State as prescribed by act 39, *supra,* and, since she occupied no status localizing venue, as applied to domestic corporations or natural persons domiciled here, she is not denied equal protection of the law as prescribed by the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the United States Constitution, as construed by the Supreme Court of the United States, does not prevent or restrict a State from adjusting its legislation to differences in situations, neither does it forbid classification to that end, but only requires that such classification be not arbitrary. *Traux* v. *Corrigan,* 274 U. S. 337, 42 S. Ct. 124; *Gulf, Colo. & Sante Fe Ry. Co.* v. *Ellis,* 274 U. S. 155, 17 S. Ct. 255; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 31 S. Ct. 337. The necessary requirement is that the classification be pertinent to the subject of classification. As we have heretofore pointed out, petitioner does not occupy the status of a foreign corporation doing business in this State with a local domicile or place of business, and she does not occupy the status of a domestic corporation or natural person domiciled in this State, therefore she is subject to a separate classification as to venue in the

courts of this State, and such classification does not offend against the Fourteenth Amendment or deny her equal protection of the law, as it is not arbitrary or without substance. Moreover, venue statutes of the Commonwealth of Massachusetts in force at the time of the rendition of the opinion in *Hess* v. *Pawloski, supra,* required that all transitory actions against residents of that State should be brought and maintained in the county where one of the parties lives or has his usual place of business or where one of the defendants lives or has his usual place of business or by actual service of process upon a nonresident defendant. See chapter 223, volume 2, Massachusetts General Laws of 1932. The constitutional question whether the Massachusetts statute approved by the Supreme Court of the United States in the case referred to, *supra,* offended against the Fourteenth Amendment by denying equal protection of the law to the nonresident car owner defendants raised itself in said litigation and the court, by approving the statute as otherwise constitutional and valid, impliedly determined that it did not offend the Fourteenth Amendment. At least, this is a cogent circumstance tending to show that the court did not conceive the question of vital importance.

The reasoning heretofore set out is applicable to and disposes of petitioner's contention that act 39 of 1933 is violative of § 18 of art. 2 of the Constitution of Arkansas. See also *State* v. *Johnson,* 172 Ark. 866, 291 S. W. 89.

We conclude, therefore, that act 39 of 1933 is constitutional and valid, and that the service of process upon petitioner in conformity therewith gave to the circuit court of Clark County jurisdiction over the person of the petitioner, and for these reasons the writ of prohibition will be denied.

MATHIS *v.* STATE.

Crim. 3974

Opinion delivered January 13, 1936.

C. R. DuVall and *M. L. Reinberger,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams,* Assistant, for appellee.

JOHNSON, C. J. Appellant Wylie Mathis was duly indicted, tried and convicted in the Grant County Circuit Court for the crime of grand larceny and was assessed punishment of 18 months in the State penitentiary therefor from which comes this appeal.

Over appellant's objections and exceptions a witness, Duff Stuckey, was interrogated by the prosecuting attorney and by the court required to answer the following questions:

"Q. In 1921, what kind of spell was that? Did he get into a scrape? A. No, sir. Q. Was he tried then for stealing a yearling? Objected to, objection overruled, exceptions saved. Q. He was tried for the same kind of crime? Objected to, objection overruled, exceptions saved. A. Not the same crime, he had a trial."

The purpose and effect of this line of testimony was to show that the appellant was in 1921 judicially accused of stealing a yearling, a similar crime to that for which

he was upon trial. This testimony was not only inadmissible, but highly prejudicial to appellant's legal rights.

The general rule is that an offense cannot be established by proof of another offense unless the two are so related and connected as to form a part of one and the same transaction. *Wilson* v. *State,* 184 Ark. 119, 41 S. W. (2d) 764, and authorities there cited. Moreover, were the prior accusation in 1921 admissible as evidence against the accused in this action, it cannot be established by parol evidence. We have always held that matters which should appear of record cannot be established by parol evidence. *Gibney* v. *Crawford*, 51 Ark. 34, 9 S. W. 309; *Morris* v. *Dooley*, 59 Ark. 483, 28 S. W. 30-430; *Gregory* v. *Bartlett,* 55 Ark. 30, 17 S. W. 344; *Martin* v. *Allard*, 55 Ark. 218, 17 S. W. 876.

The trial court also erred in permitting the prosecuting attorney to interrogate appellant on cross-examination in reference to the alleged accusation of theft in 1921. The long-established rule in this jurisdiction is that a witness cannot be interrogated on cross-examination in reference to previous indictments or mere accusations of crime for the purpose of impeachment. *Morrison and Neely* v. *State,* 87 S. W. (2d) 50; *Kennedy* v. *Quinn,* 166 Ark. 509, 266 S. W. 462, and cases there cited.

For the error indicated, the cause will be reversed, and remanded for a new trial.

JACKSON COUNTY AGRICULTURAL CREDIT CORPORATION *v.* EMRICH.

4-4089

Opinion delivered January 13, 1936.

Fred M. Pickens, for appellant.

Joe C. Barrett, for appellee.

JOHNSON, C. J. Immediately prior to June, 1932, the South West Joint Stock Land Bank of St. Louis, Missouri, instituted foreclosure proceedings in the Poinsett County Chancery Court against Jess Brown, who owned and occupied the mortgaged lands. Subsequently on June 25, 1932, at the instance of plaintiff in the foreclosure proceedings, a receiver was appointed to collect rents and preserve the mortgaged estate. This foreclosure proceeding progressed to a decree of foreclosure on December 4, 1933, and the sale of the mortgaged lands was effected on April 28, 1934, at which sale appellee William Emrich became the purchaser. On April 12, 1934, Jess Brown who occupied the mortgaged premises during the foreclosure proceedings and one J. H. Schwarz who was also an occupant of said premises as tenant, effected a crop mortgage to appellant, Jackson County Agricultural Credit Corporation, upon the crop produced and to be produced upon the mortgaged premises during the year 1934 and also upon certain chattels, a description of which is not necessary to here set out, to secure an advance of $1,050. On April 13, 1934, the receiver applied to and was authorized by the chancellor of the district in which the foreclosure action was pending to waive rentals upon crop produced upon the mortgaged land in 1934 to enable the tenants Brown and

Schwarz to produce said crop. Brown and Schwarz produced a crop of rice upon the mortgaged premises, which was surrendered to appellant as mortgagee, and by it sold, and the proceeds applied in satisfaction of its mortgage debt. This suit was instituted by appellee, William Emrich, against appellant and others, alleging a conversion of the rice crop and to recover rentals for 1934. Appellee succeeded upon trial in the lower court, and this appeal comes from that decree.

The sole question presented on this appeal is the validity of the vacation order of the chancellor authorizing and directing the receiver to waive rentals on the mortgaged premises in 1934. If this order is valid, appellant should succeed on this appeal; otherwise not.

Appellee's contention is, and the lower court so decided, that chancellors or chancery courts in this State have no power or authority to direct receivers to waive rentals on mortgaged premises since the expiration of act 92 of 1931. Moreover that, if such authority exists in law, it is lodged in the courts, and not in the chancellors in vacation.

By § 8615 of Crawford & Moses' Digest it is expressly provided:

"The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally do such acts respecting the property as the court may authorize."

The language employed, "and generally do such acts respecting the property as the court may authorize," is express statutory authority for the chancery courts of this State to make all necessary orders in reference to the mortgaged premises as may be necessary to preserve the mortgaged estate, and this certainly includes the power or authority to waive rentals to the end that the mortgaged premises may be cultivated and kept in a state of cultivation. The case of *Clark* v. *Dickey,* 190 Ark. 192, 78 S. W. (2d) 824, cited and relied upon by appellee is not opposed to these views. There we were dealing with a statute which expressly limited the exercise of

power by a guardian or a curator in the manner therein prescribed.

The next question for consideration is: May this order be made by the chancellor in vacation? By § 8600 of Crawford & Moses' Digest chancellors are expressly authorized to appoint receivers in vacation, and by § 8609 they are expressly authorized to remove receivers in vacation. By § 8610, *supra,* chancellors are expressly authorized to require reports from receivers in vacation; to examine same and allow expenses of administration including disbursements of funds in receivers' hands.

The express powers granted by the statutes, cited *supra,* to effect appointments of receivers in vacation; to compel reports of receivers in vacation; to remove receivers in vacation; to examine reports and allow expenses of receivership in vacation; to disburse funds in receivers' hands in vacation, impliedly confer power upon chancellors in vacation to make necessary orders for the preservation of the property in the receivers' hands, and this was the necessary implication of the vacation order directing the receiver to waive rentals for 1934 upon the lands in the receiver's possession.

It follows from what we have said that the court erred in holding that the vacation order directing the receiver to waive rentals was invalid and in holding that appellee's claim for rentals for 1934 was superior to appellant's mortgage, and the cause must be reversed and remanded for this reason.

Upon remand the lower court is directed to enter a decree conforming to the views heretofore expressed, and in addition should direct a marshaling of assets and a foreclosure of appellant's mortgage upon all chattels mentioned therein for the benefit of appellee.

SPRINGDALE *v.* FLEMING.

4-4091

Opinion delivered January 13, 1936.

[redacted]

Duty & Duty, for appellant.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Washington County rendered on the 11th day of March, 1935, enforcing by mandatory injunction a contract entered into between appellant and appellee on the 13th day of July, 1927, as amended by the parties on the 19th day of October, 1931.

The substance of the contract was that appellee should convey a tract of land near the city of Springdale to appellants, upon which there was a spring of four hundred gallons per minute capacity and to give an easement over an additional tract he owned to lay water mains or pipes, in consideration that appellant would pay him $150 cash and furnish him free water for domestic, yard sprinkling, and stock purposes at his home and at two other places on said lands. Pursuant to the contract, the deed was executed, money paid, and about one and one-half miles of water pipe laid on said lands and put in use, and appellee was furnished free water until the summer of 1933, at which time appellant denied appellee's right to free water and disconnected the water supply from his properties for the alleged reason that he

was abusing his free water privileges by using the water for commercial and irrigation purposes and also wasting the water by allowing his hydrants to remain open continuously. The original contract was in writing, signed by the mayor and other officials of the city as well as appellee. The amendment to the contract was adopted by resolution of the city council without an "aye" and "nay" vote.

Appellant contends for a reversal of the decree because the contract was not made in accordance with the provisions of § 7528 of Crawford & Moses' Digest, which is as follows:

"On the passage of every by-law or ordinance, resolution or order, to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded, and to pass any by-law or ordinance, resolution, or order, a concurrence of majority of the whole number of members elected to the council, shall be required."

The argument is made that the contract is void because of the failure to execute it in accordance with said section of the statute, and that appellee cannot enforce its provisions. It is also argued that it is *ultra vires* and non-enforceable. The right of a city to acquire a water source and an easement over lands to lay its water mains and pipes is not *ultra vires*. In the instant case it is immaterial whether the water supply and easement was acquired in conformity with the statute quoted above. The city cannot retain the spring and easement and refuse to pay the continuing consideration therefor, which is the use of free water by appellee. It may be that the contract can be abrogated in a proper proceeding because not executed in accordance with law, but certainly the city cannot retain the benefits under the contract and deny appellee the benefits flowing to him thereunder.

We have carefully read the decree of the chancery court, and have concluded it correctly and definitely sets forth the rights of each party under the contract as long as it remains in force and effect.

The decree is affirmed.

EASTER *v.* FARMERS BANK & TRUST COMPANY.

4-4078

Opinion delivered January 13, 1936.

[redacted]

U. J. Cone, for appellant.

Compere & Compere, for appellee.

McHANEY, J. Appellant brought this action against appellee in April, 1934, in which he alleged that it was indebted to him in excess of $3,700 on various overcharges and undercredits, and which should be applied to the satisfaction of his indebtedness to it, and that the mortgage securing his indebtedness should be canceled and he have judgment against it for the excess. Appellee answered, denying it was indebted to appellant in any sum, as well as denying all material allegations in the complaint, and filed a cross-complaint against him alleging that he was indebted to it on two promissory notes, both dated June 30, 1931, one for $454.17 and the other for $3,005.50, with interest from date at 8 per cent., and both secured by mortgage on certain real estate, for which amount it prayed judgment and a foreclosure of said mortgage. Trial resulted in a decree dismissing appellant's complaint for want of equity, and a judgment against him and his wife, joint maker of said note and mortgage, for the amount thereof, with interest, and a

foreclosure of said mortgage, in accordance with the prayer of the cross-complaint. The case is here on appeal.

One of the matters of which appellant complains relates to the sale of his stock in appellee bank in 1923. He was the owner of $700 par value of said stock, and his sister was the owner of $1,400 worth. He says that Mr. Pugh, active vice-president of the bank, told him, if he would acquire his sister's stock, he, Pugh, would find a sale for it at $1.50 for each dollar par value and credit same on appellant's indebtedness to the bank; that he acquired his sister's stock, paying her $1.50 and then sold all of his stock through the bank; that he learned several years later, about the time this suit was brought, that the bank had given him credit for the $2,100 worth of stock for only $2,625, a price of $1.25, whereas he should have been given credit for $3,150, which would have been the price if sold at $1.50. The difference amounts to $525, for which amount with interest he sought to recover against appellee. Mr. Pugh testified that the stock was sold at $1.25, which was the market value of the stock at that time, and that he did not tell appellant he would get $1.50 for it. Appellant made no complaint about this transaction at any time prior to the bringing of this suit, although the amount was applied on his indebtedness and he received statements of his account with the bank from month to month thereafter.

Another item about which he complains relates to an indebtedness of appellant to Mr. Gus Wilson, an officer in appellee bank. On January 2, 1925, appellant executed a note to appellee bank for $6,000, secured by a mortgage on his real estate. The purpose of this note and mortgage was to secure sufficient funds with which to pay the indebtedness to Wilson and to take up his other indebtedness to the bank, or at least a part thereof. He contends that, in the settlement with Wilson the bank paid Wilson for his account $1,170.13 more than he owed Wilson. The mortgage covered appellant's gin plant, gin lot, his home and a farm. In February, 1925, the gin burned and insurance to the amount of $3,812.56 was col-

lected and turned over to the bank to be applied on his indebtedness by appellant. In June, 1925, Easter sold the gin lot for $2,000, which was also turned over to appellee and applied on appellant's indebtedness. Appellant contends that the insurance money and the sale price of the lot were directed by him to be applied on his mortgage indebtedness of $6,000, and that this was all of his indebtedness to the bank at that time. Not only is this fact disputed by Mr. Pugh and the records of the bank, including another note, but the fact is that appellant thereafter renewed the mortgage indebtedness from time to time for an amount largely in excess of the amount which would have remained had the items above mentioned been applied on the $6,000 note. The fact is, as testified by Mr. Pugh and as shown by the records, that he was indebted on another note in excess of $1,000 and for an overdraft in his personal account of some $700 or $800. We cannot undertake to state all of the items and claims made by appellant in detail. As found by the trial court, appellant is in the unfortunate situation of having to depend for his evidence to support his claim on his memory of the details of transactions that took place many years ago, whereas his memory is disputed by the records of the bank and by the positive testimony of its officers, to say nothing of his own conduct in waiting so many years to speak, and of renewing his obligations to the bank from time to time after making payments thereon both of principal and interest without any question as to their correctness. He attempts to explain his long delay by reason of his close friendship with, and absolute confidence in, the honesty and integrity of the bank's officials, but this is not sufficient to excuse this delay. Not only did he make payments on his obligations to the bank after January 2, 1925, as above mentioned, but he made other payments and made other renewals of his obligations under circumstances that indicate that he was fully aware, or at least he should have been aware, of the manner of application of payments. Not only this, but the bank rendered him statements of his account from month to month of his bank accounts, and, if such statements were incorrect, it was his duty to

speak within a reasonable time. *City National Bank* v. *McGraw, ante* p. 927. In that case we quoted with approval from *Bank of Hatfield* v. *Clayton,* 158 Ark. 119, 250 S. W. 347, the following:

"The rule seems to be universal that the furnishing of a statement by a bank to depositor, where the items are sufficiently shown to put the depositor upon notice, constitutes an account stated, to which objection must be made within a reasonable time, otherwise the account is final."

But he also seeks to excuse his delay in questioning his transactions with appellee because of the condition of his health and because of his unfortunate blindness, but we think this fact would not be sufficient to excuse his duty to act and speak promptly; and that he either knew the facts or should have known them by reason of the transaction above mentioned.

We are therefore of the opinion that the court correctly dismissed appellant's complaint for want of equity, and correctly entered judgment against him for the amount of his debt to appellee, and directed a foreclosure of the mortgage. The judgment is therefore affirmed.

RUDDELL *v.* JONES.

4-4226

Opinion delivered January 13, 1936.

Dene H. Coleman, for appellant.

W. K. Ruddell and *John L. Carter,* for appellees.

BAKER, J. This is a suit involving the refunding of bonds in the total sum of $113,000, issued under authority of Amendment No. 10 of the Constitution of the State of Arkansas. The complaint in this case was filed to enjoin the issuance and delivery of the refunding bonds. The answer admitted generally the facts stated in the complaint, and pleaded that the system or scheme for the issuance of the refunding bonds had been made to conform to the principles announced in the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. (2d) 71. The answer pleaded also that the proceeds or collections arising from the tax of two mills were insufficient to meet the interest and maturities of outstanding bonds, and that it was decided to extend the time of payment and reduce annual maturities rather than to increase the rate of taxation above two mills, and that it was necessary, or at least expedient, to refund the bonds under these conditions, and alleged the purpose and intent of continuing the refunding scheme until consummated.

The plaintiff demurred to this answer. The demurrer being overruled, plaintiff refused to proceed further, and her complaint was dismissed for want of equity. From this decree the appeal is prosecuted.

We discussed the matters involved in the case of *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. (2d) 71, and also in the case of *Turnbow* v. *Talkington, ante* p. 492.

The particular controversy arises out of the opinion in the last-cited case.

"As was pointed out in the opinion in the case of *Talkington* v. *Turnbow, supra,* this act confers express authority to refund, but this action is not permitted, under the proviso above quoted, 'so long as the taxes collected from the millage tax heretofore authorized to be levied for that purpose shall be sufficient to pay such indebtedness as same matures.' We think the phrase,

'heretofore authorized to be levied,' refers, not to the election or amendment authorizing the tax, but to the action of the quorum court in levying a particular rate. The bonds may not be refunded so long as the taxes collected from this rate are sufficient to pay the indebtedness as the same matures.''

All parties to this suit agree that the above quotation is clear, but it is urged by appellant that the remaining portion of the same paragraph causes some confusion. It is as follows:

''But the converse of the proposition is also true. They may be refunded if the taxes so collected are insufficient. Here it is alleged—and the demurrer concedes the answer to be true—that the taxes being collected are insufficient for this purpose, and 'that in any event and under all circumstances there will remain a deficit with no way to meet said deficit even if the five mills were available.' ''

Appellant argues that the conditions under which appellees are attempting to refund bonds are not similar to those in the above-cited cases and particularly in the more recent case of *Turnbow* v. *Talkington.* It will be observed from the last quotation that it was stated that the maximum tax that might be assessed therein would not be sufficient to meet obligations maturing immediately subsequent to the issuance of the refunding bonds, whereas it is urged that in Independence County, if a three-mill tax were levied, the proceeds or revenue therefrom would be sufficient to meet maturing obligations.

Appellant contends that upon this account Independence County has not the right to issue refunding bonds, but that to meet maturing obligations the law requires that there be an increase in the levy to three mills, rather than a new bond issue. That has not been our interpretation of act 102 of the Acts of 1935.

Elaborating somewhat upon the questioned paragraph in the case of *Turnbow* v. *Talkington, supra,* and paraphrasing and making additions thereto, will make clear, we think, any presumed ambiguity.

We think the phrase, "heretofore authorized to be levied" refers not to the election or amendment authorizing the tax, nor does it refer to the maximum tax that might be levied under the amendment, but to the rate fixed by the action of the quorum court. The bonds may not be refunded so long as the tax collected from this rate, as fixed or levied by the court, as distinguished from the maximum rate provided for by the amendment, is sufficient to pay the indebtedness as the same matures.

Whenever the taxes collected from this rate, as fixed by the court (not the maximum rate provided for in the amendment), are inadequate to meet maturing obligations, then, if it be deemed expedient to extend the time of payment, providing for smaller annual installments instead of increasing the rate of taxation to pay installments that would otherwise mature, the refunding scheme or system provided for in act 102 is available.

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

CHAPMAN & DEWEY LUMBER CO. *v.* MEANS.

4-4165

Opinion delivered December 23, 1935.

Gordon E. Young, for petitioner.
F. D. Goza, for respondent.

BUTLER, J. On August 8, 1935, T. O. and R. O. Bell sued the Chapman & Dewey Lumber Company in the Hot Spring Circuit Court for an alleged balance due upon a contract. Summons was issued addressed to the sheriff of Craighead County, Arkansas, to be served upon T. G. Stayton, the designated agent for service of the defendant company which was alleged to be, and is in fact, a foreign corporation. On the same date an affidavit and bond in attachment was filed in the said court, it being alleged in the complaint that the defendant had property belonging to it and debts owing to it in Hot Spring County. On August 20, 1935, the sheriff of Craighead County returning said summons stating in the return that he had made diligent inquiry for T. G. Stayton, the designated agent, and that the said Stayton was not a resident of Craighead County. On the receipt of this return and the filing thereof in the office of the clerk of the court, two summons were issued in the said cause on August 31, 1935, directed to the sheriff of Pulaski County to be served on the Auditor and Secretary of State, respectively. These were duly served and returned, and on the first day of the October term of the circuit court of Hot Spring County the defendant appeared specially in said cause and filed its written motion to quash the process, affidavit and bond for attachment alleging that the defendant was a foreign corporation with T. G. Stayton of Poinsett County as its regular designated agent for service in this State, that it had no branch office or place

of business in Hot Spring County, that none of its officers resided, or were served, in said county, and that it had no property or debts owing to it therein.

The attorneys for plaintiffs and defendant entered into a stipulation of fact to govern the court in its decision upon the defendant's motion to quash. This stipulation recited the filing of the suit, issuance of the summons and the returns thereon which have heretofore been noticed. It was further stipulated that the articles of incorporation of the defendant company, filed in the office of the Secretary of State, designated the residence of T. G. Stayton, the designated agent to be Jonesboro, Craighead County, Arkansas; that the records in the office of the Secretary of State showed that the defendant corporation had conformed with § 1827 of Crawford & Moses' Digest, by filing its resolution adopted by its board of directors consenting that service of process might be had upon any agent of such company in the State or upon the Secretary of State. It was also agreed that at the time of the filing of the complaint and issuance of summons, and at all times thereafter, T. G. Stayton was a resident of Poinsett County, Arkansas, and that service could have been had upon him in said county. It was finally agreed that the defendant has no branch office or place of business in any county of the State of Arkansas except Poinsett, and that none of its officers or agents reside in Hot Spring County.

The trial court overruled the motion to quash and plea to its jurisdiction, whereupon the defendant filed its petition in this court for a writ of prohibition to restrain the Hot Spring Circuit Court and Hon. H. B. Means, its judge, from further proceedings in said cause.

The contention of the petitioner is that, since it had named T. G. Stayton as its designated agent, it was necessary that service be had upon the agent, and that, although the residence and address of the agent was not correctly given, the plaintiffs had such information as would enable them to have the process served on the agent in Poinsett County.

The applicable statute relating to service upon foreign corporations doing business in the State is found in

§ 1827 of Crawford & Moses' Digest. Under its provisions two methods for service are provided: One, upon any agent of the company, and the other, by service of process upon the Secretary of State. The requirement for service upon any agent is not the exclusive method, but, as we interpret the language used in the section, *supra,* service of process may be had on either an agent or the Secretary of State. Therefore the service in this case had upon the Secretary of State is sufficient.

The question then is, in what counties may the action be prosecuted? It appears that an attachment has been sued out in the circuit court of Hot Spring County. If the attachment has been properly sued out, a question we do not now decide, and property of the defendant is found in Hot Spring County upon which the attachment may be levied, then, under the provisions of §§ 502 and 1174 of Crawford & Moses' Digest, the action may be maintained at least to the extent of an action *in rem.* As it has been admitted that the corporation maintains no office or place of business in Hot Spring County, and none of its officers or agents reside therein, § 1152 of Crawford & Moses' Digest has no application.

The question of whether there is such property or debts is one of fact to be determined by the trial court, and the remedy of defendant company from an adverse holding, if it feels aggrieved, is by appeal to this court. It is true that it has been frequently decided that no matter how erroneous a decision of a trial court as to its jurisdiction of the person, an appeal to this court serves to enter the appearance of the defendant, and the trial court has jurisdiction on remand because of that. *Benjamin* v. *Birmingham,* 50 Ark. 433, 8 S. W. 183; *Waggoner* v. *Fogleman,* 53 Ark. 181, 13 S. W. 729; *Adams Mach. Co.* v. *Castleberry,* 84 Ark. 573, 106 S. W. 940; *Merrimac Mfg. Co.* v. *Bibb,* 119 Ark. 443, 178 S. W. 403; *Duncan Lbr. Co.* v. *Blaylock,* 171 Ark. 397, 284 S. W. 15; *Purnell* v. *Nichol,* 173 Ark. 496, 292 S. W. 686; *Federal Land Bank* v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696. This is a procedural rule which we may alter or abolish if it should appear that we were originally mistaken. It does not have the binding effect, under the rule *stare decisis,* as

would a rule of substantive law which this court has announced. It has always appeared to be anomalous that where a trial court has no jurisdiction of the person, and where that fact is suggested to it, an appeal from the trial court's adverse decision serves to give it the jurisdiction which in the first instance it did not have, notwithstanding the fact that through every step of the proceeding its jurisdiction was protested.

In the following cases, *Crow* v. *Futrell,* 186 Ark. 926, 56 S. W. (2d) 1030; *Terry* v. *Harris,* 188 Ark. 60, 64 S. W. (2d) 82; *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S. W. (2d) 235; *Sparkman Hardwood Lbr. Co.* v. *Bush,* 189 Ark. 391, 72 S. W. (2d) 527, we have held that where the jurisdiction of a trial court depends upon a question of fact, a writ of prohibition will not lie. This appears to be the situation in the instant procedure, and the writ will therefore be denied.

[redacted]

CLAYTON *v.* STATE.

Crim. 3944-3945

Opinion delivered November 18, 1935.

[redacted]

John R. Thompson and *Jno. A. Hibbler*, for appellants.

Carl E. Bailey, Attorney General, *J. Hugh Wharton* and *Ormand B. Shaw*, Assistants, for appellee.

McHaney, J. Appellants, Clayton and Caruthers, negro men, aged 21 and 19 years, respectively, were convicted of the crime of rape, committed on the person of Vergie Terry, a white woman aged 19, on the night of December 21, 1934, near a cemetery in the suburbs of the city of Blytheville, Arkansas. They were sentenced to death in the electric chair. They were separately indicted, but tried jointly.

For a reversal of the judgment of conviction and sentence, a number of errors are assigned and argued, among which are the following:

1. That the court erred in refusing to quash the indictments against them on their motion because: (a) They were not signed by the prosecuting attorney himself or his deputy. It has never been the law in this State that the signature of the prosecuting attorney to an indictment is necessary to its validity. On the contrary, it has been continuously held that such signature is not necessary. *Anderson* v. *State*, 5 Ark. 444; *Watkins* v. *State*, 37 Ark. 370. An indictment is not demurrable because not signed by the prosecuting attorney, though it is customary and better practice for him to do so. *Robinson* v. *State*, 177 Ark. 534, 7 S. W. (2d) 5. (b) Because, as it is said, they were denied the privileges and immunities guaranteed them under the Constitution in that no negroes were on the grand or petit jury, which was a discrimination against them on account of their race or color in violation of the "due process clause" of

the 14th Amendment. There is nothing in this record tending in any way to show that there were no negroes on the grand jury that indicted them, or on the petit jury that tried them. No objection was made to either jury on this account, nor was such a ground alleged in the motion to quash the indictment, nor was any motion made to quash the trial panel on this or any other ground. It was not even mentioned as a ground in the motions for a new trial. This question is raised for the first time in the brief for appellants, without any record to support it. It cannot be considered. Even though raised in the motion for a new trial for the first time, such assignment comes too late. *Hicks* v. *State,* 143 Ark. 158, 220 S. W. 308.

2. That the court erred in refusing to change the venue on their petition. The statute (§ 3088, Crawford & Moses' Digest) provides the requirements to effect a change of venue, among which are that the petition "be supported by the affidavits of two credible persons, who are qualified electors, actual residents of the county and not related to the defendant in any way." The petition in this case was supported by the affidavit of only one person, and was properly overruled, no matter how credible the affiant was, because not in compliance with the statute. *Davis* v. *State,* 170 Ark. 602, 280 S. W. 636; *Adams* v. *State,* 179 Ark. 1047, 20 S. W. (2d) 130; *Cain* v. *State,* 183 Ark. 606, 37 S. W. (2d) 708. The statements of counsel for appellants at the trial as to the reason why he could not get another or other affiants cannot supply the omission.

3. That the evidence is insufficient to support the verdicts and judgments against them. In considering this assignment, we must view the evidence in the light most favorable to the State, and if, when so viewed, there is any substantial evidence to support the verdict, we must permit it to stand. It is earnestly insisted, both in the original brief and in the supplemental brief on behalf of the appellants, that the evidence of the alleged rape was incredible, and that the identification of the appellants was unsatisfactory. Incredible and unsatisfactory to whom? The jury is the judge of the credibility

of the witnesses and the weight to be given their testimony. These are questions for the jury and not for this court if, as above stated, there is substantial evidence to support the verdict. The prosecuting witness, Vergie Terry, testified very positively that she was raped by both appellants on the night of December 21, 1934; that she and Wiley Bryant were sitting in a parked car near Sawyer's graveyard, about a mile and one-half southeast of Blytheville; that they were parked on a road running north and south near the intersection of another road running east and west; that, while so parked and she and Bryant were sitting in the front seat, two negroes passed going south, and in about ten minutes they came back with flashlights in their hands and each with a pistol; that they ordered them to get out of the car and one of them fired a shot into the car and one of them struck Bryant over the head with a flashlight; that they forced Bryant to get down into a ditch and the smaller of the two held a gun on him and the other ordered her to get into the back seat of the car where he forced her to submit to his fiendish passions; that the larger of them guarded Bryant while the smaller one forced her again to submit to him. She identified appellants as being the two men who committed the rape. This evidence was fully corroborated in all respects by Wiley Bryant. She further testified that, while in the act of raping her, she saw the face of each, both by the light of the moon and by the light of a passing automobile. When appellants were first arrested, they were not suspected of this crime, but it was thought that they were the ones who had recently shot the sheriff. They were threatened with mob violence, and the officers removed them to Memphis and from thence to the penitentiary for safe-keeping. While in the penitentiary, Vergie Terry and Wiley Bryant were taken there by the officers to see whether they could identify these appellants as the parties who had committed the rape. They both testified that they recognized them immediately. They identified them again in the court room. Both Vergie Terry and Wiley Bryant testified that the negroes had two flashlights and that they wore handkerchiefs over their faces. Vergie Terry said that

they were white handkerchiefs and that one had a colored border. Appellant Caruthers' automobile was found parked out near where the sheriff was shot. In the car they found a forty-five caliber pistol hidden under the upholstering of the back seat. Two caps were found under the cowling in the car and over a heater and two handkerchiefs were found in the pocket of the car, one of which had been folded in a three-cornered shape and twisted on each end as if it had been tied. Two flashlights were also found in the car. These are circumstances for the consideration of the jury which are not without weight. It was testified that the rapists wore caps on the night the crime was committed and had flashlights, pistols and handkerchiefs over their faces. This testimony tends to corroborate the identification of the appellants by the victims. Appellants denied that they were the ones that committed the crimes and attempted to prove an alibi. The jury refused to accept their testimony as true. We cannot say that there is no substantial evidence to support this verdict. On the contrary, it is quite substantial, and we must permit the verdict and judgment to stand.

4. That the court erred in permitting the prosecuting attorney to question the defendants on other unrelated crimes. We have examined this assignment very carefully and find it without merit. The rule in this State with reference to the cross-examination of the accused, touching his credibility, in relation to other crimes is stated in *Kennedy* v. *Quinn,* 166 Ark. 516, 266 S. W. 462, and recently quoted in *Morrison* v. *State, ante* p. 720, as follows:

"We have frequently and recently decided that a witness cannot be interrogated on his cross-examination for purpose of impeachment concerning indictments or mere accusations of crime. He may be asked if he was guilty or was convicted, but he cannot be asked if he was indicted or accused." An examination of the questions asked by the prosecuting attorney on cross-examination of appellants related to their guilt, or whether convicted of other crimes. They were not asked about indictments for other crimes or mere accusations of such crimes. For

instance, Bubbles Clayton was asked these questions: "Part of your occupation has been stealing, hasn't it?" "You hi-jacked Mr. Frank and Miss Hutchins on November 18 and shot her, didn't you?" Similar questions were asked appellant Caruthers. These were questions relating to actual guilt or guilty knowledge and not to indictments or mere accusations. This was proper cross-examination under the rule announced and we so hold it here. These are all of the assignments which we deem of sufficient importance to justify a discussion thereof. We have carefully examined all of the assignments of error, and find them without substantial merit.

It follows that the judgments must be affirmed, and it is so ordered.

McHaney, J., (on rehearing). Appellants make a very strong argument that we erred in holding there was substantial evidence to support the verdict. But what we said in the original opinion, to which we adhere, answers this contention. It was a question of fact for the jury, and it is the settled rule of this court, announced in hundreds of decisions, that it is not our province to set aside the verdict of the jury supported by substantial evidence. We think the evidence is substantial, direct and positive, and was a question for the jury's determination and not ours.

The only other question raised in the brief on rehearing which calls for discussion is that this court erred in affirming death sentences based upon the following verdicts: "We, the jury, find the defendant, Jim X. Caruthers, guilty as charged in the indictment, and fix his punishment at death by electrocution. Ike Miller, foreman." A like verdict was rendered in the case of Bubbles Clayton.

It is urged that, since an indictment for rape includes also a charge of carnal abuse, a charge of incest and a charge of assault with intent to rape, that the above verdicts were defective in failing to find the particular offense, with which appellants were charged. Had the verdicts in these cases simply found the defendants guilty as charged in the indictment without fixing the punishment, there might be some merit to appellants' conten-

tion. It is true that in the case of *Banks* v. *State,* 143 Ark. 154, 219 S. W. 1015, on a charge of murder in the first degree, the verdict read: "We, the jury, find the defendants, John Martin and Alf Banks, Jr., guilty as charged in the indictment," this court held that the verdict was so fatally defective that no judgment could be rendered upon it. So it has been held in a number of murder cases by this court. These decisions were founded on the provisions of the act of December 17, 1838, digested as § 3205 of Crawford & Moses' Digest, which provides: "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 confesses guilt, the court shall impanel a jury and examine testimony, and the degree of the crime shall be found by such jury." We have no such statute in relation to the charge of rape, and moreover we are of the opinion that the verdicts rendered in these cases are made definite and certain by the jury in fixing the punishment at death by electrocution. No such punishment could have been inflicted by the jury for any of the lesser offenses. Moreover, this court has several times held that a general verdict, like the one in question is sufficient. In the recent case of *Wallace* v. *State,* 180 Ark. 627, 22 S. W. (2d) 395, the indictment charged the appellant with grand larceny. The jury returned the following verdict: "We, the jury, find the defendant guilty, and fix his punishment at one year, and recommend to the court to suspend his sentence on good behavior." It was contended in that case that the verdict was indefinite, and that it did not show what the defendant was guilty of. In answer to this contention, the court said: "It is true that the verdict must, either in itself or by reference to the indictment or information, contain a finding of every essential element of the crime of which the appellant is convicted. But a verdict of guilty implies a finding of every element essential to constitute the crime as charged, and it need not state the specific crime, it being sufficient that it finds the defendant guilty as charged in the indictment or information, or that from its language as a whole no doubt can arise as to the

offense of which the accused is convicted." Citing 16 C. J. 1109; *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467. Continuing, the court said: "It is only in cases of murder that the statute makes it necessary for the jury to state in their verdict the degree of crime." The court then quoted § 3205, Crawford & Moses' Digest, regarding verdicts on indictments for murder, and said: "But there is no such requirement in indictments for other felonies." See also *Gribble* v. *State,* 189 Ark. 805, 75 S. W. (2d) 660.

The petition for rehearing is therefore denied.

MEDENDORP *v.* WASHINGTON.

4-4077

Opinion delivered December 16, 1935.

Oscar E. Williams, for appellant.

Compere & Compere, for appellees.

SMITH, J. The testimony in the record before us develops the fact that appellant Mendendorp, who resides in Lonoke County, was the agent for a nonresident of the State, who owned a farm in Ashley County. He filed a suit as agent on April 29, 1929, for the purpose of collecting the rent for 1928. At that time all of the cotton had been sold, and the purpose of the suit was to hold

the purchasers of the cotton liable for the conversion of property which was subject to a landlord's lien, with knowledge of the lien. The court found the fact to be that "the persons who bought the cotton herein bought it in good faith and without knowledge of plaintiff's lien, and that there is no equity in the bill."

The case of *Van Etten* v. *Lesser-Goldman Cotton Company,* 158 Ark. 432, 250 S. W. 338, declares the law applicable to the issues here joined. We there said: "For the law is that, while one buying cotton subject to a landlord's lien is not liable as for conversion, if he has no knowledge of the lien, yet if the purchaser is in possession of facts sufficient to put him upon notice that the cotton is subject to the lien of a landlord, good faith requires him to pursue the inquiry to the extent of investigating the facts of which he has knowledge, and, if reasonable diligence in the investigation of these facts would have led to the knowledge of the actual existence of the lien, then the purchaser is liable for a conversion, just as he would have been had he possessed the actual knowledge. The act of purchasing the cotton destroys the landlord's lien, and one cannot do this and escape liability for so doing except when he has acted in good faith in making the purchase, and good faith requires a reasonable investigation of any information of which the purchaser has possession calculated to warn him that he is being offered cotton upon which there exists a landlord's lien." (Citing cases.)

Here the testimony shows that Medendorp brought Robert Washington to Ashley County in 1925, and placed him in possession of the farm. It appears that this was done under a rental contract covering the entire farm, portions of which Washington subrented to other tenants. Washington's possession, which began in 1925, continued through 1928. The farm was near Wilmot, and Medendorp testified that he would come down there about Christmas for the purpose of collecting the rent from his tenant and of making settlement of the year's operations. During this time, the impression became general, as is evidenced by the testimony of a large number of witnesses, that Washington was the general manager of the

farm. For instance, R. C. Wells, a merchant at Wilmot, testified that Washington carried an account with him which was charged to Medendorp, and on one occasion prior to 1928, Washington came to him and told him he had sold his cotton and wanted to pay Medendorp's account, and he did so.

Defendants, W. B. de Yampert and McDermott and Son, bought a portion of the cotton grown on the farm in 1928, and this appeal presents the question of their liability for the value of this cotton. There were other defendants named in the original complaint, but they appear to have passed out of the case.

De Yampert testified that he had known Washington during the years 1925 to 1928, and he always understood that Washington was the manager of the farm. "He acted as one of authority by making trades, buying and selling farm products, purchasing mules and other equipment for a plantation. I had no information that he was renting the place. He was recognized as the agent with full authority to act."

Defendant E. O. McDermott, of the firm of McDermott and Son, testified that he had bought cotton from Washington for several years and considered him the manager of the farm. He further testified: "Medendorp nor any one else ever during those four years gave me any information or idea whether or not Washington was renting this land from any one. 'I had no idea at the time I bought this cotton from Washington that he was a tenant, and due to pay any rent to any one from this place.' 'I did not, but to the contrary, having bought from him the year before, thought he had the right to sell me the cotton'."

Harry McDermott, a member of the defendant firm of McDermott and Son, testified in part as follows: "He (Washington) was the only one I ever saw show any authority about selling the cotton, buying the merchandise for the place. I had bought cotton from him the preceding years. I never had any information that Washington was renting that land from the owner up to the time I bought the cotton. He was generally recog-

nized in the neighborhood as manager of that place. Medendorp nor Diebold ever intimated to me that Robert Washington did not have authority to sell the cotton from the place before I bought the cotton in 1928."

There was other testimony corroborative of this, but we will not protract the opinion by reciting it. This testimony supports the finding that Washington had sold cotton in the open market, produced on the farm prior to 1928, and that his authority so to do had not been questioned. The court was therefore justified in finding, as was found, under the authority of the Van Etten case, *supra,* that appellees had purchased the cotton, for the value of which they are sued, in the open market and without knowledge of the landlord's lien, or of facts sufficient to impose upon them the requirement of making inquiry concerning the lien.

The decree is correct, and is therefore affirmed.

REFUNDING BOARD OF ARKANSAS *v.* NATIONAL REFINING COMPANY.

4-4196

Opinion delivered December 23, 1935.

Carl E. Bailey, Attorney General, *Walter L. Pope* and *Leffel Gentry,* for appellants.

Isgrig & Robinson, for appellee.

SMITH, J. Appellee filed a petition in the Pulaski Circuit Court praying that a writ of mandamus be issued requiring the State Refunding Board to refund its claim against the State Highway Commission. Attached to the complaint were exhibits showing that, pursuant to act No. 11 of the Extraordinary Session of the 1934 General Assembly (Special Acts of 1934, page 28), the claim had been referred to the Highway Audit Commission which on October 6, 1934, had reported to the Refunding Board that "the same is hereby approved and the State Refunding Board is hereby requested to refund the same according to law." It was alleged that the claim having been approved by the Audit Commission, the Refunding Board had only the ministerial duty to perform of ordering it refunded as required by act No. 11, above referred to.

A response was filed by the Refunding Board which admitted all of the allegations of fact but alleged that "the petitioner's claim has not been refunded for the reason that the petitioner has refused and does now refuse to permit its books and records regarding said claim to be investigated and audited as provided by the statutes of this State in order that the validity of such claim might be determined."

A demurrer to this response was sustained, and, the Refunding Board declining to plead further, it was ordered that the claim be refunded as provided by law.

The controlling question in this case is whether the duty of the Refunding Board is merely ministerial. The petitioner admits that, unless the board's duties are ministerial, the writ will not be awarded. The concession is well made. The law of the subject is well defined and has often been stated. The leading case on the subject appears to be that of *Kendall* v. *United States,* 12 Pet. 524, which differentiates ministerial from executive duties. The leading case on the subject in this State is that of *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, and both are to the effect that when an executive officer

in the discharge of his official duty has a discretion as to the action he should take, this discretion cannot be controlled by mandamus. "But there is a marked distinction everywhere recognized between the exercise of discretion and a ministerial act the performance of which is a plain and positive duty enjoined by law; and, when essential to the enjoyment or completion of some public or private right, and no other adequate specific remedy is provided, the authorities concur in holding that a mandamus will lie, affording a prompt and efficient remedy, at the instance of any person interested to compel its performance." *Danley* v. *Whiteley*, 14 Ark. 687; *Jobe* v. *Caldwell*, 93 Ark. 503, 125 S. W. 423.

The question presented must be decided by a consideration of the act, *supra*, pursuant to the provisions of which the Board is functioning, and it must be remembered that the Board whose action this proceeding seeks to control by mandamus, is composed of the Governor, the Lieutenant Governor, the Attorney General, the Auditor of State, the Treasurer of State and the Secretary of State, these being the constitutional executive officers of the State, together with the State Bank Commissioner. It would be an anomalous situation if the General Assembly, in constituting this board, intended that these executive officers should be called from the discharge of their important and essential duties to assemble as a board to perform mere ministerial acts. We would be reluctant to announce that conclusion, unless it was clearly indicated and required by the statute. For what purposes was this board constituted and what duties are they required to perform? As an executive board it is invested with the power, and charged with the responsibility, of refunding the various classes of outstanding obligations of the State, and the obligations of road districts, which the State offered to assume, aggregating many millions of dollars.

The act provides for the issuance of State highway refunding bonds to be exchanged for State highway bonds, toll bridge bonds, short term notes issued under act No. 15, approved April 14, 1932, State bonds issued under act No. 167, approved March 28, 1933, short term

notes issued under act No. 18, approved September 2, 1933, claims against the Highway Commission, under contracts for construction or maintenance, certificates of indebtedness issued under act No. 248 of 1931, certificates of indebtedness issued under act No. 8, approved October 3, 1928, and act No. 85, approved March 3, 1931, and road district bonds on which the State had been paying interest under § 3 of act No. 11, approved February 4, 1927, and § 19 of act No. 65, approved February 28, 1929. The board is given the power to prepare the form and determine the denominations of the refunding obligations; to fix the maturity dates of certain classes of them; to designate the banks or trust companies, at which they are to be payable; to pass on claims against the Highway Commission and to refund those found to be valid; to make the actual exchange of refunding bonds for the obligations subject to be refunded; and to use the funds in the State Treasury to the credit of the various "Refunding Bond Redemption" accounts in the purchase of State refunding bonds at the best bid tendered, the board to consider, in determining what is the best bid, "the interest rate, maturity, and all other proper elements, which have a bearing upon fixing the value of the respective bonds offered for sale, the purpose of the Board being to act for the best interest of the State of Arkansas and its citizens."

In the administration of the refunding program, the Board represents the sovereign power of the State, and in allowing and refunding claims it executes the sovereign will of the State. The refunding process changes the character and the terms of such obligations. The action of the Board within its statutory powers is binding on the State and subjects it to new and different obligations to its creditors. The power to assume new obligations, and the responsibility for their assumption, is vested in and imposed upon the Refunding Board.

These functions are essentially executive in character and call for the exercise of sound judgment and wise discretion, as the Legislature appears to have been fully aware, for the phrases "the judgment of the board"

and "for the best interests of the State" are recurrent throughout the act.

The Board is required in the discharge of its duties, not only to weigh and determine facts, but to expound the various provisions of the law under which it operates, and the Board's judgment in these respects is not subject to control by mandamus or injunction. *Riverside Oil Company* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683; *Bates & Guild* v. *Payne,* 194 U. S. 106.

Section 15 of the act No. 11, *supra,* reads as follows:

"The Refunding Board is hereby authorized, 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, and 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. When such matters are referred to the Highway Audit Commission, it shall be the duty of the chairman thereof to make a preliminary examination of all records incidental thereto, and to facilitate this work said chairman shall remain on duty at all times, for which services he shall be entitled to compensation in the sum of $5 per day, which shall be in addition and supplemental to any salary heretofore authorized in his behalf."

Petitioners proceed upon the assumption that, the claim having been approved and audited by the Audit

Commission, the Refunding Board has only the ministerial duty to perform of refunding it. But we think the act is not susceptible to that construction. The section of the act quoted does make it the duty of the Highway Audit Commission to investigate and make a full and complete report upon the validity of such claims as may be referred to it, with the proviso that the adjudication of a competent court shall be final and conclusive. The duties of the Audit Commission appear to have been analogous to those of a master in chancery. It is the familiar practice in such courts to refer complicated questions of fact and especially those involving matters of accounting to masters to hear testimony and to make reports. In other words, the purpose of the Audit Commission was to conserve the time of the members of the Refunding Board, by passing upon such claims as the Board referred to it, for investigation and report, except those claims which had been determined to be valid or invalid by a court of competent jurisdiction.

We conclude, therefore, that the duties of the Refunding Board are not merely ministerial and, therefore, that the writ of mandamus was improperly awarded. It is suggested that the case is in effect a suit against the State; but the conclusion we have reached makes it unnecessary to pass on that question, which is reserved for consideration until a case is presented which requires its decision.

WESTERN UNION TELEGRAPH COMPANY *v.* BUSH.

4-4187

Opinion delivered December 23, 1935.

W. R. Donham and *Rose, Hemingway, Cantrell & Loughborough,* for petitioner.

Malcolm T. Garner, A. G. Meehan, Jno. W. Moncrief, J. H. Lookadoo and *Sam T. & Tom Poe,* for respondent.

BAKER, J. C. J. Singleton and Frank Lester filed separate suits in the circuit court of Clark County to recover damages for alleged loss of crops of corn and cotton growing on certain lands in Pulaski County, Arkansas. Singleton was the owner of land and Lester was a tenant. It was charged in the complaints, in each case, that the defendant, Western Union Telegraph Company, cut a certain levee nearly or about a mile west of the lands owned and cultivated by the parties suing it, by digging a hole down into the levee and inserting therein a pole for the suspension of its lines, and that this placing of the pole in said levee caused the levee to break by weakening or destroying its resistance to the pressure of the flood waters caused by rain occurring on July 4th and 5th, 1932. The pole was put into the levee some time in April prior to the date of the break in the levee.

For a more elaborate or detailed statement in relation to the facts, reference is made to the case of *Western Union Telegraph Company* v. *Turner,* 190 Ark. 97. The case just mentioned grew out of the same alleged act of negligence on the part of the defendant, the same break in the levee and the injuries complained of are damages to crops on lands either near or adjacent to lands occupied and cultivated by the plaintiffs, Singleton and

Lester, who filed their suits in the circuit court of Clark County.

The question that arises upon this petition for a writ of prohibition is the question of venue raised in the circuit court by motion to quash the service of summons. Motion being overruled, the defendant, Western Union Telegraph Company, upon being required to answer, filed the petition here under consideration. The petitioner asserts that the cause of action of these parties is a local action, the venue of which must be in Pulaski County, where the lands are situated, and that, for the destruction of the growing crops, as sued for, the action cannot be transitory. The respondent ruled adversely to this petitioner, and now defends this proceeding, upon the theory that the growing crops were chattels, and that the action is therefore transitory.

The petitioner relies primarily upon § 1164 of Crawford & Moses' Digest, which is § 84 of the Civil Code. It reads as follows:

"Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated:

"First. For the recovery of real property, or of an estate or interest therein.

"Second. For the partition of real property.

"Third. For the sale of real property under a mortgage, lien or other incumbrance or charge.

"Fourth. For an injury to real property."

Counsel for respondent, with more than extraordinary diligence, energy and powers of research, have furnished us with an elaborate array of authorities, either directly in point upon this vexing question or by analogy, pointing to the conclusions that they have drawn.

They call our attention to several legislative enactments of our State relating to crops, which statutes furnish, at least, a somewhat plausible ground upon which argument may be based to support the conclusions they would have us reach. One of these is a statute making legal mortgages upon crops. The ordinary crop mortgage, under this statute, c. 125, Crawford & Moses' Digest, is not different from the ordinary chattel mort-

gage, nor is the registration by filing different. This statute, however, though it may treat crops as chattels, does not expressly declare them to be such, but they may be so regarded when mortgaged without impairing any of the well-known tests as to certain attributes of real estate. The mortgage on a crop may be treated as a constructive severance. Any sale of a growing crop, not in contravention of the statute of frauds, would amount to constructive severance.

We think there could be little difference of opinion about severance of products from the soil, and that after severance they become movables and are therefore chattels, but it is equally true that there may be a constructive severance by which articles may thereby become chattels as one might sell or transfer a house, with the privilege or right of removal. The sale of fruit upon the trees by contract of the parties would be a constructive severance, and what had been prior to the contract a part of the realty would become chattels in legal effect. *Cannon* v. *Matthews,* 75 Ark. 366, 87 S. W. 428, 69 L. R. A. 827, 112 Am. St. Rep. 64.

We are cognizant of the arguments in the opinion in the cited case, but since the case arose out of the sale of strawberry plants, we suggest that perhaps the respondent has minimized the effect of the consequent constructive severance. The writer of this opinion was following the same theory as the respondent in the case of *Lee* v. *Bandimere,* 140 Ark. 277, 215 S. W. 635. There were two of these cases wherein Bandimere was plaintiff against Lee as defendant, in the first of which Bandimere sued in replevin for the crops. His second suit was a suit in ejectment. Bandimere got possession of the crops under his replevin suit, but this suit was dismissed for lack of jurisdiction, and the court was deemed to be without power to order a return of the severed crops. Bandimere won his ejectment suit and claimed the crops as a part of the real estate recovered by him. Lee claimed no right of possession to Bandimere's land. Bandimere was a resident of Colorado, and, during the interval of three or four years, had no one in charge of or looking after his property. During this interval Lee entered and

lived upon it without right, planted and grew the crop in controversy in 1916. There was no constructive severance here as between Lee and Bandimere by mortgage or other kind of agreement, though Lee had mortgaged the crops to Hamilton. Lee secured the dismissal of the replevin suit, and, because of the fact there was no order for the return of the property, appealed to the Supreme Court. This fact appears on page 280 of the cited case. The dismissal was by a *per curiam* order, and is noted in 135 Ark. 617, 204 S. W. 307. Hamilton was unable to enforce his mortgage against Bandimere.

Blackstone, in his first paragraph of chapter 2, Book II, says: "The objects of dominion or property are things, as contradistinguished from persons; and things are by the law of England distributed into two kinds; things real and things personal. Things real are such as are permanent, fixed and immovable, which cannot be carried out of their place; as lands and tenements; things personal are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go." Vol. 1, Lewis' Blackstone, 481.

Again it is interesting to note in chapter 25, Book II, Blackstone, 389, in a definition of "things personal" and an illustration thereof by the author, we find this expression: "(3) Such may be all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like; such also may be all vegetable productions, as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself, when severed from the ground." Vol. 1, Lewis' Blackstone, 848.

In our attempt at a solution of this problem, we will not be able to analyze and discuss all of the citations presented to us, and most naturally we forego a discussion of those of other jurisdictions, particularly, on account of the fact, that we believe a proper presentation and understanding of our own decisions will work a satisfactory settlement and determination of the controversy.

From a reading of the excellent brief furnished us we believe that counsel for respondent have suffered themselves to be led into error from an unsound or false

theory that a trespass *quare clausum fregit* must necessarily be accompanied by some degree of force as they have argued in one case of proposition of cattle breaking an enclosure.

It is argued also that the telephone pole, inserted in the levee, which, it is alleged caused the break, was more than a mile distant from the lands where the crops were growing, which crops are the subjects of these suits; that, therefore, there was no "breaking of the close." That conclusion however does not necessarily follow. However we shall not enter upon a technical discussion of all the various matters constituting wrongs wherein the remedy was found in the old form of trespass *quare clausum.*

Although all those forms of actions and suits formerly existing were abolished by our Code, (§ 1030, Crawford & Moses' Digest), it is sometimes necessary, or at least somewhat more convenient, to recognize some of these ancient forms, in order that a better understanding may be had of the remedy as it then existed for an alleged wrong, and of the remedy now for the same wrong. We think it is not necessary that the wrongdoer must have been personally present or even present by some person as an agent at the point or place of actual injury. It is sufficient if the wrongdoer actually set in motion some dangerous agency which in itself, though far distant from the wrongdoer, inflicts a wrong, such as a "breaking of the close," and for such trespass relief is granted.

Any other theory would absolve the guilty and permit the wrongdoer to escape only by reason of shrewdness, rather than by the presentation of a defense.

Without unduly extending this opinion by furnishing examples, the writer would suggest that a remarkable one may be found in the 15th chapter of the Book of Judges.

We have been impressed in this case with the remarkable ingenuity of the several attorneys to present decisions of our own court in a light most favorable as supporting their respective theories or beliefs in this action. Both parties to this litigation have presented and argued the case of *Emerson* v. *Turner,* 95 Ark. 597,

130 S. W. 538. We find no particular difficulty in this case and fail to see why learned counsel should differ or disagree about the effect thereof. For some private wrongs a plaintiff may have the election of two or more remedies. If Emerson cut Turner's timber, had it done, or permitted it to be done, beyond question Turner might have taken the timber wherever he could have found it, and this is true notwithstanding the fact that Emerson might have increased its value by labor he had spent upon it, or Turner might have sued Emerson for a conversion of the timber at the increased value at any point or place where Emerson may have been served with process, and he may likewise have sued Emerson's purchaser as a conversioner. Moreover, he may have sued for damage to the real property, charging Emerson as a trespasser for his wrongful entry, upon his lands and the consequent damages. Had he sued for damages to the real property, the venue was local or at the place of the invasion.

In the last cited case the court makes clear this distinction by citing the case of *Jacks* v. *Moore,* 33 Ark. 31. In that case it was charged that the defendant entered upon the land, cut the timber growing thereon and otherwise injured the same, that is the land. Turner sued Emerson however for converted timber. Turner alleged that Emerson had converted timber that belonged to him. The timber cut, as distinguished from trees growing was the subject of conversion as any other personal or chattel property might be. Turner lost his suit by reason of the fact he was unable to prove his case, and not on account of the venue.

In the case of *Short* v. *Kennedy,* 183 Ark. 310, 35 S. W. (2d) 591, plaintiff sued the defendant for 3,234 feet of pine logs converted by the defendant. Certainly one may sue for the conversion of pine logs. It is also true that one could enter upon the land of another and cut the timber thereon. It seems to us that the owner of this timber would have his right or election to sue for damage to the real estate, or for the conversion of whatever timber was taken away. Certainly, if he sued for damage to the real estate, he must sue in the county in which it was located and in the proper court. If he sued for a

conversion of the timber, his suit could be filed and maintained as other transitory cause of action. That is the distinction made in the case of *Jacks* v. *Moore, supra,* and *Emerson* v. *Turner, supra.*

It does not follow that, because articles may be severed from the soil, the action therefor must be one for damages to real property, nor does it follow that, because severed articles may be converted, a suit for conversion is the only remedy.

In order that we may not extend this opinion to an unwarranted length, a further discussion of authorities submitted by the respondent will be omitted, although they have been examined and considered.

Again we refer to Book III, chapter 12, Blackstone Comm. 209, 2 Lewis' Blackstone 1195: "Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz: the treading down and bruising his herbage.

"One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land."

The notes on page 1195, above cited are rather illuminating. One is to the effect that it matters not that there was no actual force, for the law implies force, and damage likewise, in every unauthorized entry. It cites the case of *Norvell* v. *Gray's Lessee,* 1 Swan 96, 103; (Tenn. 1851).

It is also held that the action is founded on possession and not title. Such is the effect of some of the notes on page 1195 just cited.

We further refer to this most eminent authority on the question of venue. Book III, Blackstone, Comm., 294, 2 Lewis' Blackstone, 1265: "In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; but in transitory actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid. Though if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of the venue or visne, (that is, the vicinia or neighborhood in which the injury is declared to be done) and will oblige the plaintiff to declare in the other county; unless he will undertake to give material evidence in the first. For the statutes 6 Ric. II, c. 2, and 4 Hen. IV, c. 18, having ordered all writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the venue, if required, and not to insist rigidly on abating the writ; which practice began in the reign of James the First."

There can be little question about the ancient law. We have not changed our venue statute. It is the same now as it was when we adopted the Code. It was declaratory then and now of the common law of venue.

It is unsafe, as well as unsound, to make this venue statute of no effect by new definitions or new interpretations of objects or subjects upon which it may operate.

It must be conceded, in fact the complaints show, that at the time the injury was suffered crops of corn and cotton were in an immature stage. None of them could have been severed from the soil and been of any value. Therefore they were not subject to conversion.

Again turning to the question as to whether a growing crop is real estate or personal property, we find, of

course, opinions which seem to make the point a controversial one. We, however, are of the opinion that this happens by reason of conclusions drawn from announcements made by the courts upon the relation of particular facts. Tiedeman on Real Property, fourth edition, pages 2 and 3, § 2, calls attention to the fact that a grant of lands without qualification conveys not only the soil but everything else which is attached to it, or which constitutes a part of it, the buildings, mines, trees, growing crops, etc. He also adheres rather strictly to the Blackstone definition of real property, one of the essential characteristics being its immobility as distinguished from personal property, which may be carried around upon the person of the owner.

We find also from the same authority, § 7, page 7, that if growing crops are planted by owner of the soil, they form a part of the realty, but if they are planted by a tenant, holding under the owner, then they are personalty as regards the owner of the soil during the continuance of the tenancy, but real estate in respect to all other persons.

We would be somewhat presumptuous to attempt a categorical definition of the proper status of crops as chattels or realty, fitting upon all occasions or circumstances that might or could arise. The textbook writers have not succeeded in doing so, nor have the courts been uniform in their declarations under the same or given conditions. However, our views are in accord with the suggestion of Mr. Tiedeman above referred to, and we think our court has, with practical uniformity, followed the definitions and declarations of the foregoing texts.

We think we have shown from the foregoing citations that our Civil Code in this matter of venue is a restatement of the common-law rule as to actions for trespass. *Jacks* v. *Moore, supra; Cox* v. *Railway Co.,* 55 Ark. 454, 18 S. W. 630.

Where the injury can occur only in one place, or in a particular county, the suit must be brought in that county. *Pike* v. *Little,* 6 Ark. 212.

We have followed the ancient doctrine in regard to conveyances without reservations. Such conveyances

carry the growing crops as a part of the realty. *Gibbons* v. *Dillingham,* 10 Ark. 9; *Floyd* v. *Ricks,* 14 Ark. 286; *Gailey* v. *Ricketts,* 123 Ark. 18, 184 S. W. 422; *Arnold* v. *Grigsby,* 158 Ark. 232, 249 S. W. 584.

In this case there is no dispute about the condition of the crops at the time of the injury. As a matter of law, however, we take notice that at the particular time and season the crops were unmatured. This is supported by authority. *Graham* v. *Roark,* 23 Ark. 19; *Tomlinson* v. *Greenfield,* 31 Ark. 557; *Haffke* v. *Hempstead Bank & Trust Co.,* 165 Ark. 158, 263 S. W. 395.

We also have authority to the effect that generally replevin will not lie for growing crops, notwithstanding the case of *Cannon* v. *Matthews, supra.* However, it may be emphasized, in the above case, in addition to the constructive severance of the strawberry plants, that these plants were grown for the purpose of sale as such, and at the time of the institution and maintenance of this suit they were matured for the market and ready for removal. *Jarrett* v. *McDaniel,* 32 Ark. 598; *Lee* v. *Bandimere,* 140 Ark. 277, 215 S. W. 635.

It is also held in the last-cited case, in accordance with the ancient doctrine heretofore discussed, that, until the matured crops are severed, whether actually or constructively, they remain a part of the real property. A principle of law recognized by the entire bar is to the effect that the crops of the insolvent mortgagor, whose land, as distinguished from crops, is of insufficient value to pay the mortgage debt, may suffer seizure of his crops by a receiver appointed under the mortgage in foreclosure proceedings. *Osburn* v. *Lindley,* 163 Ark. 260, 259 S. W. 729; *Bank of Weiner* v. *Jonesboro Trust Co.,* 168 Ark. 859, 271 S. W. 952; *Wilkening* v. *Layne-Arkansas Company,* 179 Ark. 667, 17 S. W. (2d) 879.

The superiority of such real estate mortgage over the so-called crop mortgage to another or independent party adds emphasis to the suggestion that the crop is a part of the real property, and is so regarded, although the statute authorizes and makes valid a mortgage upon the crop as distinguished from the real estate as such.

O'Connell v. *St. Louis Joint Stock Land Bank,* 170 Ark. 778, 281 S. W. 385.

We think that one of the most recent cases in point is *Missouri Pacific Railway Co.* v. *Henry,* 188 Ark. 530, 66 S. W. (2d) 636. In that case cottonseed had been planted and mixed with the soil, of course, in the planting. On account of flood water, wrongfully cast upon the field, the seed did not germinate. In the suit for damages this court regarded the planted seed as part of the real property.

Aside from the technical proposition of whether we would consider, under all conditions and circumstances, growing crops as a part of the real property or chattels, we think the action for damage to growing crops or crops before severance must necessarily be treated as a trespass *quare clausum,* and that therefore the action is local, not transitory.

The circuit court was in error in attempting to exercise jurisdiction. The remedy for the unwarranted assumption of jurisdiction is prohibition. *Merchants & Planters Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421; *Order of Ry. Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448.

Writ of prohibition will issue.

HUMPHREYS, J., dissents.

STATE EX REL. ATTORNEY GENERAL *v.* VAN BUREN SCHOOL DISTRICT NO. 42.

4-4076

Opinion delivered January 13, 1936.

Harvey G. Combs and *Joseph R. Brown*, for appellants.

Partain & Agee and *R. S. Wilson*, for appellees.

MEHAFFY, J. On December 18, 1854, the General Assembly of the State of Arkansas passed an act incorporating the Crawford Institute and appointing trustees for such institute. Section 1 of the act provided that the trustees and their successors are created a body corporate and politic under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South, and shall be known and called by the name of the Crawford Institute. Section 3 of the act provided that the institution should be located in or near the city of Van Buren in Crawford County, in this

State. Section 4 of the act provided that the corporation, by and with the advice and consent of the said Annual Conference, shall have the power to appoint all necessary teachers to carry on said Crawford Institute. Section 5 of the act provided that it should be the duty of said corporation to transmit to the Annual Conference of the Methodist Episcopal Church, South, a report of the progress of said Crawford Institute, including statements of the finances thereof, number of pupils, course of studies, and the said Annual Conference may, as often as they think proper, appoint a committee to visit said school and inspect its condition. Section 6 of the act provided that said corporation shall, together with the consent of said Annual Conference, have power to establish departments for the study of any or all of the learned professions, and to institute and grant diplomas in the same, to constitute and confer the degree of doctor in the learned arts and sciences and belle lettres, and to confer such other academical degrees as are usually conferred by most learned universities. Section 7 of the act provided that said corporation, together with said Annual Conference, shall have power to institute a board of competent persons, always including the faculty, who shall examine all applicants, etc.

On April 25, 1856, Alfred Wallace made a will in which he bequeathed $10,000 to Crawford Institute to aid in completing the building being erected and to establish the institution upon a permanent basis. The 26th paragraph of the will read as follows: "I hereby give and bequeath $10,000 to endow the Crawford Institute."

Alfred Wallace died, and on January 10, 1857, the Legislature passed an act changing the name of the institution from Crawford Institute to Wallace Institute. Wallace died in 1856. The Wallace Institute functioned as an educational unit in Crawford County until the war between the States in 1861. It was never thereafter revived as an educational unit, but the trustees made loans from time to time of the money belonging to the institute. Vacancies on the board of trustees were filled from time to time, but in 1883 so many vacancies existed that the Legislature passed an act naming a board of trus-

tees, and § 1 provided that the trustees shall constitute a body corporate and politic under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South, to be known by the name of the Wallace Institute.

The State of Arkansas, on relation of the Attorney General, brought this suit to obtain the assets held by the trustees of the Wallace Institute. The defendants named in the suit were the trustees of Wallace Institute, Hendrix College, the Arkansas Annual Conference of Methodist Episcopal Church, South. Hendrix College and the Arkansas Annual Conference of Methodist Episcopal Church, South, filed an answer admitting most of the allegations in the complaint, and alleging that Hendrix College, located in Conway, Arkansas, was serving the educational needs of practically the same territory served by the Crawford Institute and its successor, Wallace Institute; that the general course of study and curriculum of Hendrix College are now of a standard which the Wallace Institute and its predecessor should have maintained under their charter; that Hendrix College is a thriving institution with a creditable endowment fund with substantial buildings and thorough and modern equipment, and the faculty consisting of the highest class of educators; that special emphasis is placed upon Christian life and Christian education; that it is a proper institution to administer the endowment fund given to Crawford Institute by Alfred Wallace; that it is in all respects similar to the Crawford Institute and its successor. They allege that, because of the failure of the Wallace Institute to function and its inability to ever function, the purposes of the Alfred Wallace endowment will fail completely unless the money is given to Hendrix College; that, if the fund is given to it, the intention of the donor in making the bequest will be carried out as nearly as possible and will be used for the maintenance of an institution of higher learning located in Arkansas, under the care and patronage of Arkansas Annual Conference of Methodist Episcopal Church, South. They deny that the claim of Hendrix College is inferior to the claim of the State, and deny that the

fund has escheated to the State of Arkansas; allege that the court had the power to administer the fund under the *cy pres* rule, and allege that the court should order the fund paid over to the trustees of Hendrix College to endow said college.

The Wallace Institute and its board of trustees filed answer admitting practically all of the allegations in the complaint; deny that they have surrendered the charter; admit that the gift from Alfred Wallace was absolute with no right of reversion, and admit that Hendrix College is an institution of learning incorporated under the laws of Arkansas, but deny that it is similar in all respects to Crawford Institute and Wallace Institute, and allege that Conway is 127 miles from Van Buren.

Van Buren School District No. 42 and its board of directors filed an intervention, and adopted the answer of the Wallace Institute and its board of trustees, and in addition thereto alleged that it was clearly the purpose of Alfred Wallace in the will involved in the suit, to promote the interest of education and good morals in Crawford County, Arkansas, at or near Van Buren, and that the public school system maintained by the interveners in Van Buren, Arkansas, constitutes an institution more nearly similar to Crawford Institute than Hendrix College or any other educational institution. They allege that the course of study maintained in the Van Buren school system is similar in all respects to that which was actually maintained by Wallace Institute at the time said bequest was made. They further allege that the definite charity specified in the testator's will has failed, and that under the doctrine of *cy pres* the court has jurisdiction to effectuate and substitute another mode for the purpose of carrying out the general charitable intention of the testator and can most nearly do so by substituting the public school system of Van Buren, School District No. 42, as beneficiary of the endowment.

A response and cross-complaint were filed by plaintiff to the intervention of the school district and its directors, denying the allegations in said intervention.

A reply and cross-complaint were filed by Gilliam C. Yoes as an individual, and as trustee of Wallace Institute, denying the allegations of the answer of Hendrix College and its trustees.

The interveners filed reply to plaintiff's cross-complaint. Plaintiff also filed reply to the cross-complaint of Yoes.

The chancellor entered a decree holding that, under the *cy pres* rule, Hendrix College was entitled to the assets of the Wallace Institute, it being an educational institution of the same standard and type as the Wallace Institute was authorized to maintain. The chancery court also held, however, that the loans to Van Buren School District were made in good faith without the taint of fraud, and that, when the Wallace Institute board made the loan, it was encouraging education and promoting good morals, and held that the notes and mortgages of the school district should be canceled.

The case is here on appeal.

There was introduced in evidence copies of the acts of the Legislature above-mentioned and also copy of Alfred Wallace's will. All parties concede that the donation by Wallace was a charitable trust. The evidence shows that Hendrix College is located at Conway, Arkansas, about 125 miles from Van Buren; that it is a Methodist College of higher learning authorized to issue degrees and diplomas, and authorized to maintain a preparatory department. The evidence also shows that Hendrix College was incorporated and is now under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South. The evidence shows that the school district had borrowed money from the Wallace Institute Board and that it is now indebted to said board in the sum of several thousand dollars. The school directors knew at the time they received the money that it was a trust fund, and knew the facts with reference to the donation by Wallace.

The school district No. 42 is a public school district organized under the laws of the State of Arkansas. Neither the school board nor Hendrix College made any claim to the fund for more than seventy years.

It is first contended by appellee that the State of Arkansas was not a proper party to bring the suit.

In suits for the enforcement of a public trust or charity, the Attorney General is a proper party and may file such suit. 11 C. J. 366 *et seq.* Moreover, no objection was made by any of the parties to the State's bringing the suit, and it was not suggested in the court below that it was not a proper party to bring the suit.

Section 1189 of Crawford & Moses' Digest provides that the defendant may demur when the plaintiff has not legal capacity to sue or where there is a defect of parties plaintiff or defendant. Section 1192 of Crawford & Moses' Digest is as follows: "When any of the matters enumerated in § 1189 do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same except only the objection to the jurisdiction of the court over the subject of the action, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The controversy, however, now is between Hendrix College and the school district, each of them claiming under the *cy pres* rule.

The appellee says "This case ought to be considered by the court strictly as a case between the appellants, Hendrix College and the Methodist Conference, on the one side, and the appellees on the other, just as though it had not been instituted by the State."

The *cy pres* doctrine, as applied in the United States, is the doctrine of approximation. In its last analysis it is found to be a simple rule of judicial construction designed to aid the court to ascertain and carry out as nearly as may be, the intention of the donor.

"A further application of the doctrine sometimes takes place where the object itself fails. In such case another object of the same general, charitable nature will be substituted by a court of equity to receive the benefit of the charity. And where the donee to whom the gift was made is not in existence at the time the gift takes effect, or has not the capacity to take, the charity

will nevertheless be enforced according to the main charitable intention of the donor. And likewise where the donee is in existence at the time the gift takes effect, and thereafter ceases to exist, the courts will go very far in an endeavor to discover a predominating charitable intention so that the trust may be enforced." 5 R. C. L. 368.

There is no difficulty in the present case in determining the intention of the donor. The first act of the Legislature introduced in evidence shows clearly that it was the intention of the lawmakers that the institution should be under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South. The corporation was given power by said act to employ teachers, and the faculty was given power to enforce all bylaws and regulations, but they must perform these duties, under the act, by and with the advice and consent of the Annual Conference. The act required the corporation to transmit to the Annual Conference a report of the progress, etc., and provided that the Annual Conference may, as often as they think proper, appoint a committee to visit said school and inspect its condition. The corporation was given power to establish departments and grant diplomas with the consent of the Annual Conference. Under this act all the duties were to be performed under the care and with the advice and consent of the Annual Conference. It is plain from the provisions of the act that the institution was to be managed under the direction of the Methodist Conference.

This act was amended by an act passed and approved January 10, 1857, changing the name from Crawford Institute to Wallace Institute, because Wallace had made a liberal donation to the institution. Wallace died in 1856, and in his will bequeathed $10,000 to endow the Crawford Institute, and the act last mentioned was then passed, changing the name to Wallace Institute. In his will he also bequeathed to the son of his brother, Leonard Wallace, $7,000, $2,000 of which was to be spent in the payment for his education at Crawford Institute, but the clause in the will giving this $7,000 expressly provided that the remaining $5,000 should be used to defray the

expenses incurred in completing his nephew's education at some Methodist College or University of high repute.

On March 8, 1883, the Legislature passed an act naming a board of trustees, and also stated that they should constitute a body corporate and politic under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South.

It therefore appears throughout the acts and the will that it was the intention of Wallace that this charity should be devoted to a school controlled by the Methodist Conference. This seems perfectly clear, and we do not think there can be any doubt about the intention of the donor.

It is contended however, that the school district in Van Buren is entitled to the fund under the *cy pres* rule. At the time of the passage of the acts above mentioned and at the time that Wallace made his will we had no system of free schools as we now have. Under the present system persons between the ages of six and twenty-one can receive free education. The statute also provides that the supervision of public schools, and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly.

Under our system a public school could not be operated under the care and management of any church or any conference. Therefore, the Van Buren School District could not comply with the terms of the acts or provisions of the will. The Methodist Conference would have no right to require the public schools to report to it, and no right to manage or control in any way any public school in this State.

We therefore think that it would be impossible for the Van Buren School District to comply with the provisions of the will or of the statutes.

It is contended, however, that the school must be located in Crawford County, or it will not be entitled to the fund. It is true that the donor gave the money to an institute in Crawford County.

In the case of *Schell* v. *Leander Clark College,* 10 Fed. Rep. (2d), the court said: "It is elementary that

charitable trusts will not be permitted to fail if the intention of the creator of such trusts can be carried out and effect be given thereto. It seems to us that the provision by Leander Clark that the college should bear his name was a mere incident to a broader and more generous purpose—that of assisting to found and perpetuate a fund to be so invested and managed as to yield an annual income to be used for the better education of young men and women who desire to take advantage of the opportunity offered by the maintenance of such an institution as the college in question."

The court also said: "Where it becomes impracticable or impossible to administer a charitable trust according to its terms, a court of equity will assume jurisdiction thereof, and, in the exercise of its broad general powers, direct the trustees to administer the same or apply the *cy pres* doctrine thereto."

In the same case it was also said: "It seems to us clear that the dominant purpose of the gift of Leander Clark was to establish a perpetual charitable trust for the aid and support of Christian education. The fact that he may have believed that Leander Clark College would exist forever is without controlling importance. He made no provisions for a forfeiture or reversion, but instead used language from which we infer a contrary intention."

In the instant case it seems clear to us that the dominant purpose of the gift of Alfred Wallace was to establish a perpetual trust for the aid and support of an institution under the care and patronage of the Arkansas Annual Conference of the Methodist Episcopal Church, South. Wallace may have believed that Crawford Institute would be established and maintained forever in Crawford County, but he made no provision for forfeiture and unquestionably intended to establish a perpetual charitable trust. It was not provided that the institution should be in Van Buren, but near Van Buren. As a matter of common knowledge, Conway is more accessible to people in Van Buren and Crawford County, than the institute established in 1854, or at the time of the donation in 1856, than most of Crawford County would

have been at that time. In other words, Conway is more accessible to the people of Crawford County than the institute would have been at that time if established in Van Buren.

Moreover, the place of the institution was not the dominant intention of the donor. This is gathered, not only from the manner of making the donation and the acts, but from the additional fact that he expressed an intention that his nephew should be educated in a Methodist College.

It is contended, however, that this action by Hendrix College is barred by the statute of limitations. It is true that, if there is a clear breach of trust by the trustees, yet if the beneficiary has for a long time acquiesced in the misconduct of the trustee with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose. But in this case there is no evidence that there was a breach of trust of which the beneficiary had knowledge. As a matter of fact, the evidence all shows that the school board was claiming the money that it had as a loan and did not claim title to it, and did not claim a right to it under the *cy pres* doctrine until this suit was begun.

"As between trustee and *cestui que trust* in the case of an express trust, the statute of limitations has no application, and no length of time is a bar." Perry on Trusts and Trustees, § 863.

"Trusts are not only enforced against those persons who are rightfully possessed of the trust property as trustees, but against all persons who come into possession of the property bound by the trust with notice of such trust. Even a purchaser, still more a volunteer, taking possession of trust property with a notice of the trust will be made a trustee by the court." 26 R. C. L. 1237.

It is agreed by all parties that this is a charitable trust, and this court is committed to the *cy pres* rule, and both parties are claiming under that rule. It is therefore unnecessary to consider any questions except to determine what the dominant intention of the donor was in making the bequest, and whether the beneficiary claiming the property is barred by the statute of limitations.

It follows from what we have said that the decree of the chancery court must be reversed, and the case remanded with directions to enter a decree in favor of Hendrix College, and to enter a judgment against the school district for the amount of the trust property in its possession.

It is so ordered.

DAME *v.* STATE.

Crim. 3969

Opinion delivered January 13, 1936.

C. T. Bloodworth, for appellant.

Carl E. Bailey, Attorney General, *J. F. Koone* and *Guy Williams,* Assistants, for appellee.

BUTLER, J. The appellant was indicted, tried and convicted, for the crime of arson and sentenced to imprisonment in the State penitentiary for a period of five years. The evidence tending to connect the appellant with the commission of the crime is to the following effect: The Randolph Hotel at Pocahontas, Arkansas, was burned in the early morning of April 28, 1935. The fire was discovered about 2:30 A. M., and apparently had started in the attic over room No. 121. Those who first discovered the fire observed coal oil dripping from the ceiling over one or more of the rooms. It was found that the fire fighting equipment had been tampered with and the hose cut, which interfered with the attempt to extinguish the flames, and the building was destroyed.

The appellant, Ben Dame, and his wife came to the town of Pocahontas and registered at the Randolph Hotel about 9:30 on the night of April 26th. Dame asked for a double room, which was assigned to him. He brought a suit case with him which was very heavy and which was afterwards found to contain three one-gallon jugs. He and his wife kept their room during the day of the 27th and checked out about seven or eight o'clock on the evening of that day. During the day of the 27th, Dame left Pocahontas and returned in the afternoon with Pauline Gearhart, a girl about seventeen years of age,

who is his wife's sister. The conveyance in which they were traveling stopped before it reached the hotel, and Dame there gave the girl some money, directing her to go to the hotel and secure a room. She accordingly registered at the hotel and was assigned room No. 121. Dame visited her in this room some time on the evening of the 27th and left with the understanding that he would return about ten o'clock. The attic could be reached through some "scuttle holes," one of which was in a closet which was a part of room 121 occupied by the Gearhart girl. This was one of the rooms where coal oil was observed to be coming through the ceiling. Pauline Gearhart was arrested a short time after the hotel was burned during the early morning hours of that day. Shortly thereafter, the appellant and his nephew, a youth under the age of twenty-one, were also arrested. Appellant was transported to Little Rock for questioning by James Pitcock, chief of detectives of the police department of that city. As a result of his examination by Pitcock, he signed a written confession to the effect that he had burned the hotel at the instigation of two men, one of whom had paid him a small sum and had agreed to pay about $500 for the burning of the hotel; that he made preparations to burn the hotel on the night preceding the fire; that he had in the suit case which he brought to the hotel three one-gallon jugs of coal oil and also a small bottle containing the same fluid; that he took the bottle and jugs through one of the scuttle holes into the attic of the hotel and from the bottle he sprinkled coal oil on the papers and rubbish there; that on the next day he hired a conveyance and went to where Pauline Gearhart was staying and brought her back to Pocahontas; that he got her consent to start the fire and then left and went with his nephew to a house where the fire fighting equipment was stored which he entered by making an opening in one of the walls of the building; that he there detached "the distributor" from the fire truck and cut the fire hose in several places; that he then went to the home of his mother-in-law, where he was when the fire was discovered and where he remained until morning.

Shortly after Pauline Gearhart was arrested, she also made a confession as to her part in the transaction, which was reduced to writing and signed by her.

Twelve assignments of error are preserved in the motion for a new trial and here argued for a reversal of the judgment.

1. When the grand jury was impaneled, appellant filed his written objection to the competency of George Promberger "because the said George Promberger is a complainant upon the charge of arson against this defendant; because the said George Promberger is a near relation to the party to whom the property destroyed by fire, or a large share thereof, belonged, for the burning of which this prisoner is being held on a charge of arson to await the action of the grand jury and is directly and indirectly interested in the prosecution." As to his qualifications, Promberger testified as follows: "I am a son-in-law of Ferd Spinneuweber, who is the owner of the Hotel Randolph which was burned. I have no interest in the hotel and am not a witness in the case in any way. If I should be taken and qualified as a grand juror, there is nothing that would prevent me from giving a fair and impartial consideration to the charge against the defendant, Ben Dame."

The trial court did not err in holding the juror qualified. Section 3005 of Crawford & Moses' Digest is decisive of this question. It provides: "Every person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection be established, the person so challenged shall be set aside."

2. Appellant filed his petition and affidavit for a change of venue. The affidavit was signed by four supporting witnesses. On their examination by the trial court touching their qualifications to make the affidavit, it beveloped that they were not qualified electors of the county,

as they had not paid their poll taxes in the time prescribed by law. The examination, moreover, failed to show that the affiants had such a general knowledge of the sentiment of the people of the county generally as would qualify them as credible persons within the meaning of the statute. *Spear* v. *State*, 130 Ark. 457, 198 S. W. 113. When the court held that the affiants were not qualified to make the affidavit, appellant offered as witnesses on his motion several bystanders. The court refused to permit them to testify, over the objection and exception of the appellant. In this action the court was correct. "No requirement of the statute was met by the testimony of the three bystanders called by the appellant, and the court properly disregarded their evidence, as they testified in regard to the truthfulness of the recitals of the petition rather than as to the credibility of the affiants." *Whitehead* v. *State,* 121 Ark. 390, 181 S. W. 154.

3. On examination of the jurors on their *voir dire,* counsel for appellant, when certain of the jurors stated that they had heard the case discussed, asked them if the comments they had heard were unfavorable to the appellant. The court refused to permit the question to be answered, and this action of the court is assigned as error. It is sufficient, however, to say that the record does not show what was the expected answer.

4, 5 and 6. A witness was permitted to testify over the objection of appellant that the material of which the hotel was constructed would not easily catch fire. We are unable to see wherein prejudice could have resulted to the appellant by the admission of this testimony although it seems not to have been material. The lessee of the hotel was permitted to testify that he had suffered a loss of $6,000 in the fire by reason of the destruction of personal property. This testimony was competent as tending to rebut an insinuation to the effect that the lessee himself might have been the incendiary.

A witness, on cross-examination, was not permitted by the court to answer the question: "You are under indictment now at Corning for stealing hogs, are you not?" This question was improper, and the court was correct in

its holding. *Kincaid* v. *Price,* 82 Ark. 20, 100 S. W. 76; *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773.

7 and 8. As we view it, the most serious question presented is that contained in the seventh and eighth assignment of error. The seventh relates to the competency of the confession of appellant introduced in evidence. Before the introduction of the confession, testimony was taken relating to whether it was voluntary and made without the promise of reward or induced by threats of coercion. The testimony of appellant in this regard insinuates, without stating positively, that personal violence was suffered by him at the hands of the examining official. Appellant also stated that the confession was induced by a statement made to him to the effect that Pauline Gearhart and his nephew had confessed, and that he had as well do so, and also by the suggestion made to him by Mr. Pitcock as to how he would feel when he would be "in the long line at the penitentiary," while those who suggested to him and induced him to burn the hotel "would be sitting under an electric fan at Walnut Ridge." We see nothing in the last suggestion to carry with it the intimation of any threat, promise or compulsion, and as to the statements made relative to the confession, Pauline Gearhart and appellant's nephew had confessed, and the statements made to appellant were true. All those present when the confession was obtained testified with emphasis that no threats, hopes of reward or compulsion were made or used; that the confession was a voluntary act of appellant, and that he himself dictated the written confession to the stenographer.

It is insisted that the sheriff admitted a threat to the appellant during the course of examination. Under the circumstances, and in view of the language used by the sheriff to the appellant, we do not think that any threat was implied or so understood by appellant. The sheriff, in recounting the part taken by him in the examination, stated that, when appellant talked first one way and then another, "I said, 'Ben, if that is the way you are going to talk about it, we will give you all we can,'

and in about five minutes they called me back in there and he went ahead and made that statement." It seems clear there was no threat either express or implied, but a mere expression of impatience on the part of the sheriff caused by the contradictory statements appellant was making.

The court fully and fairly instructed the jury on the competency of the confession, directing it not to consider the same unless it believed beyond a reasonable doubt that appellant confessed voluntarily without promise of reward, and that his confession was free of compulsion or coercion. This instruction was more favorable to appellant than he was entitled. In order to establish the admissibility and competency of a confession, it is necessary only that the preponderance of the evidence establishes its free and voluntary nature.

Pauline Gearhart was called as a witness on behalf of the appellant and denied all complicity with, or knowledge of, the commission of the crime. She explained her presence in the hotel on the night of the fire by stating that she was there to keep a clandestine meeting with the appellant.

On cross-examination she was questioned without objection relative to statements she had made contradictory of her testimony which were to the effect that she had gone to the hotel at the suggestion of appellant and there agreed to, and did afterwards, set the hotel on fire. Her written confession was then permitted to be read to the jury over the objection and exception of the appellant. The written confession was immaterial, since it added nothing to, or took nothing from, the effect of her admissions on cross-examination.

It is well settled that one of the methods of impeachment is to show that the witness has made statements contradictory to the testimony given on the witness stand. The court so instructed the jury, and gave a cautionary instruction as to the confession of Pauline Gearhart, as follows:

"Gentlemen of the jury, the court wants to instruct you strictly that this statement is to be considered by you

only as going to the credibility of this witness, and the statement which she admits having made and saying it was true at the time she made it, but now says it is not true, is not to be considered by you in any way as tending to show the guilt or innocence of the defendant. It is only to be considered by you as testing the credibility of this witness, and you will be governed strictly by that rule. In other words, any statement made since the commission of the crime cannot under the law be used as evidence against this defendant. It is only introduced to show possible contradiction of what she said in the past and what she says now and testing her credibility as a witness now."

9. We attach no significance to the complaint made in this assignment of error relative to a question asked appellant on cross-examination. "Q. At the time they arrested you, they told you that Jack Dame (nephew of appellant) had confessed to breaking in with you in the fire house?" This question was asked in connection with questions relating to the confession of appellant which he had repudiated on the witness stand. It seems to us that no prejudice could have resulted from the question propounded.

10. This assignment of error challenges the correctness of the court's instruction relating to the confession of appellant. This has already been noticed and was most favorable to the appellant.

11 and 12. Finally, error is assigned because of improper argument made by attorneys for the State. We do not set out the statements of counsel because we are fully satisfied that both statements were legitimate and fully warranted by the testimony in the case.

We find no reversible error, and the judgment is therefore affirmed.

WESTERN COAL & MINING COMPANY *v.* RANDOLPH.

4-4072

Opinion delivered January 13, 1936.

Pryor & Pryor, for appellant.

G. C. Carter and *Partain & Agee,* for appellee.

BUTLER, J. Independent suits were filed against appellant by several plaintiffs, and these cases were consolidated for the purpose of trial. Plaintiffs were owners of small tracts of land in and near the vicinity of the town of Denning in Franklin County. These properties joined, or lay close to, each other. Underlying was a

vein of coal owned by the appellant. Suit was brought for damages to the strata overlying the vein of coal on the allegation that in the years 1931 and 1932 the appellant, in mining operations, failed to leave sufficient support, thereby causing the surface of the land to crack and settle, the effect of which was to drain the underground streams of water which supplied plaintiff's wells. The trial of the case resulted in a verdict and judgment in favor of each of the plaintiffs.

On appeal, the assignments of error preserved and argued will be noticed in the order of their presentation in appellant's brief.

It is insisted that there should have been a directed verdict as requested because (a) the proof conclusively shows that the mine was not operated by the appellant in the years 1931 and 1932 as alleged; (b) that the evidence failed to establish that the injury to appellees' wells was the result of the mining operations; (c) that the subsidence was not on the tracts of land owned by the appellees; (d) that the proof failed to show that the wells were fed by underground streams and not by percolating waters; and (e) that the proof affirmatively shows that the action was barred by the statute of limitations.

(A) As to when the mining operations were conducted under, and in the vicinity of, appellees' land, the proof introduced on their behalf is indefinite and unsatisfactory, but it conclusively appears from proof introduced on behalf of the appellant that the operations were finished during the years 1928 and 1929, and during the latter year the pillars of coal left to support the roof were mined and withdrawn. That the plaintiffs (appellees) were mistaken as to the years in which the mining operations were being conducted is of no consequence. The important and controlling questions are, first, did those operations cause the damage? and, second, when did that damage occur? It is contended that after the year 1929 the mining operations were conducted by a lessee of appellant over whom no right of supervision was reserved, and that therefore appellant (lessor) is not responsible for damage resulting from the mining operations of said lessee. We need not consider the rela-

tion of lessor and lessee or the effect of the written lease introduced in evidence, because, from the proof introduced on behalf of appellant, the coal under the properties of appellees, and the lands adjacent thereto, had been removed prior to the time when the lessee began its operations.

(B) On the question of damage to the wells of appellees, the evidence is in direct and irreconcilable conflict. On behalf of appellees there is substantial evidence to show that the surface settled in the immediate vicinity and on three sides of their properties and the strata overlying the coal mines cracked in September, 1932. Before that date the wells afforded an abundant supply of pure and wholesome water, and immediately after the disturbance of the strata overlying the mines the water became so depleted that it was not sufficient for household purposes, and appellees were obliged to depend on the wells of their neighbors. The evidence on the part of appellant strongly disputes this and tends to show that the wells continued to afford an abundant supply of water. This dispute in the testimony of the witnesses presented a question of fact for the jury, the judgment of which, under settled principles, we are not at liberty to disturb.

(C) It appears that the disturbance to the strata overlying appellant's mine did not actually occur on the tracts of land owned by the appellees, but liability for damage for this reason cannot be avoided because, in the recent case of *Western Coal & Mining Company* v. *Young,* 188 Ark. 191, 65 S. W. (2d) 1074, the appellant in the case at bar being the appellant in that case, this court held that it was liable in damages under facts practically identical with those in the case at bar—that is, the subsidence did not occur on the land of the party plaintiff, but on adjoining land which resulted in the draining of plaintiff's well. In *Western Coal & Mining Company* v. *Young, supra,* the result reached seems to find support in the conclusion of the author in Lindley on Mines, vol. 3, page 2030, § 832. The distinction between liability for lack of adjacent support to land in its natural state and for damage to structures erected thereon

is pointed out in *Gilmore* v. *Driscol,* 122 Mass. 199, 23 Am. Rep. 312, for the former, damages are recoverable without proof of actual negligence; for the latter, negligence must be established.

(D) It is the theory of appellant that the wells were not shown to have been fed by underground streams, and, in the absence of such proof, the presumption would be that they were fed by percolating waters for the interception of which appellant, in its mining operations, would not be liable. 18 R. C. L. 1241; 3 R. C. L. Supp. 907. We are of the opinion, however, that there is substantial evidence to show that the wells were fed by underground streams. Several witnesses testified that the flow was so abundant it was with difficulty that the water was drawn out and reduced sufficiently to allow the wells to be cleaned, and that when the water in them was reduced the sound of running water could be heard.

(E) The evidence makes it fairly certain that the removal in 1928 and 1929 of the pillars which had been left in the mine was the cause of the subsidence of the surface in September, 1932, and that this subsidence resulted in the damage which appellees sought and recovered.

The real important question in this case is, when did the cause of action of the appellees accrue? It is insisted by the appellant that it accrued in 1928 or 1929 at the time the supports were removed from the mine. This court, in *Western Coal & Mining Co.* v. *Young, supra,* aligned itself with the great weight of authority holding that the absolute duty to provide for supports sufficient to prevent a subsidence of the surface rested with the mining company. Therefore the contention is made that the action accrued and the statute of limitations began to run from the date this duty was breached. To support this contention, the recent case of *Field* v. *Gazette Publishing Co.,* 187 Ark. 253, 59 S. W. (2d) 19, is cited, and also the cases of *St. L. I. M. & So. Ry. Co.* v. *Morris,* 35 Ark. 622; *Fordyce* v. *Stone,* 50 Ark. 250, 7 S. W. 129, and *Griffin* v. *Dunn,* 79 Ark. 408, 96 S. W. 190. The Field case was an action for personal injuries where it was shown that facts relating to the injury

were as well known to the plaintiff as to the defendant and therefore, under the general rule, the action accrued and the statute of limitations began to run from the date the injury was sustained, although the results were not then fully developed. The cases of *St. L. I. M. & So. Ry.* v. *Morris* and *Fordyce* v. *Stone, supra,* were for damages caused by the construction of a permanent levee or embankment, the consequences of which were ascertainable from the date of construction and the damages were such as could be recovered in a single action. In that state of case it was held that the cause of action accrued and limitations began to run from the date of the building of the levee or embankment. *Griffin* v. *Dunn, supra,* involved the question of the accrual of the right of action of the heir to recover a homestead upon the termination of the particular estate. Those cases are distinguishable, however, from cases which, like the one at bar, involve damages for the subsidence of surface land because of the removal of supports in underlying mines. The reason is that in the cases relied upon by appellant the cause of the injuries was immediately apparent, whereas in cases like the instant one the removal of the supports might not be known to, or discoverable by, the owners of the surface until the subsidence revealed this fact. It is therefore the general rule established by the clear weight of authority that the cause of action arises only when the subsidence occurs and the surface proprietor may bring his action for the injury at any time within the statutory period after the injury to the surface occurs, irrespective of the date of the removal of the supports. 3 Lindley on Mines (3d ed.) 2016, § 823; *West Pratt Coal Co.* v. *Dorman,* 161 Ala. 389, 49 So. 849, 25 L. R. A. (N. S.) 805, and case-note.

The appellant lastly contends that it was prejudiced by the argument of appellees' counsel made to the jury relating to a lease of the Consolidated Sales Company. The objection was that the Consolidated Sales Company lease is not involved in the instant proceeding. The court overruled the objection, and that action of the court is one of the errors assigned. The argument was unnecessary for the reason that, under the same evidence

as was given in the case at bar, this court, in *Western Coal & Mining Co.* v. *Young, supra,* held that the appellant was responsible for the acts of the Consolidated Sales Company. The other argument objected to was to the effect that appellant was shifting from one paper corporation to another in order that it might avoid liability for its conduct in its mining operations. The court sustained the objection to this argument. There was therefore no prejudicial error.

The evidence in the instant case discloses that the mining operations and the removal of the supports was done by the Consolidated Sales Company. This was the same company and the same operation involved in the case of *Western Coal & Mining Company* v. *Young, supra,* where it was held that the mining company was responsible for injuries resulting from the operations of the Consolidated Sales Company. That decision controls and makes necessary an affirmance of the judgment in the case at bar. It is so ordered.

ROLEN *v.* STATE.

Crim. 3972

Opinion delivered January 13, 1936.

W. F. Reeves, for appellant.

Carl E. Bailey, Attorney General, *Guy E. Williams* and *J. F. Koone,* Assistants, for appellee.

BAKER, J. The appellant, Sump Rolen, alias Sumpter Rowland, was indicted by the grand jury of Van Buren County upon a charge of assault with intent to kill and murder one Jake Johnson. Upon trial he was convicted

and sentenced for a term of one year in the State penitentiary. To reverse the judgment of conviction, he has appealed.

The errors alleged upon appeal are that the court erred (1) in permitting Jake Johnson to testify in regard to bloodhounds trailing the defendant; (2) that the court erred in a refusal to strike the evidence of the said witness, and in a refusal to direct the jury not to consider the same; and (3) that the court erred in permitting J. W. Hatchett, the sheriff, to testify as to the action of the bloodhounds in trailing the appellant, and (4) in the refusal to take from the jury this evidence.

Otherwise stated, the only question for consideration upon this appeal is evidence in relation to the use of bloodhounds and in permitting the jury to hear the evidence of two witnesses who were with or followed the bloodhounds the next morning, when officers were making an effort to trail or follow the assailant of Jake Johnson, who had been shot the midnight before.

No other question has been brought up for our consideration. Therefore, unless we determine that there was error in permitting the two witnesses to testify before the jury in relation to the action of the bloodhounds, the case must be affirmed.

A concise statement of the questioned matters as they appear in the record is about as follows:

Jake Johnson, a man about 70 years of age, testified that he had known the appellant about seventeen or eighteen years, and that on or about the 22d of June, 1933, he was awakened during the night, and at the time a light fell on his face, and that he asked what was wanted, and some one said, "Just lie still." He thought he recognized the voice, but was not positive. He told some one then to go around the house, and at the same time reached for the door knob to shut the door. Again he asked, "What do you want?" and some one on the outside said, "Just raise up a little bit." When he reached up to get his gun, he jumped to one side, and just as he jumped a person on the outside fired a shot through the door and struck him in his right arm. He says he recognized the voice and

the person on the outside who spoke the second time; that it was the voice of Sump Rolen, appellant here.

The night was hot, the doors were open, but the screens were closed and fastened on the inside, and the witness was about fifteen or sixteen feet from the screen door. This occurred about 12:30. He "heard the parties run out the gate, first to the north and then to the east." He then got in a car and went to Clinton, where his wounds were dressed, and he asked Mr. J. W. Hatchett to get the bloodhounds to track down his assailant. Mr. Hatchett was the sheriff. He told him he wanted the best bloodhounds he could get, to make arrangements to get them, and the witness would pay whatever it would cost. A fellow came with two hounds and the dogs were started from the porch. They took their trail from that point. At this point in the examination the court sustained an objection to the testimony as to the conduct or activities of the dogs without a showing of the qualifications of the hounds to pick up trails and follow them, and then Mr. Johnson, the witness, was asked if he had had experience with bloodhounds prior to that time. In response he said that he was not an experienced trainer of bloodhounds, but that he had been with them, observed them in their work, and had seen them trained for a period of about two years; that from his experience and observation he could tell whether the hounds were trained or not and capable of following a trail. The hounds that were brought there were used by the police force of the State, or officers at the State penitentiary. Upon appellant's cross-examination of this witness, he went into somewhat minute or detailed argument with his cross-examiner to the effect that bloodhounds were not used if they were not trained; that, if they cannot trail a scent, they are not kept; that that is the purpose for which they are kept. He did not know the parties who brought the bloodhounds, but he knew the dogs were bloodhounds when he saw them. He knew that they had been trained when he saw them working; that he could tell whether the hounds had been trained by seeing them at work. He had never seen these dogs before, but he stated that a man who had been with

dogs like these could tell about their training by observation of their work. He had not seen them working any other time. He only knew they were trained from observation. He went on to say that when he saw the dogs stick their noses to the door and get the scent off the door knob he well knew that the dogs were trained, and he knew it also when the dogs yelped and got the scent and got the trail. He didn't try them out on any one else as that was unnecessary. He went on to tell that Mr. Hatchett followed the dogs. He never saw them trail any one else.

With this qualification the court permitted the witness to testify that the dogs struck a trail at the door and went off up the hill; that they took the trail at the door knob and from the floor on the porch and went about 75 or 100 yards, turned and came back; that again they started, took hold of the track and went on as before. The dogs followed the same general direction that the witness had heard the man take when running away the night before. This was about all the testimony from this witness.

The sheriff, Mr. J. W. Hatchett, was called and stated that he made an investigation of the shooting of Jake Johnson; that he was asked to secure bloodhounds proved and trained ones, and he thought he knew where they had the best ones, and, from what he knew about them, he thought they were trained. He talked with some one at the State penitentiary at Tucker.

He had seen the bloodhounds at the penitentiary that were kept there for the purpose of trailing escaped prisoners. They had been shown him by the manager of the bloodhounds, and the keeper had also shown them to him. He testified that he did not know anything about the training of the dogs. He had gone, however, prior to that time, with bloodhounds trailing criminals. He had seen these particular hounds at the penitentiary, and it had been explained to him that they were the ones used when prisoners escaped. He knew the older one of the two hounds was one he had seen at the penitentiary. He went on to explain that he followed the hounds and their

keeper. They went down through the woods and trailed to Sump Rolen's backyard and to the back door of Sump Rolen's house. They then trailed from the front of the house and followed the trail to Elba. They went down in town but were then "pulled off the track." He went and arrested Rolen, who denied his guilt, but admitted that he had gone down where the dogs had gone from his house toward Elba where he had gotten on a handcar and had ridden some distance to the place where he had gone to work. The sheriff measured tracks he saw along the trail the dogs followed going toward Sump Rolen's house and measured other tracks going from Rolen's house and compared them and they were the same. He stated further that Rolen denied he had been along the trail or path the dogs had followed in going to Sump Rolen's house.

This was all the evidence relative to the activities of the dogs and substantially all the statements made relative to the training of the dogs, or the handling of them as they trailed the supposed assailant of Johnson.

The foregoing will be taken also as the full effect of the testimony in so far as it relates to the proposition here under consideration.

The evidence disclosed, however, that other people lived at the same place occupied by Sump Rolen, at least two or three others, and in addition there was a total lack, so far as it has been abstracted for our consideration, of motive actuating Rolen in the commission of the crime of which he is accused. Moreover, there was further proof that Rolen was at his home that night, that he went to bed rather early on account of the fact he had been at work that day and was somewhat tired and that others there were up with a sick child. They testified that Rolen did not leave the house at that time.

We cannot know or surmise just what value the jury may have placed on the conduct or activities of the bloodhounds, if indeed they found the testimony to be worth anything. We do not think, however, under the showing made, that it was improper or prejudicial for the court to submit to the jury this evidence under proper instructions. The witness, Johnson, testified as above stated, to sufficient facts as to his qualifications and ability to judge

bloodhounds for the jury to determine from his statements that these hounds were trained. There is no proof about how the hounds were handled except proof that they were taken to a place where the man had been who fired the shot; that they followed the same general direction that was taken by the man who ran away after the shot was fired. So far as the evidence discloses, those who were handling the dogs merely followed them until they went to the home of Rolen and after they left that place to Elba.

There is further evidence, however, given by Mr. Hatchett, who had seen these dogs at the penitentiary on different occasions. They had been shown to him. He knew something of their reputation as trailers, of their ability to follow escaping criminals. It may not be amiss to suggest that with this explanation on his part that these dogs were kept by said officers, wardens and those in charge of the penitentiary for the purpose of recapturing those who escaped, that there is necessarily a presumption that they were suitable for that purpose.

It is strongly urged that since Mr. Johnson had not worked with bloodhounds in perhaps forty years, or more, that his testimony should not have been accepted as tending to lay a proper foundation for introduction of the testimony as to activities of these dogs in trailing the supposed criminals. These matters were all submitted to the jury, and the jurors with their common sense, knowledge and information, doubtless realized, as everyone must agree, that some men have the power of keen observation, retentive memories, the power to assimilate facts and understand them and make use thereof throughout a lifetime. On the other hand, if Mr. Johnson's testimony, or that of Mr. Hatchett, was of little or no value, the jurors, and not the members of this court, necessarily determined and fixed the value of this testimony. It is not shown that the case was tried at variance with or different from the principles announced in the case of *Holub* v. *State,* 116 Ark. 227, 172 S. W. 878, or the case of *McDonald* v. *State,* 145 Ark. 581, 224 S. W. 976. It is a stronger case than that of *Fox* v. *State,* 156 Ark. 428, 246 S. W. 862. The Fox case was affirmed.

In the Fox case Titus Measles did not even know that his dog was a bloodhound, one of the kind that is presumed to be of the breed used to trail human beings. Measles did not pretend to be a trainer of dogs and no one really testified that his eleven months' old hound pup had received any particular training or that he had any reputation as being reliable as a trailer. He was not even kept at a time or place for use in trailing escaped prisoners or other persons.

It was not error to submit the foregoing facts under proper instructions to the jury. Under such conditions the jury's province to determine the effect and value thereof was exclusive. We must and do presume a proper submission.

It is unnecessary that we discuss other testimony, or even set it forth. We have considered all the facts as abstracted and presented, and think there is sufficient testimony to warrant the verdict of the jury, and that there was no error in permitting the testimony as to the activities of the bloodhounds upon the showing of qualifications offered in testimony prior to the introduction of this questioned proof.

The judgment of the court is therefore affirmed.

YOCUM *v.* OKLAHOMA TIRE & SUPPLY COMPANY.

4-4100

Opinion delivered January 20, 1936.

Partain & Agee, for appellant.

Hill, Fitzhugh & Brizzolara and *C. H. Rosenstein,* for appellee.

JOHNSON, C. J. On June 4, 1935, appellant Frank Yocum, and Frank Yocum, administrator of the estate of Ralph Yocum, deceased filed suit in the Crawford County Circuit Court against appellee, Oklahoma Tire and Supply Company, praying judgment in damages for personal injuries sustained through the negligent operation of a motor truck upon a highway situated in Crawford County on January 23, 1935. Service of process was obtained upon appellee's truck driver in Crawford County on June 5, 1935, as prescribed by act 70 of 1935. The circuit court sustained appellee's motion to quash service of process and this appeal comes from that order. Appellee's first contention for affirmance is that the circuit court's order quashing service of process is not a

final or an appealable order, and in support of this contention we are cited *Harlow* v. *Mason,* 117 Ark. 360, 174 S. W. 1163, and *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579. The cases referred to and cited support the contention urged, but they have no application to the facts of this case. The record here reflects that appellant elected to stand upon the service of process first had and obtained, and this was tantamount to a dismissal of the complaint and a final order from which an appeal lies. See *Berryman* v. *Cudahy Packing Co.,* 189 Ark. 1151, 76 S. W. (2d) 956.

Next appellee contends for affirmance that act 70 of 1935 affords no grounds or support for the service of process obtained in this action. Sections one and three of said act provide:

"Section 1. When the defendant is the owner or the operator of any motor bus or buses, motor coach or coaches, or motor truck or trucks, engaged in the business of carrying and transporting either passengers, freight, goods, wares or merchandise over any of the highways of this State, the service of summons may be had upon any such owner or operator by serving same upon any clerk or agent of any such owner or operator selling tickets or transacting any business for such owner or operator, or may be upon any driver or chauffeur of any bus, coach or truck being operated or driven by such driver or chauffeur as a servant, agent or employee of any such owner or operator, and service so had upon the agent or agents of any such owner or operator or had upon any such chauffeur or driver of any such bus, coach or truck being operated or driven as such driver or chauffeur as a servant, agent or employee of any such operator or owner shall be deemed and considered as good and valid service upon such owner or operator whether such owner or operator be a person, firm or corporation."

"Section 3. Whereas many motor buses, coaches and trucks are being operated upon the public highways of this State, and by reason of their operation persons are being injured and their property damaged, and in many instances there is now no agent of the owner or operator

of such vehicles upon whom service of summons can be had in counties through which same are being operated; therefore an emergency exists on account of such injuries and damages to persons and property and no adequate provision for service of summons existing, it is found that this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby found to exist, and this act shall be in full force and effect from and after its passage."

The undisputed facts in reference to the service of process in this action are that appellee is a Delaware corporation, and maintains its place of business at Fort Smith in Sebastian County; that it owns and operates a small motor truck to deliver goods, wares and merchandise to its customers in that vicinity, and was actually engaged in making such a delivery to a customer in Crawford County when the alleged injury occurred on January 23, 1935; that the service of process was obtained in this action by the sheriff of Crawford County upon appellee's truck driver in said county.

Appellee's most serious contention seems to be that said act should be construed by us as applicable only to those truck and bus owners who carry freight and passengers for hire. The language of the act does not justify this narrow construction. Section one of the said act when paraphrased provides in plain and unmistakable language that when "the owner or operator of any motor * * * truck or trucks engaged in the business of carrying and transporting either passengers, freight, goods, wares or merchandise over any of the highways of this State, the service of summons may be had upon any such owner or operator * * * upon any driver or chauffeur or any * * * truck operated or driven by such driver or chauffeur as a servant, agent or employee or any such owner or operator and service so had * * * shall be deemed * * * good and valid service * * * whether such owner or operator be a person, firm or corporation." Section three of said act not only harmonizes with section one as paraphrased but demonstrates our conclusions hereinafter stated.

When act 70 of 1935 is viewed and considered from its four corners, the unmistakable intent of the Legislature was to make all owners and operators of trucks or buses upon the highways of this State carrying either passengers, freight, goods, wares or merchandise amenable to service of process through the drivers or chauffeurs of the trucks or buses in any county through which their trucks or buses may be operated.

The conclusion thus stated is not only made certain, but is demonstrated by § 3 of said act. It expressly provides:

"Whereas, many motor buses, coaches and trucks are being operated upon the public highways of this State, and by reason of their operation persons are being injured and their property damaged and in many instances there is now no agent upon whom service of summons can be had in counties through which same are being operated, * * *."

When the undisputed facts of this case are measured by the language of act 70, quoted *supra,* it appears that the service of process obtained falls within its terms. Under repeated opinions of this court we are not at liberty to nullify and destroy the plain intention of the lawmakers by judicial construction. *Southern Surety Company* v. *Dardanelle Rd. Imp. Dist. No. 1,* 169 Ark. 755, 276 S. W. 1014; *Berry* v. *Sale,* 184 Ark. 655, 43 S. W. (2d) 225.

Appellee next urges that act 70 of 1935 has no application to this case because the cause of action arose prior to the passage and approval of said act.

We understand the rule to be that the legislative branch of the State government has full power, and may provide such methods and means for service of process in civil actions as it may deem wise or expedient, provided only that such enactments afford due process of law and are not discriminatory in its application and effect. That act 70 affords due process and is not discriminatory necessarily follows from our opinion in *Kelso* v. *Bush, ante* p. 1044. We there held that an act which required a nonresident car owner or operator upon the highways of this State to appear in any action pend-

ing in the courts of this State was not discriminatory because based upon a reasonable legislative classification, and the reasoning there entertained and stated is full answer to the contention here urged.

It only remains to determine if act 70 of 1935 is applicable in the prosecution of this case. The act is necessarily and exclusively procedural in its scope and effect and must be construed and applied as such. We have repeatedly held that under procedural acts a case must be determined on the law as it is at the time of the judgment unless the contrary appears from its context. *Rose* v. *Ford,* 2 Ark. 26; *Green* v. *Abraham,* 43 Ark. 420; *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653; *State, etc.,* v. *Anderson-Tully Co.,* 186 Ark. 170, 53 S. W. (2d) 17.

Appellee asserts that the act in question is not merely procedural but falls within the rule announced in *State* v. *K. C. & M. R., etc.,* 117 Ark. 606, 174 S. W. 248; *Mosaic Templars* v. *Bean,* 147 Ark. 24, 226 S. W. 525; *Mutual Relief Ass'n* v. *Parker,* 171 Ark. 952, 287 S. W. 199; *Elrod* v. *Board of Imp.,* 171 Ark. 848, 286 S. W. 965. The statutes considered and construed in the cases last referred to are not procedural in scope and effect as is the statute here under consideration, and this suffices to distinguish them from the cases first cited.

It follows from what we have said that the lower court erred in quashing the service of process, and the cause must be reversed, and remanded for further proceedings.

FREEMAN *v.* BENTON.

Crim. 3977

Opinion delivered January 20, 1936.

Kenneth C. Coffelt, for appellant.

Ernest Briner, for appellee.

SMITH, J. Appellant was arrested, tried and convicted on October 23, 1933, in the court of the mayor of the city of Benton upon the charge of transporting intoxicating liquors in violation of an ordinance of that city. The minimum fine of $100 was assessed, but after its assessment it was suspended by the mayor during appellant's subsequent good behavior. On September 23, 1935, which was one year and 11 months later, appellant was tried and convicted in the same court upon a charge of drunkenness in violation of a city ordinance upon that subject. At the same time a fine of $100 was imposed under the former conviction. Having been taken into custody, in discharge of this $100 fine, appellant sought to obtain release through a writ of *habeas corpus*. The circuit court denied that relief, and this appeal is from that order.

In the case of *Holden* v. *State*, 156 Ark. 521, 247 S. W. 768, the defendant was convicted for the commission of a felony and the court entered a judgment sentencing appellant to confinement in the penitentiary for a period of five (5) years; but it was further ordered "that the execution of the judgment be and is suspended until further orders of the court, and the court doth retain jurisdiction of this case from term to term for the purpose of doing full justice in the case." We there said that there is no authority in the law for the trial court to suspend the execution of a judgment of conviction in a criminal case from term to term. It was said that the court during the term has control over the judgment and could

set it aside, if it thought proper to do so; but that "at the close of the term the conviction and judgment and sentence become final, and any order suspending the execution of same, when the defendant is in the presence of the court or in the custody of the sheriff, in the absence of a statute authorizing it, is void. The law contemplates that upon a verdict of guilty, unless such verdict is set aside and a new trial granted, the court shall render a judgment of sentence, which, in the absence of a statute duly authorizing its suspension, must be duly executed." It was therefore ordered that the sheriff execute the judgment of sentence the same as if it had not been suspended.

In the case of *Davis* v. *State,* 169 Ark. 932, 277 S. W. 5, the defendant entered a plea of guilty to the charge of selling intoxicating liquors, and upon that plea a sentence of one year in the penitentiary was imposed; but in the same judgment it was ordered that this sentence be suspended until the defendant had again violated the liquor laws of this State. At a subsequent term of court it was adjudged that the suspension of the execution of the judgment of conviction was without authority. A motion was filed to revoke the order suspending the execution of the sentence upon the ground that the defendant had again violated the liquor laws. The motion was granted, and it was ordered that the defendant be transported to the penitentiary to serve the year under the original sentence. We affirmed that judgment, and in doing so held that "courts have no power to suspend the execution of their sentences indefinitely." After the rendition of the opinion in the Holden case, *supra,* an act was passed by the General Assembly conferring power to postpone the pronouncement of final sentence upon conditions deemed proper, but this act applies only to criminal trials in circuit court. Acts 1923, page 40.

The mayor of the city of Benton was therefore without authority to suspend this sentence, and the fine which he later imposed should have been assessed in the first instance, when the original conviction was had.

It is insisted, however, that this must have been done within one year, after the violation of the ordinance or the commission of the offense, and not afterwards, and

§ 7561, Crawford & Moses' Digest, is cited as sustaining that position. It reads as follows:

"§ 7561. All suits or prosecutions for the recovery of any such fines, penalties or forfeitures, or for the commission of any offense made punishable by any by-law or ordinance of any municipal corporation, shall be commenced within one year after the violation of the by-law or ordinance, or commission of the offense, and not afterward. Provided, the offender has remained within the jurisdiction of such municipal corporation during the one year aforesaid, if not, then the limitation herein provided shall extend for the term of five years."

The limitation of this section, however, is upon the institution of suits or prosecution thereof for the recovery or imposition of fines, penalties, or forfeitures for the commission of acts made punishable by the ordinances of municipal corporations. No contention is here made that this prosecution was not commenced within one year of the date of the commission of the offense charged. This, if true, would have been a proper defense at the trial in the mayor's court, but does not avail in this proceeding.

It is not the purpose of this proceeding to determine whether appellant is guilty of a violation of an ordinance of the city of Benton. That fact has already been adjudged, and the erroneous postponement of the enforcement of that judgment has not destroyed its effect. Had appellant escaped from custody and concealed himself from arrest for a period of more than one year after his conviction in the mayor's court, it could not be maintained that he had acquired immunity because of this lapse of time. Neither can he claim immunity because the mayor did not direct that the judgment of his court be immediately enforced, as he should have done.

The circuit court therefore properly refused to order appellant's release, and that judgment is affirmed.

FIRE ASSOCIATION OF PHILADELPHIA *v.* ELDRIDGE.

4-4103

Opinion delivered January 20, 1936.

Thompson, Knight, Baker & Harris, William A. Rembert, Jr., and *Frank S. Quinn,* for appellant.

Shaver, Shaver & Williams, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in the circuit court of Miller County in favor of appellee upon an insurance policy issued by appellant to the Citizens Building & Loan Association covering its equity in a frame residence against loss by fire, which was situated on lot 22 in the NW¼, SW¼, section 29, township 15 south, range 28 west, in said county, known as 216 Charles Ave., to whom appellee had mortgaged same to secure an indebtedness for borrowed money. The mortgage provided that appellee should maintain adequate insurance on the property, and that, in the event he did not do so, said building & loan association might take out insurance and charge the cost to him. The insurance policy was for $300, the amount of the loan, and covered a period of one year from its date on May 27, 1933. The annual premium thereon was $4.65. This premium was charged to appellee by the building & loan association and collected from him in the form of a check on November 20, 1933, which check was indorsed and delivered by the building & loan association to appellant, who received and cashed same after marking thereon "216 Charles Ave." At the time the check was delivered to and received by appellant, the building & loan association notified appellant that appellee had paid the indebtedness secured by the mortgage on November 14, 1933. The policy was not taken up or canceled by

appellant, but was left with the building & loan association. The residence was totally destroyed by fire on November 29, 1933, after which appellee went to the office of the building & loan association and got the policy and discovered that appellant had not inserted or substituted his name in the policy after receiving and collecting his check covering the entire period for the full year. After denial of liability on the part of appellant, this suit followed with the result stated above.

Based upon the undisputed facts detailed above, the trial court instructed a verdict and rendered a judgment thereon against appellant.

Appellant contends the judgment is erroneous because it made no contract with appellee to insure his interest in the residence against loss by fire, but, on the contrary, made a contract with the building & loan association to insure its equity only in the residence. It is true the written policy so provides, but this contention leaves out of the equation that, after being informed that the building & loan association had no further equity in the residence, it accepted appellee's check and cashed it in payment of the premium for a full year ending May 24, 1934, after writing on the check the description of the property. This act on the part of appellant amounted to a continuance of the insurance in favor of appellee for the remainder of the time the policy was to run. The acceptance of the premium from appellee for the full time after notice that the building & loan association had no further interest in the residence or property led appellee to assume that appellant had done all things necessary to render the insurance effective. The rule of law applicable to the undisputed facts stated above is correctly announced in § 367 of 14 R. C. L., page 1181, to the effect that an insurance company "cannot treat the policy void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums."

No error appearing, the judgment is affirmed.

MATTHEWS *v.* UNION SAVINGS BUILDING & LOAN ASSOCIATION

4-4037

Opinion delivered January 20, 1936.

Archie D. Murphey and *Coulter & Coulter,* for appellants.

J. S. Brooks and *Fred L. Purcell,* for appellees.

HUMPHREYS, J. This is an appeal from a final order rendered by the chancery court on January 17, 1935, in the Second Division of the Chancery Court of Union County in the case of Mrs. Lilly J. McGraw *v.* El Dorado Building and Loan Association et al., which is as follows:

"On this, the 7th day of January, 1935, all of the parties to this action being present by counsel, this cause is submitted to the court on the third and final report of the special master; on the master's fourth report filed in this cause, and upon a proposition and offer made by defendant, Union Savings Building & Loan Association, to deliver to the receiver, heretofore appointed by the court in this action, investment certificates representing liability of the El Dorado Building & Loan Association to its investment stockholders in the total sum of ten thousand dollars ($10,000), to be in full accord and satisfaction and settlement of all claims of every nature against defendant Union Savings Building & Loan Association made in this cause, and existing or arising by reason of and on account of that certain contract or articles of agreement entered into by and between the boards of directors of the said El Dorado Building & Loan Association and Union Savings Building & Loan Association on the 15th day of March, 1932, which articles of agreement and the actions of the parties thereunder have formed the basis of litigation in this action,

both in the complaint filed herein and in the cross-complaint against defendant Union Savings Building & Loan Association, its officers and directors, and against Raymond Rebsamen, G. Russell Brown and Fred L. Purcell, as individuals, and it appearing to the court from the master's said reports, from all evidence adduced in the case, both by deposition and *ore tenus,* and transcribed and filed as a part of the record, that the defendant, Union Savings Building & Loan Association, and its officers and directors, have fully and faithfully administered the estate of the El Dorado Building & Loan Association while in the hands or possession of the Union Savings Building & Loan Association, and that the said defendants have fully and faithfully accounted to the receiver for all assets taken into its possession under said contract or articles of agreement, and completely discharged its obligation with reference thereto, and that it has withheld nothing for which it was in duty bound to account under the orders of this court; that neither Union Savings Building & Loan Association, nor its officers or directors, nor the individual defendants in the cross-complaint filed herein are in any wise liable to cross-complainants as alleged, and it appearing to the court from the evidence adduced that it is to the advantage of the estate of the El Dorado Building & Loan Association, and to its stockholders, that an end be made of the issues and of all issues between all parties in this action, both upon the complaint and upon the cross-complaint by the settlement so offered by defendant Union Savings Building & Loan Association as herein recited, it is therefore ordered, adjudged and decreed by the court that the third and final report of the special master filed in this cause and the master's fourth report filed herein in so far (and to that extent only) as they apply to and affect said Union Savings Building & Loan Association, be, and the same are, hereby approved, and it is further ordered by the court that the receiver, Tom Marlin, heretofore appointed in this cause, be and he is authorized and directed to accept from Union Savings Building & Loan Association the said investment stock certificates of the El Dorado

Building & Loan Association in the total sum of ten thousand dollars ($10,000) in full accord and satisfaction of the total amount found by the master to be due the receiver by the Union Savings Building & Loan Association, and the same is a full accord and satisfaction of all claims of every nature and kind against the Union Savings Building & Loan Association in this action.

"The cross-complaint filed herein against Union Savings Building & Loan Association, its officers and directors, and against Raymond Rebsamen, G. Russell Brown, and Fred L. Purcell, is without equity and should be and is by the court dismissed."

Appellants contend for a reversal of the order on the ground that it was made on a basis unfair to them, but they have not brought into the record the evidence on which the chancery court based its order, so we cannot try the issues involved on this appeal *de novo* as suggested by appellants, and for that reason cannot try the issues *de novo* involved in the order of the chancery court fixing the value of investment certificates, from which an appeal was prayed.

The orders or decrees appealed from are therefore affirmed.

CITY COUNCIL OF CAMDEN *v.* MERCHANTS & PLANTERS BANK.

4-4092

Opinion delivered January 20, 1936.

Lawrence E. Wilson and *C. M. Martin,* for appellants.

Thomas Gaughan, for appellees.

McHaney, J. Camden Sidewalk District No. 1, of the city of Camden, was created by the city council on November 27, 1923, on a petition of ten property owners. Thereafter, within three months, the second petition signed by a majority in value of the property owners of the district was presented to the council, and on February 15, 1924, commissioners were appointed for the district, who entered upon their duties, prepared and filed plans and specifications for the improvement and submitted same to the council. On April 8, 1924, assessors were appointed who entered upon their duties, made an assessment of the benefits on the real property in the district and filed same with the city council. The first assessment was for $22,697.80, but, on complaint of certain property owners, the commissioners, pursuant to Crawford & Moses' Digest, § 5664, directed the assessors to reduce the assessments on said property, which was done in the sum of $1,045. No increase of assessment was made on the other property. In 1929, after the improvement had been constructed, the assessments collected and the outstanding bonded indebtedness paid, it was found that the district was still in debt in the sum of approximately $1,600, with no assets with which to pay same except $554 in delinquent assessments on vacant lots which the district had been unable to collect. On November 30, 1932, the assessors of the district raised the assessments on property in the district in a sum equal to the amount they had previously reduced it and for an additional sum to make a total sufficient to take up the district's indebtedness. This reassessment of 1932 was filed in the office of the city clerk, who caused a notice thereof to be published for the time, in the manner and language provided by said § 5664. This notice was published on December 3, 1932. Although the statute provides that: "Appeals from such reassessment shall be heard by the city or town council in the manner and at the

time set forth in §§ 5661 and 5662," no one appealed from said reassessment within the time provided by law. The commissioners petitioned the city council to levy the benefits in accordance with the reassessment list previously filed pursuant to § 5665, Crawford & Moses' Digest, and the council passed such ordinance. Thereafter, objection was made by certain property owners to the reassessment ordinance, and a committee was appointed by the council to investigate the financial affairs of the district to determine whether it owed the amount claimed. This committee employed an accountant, and, on a report made by him, the committee determined that the district was not in debt in the amount claimed, so reported to the council, and it repealed the ordinance making the reassessment. Just when the ordinance was repealed is not definitely shown in the abstract filed, but it must have been some considerable time after it was originally passed. Thereafter, this action was instituted by appellees against the appellants for a writ of mandamus to compel the city council to reassess the property in the district in accordance with the prayer of the petition. Trial before the court resulted in a judgment in favor of appellee bank in the sum of $1,547 with interest, and that the writ of mandamus issue as prayed. The case is here on appeal.

The trial court found, and its finding is supported by the evidence, that the district borrowed the money, balance of which is shown by note, from the bank from time to time for the purpose of paying for the construction work before the proceeds from the bonds were available. This note was renewed from time to time, and the original indebtedness was reduced by payments to its present amount. It is undisputed in this record that the bank holds the district's note dated June 26, 1929, for $1,545.66, with interest from date until paid. We agree with the trial court that this indebtedness is due the bank and has not been paid. We are furthermore of the opinion that when the city council passed the reassessment ordinance, in accordance with the reassessment roll filed with the city clerk, notice of which was published on December 3, 1932, and no property-owner ap-

pealed therefrom within the time provided by law, the city council of the city of Camden exhausted its jurisdiction in the premises, and it thereafter had no power or authority to repeal the ordinance, and that its action in so doing was and is void. Section 10 of act 64 of the Acts of 1929, page 251, provides: "Where assessment of benefits are revised in pursuance of § 5664, of Crawford & Moses' Digest, and notice given as therein provided, such assessments shall be final and conclusive unless suit is brought in chancery court within thirty days after the publication of the notice provided for in § 5664 for the purpose of correcting the same." We are therefore of the opinion that the council was without authority to repeal the ordinance levying the reassessment and that that assessment is now valid and binding on the property-owners of the district, since no appeal was had from the assessment to the city council and no proceedings brought in the chancery court to enjoin same. The only reason assigned for the attempted repeal was that the district was not in debt, a fact about which the city council was mistaken. This view of the case works an affirmance of the judgment, although it will not be necessary under our views to require the city council to pass again the reassessment ordinance.

MAY *v.* SHARP.

4-4106

Opinion delivered January 20, 1936.

S. Hubert Mayes, for appellants.

L. A. Hardin and *J. F. Holtzendorff*, for appellee.

BUTLER, J. The appellee brought suit against G. C. May, Harold May and W. C. Sharp for damages sustained by personal injury. From a verdict and judgment in his favor, G. C. May and W. C. Sharp have prosecuted this appeal.

At the conclusion of the testimony the appellants moved the court to instruct the jury to return a verdict in their favor on the ground that whatever injury appellee received was the result of an assumed risk. The sole ground advanced by appellants for reversal of the case is the alleged error of the court in refusing to give this requested instruction.

The contention of appellants is based upon the theory that the evidence conclusively shows that Harold May, the person whose negligence occasioned the injury, was a fellow-servant of the appellee, and that because his employers were a partnership, and not a corporation, no liability would attach because of the alleged negligence of the said Harold May.

It is insisted on behalf of the appellee that Harold May was not his fellow-servant, but his foreman and the appellants' vice-principal, for whose negligent act the appellants would be liable.

The fellow-servant doctrine obtains in this State except as to corporations. If, then, the undisputed evidence shows that Harold May was merely a fellow-servant of the appellee, no negligence would attach to the employer for his negligent act. On this question the testimony is in decided conflict. That on behalf of the appellee tends to establish the following facts: appellant partnership was engaged in the construction of a courthouse in the town of Murfreesboro. Appellee was a common laborer working under the supervision and direction of Harold May, a brother of G. C. May, who

was a member of the partnership. Harold May was the foreman over a number of workmen, some of whom were engaged in working on the ground and others upon the building. The workmen on the ground were charged with the duty of placing stones fitted for use in the building upon a cart or buggy which, when loaded, was pushed upon a contrivance called an elevator, by means of which the stones were carried from the ground upward to the part of the building where they were to be used. When these stones were thus carried to their point of destination, other workmen would there take charge of them and put them in place. This work was all under the supervision of Harold May. He had in his possession, and used in the work, a blue print with the aid of which he would select the stones required, point them out to the appellee and his fellow-workmen, and direct their loading upon the cart or buggy which would then be moved to the elevator. When the stones were carried up to the part of the building in which they were to be placed, Harold May would then direct the workmen where to go with the cart or buggy and where to deposit the stones. He also kept the time of the laborers working under him. When a stone of more than ordinary weight was to be loaded, Harold May would sometimes assist in placing it upon the conveyance and sometimes would help push the cart from the elevator when it had ascended to the point required upon the building.

Except for the testimony relative to Harold May keeping the time, the evidence on behalf of the appellants tended to show that Harold May was nothing more than an ordinary laborer and at most could only be said to be merely a leader of the crew, and, being such, a fellow-servant of the others with whom he worked.

Appellant cites the case of *Koss Construction Co.* v. *Vanderburg,* 185 Ark. 316, 47 S. W. (2d) 41, as upholding their contention, where it was said: "There is a difference between a leader of a crew of men, merely charged with the duty of overseeing the work, and one in which authority is given to one man to have superintendence, control and dominion over the other men, in order to properly carry on the work;" and further relies

on the principle announced in *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257, reaffirmed in *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532, as follows: "A foreman under whom workmen are employed may be a fellow-servant with the workmen when engaged in accomplishing with them the common task or object; but, when discharging the duties toward the workmen which the law imposes on the principal, he is a vice-principal."

We apprehend that there is little, if any disagreement in the authorities holding that one under whom other workmen are employed is merely a fellow-servant with such workmen when he is engaged solely in accomplishing with them the common object of their employment. But in this case the evidence presents a conflict as to whether or not Harold May was solely thus engaged; that on the part of appellee tending to show that, in addition to this, he was clothed with the discharge of duties toward the workmen which the law imposes on the employer. He directed (according to the testimony adduced on behalf of the appellee) the workmen as to how and in what manner their duties should be discharged, supervised them while they were discharging these duties and kept their time. These were duties devolving upon the employer and rendered Harold May the vice-principal, although he might have at times assisted in the actual performance of the work. This statement is sustained by the authority cited by the appellee. *Fones* v. *Phillips,* 39 Ark. 17; *St. L. I. M. & So. Ry. Co.* v. *Harper,* 44 Ark. 524; *C. O. & G. Ry. Co.* v. *Jones,* 77 Ark. 367, 92 S. W. 244; *Tex. etc. Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257.

The question of whether Harold May was a fellow-servant or vice-principal was submitted to the jury under instructions which are not questioned, and, as there was substantial evidence to warrant the finding of the jury either way, its judgment is binding on this court, as it is the sole and exclusive judge of the credibility of the witnesses and the weight to be given their testimony.

The specific negligence alleged, which the evidence tends to establish, is that when the buggy was placed in the elevator Harold May "scotched" it with a round iron

instrument, whereas he should have "scotched" it with a piece of wood and was so advised by one familiar with the work; also, when the buggy was being removed from the elevator, in the exercise of ordinary care, the bar of iron should have been removed before rolling the buggy from the elevator. This was not done. But May directed the workmen to remove the buggy from the elevator and assisted in the operation. This movement of the buggy pushed or rolled the iron bar so that it fell from the building to the ground striking the appellee upon the head and inflicting the injury. The consequence of this bar falling upon the head of the appellee and the resultant effects are matters about which the testimony is in sharp dispute, that on the part of the appellants tending to show that the injury was slight and inconsequential while that on the part of the appellee is to the effect that it was serious and permanent. But, as no question is raised as to the amount of damages awarded by the jury, this evidence need not be noticed.

Under the rules announced, we are of the opinion that there was evidence of a substantial nature tending to establish negligence of a vice-principal as the proximate cause of the injury sustained by the appellee, and the judgment of the trial court must therefore be, and is, affirmed.

KENTUCKY HOME LIFE INSURANCE COMPANY *v.* MOSLEY.

4-4099

Opinion delivered January 20, 1936.

L. H. Hilton, D. W. McMillan and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

J. H. Lookadoo and *Lyle Brown,* for appellee.

BAKER, J. Junie Gober Mosley sued the Kentucky Home Life Insurance Company upon a policy of insurance issued by the Inter-Southern Life Insurance Company, assumed by appellant. Against this policy of insurance there was a lien or debt of $79.48 and some interest. This was pleaded by the plaintiff in filing her suit. The contract under which Kentucky Home Life Insurance Company assumed these obligations of reinsurance had been duly approved by proper officers in Kentucky, where the appellant company was domiciled, and in Arkansas, wherein the policy sued upon was delivered to Alonzo T. Mosley, the insured.

The reinsurance agreement provided that a lien equal to sixty per cent. of the net equities should be established against policies assumed by the Kentucky Home Life Insurance Company, and it was pleaded, and not disputed, that the net equity in policy No. 151,763 amounted to $37.68; that a lien in the amount of $22.61 was established and placed against the said policy. This added to the indebtedness of $79.48, with accrued interest, was in excess of the cash reserve upon the particular policy at a time long prior to the time of the death of Alonzo T. Mosley. Under the terms and conditions of the policy, when such condition prevailed, after lapse for failure to pay premiums, the policy became of no effect, and the beneficiary was without right to recover thereon.

In the briefs, as we understand them, all parties agree substantially to the foregoing announcement. Plaintiff, however, appellee here, offered proof to the effect that there was an error in the complaint admitting the indebtedness as pleaded therein of $79.48, and offered further proof to the effect that a premium note of $44.95, with interest upon a former outstanding loan, amounting to $1.88, which fell due on August 26, 1931, and which indebtedness was renewed on that date, or shortly thereafter by the execution of another note, in-

cluding the above-mentioned indebtedness, in the sum of $48.23, had been paid. Witnesses who testified to the fact of payment testified first upon a motion to quash the summons and return of service thereon; that the payment was made in the fall of 1932. The appellant had filed this motion to quash, alleging that it had done no business in Arkansas, had no agent for service, and that the service of process on that account was improper. The appellee, however, to show that the company had been doing business, offered this proof tending to show that the appellant company was making collections upon these old notes or obligations, which had been, prior to that time, given to the Inter-Southern Life Insurance Company, and which had been taken over by the appellant.

Upon trial of the case two witnesses testified that early in January of 1933, a Mr. Woods came to Gurdon, where the Mosleys lived, and had with him this premium note above-mentioned and collected the same from Mr. Mosley. The witnesses were not positive, but thought Mr. Woods' initials were S. C. They testified most positively that he represented himself to be the agent or representative of the Kentucky Home Life Insurance Company.

If this alleged fact of the payment of this note be conceded to be established by the proof and as found by the verdict of the jury, then this case ought to be affirmed; otherwise it must be reversed. The question of whether the note was presented and paid is one that was sharply disputed, and, if there is any substantial evidence to support the finding of the jury, the verdict would be binding and conclusive upon us, although this testimony is far from satisfactory to establish the facts contended for, even if the testimony offered were competent for the purpose for which it was offered.

Several witnesses testified by affidavit, upon supplemental motion for new trial, on account of newly-discovered evidence, that the note had constantly been in the files of the appellant company, at its home office in Kentucky, had not been taken therefrom by Woods or any one else; that it had not been sent to Arkansas for collec-

tion at the time witnesses alleged they saw it paid, but this proof comes somewhat late, and it appears to us it must have been available at the time of the trial of the cause, as S. C. Woods was there and testified in the case, and for that reason we give little consideration to this supplemental motion for a new trial, though the evidence set up is perhaps a correct statement of the facts.

Ray Mosley, son of the insured, and Dick Jackson, attorney, who had at one time represented the insured, testified upon trial of the case, that they were present in January, when the man named Woods collected this note and say that he gave a receipt for the money paid, and that the receipt has now been lost; that he did not deliver note upon payment, but said it would have to be taken back to Little Rock on account of suit pending there. Payment was made, however, by Mr. Mosley to Woods in their presence. Ray Mosley got about $20 of the money, which he loaned his father for the purpose of this payment, from the Gurdon Lumber Company, and says that his father got some money also from the Gurdon Lumber Company for the purpose of making said payment.

These facts were sharply disputed by cashiers or bookkeepers of the Gurdon Lumber Company, who say that no such funds were advanced, either to the elder Mosley or to his son, but the jury found against this contention. In addition, the verdict of the jury was approved by the trial judge, who saw all the witnesses and heard them testify.

However, there was one fatal defect in these matters as presented in this case. The only evidence in this entire record about this payment is the testimony of Dick Jackson and Ray Mosley, and the only evidence that payment was made to any agent or officer of the insurance company is their testimony to the effect that the said collector, Woods, represented himself to be the agent of the Kentucky Home Life Insurance Company. There is no proof of agency, aside from the alleged declarations of collector Woods.

It is true that Jackson and Mosley had available a letter from S. C. Woods, written from the home office of the company to Mosley, sometime prior to his death, in regard to his insurance. Neither one of these parties was actually sure that the initials of the alleged agent or collector were S. C., but it may be assumed, for the purpose of this opinion, at least, that S. C. Woods was the one they meant to designate as the agent collecting the money. S. C. Woods, however, was called as a witness, that is to say the S. C. Woods, who wrote the letter in regard to the insurance policy. He testified that he had worked for a time in the home office of the company at Kentucky and had later been sent to Florida for the company, and that he had not collected any money upon this note. He stated in fact that he had never been in Arkansas and was not in Arkansas at the time of the alleged collection of the note.

Dick Jackson and Ray Mosley, present as witnesses, did not dispute this statement of S. C. Woods. His statement is uncontradicted and undisputed.

Then it must appear that whatever payment was made, if one were in fact made, was made to some other Woods. If it were made to S. C. Woods, Jackson and Mosely would have been able to identify him as the man who was present, received the money and gave the receipt and kept the note. There is no proof that any of this money, alleged to have been used to pay this note, was ever received at any office or by any officer of the appellant company.

We cannot conceive that Ray Mosley and Dick Jackson mean to infer that the S. C. Woods, present and testifying, was the collector. They did not say so directly or inferentially.

According to these witnesses, Mr. Mosley and his son went to Mr. Jackson for advice before making payment upon this note. It is not easy to understand how Mr. Jackson, who is a practicing attorney, suffered himself to fall into an error or belief that this note was an outstanding obligation. According to the note and its terms and conditions, and according to the policy, the note had already been settled by the application of whatever re-

mained of the reserve upon this policy. It was not such an obligation that it could have been reduced to a judgment against Mosley. The most favorable theory, however, of which this case is susceptible is the suggestion that, according to their testimony, the insurance company was willing to revive the lapsed policy and put it in force and effect upon the payment of the amount of money represented by the note. If that be the theory upon which Jackson advised his client, then the authority of the agent collecting the money must be established as well as his agency.

The law applicable to this case is well settled and is not difficult of application here. We think the statement of S. C. Woods, who testified in this case, is undisputed. He was not the one who presented the note or collected the money. He is the only Woods whose name appears in the record, who presumptively may have had any such authority. This testimony of Woods should not have been ignored. *St. L. I. M. & S. Ry. Co.* v. *Ramsey,* 96 Ark. 37, 131 S. W. 44; Ann. Cas. 1912B, 383; *St. L. I. M. & S. Ry. Co.* v. *Spillers,* 117 Ark. 483, 175 S. W. 517; *Walnut Ridge Merc. Co.* v. *Cohn,* 79 Ark. 338, 96 S. W. 413.

The remaining question as to proof of agency and authority of the agent by his own declarations is not new. The unbroken line of authorities in this State is to the effect that neither agency nor authority of the agent can be established by proof of the declarations of such alleged agent. *Daly* v. *Arkadelphia Milling Co.,* 126 Ark. 405, 413, 189 S. W. 1053. (See authorities there cited to support the text.) *Turner* v. *Huff,* 46 Ark. 222.

Therefore we must say that since there is no proof that any of the money arising out of this alleged payment of the note was ever received by the insurance company, or any of its officers, and there is no competent evidence of payment of the note to any one authorized to receive it, such payment as may have been made, if any, was not a payment to the insurance company, and would not operate to revive the lapsed policy, and the judgment rendered upon this theory was therefore erroneous.

The case has been thoroughly developed with every opportunity to present all available proof.

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

JOHNSON, C. J., and HUMPHREYS, J., concur.

JOHNSON, C. J., (concurring). I concur only in the result reached by the majority. The law is, as I understand, that one who presents for payment a promissory note and delivers possession thereof to the maker has *prima facie* authority in the premises, but, when delivery of the instrument is not made to the maker, the presumption does not follow. The true rule is stated as follows in 2 C. J., p. 624, § 260.

"In the absence of actual authority, an agency to receive payment upon a note or security can be implied only where the one assuming such authority has possession of the instrument, and capacity to deliver the same upon payment, etc."

The majority opinion does not differentiate in this respect, and for this reason I cannot concur therein.

[redacted]

ARKANSAS NATURAL GAS CORPORATION *v.* BROWNE.

4-4110

Opinion delivered January 27, 1936.

[redacted]

Buzbee, Harrison, Buzbee & Wright, for appellant.

J. H. Lookadoo and *Lyle Brown,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $3,000 rendered against appellant in favor of appel-

lee in the circuit court of Clark County for an injury received by appellee in falling over a small rod five-eighths of an inch in diameter protruding from the ground in appellee's back yard, which rod had been installed by appellant many years prior to the injury to hold a guy wire attached to one of its poles erected on the street line of an adjoining street. The rod was imbedded in a small concrete foundation under ground to securely hold it. One end of the guy wire was fastened to the rod and the other to the pole at the time the rod was installed. The rod was about eighteen inches long and bent over toward the street. The picture which was taken and introduced in evidence shows that it was three or four inches above the ground, but appellee testified that at the time he caught his foot under it and fell, "it was kind'o mashed down in the grass" and not standing up prominently as reflected by the picture. The guy wire had been disconnected from the rod and pole from seven to ten years before the injury, and the rod had not been maintained and used by appellant for any purpose for about that period of time. When disconnected and abandoned, it was left standing in the yard. Appellee had occupied the premises for three or more years as the tenant of his daughter-in-law when he was injured. Appellee's wife had attended to mowing the lawn during the time he had lived in the house. She employed a colored man from time to time to mow the lawn. Appellee testified that he would come to and from his home by the way of his garage, and that he had never observed the rod in the ground until he caught his foot under it and fell on the evening of January 28, 1935, as he was going from the street across to his garage to see if some one was stealing gas out of his car.

Upon the conclusion of the evidence, appellant requested an instructed verdict upon the ground that no liability was shown against it under the facts stated above. The court refused to give the instruction and submitted the issue of liability to the jury. The court erred. Under the law as applied to the facts, appellee, as a reasonably prudent man in the exercise of ordinary care, should have discovered the existence and location

of the rod in his small back yard during the long period of time he occupied the premises. The rod was not concealed, and could have been seen by a casual observer. He was guilty of contributory negligence in not discovering it long before he did.

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