ROOT REFINING COMPANY *v.* BROOKS.

4-4088

Opinion delivered January 13, 1936.

Mahony & Yocum, for appellant.

Marsh & Marsh and *W. E. Patterson* and *W. H. Rector,* for appellee.

SMITH, J. D. S. Brooks was on September 15, 1925, the president of Root Refineries, Inc., a Louisiana corporation, having its principal office at Shreveport in that

State. Brooks maintained an office at El Dorado in this State where the company's refinery was located. On the date mentioned, Brooks purchased an oil and gas lease from Harry Ezzell, covering a forty-acre tract of land in Union County. The consideration for the lease was the sum of $40,000 of which $20,000 was to be paid in money the balance in oil, "if as and when produced." Of the money payment, $5,000 was in cash paid by a draft on the corporation. The balance of the money payment was evidenced by three notes for $5,000 each, due respectively thirty, sixty and ninety days after date, and all bearing interest at the rate of 7 per cent. per annum from date until paid. The testimony is somewhat confusing as to whether the original lease was to Brooks individually or to him as trustee. Ezzell testified that the lease was made to Brooks as trustee, but that he understood that the lease had been bought for the corporation of which Brooks was president. He testified, however, that he required Brooks to sign the notes individually and not as trustee, and this was done.

The general office at Shreveport was in charge of D. P. Hamilton, who was the vice-president of the corporation. It is certain that Hamilton was displeased with the purchase, and that Brooks was so advised. The first note due October 15, 1925, was not paid until November 7, 1925, and the draft drawn in its payment made no reference to the interest which had accrued thereon. Brooks does not, however, appear to have taken up the note when he drew the draft covering it.

Brooks testified that, when he saw Hamilton's displeasure, he told Hamilton to charge the purchase price to his (Brooks') account, but Hamilton declined to do so and told Brooks to forget it. The remaining two notes were not paid. It appears that Ezzell was satisfied with Brooks' individual liability as the maker of the notes, although Ezzell testified that he considered the corporation secondarily liable, as the lease had been purchased for its account by its president. Ezzell does not appear to have addressed any demand for payment to the corporation itself at its home office in Shreveport, although he

frequently discussed the matter with Brooks personally at El Dorado.

The lease required that a well be drilled within ninety days from September 15, 1925. The lease was not transmitted to the corporation, nor was it placed of record, nor was it assigned by Brooks to the corporation. No well was drilled. Thus the matter rested for nearly two years and until September 15, 1927, at which time Ezzell executed and delivered to Brooks as trustee, a second lease which eliminated the drilling requirement. This lease was not assigned or placed of record, and the Shreveport office appears to have had no information about it until March 29, 1928, at which time the following letter was received from Brooks:

"El Dorado, Arkansas, March 29, 1928.

"Root Refineries, Inc.,
"Commercial National Bank Building,
"Shreveport, La.

"Gentlemen:

"On September 15, 1925, I purchased under the name of D. S. Brooks, trustee, 40 acres from Harry Ezzell, Jr., situated in the NE¼ of the NW¼ of section 18, township 17 south, range 17 west, Union County, Arkansas, for the consideration of $20,000 cash and notes, and $20,000 out of oil, as set forth in oil and gas lease attached.

"Our records show that we have paid $10,000. Mr. Ezzell still holds two notes for $5,000 each, which I have agreed to pay at the rate of $400 monthly, commencing this month and continuing over the ensuing 24 months. Hereafter send remittances to Harry Ezzell, Jr., 511 Exchange Bldg., between the 20th and 25th of each month.

"The lease attached is the same as the original dated September 15, 1925, except that it runs to September, 1931, instead of 1930.

"If a well is not started on this lease by September 15, 1928, see that the $40 a year rental is taken care of,

as set forth in last paragraph, first page of said oil and gas lease.

"Yours truly, Dan Brooks,
"President."

Thereafter the corporation made regular monthly remittances of $400 each to Ezzell. Checks covering these payments were accompanied by vouchers stating the account upon which the payment was made. The 25th remittance was made under date of May 24, 1930, and contained this indorsement: "This check is given in payment of final payment on account of purchase of lease covering NE¼ of the NW¼, section 18, township 17 south, range 17 west, Union County, Arkansas."

Ezzell testified that he received this check on May 26 and held it until June 3 before writing the corporation demanding the payment of interest. Before depositing the check for collection, he made the following notation on its back: "Payment on account but not final payment." The check was duly paid. No well was ever drilled on the lease in question, but the drilling of dry wells on adjacent lands demonstrated that the land was without value so far as the production of oil and gas is concerned.

At the time the last $400 payment was made, the corporation had been reorganized, and Hamilton had succeeded Brooks as president.

Ezzell sued Brooks individually on the original purchase money notes after allowing credit for the money he had received. Judgment was recovered by default without making the corporation a party defendant. Brooks did not pay this judgment and it is alleged that he is now insolvent.

On December 5, 1933, Brooks filed suit against the corporation in which he alleged that as the president of and as agent for the corporation he had purchased the lease, giving his individual notes for the benefit of the corporation. He alleged that a judgment had been recovered by Ezzell against him in the sum of $3,135.28, as the balance on said notes remaining unpaid by the said Root Refining Company, and he prayed judgment

against that company. "* * * in extinguishment and in satisfaction of said judgment against him so obtained by Harry Ezzell * * *." An intervention was filed in this cause by Ezzell who prayed that he have, "* * * independent judgment jointly and severally against the plaintiff, D. S. Brooks, and against the defendant, Root Refining Company for the balance due upon the aforesaid notes."

The relief prayed was granted, and a judgment and decree was rendered in Ezzell's favor against both Brooks and the corporation from which is this appeal.

For the affirmance of this decree, it is insisted that there was no dispute or controversy as to the liability of the corporation, nor as to the amount thereof, and that Ezzell had the right therefore to consider the $400 payments as mere payments on account and to ignore the recital of the 25th check that it was tendered as payment in full.

The law applicable to the fact herein recited has been frequently declared, one of the most recent cases on the subject being that of *Massachusetts Mutual Life Insurance Company* v. *Peoples Loan & Investment Co.*, 191 Ark. 982, 88 S. W. (2d) 831, which cited our leading cases. It was there said: "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" (Citing cases).

It was there also said that it was not necessary that the dispute or controversy should be well founded, but that it was necessary that it should exist in good faith.

Appellee insists that, there never having been any controversy about the amount due Ezzell, he was justified in assuming that the accounting department of the corporation had placed the notation of the final payment on the check by mistake, and that he had accepted the check believing that those words had been placed on

it by mistake, and that he so advised the corporation in ample time for it to protect itself.

We do not concur in this view. Ezzell was fully warranted in assuming that Brooks did not question his personal liability, and he testified that he looked to Brooks primarily for his money, but he considered the corporation secondarily liable. He must have known of the friction between Brooks and the accounting department of the corporation. The failure for a period of two years to make any payment or settlement would alone apprise him of that fact. The letter of March 29, 1928, set out above, lacks but little if anything of being a novation. A new lease was executed and new terms of payment provided. If this writing expressed the new agreement as it purported to do, it is apparent that an additional payment of only $10,000 was provided for, and this was to be distributed over a period of 25 months. Evidently no account was taken of the interest and no provision was made for its payment. It is certain that 25 payments of $400 each would not pay both principal and the accrued and current interest, and yet only 25 payments of $400 each were provided for. It appears that each payment referred to the new indebtedness and it is certain that the 25th payment professed to be in full discharge of the balance remaining due. Ezzell knew that it was so intended, for he wrote upon the check that it would not be so accepted. He had no right to assume that a mere mistake in accounting had been made as a copy of the letter of March 29, *supra*, had been furnished him. There was no mistake. Ezzell had the option of accepting the check as tendered or of returning it. He did not return nor has he tendered the return of the proceeds of the check or of any of the other 25 payments. He made his election and is bound by it.

The decree will therefore be reversed, and, as the cause has been fully developed, it will be dismissed.

WADE *v.* WADE.

4-4096

Opinion delivered January 13, 1936.

Jeff Bratton, for appellant.

J. C. Young, Jr., for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the Eastern District of Craighead County adjudging to appellee the sum of $2,885 received by appellant from the Federal Government on two insurance policies of war risk insurance issued to T. J. Wade by the Government. The facts are undisputed, as reflected by the following statement signed by the attorneys for appellant and appellee and adopted by the trial court as the bill of exceptions in the case:

"Frank Wade, now deceased, had a son, T. J. Wade, who held two Government insurance policies of war risk insurance.

"T. J. Wade died in 1918, and the insurance was thereafter paid to his father, Frank Wade, in accordance with Federal statutes, until March, 1934, at which time the father, Frank Wade, also died, leaving surviving him his widow, Mrs. Pink Wade; three sons, F. W. Wade, Eulus Wade and France Wade, and one daughter, Mrs. Alex Gamble. The widow, Mrs. Pink Wade, is not the mother of T. J. Wade, deceased, or the three other sons and the daughter of Frank Wade, deceased. After the

death of Frank Wade his widow, Mrs. Pink Wade, administered on his estate, and F. W. Wade administered upon the estate of his brother, T. J. Wade, deceased.

"At the time of the death of Frank Wade, the father of F. W. Wade, Eulus Wade, France Wade and Mrs. Alex Gamble, there remained unpaid of the insurance policy payable by the Government under the policies issued to T. J. Wade the sum of $2,775. Frank Wade, before his death, made a will in which he willed his wife, Mrs. Pink Wade, the insurance payable under the policies of his deceased son, T. J. Wade. This will was contested both in the probate court of the Eastern District of Craighead County and also the circuit court of the Eastern District of Craighead County, and on the 24th day of September, 1934:

"The matter was submitted to a jury in the circuit court to answer the following interrogatory: 'Was the testator of sound and disposing mind at the time of the execution of the will?' The answer to that interrogatory by nine jurors was 'Yes'; and upon that verdict the circuit court ordered that the will of Frank Wade, deceased, be admitted to probate and recorded as the last will of Frank Wade, deceased.

"F. W. Wade, administrator of the estate of T. J. Wade, received from the Federal Government the insurance payable upon the policies issued to T. J. Wade, deceased, in the sum of $2,775, and Pink Wade, executrix of the estate of Frank Wade, deceased, brought suit in the circuit court for the Lake City District of Craighead County against F. W. Wade, administrator of the estate of T. J. Wade, deceased, to recover the amount of said insurance, and on the 25th day of February, 1935, the circuit court rendered the following judgment, to-wit:

"On this the 25th day of February, 1935, this cause coming on to be heard, the plaintiff appearing by an attorney, and answered ready for trial. Thereupon the cause was heard before court sitting as judge and jury, and, having heard the evidence adduced and argument of counsel, it is the opinion of the court that the claim of the plaintiff in the sum of $2,885 against the estate of T. J. Wade be allowed.

"It is therefore ordered and adjudged by the court that the plaintiff do, have and recover of and from the defendant the sum of $2,885, together with all her costs herein expended for which execution may issue.

"(Signed) G. E. Keck,
"Circuit Judge.

"From the foregoing judgment, this appeal is taken and the question presented upon appeal in this cause is: Whether the insurance payable at the death of Frank Wade should be paid to the administrator of the estate of T. J. Wade, deceased, to be distributed by said administrator to the brothers and sister of T. J. Wade, deceased, F. W. Wade, Eulus Wade, France Wade and Mrs. Alex Gamble, or should it have been paid to Mrs. Pink Wade, executrix of the estate of Frank Wade, deceased, who had been drawing the insurance as the father of T. J. Wade, deceased? The said Mrs. Pink Wade being named as beneficiary under the will of Frank Wade, deceased.

"It is agreed by the attorneys of record for the plaintiff and the defendant that this statement of facts shall constitute a bill of exceptions, and that this cause may be submitted in the Supreme Court upon this agreed statement of facts, the same being treated as a bill of exceptions.

"Witness our hands on this, the 20th day of June, 1935.

"J. C. Young, attorney for Mrs. Pink Wade, executrix of the estate of Frank Wade, deceased.

"(Signed): Jeff Bratton, attorney for F. W. Wade, administrator of the estate of T. J. Wade, deceased.

"The above and foregoing agreed statement was this day presented to me for approval as a bill of exceptions, and after due examination thereof, I hereby approve of the same to be used as a bill of exceptions in the above-entitled cause.

"Given under my hand on this, the 22nd day of June, 1935.

"(Signed) G. E. Keck, Judge of the Second Judicial District."

T. J. Wade, the insured veteran, died intestate in 1918. The father, Frank Wade, died in 1934. In the interim, Frank Wade received from the United States Government the monthly or installment payments accruing under the policies pursuant to the law governing the United States Government war insurance. Upon his death, the balance due under the policies was paid to appellant.

The question to be determined on this appeal is, to whom appellant should pay the amount received by him from the Government? The intestacy statute of this State applicable, is the second subdivision of § 3471 of Crawford & Moses' Digest.

Under this statute, the father of the intestate, Frank Wade, was his sole and only heir in 1918 when he died. If the estate of the intestate is to be administered as of that date, his father acquired a vested estate in the balance due under the policies and could will it to whomsoever he pleased. His father chose to will it to his wife, Mrs. Pink Wade, appellee herein. This will was contested on the ground that Frank Wade was of unsound mind at the time he executed his will, but the will was upheld by the court and duly probated. The only question then is as of what date the estate should be administered, whether of the date of the death of the intestate or of the date of the death of his father, Frank Wade. This question was considered and decided in the case of *Singleton* v. *Cheek,* 284 U. S. 493, 52 S. Ct. 257, 81 A. L. R. 923, on writ of certiorari to the Supreme Court of the State of Oklahoma. The case referred to is similar to the case at bar. The Supreme Court of the United States said (quoting syllabi 2 and 3):

2. "War risk insurance installments, whether accruing before or after beneficiary's death, became assets of estate of insured on instant of his death (World War Veterans' Act 1924, § 303, as amended by act March 4, 1925, 38 USCA, § 514).

"Such installments became assets of estate of insured to be distributed to his heirs in accordance with intestacy laws of State of his residence, in view of World

War Veterans' Act 1924, § 303, as amended by act March 4, 1925, c. 553, 43 Stat. 1302, 1310 (38 USCA, § 514)."

3. "Heirs of insured soldier entitled, on his death, to war risk insurance installments, should be determined as of date of insured's death, not date of beneficiary's death (World War Veterans' Act 1924, § 303, as amended by act March 4, 1925, 38 USCA, § 514)."

No error appearing, the judgment is affirmed.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE *v.* DE ARMAN.

4-4095

Opinion delivered January 13, 1936.

Sydney F. Keeble and *Cravens, Cravens & Friedman,* for appellant.

Warner & Warner, for appellee.

BUTLER, J. Earl B. De Arman procured a policy of insurance from the appellant company for a weekly pre-

mium of five cents. The policy provided, among other things, for the payment of the sum of $1,000 in the event the insured should be accidentally killed in the manner set forth and limited by the policy.

The applicable provisions are as follows: "Or if the insured shall by collision of or any accident to any * * * public automobile, public stage or public bus which is being driven or operated at the time by one regularly employed for that purpose, and inside of which the insured is legally traveling; or by collision of or any accident to any private horse-drawn vehicle or private motor-driven automobile inside of which the insured is riding or driving, or any motor-driven truck inside of which the insured is riding or driving, * * *; provided that in all cases referred to in this paragraph there shall be some external or visible injury on the said vehicle * * * of the collision or accident, provided that an injury to the tire on such vehicle shall not be considered an injury to the vehicle."

The case was submitted to the court upon an agreed statement of facts, and the court found in favor of, and rendered judgment for, the appellee in the amount named in the policy.

The pertinent facts are that Earl B. De Arman, at a time when the policy was in full force and effect, was killed as a result of bodily injuries occasioned solely by external, violent and accidental means. Appellee was the beneficiary named in the policy. At the time of the fatal injuries, the insured was an employee of England Brothers Truck Line, which was, and is, a duly and lawfully authorized public carrier of livestock and other property by motor vehicles operating in the state of Arkansas, and, at the time of his death, the insured was acting in line of his duty. He, with a fellow-servant, was engaged in operating a 1½-ton Chevrolet truck equipped with a body suitable and of the usual type for transporting livestock. In operating the truck when loaded with livestock, two employees were required, who alternated in driving the truck and attending to the animals loaded therein. The truck had a runway or extension on the out-

side of the body which extended along either side thereof level with the floor. This was the means provided for tending the animals loaded in the truck. Upon this extension the employee tending the stock could walk or stand while the truck was in motion.

On October 25, 1934, the truck was loaded with eleven head of horses and mules which were being transported from Oklahoma to Dermott, Arkansas, for delivery. All of the animals loaded in said truck were tied to stakes in the sides of the body by halter ropes with their heads alternately extending outward toward the outside of the body on each side of the truck. The insured was required to use said runway while the truck was moving, in the discharge of his duty with respect to the animals, and was so using the runway at the time he was fatally injured.

At a time when insured's fellow-servant was driving the truck one of the mules started a disturbance, and it became necessary for the insured to get out on the runway to attend to him. The truck was being driven at a slow rate of speed and was stopped while the insured got out on the runway to quiet the mule. While the insured was thus engaged, the truck was again started, and it passed under the limb of a tree extending partially over the highway. As the truck was passing under this limb the head of one of the mules came in contact with it, cutting a gash in the mule's head, and causing it to break the halter by which it was fastened to the side of the body of the truck. This occasioned a disturbance and shifting of the load within the body of the truck which resulted in the insured's falling or being thrown from the truck and killed.

There was no collision of any part of the truck with the limb of the tree or any external or visible injury on said truck of collision or accident thereto, but immediately after the accident one end of the halter rope which was broken was found tied to the body of the truck, the other end remaining upon the mule which had received the cut, and some of the hair from the mule's head was stuck to the limb of the tree.

It is the contention of the appellant that from this state of facts it appears that there was no collision of, or accident to, the truck, nor was there any external or visible injury on the truck as required by the provisions of the policy; that for this reason appellant is not liable for the accidental death of the insured. It is the theory of appellee that, notwithstanding certain clauses of the policy providing for a strict and literal construction, the policy should be liberally construed under settled doctrines of this court, and that, when so interpreted, the facts are sufficient to establish an accident to the truck and a visible mark thereof on it. For authority for this construction, reliance is placed on the cases of *Great American Casualty Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775; *Gilbert* v. *Life & Casualty Ins. Co.,* 185 Ark. 256, 46 S. W. (2d) 807; *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Washington Fidelity Nat. Ins. Co.* v. *Anderson,* 187 Ark. 974, 63 S. W. (2d) 535.

In the case first cited the policy involved indemnified the insured for accidental injury "while actively engaged in farming by actual contact with, and while operating * * * a binding machine." At the time of the injury the insured was repairing or readjusting a binding machine, and while so engaged a hammer, which was carried on the machine to be used in making repairs, fell upon the insured's foot, resulting in the injury. The court found that, as the repair of the machine was a necessary part of its operation and the hammer was an instrument necessary for purpose of repair, the insured, within the meaning of the policy, was engaged in the operation of the machine at the time of his accidental injury.

In *Glibert* v. *Insurance Co., supra,* upon which case appellee places the greatest reliance, an injury was accidentally suffered by the insured which was occasioned by the slipping of a cable fastened at one end to a tractor and looped around a stump at the other. When this cable was drawn taut by the tractor, the loop slipped from the stump, causing the cable to whip violently to one side, striking and killing the insured. The policy insured

against accident resulting from the striking of the insured by a "vehicle propelled by steam, cable, electricity, * * * gasoline, etc." The court held that the cable attached to the tractor was to be considered as a part of it, and that the injury came within the coverage of the policy, just as if the insured had been run over by the wheels of the tractor or had come in collision with any other part of it.

In *Travelers' Protective Ass'n* v. *Stephens, supra,* there was testimony to the effect that the insured was accidentally cut while acting as a peacemaker. The court submitted to the jury, on conflicting testimony, the question of whether or not the injury received was an accident for which the insurer would be liable under the provisions of a policy insuring against injury occasioned by external, violent and accidental means.

In *Washington Fidelity Nat. Ins. Co.* v. *Anderson, supra,* the policy involved provided for liability of the insurer on two contingencies; (a) where the injury produced total, immediate and continuous disability from the date of the accident, and (b) where the injury would make a visible contusion or wound on the exterior of the body. The insured suffered ptomaine poisoning which immediately and totally disabled him and resulted in his death a short time thereafter. The court held that the insurer was liable, as these facts brought the case within the contingency first mentioned.

We have reviewed these decisions because of the earnest insistence, supported by able argument of counsel for the appellee, that these cases are authority for the position that the blow to the mule's head constituted a collision of, or an accident to, the truck, and that the fact that the tie rope was broken, one end remaining fastened to the side of the body of the truck, was sufficient to establish an "external or visible injury on the said vehicle * * * of the collision or accident." We give to the policy a liberal construction, but we are not justified thereby in giving to the language of the contract any but its natural meaning and the interpretation which the ordinary person would put upon it. It is doubtful whether

the cases relied on justify the contention made by appellee.

In order to establish liability, however, there must be, not only a collision of, or accident to, the truck and an external or visible injury thereon, but the accident, according to the plain and unequivocal language of the contract, must have occurred at a time when the insured was inside of the vehicle riding or driving.

Appellee cites us to a number of cases where the courts have held that one injured while on the running-board of an automobile or other motor vehicle was "riding in" such vehicles within the meaning of policies insuring against accident to the vehicle "in which the insured is riding or driving." Other cases are cited which define the word "in" as equivalent to the word "on" and fix liability under policies providing for liability for accident while the insured is riding "in" a vehicle when in fact he is riding "on" it. Still other cases are cited where the policy insured against accident while riding *in* a passenger car and the insurer was held liable for an accident while the insured was temporarily on the platform for a necessary purpose. In none of these cases, however, as suggested by counsel for appellant, is the phrase "inside of which" synonymous to "outside of which." So far as our investigation extends "inside" has never been held to mean "outside." In *New Amsterdam Cas. Co.* v. *Rust,* 164 Tenn. 22, 46 S. W. (2d) 70, the policy limited liability for accident while the insured was "actually riding in an automobile." The court held that the use of the word "actually" meant "in fact" and added strength to the idea that the insured must have been inside the automobile at the time of injury in order for liability to attach.

So in the case at bar the insurer was not content with the preposition "in," but used the more emphatic word "inside," which, in its ordinary meaning, is the opposite of "outside." Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people. *Martin* v. *Mutual Life Ins. Co.,* 189 Ark. 291, 71 S. W. (2d) 694. It is a matter of

common knowledge that standing on the running-board of a car or truck while it is in motion is more than ordinarily dangerous, and, when the emphatic word "inside" is used, it certainly can mean nothing else but that the insured must be inside the car or truck, in the place ordinarily occupied driving or riding therein. Such was the conclusion of the court in *Morris* v. *Peyton,* 148 Va. 812, 139 S. E. 500, and such is the weight of authority. 5 Couch, Cyclo. of Ins. Law, p. 4045. We recognize that in all proper cases the language of insurance contracts should be so construed as to fix liability for injuries arising from accidents, but, as is said in *Mitchell* v. *German Comm., etc., Co.,* 179 Mo. App. 1, 161 S. W. 362, we are not authorized to lay violent hands upon and distort the plain and obvious English in which a contract is written so as to include a risk clearly excluded by the insurance contract.

There are other questions presented which we need not discuss, as it follows, from the construction we have placed upon the contract, that the judgment of the trial court must be reversed, and the case dismissed. It is so ordered.

JOHNSON, C. J., dissents.

UNION SAW MILL COMPANY *v.* HAYES.

4-4093

Opinion delivered January 13, 1936.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

J. V. Spencer and *Marsh & Marsh,* for appellee.

MEHAFFY, J. This suit was brought by appellee against the Union Saw Mill Company and the Crossett Lumber Company for damages for an injury suffered on October 25, 1933. The court sustained a motion to quash service as to the Crossett Lumber Company, and the case proceeded to trial against the appellant alone.

The appellee alleged that a long time prior to the time of his injury he, with other employees of the Union Saw Mill Company, had been engaged in cutting right-of-way, making cross-ties and cutting wood for the Union Saw Mill Company; that on October 10, 1933, the superintendent of the Union Saw Mill Company had advised its employees that its mill at Huttig had burned, and that they would go to work cutting chemical wood to be used by the Crossett Lumber Company, and appellee and other employees were carried to and from their homes at the Union Saw Mill camp to the point where said work was to be done; that the foreman of the Union Saw Mill Company directed the manner of their working, and J. R. Withers, foreman of the Crossett Lumber Company, directed them as to the place where they should work, and the kind of timber they should cut; that he and other members of the crew were under the joint direction and control of the saw mill company and the Crossett Lumber Company; that on October 25 appellee and Clem Colvin, another employee of the Union Saw Mill Company, were directed to cut down a large post oak tree about 18 inches in diameter that was leaning, and after making preparations for felling the tree, they started sawing, and because the tree was leaning, the appellee instructed Colvin, who was handling one end of the crosscut saw, to hold the saw back and not cut his corner of the tree off for the reason that, if he should cut his corner, it would, on account of the tree being leaning, cause the tree to kick back over the stump, and would be dangerous; Colvin agreed to follow the instructions of appellee, but did not do so, but sawed his side of the tree completely through, and this caused the tree, in falling to kick back, strike plaintiff, injuring his leg.

The complaint describes his injuries and the time he was in the hospital, and alleges that his injuries are permanent.

The Union Saw Mill Company filed answer denying the material allegations of the complaint, and alleging that appellee was working for the Crossett Lumber Company and not for the appellant. It alleges that his injuries were received because of his own negligence, and that he assumed the risk.

In the view the court takes of this case, it is unnecessary to copy the evidence or to discuss any questions except the question of the negligence of the defendant and the assumption of risk by appellee,

The appellee testified that, the morning he got hurt, he and another servant, Clem Colvin, started to cut a leaning tree; they sawed it on one side and blocked it out; the tree was sagging to the left; he told Colvin to hold his left corner to keep it from splitting, and he said he would; Colvin sawed his corner off first, and when it fell it struck a snag and jumped backwards; if he had held his corner, the tree would have fallen in a clear place; when the tree kicked back it caught his foot, and they had to saw off a part of the tree before he could get his foot loose. No one told them how to do their work, and appellee knew as well as any one, how to cut down a tree. There were no bushes or undergrowth where the tree was cut except the snag which was about eight or ten feet away, and about ten or twelve feet high; the tree bent to the left of the snag. In sawing the tree down appellee had his left hand to the tree; the tree was leaning to the left of the snag, but, if Colvin had not cut off his corner first, it would have fallen to the right of the snag; the tree hit the snag and kicked back on appellee. There was a verdict and judgment for the appellee, and the case is here on appeal,

There is considerable testimony as to whose employees appellee and Colvin were, and testimony as to the extent of appellee's injury. The writer is of opinion that the facts testified to by the appellee were sufficient to require the submission of the case to the jury, but a majority are of the opinion that the evidence does not

show any negligence on the part of the Union Saw Mill Company, and that the evidence shows that appellee assumed the risk.

Appellant calls attention to the case of *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. (2d) 228. In that case the court said: "No liability exists against appellants and in favor of appellee under facts and circumstances here presented. It is a fundamental rule in the law of negligence that liability exists when the perils of the employment are known to the employer but not to the employee, and no liability is incurred when the employee's knowledge equals or surpasses that of the employer."

In support of this declaration of law, the court cites 18 R. C. L. 548; *Arkansas Smokeless Coal Co.* v. *Pippins,* 92 Ark. 138, 122 S. W. 113. The court further said in that case: "The uncontradicted testimony here shows that the employer had no superior knowledge to that of employee in reference to nature of the stone being used, therefore no duty to perform the neglect of which would create liability."

The court also said in the same case: "Moreover, it has been the long-established doctrine of this jurisdiction, that an employee assumes all the ordinary risks and hazards incident to his employment."

A majority of the court are of opinion, not only that no negligence of the appellant is shown, but also that the appellee had knowledge of all the facts and assumed the risk. For these reasons the judgment of the court is reversed, and the cause dismissed.

BRYANT *v.* EDGMON.

4-4105

Opinion delivered January 20, 1936.

J. H. Brock, G. O. Patterson and *J. F. Loughborough,* for appellants.

Ben E. McFerrin, A. J. Russell, Jr., and *C. A. Fuller,* for appellees.

McHaney, J. Appellant, J. M. Bryant, is the father of the other two appellants, Leslie E. and Charles H. Bryant. They are engaged in the stave business as partners under the firm name of J. M. Bryant & Sons Company. They operate a mill at Clarksville where they reside, and also have mills at other places. At the time of the occurrence of the matters in this controversy, they were engaged in the business of manufacturing, and buying on the market, staves for beer kegs and barrels.

Early in 1933, appellee Edwards had cruised the white oak timber on a tract of land in Newton County, containing 1,806 acres, property of the Himmelberger-Harrison Lumber Company of Cape Girardeau, Missouri, for a Mr. Sparks who was contemplating buying the white oak timber thereon at a price made by the owner of $10 per acre. Appellee Edgmon was interested in the sale to Sparks as he thought he might get to work it when it was cut. Sparks declined to purchase because he was unable to finance the proposition. Thereupon appellees undertook to interest appellants in the purchase of the white oak timber. They went to see appellants at their Clarksville office, talked to Leslie Bryant and his father who said they were not interested in the timber, but they

called in Charlie Bryant and he stated that he would like to look at the timber before they turned it down, which he did. Appellees say that in the conversation with the appellants at that time, they proposed that appellants purchase the timber and that they would work it, and the profits would be divided between appellants and appellees on a fifty-fifty basis, that is, according to Edgmon, that he and Edwards would manufacture the finished timber into beer staves. Appellants deny that any such discussion took place regarding the manufacture of the timber into beer staves on a basis of the division of the profits or any other basis. The conversation between the parties regarding the purchase of the white oak timber on said tract occurred a short time prior to February 7, 1933.

After Charlie Bryant had looked at the timber, or a portion of it, for a part of two days, Mr. Sarff, agent for the owner, and appellee Edgmon, went to Clarksville and further negotiations were had with appellants regarding the purchase of the white oak timber. Edwards was not present on this occasion, and it is not contended by appellees that anything was said at this time between the parties regarding the working of the timber by appellees on a profit-sharing basis, except that J. M. and Leslie Bryant both testified that on that occasion Leslie told appellee Edgmon that, if they did purchase the timber, there would be no moral obligation to Edgmon. This was denied by Edgmon. Sarff and appellants could not agree on the time in which the timber was to be removed from the land, he limiting this time to three years, and they asking for seven, and no agreement was reached, and appellee Edgmon went home. Sarff, Leslie and Charlie Bryant drove to the home office of the owner to see if an agreement could be reached regarding the time to remove the timber, with the result that no trade was made for the purchase of the white oak timber, but they did make a trade in which appellants bought the land and all the timber for a consideration of $21,000, and a deed was taken in the name of Leslie E. Bryant on February 7, 1933.

Shortly before March 2, 1933, and nearly thirty days after the purchase of the 1,806-acre tract by appellants, appellees called on appellants at Clarksville and entered into an agreement with them by the terms of which appellees were to sell to appellants all beer staves that appellees made in the next 12 months, at agreed prices. This agreement was reduced to writing on March 2, and signed by Leslie Bryant for appellants and M. L. Edgmon for appellees. This contract did not relate in any way to the cutting of timber on the 1,806-acre tract, and nothing was said at that time by the parties regarding the right of appellees to work the timber on the 1,806-acre tract. After working under this written agreement for several months, it was terminated by mutual consent in the latter part of October, 1933, and a settlement was had between the parties dated November 2, 1933. Appellee Edgmon complained to appellants that he and Edwards had lost money in the performance of the written contract and were unable to pay appellants what was due them. In the settlement, J. M. Bryant voluntarily allowed them increases over the contract price for staves which, together with other increases allowed during the time the contract was being performed, amounted to $6,362.31. After these allowances, the account still showed that appellees were indebted to appellants in the sum of $2,119.13, which Edgmon said they were unable to pay, and Mr. Bryant told him they would cancel it, which was done. In addition to this he gave appellees four mules, two wagons and harness. During this settlement nothing whatever was said by Edgmon or any one else regarding the claim in this litigation.

On October 13, 1933, appellants sold the said 1,806-acre tract of land to the Motor Wheel Corporation for approximately $38,000, which latter company employed Edgmon to cut the white oak timber on said tract into bourbon bolts, which work was completed in the summer of 1934.

On December 27, 1933, this suit was instituted by appellees against appellants in which they alleged that they had entered into a partnership arrangement with appellants on a profit-sharing basis to work the white

oak timber on said tract of land as above stated and prayed judgment in a large sum as being one-half the profits they would have made had they been permitted to cut the timber and that appellants breached the contract by selling the land.

On a trial of the case, the court found that there was a partnership agreement between the parties regarding the purchase of the land and the manufacture and sale of the white oak timber on it, and gave judgment against appellants for one-half the profits which the court determined would have been made from the manufacture and sale of the timber in the sum of $23,597. This appeal is from that judgment.

It is first contended by appellants for a reversal of the judgment against them, that the finding of the court that there was a contract between the parties as claimed by appellees, is against the preponderance of the evidence. The rule in this court in determining where the preponderance of the evidence lies in chancery cases has been many times stated, but in none of our cases is there a better statement of the rule than that by Judge Wood in *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160. After stating the rule in law cases, it is said: "But in chancery causes the procedure is entirely different. When chancery causes reach this court on appeal, they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius.* In determining the issues of fact by this court in chancery causes, no weight is given to findings of fact by the trial court unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. But the issues of fact, as well as law, are tried by this court anew."

Bearing this well-settled rule in mind, as well as also the rule that the burden of proof is upon the appellees to establish all the material allegations of their complaint

by a preponderance of the evidence, we are of the opinion that the finding of the trial court that there was a contract between the parties as contended by appellees is against the clear preponderance of the evidence. It will be remembered that Edwards did not cruise the timber with any view of selling same to appellants, but, on the contrary, he was employed by Sparks and paid by him to do so. Edgmon hoped that if Sparks bought the timber he would get to work it if and when Sparks was ready to do so. When this sale fell through, they both went to appellants to interest them in buying it. They testified that on that occasion they proposed to appellants that if they would buy the white oak timber, they, appellees, would work it into finished beer staves and the profits be divided between appellants and appellees equally. And this in substance is all that they claim was said at that time or afterwards on the subject, and that this proposition was made at a time when the three appellants were present at their office in Clarksville. Appellants, and each of them, deny positively that any such arrangement was mentioned or discussed. Furthermore, both J. M. and Leslie Bryant testified that, when the agent Sarff came to see them about the purchase of the timber with Edgmon, Edwards not being present, Leslie Bryant called Edgmon to one side, while they were out looking at the mill and told him, in the presence of his father, J. M. Bryant, that if they did buy the timber, there would be no moral obligation to Edgmon in the transaction, and that Edgmon agreed. This was denied by Edgmon. Leslie Bryant said that he told Edgmon that, because he and Edwards had come over and talked to them about the tract of timber and that they didn't want any one to feel that they were obligated in any way, "as it is our policy to pay as we go." Sarff did not hear the conversation and did not recall the incident. A witness for appellant, Mr. Phipps, testified that Charlie Bryant told him in January or February of 1933 that appellants had bought the land, and that Edgmon would work it for one-half the profits. He also testified that J. M. Bryant told him in August, 1933, that Edgmon was working the land, and that ap-

pellants were splitting the profits with him. At that time no timber was being worked on said land. Another witness said that Charlie Bryant told him in February, 1933, that if they closed the deal, Edgmon would have all the timber he ever wanted to saw-mill. The testimony of these witnesses in this regard was contradicted by appellants, they stating that they had no such conversation, and the testimony of J. M. Bryant denying that he made the statement that Phipps attributed to him was corroborated by Earnest Deskin and Mrs. L. J. Deskin, who said they heard the conversation between Mr. Bryant and Mr. Phipps, and nothing was said about Edgmon. Another witness, Jack Smith, for appellants, testified that, in a conversation with Edgmon regarding the cutting of the timber on the 1,806-acre tract, Edgmon told him that he did not have any contract on that tract, but, if Bryant worked it, he guessed he would work it. This was denied by Edgmon. In addition to the testimony of the witnesses as above set out, there are several cogent facts and circumstances which are undisputed, and it is proper to take the attendant circumstances into consideration in determining the correctness of the findings of fact made by the chancellor. *Lewis* v. *Brown,* 145 Ark. 492, 224 S. W. 986. It will be remembered that appellants bought the land on February 7, 1933, and it is undisputed that appellees knew of it immediately. A few days before March 2, appellees entered into negotiations with appellants for the cutting of staves which resulted in the written contract dated March 2, 1933. In that contract, appellees agreed to make and deliver to appellants' yards, "such beer staves as you make during the next twelve months." It was not contemplated that any of the staves to be manufactured under that contract were to come from the 1,806-acre tract of land, but from other lands. So it was not possible for appellees to have worked the 1,806-acre tract under the contract claimed by them for a period of twelve months because they had contracted in writing for all of their output for that period of time at prices stated in said contract. Furthermore, it does not seem reasonable that appellants would enter into an oral contract with the appellees for

the manufacture of staves from such a large tract of land owned by appellants, when they were very careful to put another and smaller contract in writing. The substance of the oral agreement as testified to by appellees has been stated. It will be noticed that nothing was said in it about how appellees were to be financed, who would furnish the money for them to operate on, or who would furnish the mill, machinery and appliances with which to cut the timber and manufacture the staves. In addition at the time of the settlement heretofore mentioned, under the contract of March 2, apparently a complete settlement was had between the parties, and it is not contended by appellees that they made any mention of the claim they now make against appellants.

In view of these facts and circumstances, we are of the opinion that appellees are mistaken in contending that they had any enforceable contract with appellants regarding the 1,806-acre tract. They may have mentioned to appellants that they would like to cut the white oak timber and manufacture it into staves for them, and they may have had the hope that they would be permitted to do so, because of their friendly relationship with appellants during many years, and because they brought the matter of the purchase of this tract to the attention of the appellants. We are of the opinion, however, that no contract was ever entered into between the parties,—that there was no meeting of the minds upon any definite and enforceable contract.

We are therefore of the opinion that the findings of the trial court were against the preponderance of the evidence, and the judgment must be reversed and the cause dismissed.

HUMPHREYS, J., dissents.

READER RAILROAD *v.* SANDERS.

4-4094

Opinion delivered January 20, 1936.

Gaughan, Sifford, Godwin & Gaughan and *McRae & Tompkins,* for appellants.

Pace & Davis, Wm. F. Denman and *Tom W. Campbell,* for appellee.

MEHAFFY, J. The appellee filed suit in the Nevada Circuit Court against the appellant, alleging that he was shop foreman and master mechanic, and that, while he was standing on the running board of an engine in the shop on March 21, 1932, a tree fell upon the shop roof, mashing in the sheet-iron roof, and that certain

rafters or pieces of limbs struck him on the head, knocking him from the running board to the floor, where he fell across a carpenter's horse, severely injuring him. He alleged that the injury was caused by the joint and concurring negligence of appellant and Ray Oliver, its agent and servant; that Oliver selected the location for the railroad shop and constructed the same; that there was a large black-gum tree standing near and leaning over the shop, and that prior to the construction of the shop Oliver had raised into position a heavy tank, by means of a block and tackle attached and anchored to said tree by means of a wire cable or chain, which was tied around the tree twenty or thirty feet above the ground; that when the tank was raised the wire cable cut into the tree to such an extent that the cable could not be removed, and it was cut and left embedded in the tree; that the tree was weakened and made dangerous by being cut by the cable; that Oliver's attention was called to the condition of the tree by appellee, and to the danger, and appellee asked Oliver to remove the tree; that a complaint and promise to remove was made about a week or ten days prior to the date the tree fell; that appellee relied on Oliver's order to continue his work and continued his work in the shop under Oliver's promise to remove the tree, and was so engaged when the tree fell and injured him; that his injuries are permanent.

The appellant filed motion to quash service, which was overruled by the court, and Oliver filed motion to make the complaint more definite and certain. This motion was complied with.

The appellant answered denying the allegations in the complaint and pleading assumed risk, and also alleged that appellee was guilty of negligence in permitting the tree to remain there. It further alleged that the tree fell as the result of an unusual and violent wind storm, an act of God, and not as a result of being weakened by the cable or chain cut. Appellant alleged that it had paid to appellee $7,326.16.

Oliver filed separate answer denying the material allegations of the complaint, and also alleging the contributory negligence of appellee, and that his right to

recover against him was barred by the statute of limitations.

There was a verdict and judgment for $41,350. The case is here on appeal.

Appellant contends that the court erred in refusing to direct a verdict for the defendants because Sanders assumed the risk. The evidence shows that Sanders had complained several times about the tree being dangerous, and he testified that six or seven days before the accident he said to Oliver: "There is nothing to keep you from cutting that tree down and getting it out of the way," and Oliver said: "All right, Sanders. I'll get Joe Berry and his crew around here in a day or two and an engine, and cut it down and get it off your mind." He further testified that he relied on this promise of Oliver. Appellee had called Oliver's attention to the tree six months before the accident, and then again approximately three months, but the time that he called his attention to it and Oliver promised to remove the tree, was six or seven days before the accident. Doubtless the tree had become more weakened and more dangerous as time went on, and had become so weakened at the time Sanders last spoke to Oliver about it, that it was dangerous, and for that reason Oliver agreed to remove it. Appellee testified that Oliver was superintendent and that he was under Oliver. It could not, however, be removed immediately, because, in order to remove it, it was necessary to get an engine and Berry's crew. Oliver, having expressly promised to remove the tree, the appellee had a right to assume that he would do this within a reasonable time, and did not assume the risk within such a period of time after the promise as would be reasonably allowed for removing the tree. The situation was such that he could not go out and move it immediately, but, as we have said, it was necessary to get an engine and to get Joe Berry and his crew. We think the appellee had the right to continue to work without assuming the risk within such time after the promise as it would reasonably require to remove the tree. *Western Coal & Mining Company* v. *Burns,* 84 Ark. 74, 104 S. W. 535; *Simms Oil Co.* v. *Durham,* 180 Ark. 366,

21 S. W. (2d) 861; *St. L. I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 555, 120 S. W. 146.

In the case of *St. L. I. M. & S. Ry. Co.* v. *Holman, supra,* the court said: "The effect of a promise to repair by the master and of the continuance in his service by the servant in reliance upon the promise, is to create a new stipulation whereby the master assumes the risk impendent during the time specified for the repairs to be made. Where no definite period is specified in which the given defects are to be remedied, the suspension of the master's right to avail himself of the defense of assumption of the risk by the servant continues for a reasonable time. No matter how obvious the defects or how imminent the perils therefrom, the servant, pending the promise of the master to repair, does not assume the risk of the given defects by continuing in the master's service in reliance upon his promise."

The court also, in the same case said: "For it cannot be said that the servant has voluntarily assumed the risk of the impending danger of working in an unsafe place, or of the use of obviously defective appliances furnished by the master, where the servant has complained to the master of such defective conditions, and agrees to and does continue in his service upon the promise of the master within the time specified, or a reasonable time if none is specified, to restore the place or appliances to normally safe conditions."

Numerous authorities might be cited, but it is sufficient to say that the settled rule of this court is that where the servant has called the attention of the master to the defect and the master had promised to repair, the servant, by continuing the work for a reasonable time, does not assume the risk.

There was some conflict in the evidence, and this was therefore a question for the jury. This doctrine was recognized in the instruction requested by appellant and given by the court, which is as follows:

"If you find from the evidence that the tree was cable or chain cut to such an extent that it was dangerous to the men working in the shop, and that Sanders knew this was true, and you further find that Sanders

continued working in the shop without complaint or objection, then he assumed all risk and dangers arising from said tree, and your verdict should be for the defendants."

According to the evidence of appellee, however, Sanders did not continue working without objection, but objected, and the master promised to repair.

The court, at the request of the appellant, also gave instruction No. 14 which told the jury in effect that if Sanders knew the condition of the tree and had complained to Oliver, and if they further find that a hard March wind was blowing which increased the danger and made the danger so imminent and obvious that a reasonably prudent person would not have continued working in the shop until the tree was cut down, and if they further found that Sanders did not stop but continued working, then he was not entitled to recover. There is a good deal of conflict in the evidence about the wind, but they were plainly told in the fourteenth instruction that if the danger was so imminent and obvious that a reasonably prudent person would not have continued working, Sanders could not recover.

Appellant calls attention to several authorities to the effect that where the servant has full knowledge of the defect, and where the defect could have been remedied in a few hours, he assumed the risk by staying an unreasonable length of time.

In all cases where there is a conflict of evidence the question of assumed risk is for the jury, and this court cannot set aside a verdict because it may think it is against the preponderance of the evidence.

It is next contended by the appellant that the court erred in refusing to direct a verdict for Ray Oliver because of the contributory negligence of Sanders. Instruction No. 9, requested by appellant and given by the court, submitted to the jury the question of Sanders' negligence, and the jury found against appellant's contention.

This court has said: "The existence of negligence is always a question for the jury unless the acts com-

plained of are declared by law to be negligent *per se,* or unless all reasonable minds must conclude that the acts were necessarily negligent." *Keller* v. *White,* 173 Ark. 885, 293 S. W. 1017.

It is next contended that the court erred in giving certain instructions and in refusing to give certain other instructions. We do not discuss the instructions in detail, but we have carefully considered all the instructions and have reached the conclusion that the charge as a whole was a correct guide for the jury and that the court committed no error in giving or refusing to give instructions.

It is next contended that the verdict is excessive. Appellee testified that he was standing upon the running board on the left side of the engine, and all of a sudden a crash came. When this crash came something struck him on the left side of his head, knocked him off the engine, and in falling he struck his left hip and lower part of his back across a carpenter's horse, 12 or 14 inches high; knocked him unconscious; did not know what happened to him; he was then treated by Doctor Hesterly; was in the hospital at Prescott 21 days; hip and back hurt so badly he could not sit up, and had headaches until he could hardly see; could not walk. He was then sent to Hot Springs by the advice of Dr. Hesterly, and at Hot Springs they sent him to the Ozark Sanitarium, where he stayed about three months, and he is still under the treatment of Dr. Scully. Before he was injured he was a strong, healthy man, 35 years old, had been drawing $225 per month up to a short time before he was injured, and has been trying to get well. The pain set up immediately after the accident and continued to get worse. The misery was so bad that he could not stand it until they gave him medicine to relieve the pain; he finally went into convulsions; had headaches so severe that they could hardly hold him in bed; his eye was swollen; he testified also that if he were to try to walk a quarter of a mile today he could not get out of bed tomorrow; his legs have practically no feeling in them; he has never been able to earn a dollar since the injury.

Dr. Scully testified that when he was called Sanders was unable to walk, and was in a semistupor. He testified at length about his treatment and about appellee's injuries, and that his injuries were permanent.

Dr. McGill testified to substantially the same conditions testified to by Dr. Scully, and Dr. McGill also testified that the appellee had severe injuries to his nerves, including the nerves of the lower limbs, groin, rectum, buttocks and privates.

When appellee's injuries are considered, the amount he was earning, the fact that he is unable to earn anything now, and also that his injuries are permanent, and when his pain and suffering are considered, we do not think the verdict is excessive.

But the evidence shows that the appellant had already paid to him and for him $7,326.16, and also shows that when the verdict was returned, the jury was asked if they intended to deduct the advances made to appellee by appellant, from the $45,000. The jury answered in the affirmative. There was some discussion then as to whether the part paid directly to appellee, or the entire amount paid to him and for his benefit should be deducted. It is our conclusion from the questions asked the jury and the answers by the foreman of the jury, that it was the intention of the jury to render a verdict for $45,000 less the entire amount paid.

The court entered judgment for the amount, $45,000, less the amount paid directly to the appellee. We think this is error and the court should have entered judgment for the $45,000 less the entire amount paid, which would leave $37,673.84.

The judgment will be modified by reducing the amount to $37,673.84, and, as thus modified, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BENHAM.

4-4098

Opinion delivered January 20, 1936.

Thomas B. Pryor and *W. L. Curtis,* for appellants.

Rains & Rains, for appellee.

BUTLER, J. Appeal from a verdict and judgment in favor of plaintiff against the defendant in an action for damages for the destruction of a meadow and pas-

ture by fire, and for personal injuries to the plaintiff suffered in an attempt to extinguish the fire.

The evidence, most favorably stated for the appellee relating to his first cause of action, is that he was the lessee of eighty acres of land on a year to year tenancy, which was used as a pasture and meadow. The fire was occasioned by sparks from a passing locomotive of the defendant company which ignited and destroyed the grass standing on the meadow and on that part of the land used for pasture. The fire occurred on July 24, 1934. A part of the 80-acre tract was devoted to meadow which would produce from 14 to 15 tons of hay. This, when mowed and baled, was worth approximately $12 per ton. On that part of the tract devoted to pasturage, the plaintiff kept from 20 to 28 head of cattle. The pasturage was of quantity and quality sufficient to sustain the cattle during the fall and winter. Then, after an interval of about a month in the late winter or early spring, the sustenance was sufficient for the cattle during the spring and summer months. In other words, the pasturage was sufficient to sustain from 20 to 28 head of cattle during the entire year with the exception of about one month.

In addition to the evidence related above, there was evidence introduced and allowed to go to the jury, over the objection and exceptions of the defendant, to the effect that the rental value of the 80 acres of land was worth from two to three hundred dollars per year according to the estimate of the several witnesses who testified on this subject and who were farmers residing in the vicinity. It was further in evidence that the meadow was rendered valueless for that year, and the pasturage was not restored so as to have any material value during the remainder of the year.

On request of the defendant, the trial court, in effect, gave an instruction to the jury as a measure of damage the usable value of the premises from the date of the fire until the land was restored to its condition immediately before its destruction.

The jury found, on this cause of action, for the plaintiff in the sum of $225. It is insisted by the defendant

that there was no competent proof offered at the trial based upon the rule for the measure of damages given by the court upon which to predicate the damages awarded by the jury, and that, in any event, the sum awarded is excessive.

It is difficult, if not impossible, to formulate a general rule applicable to all cases by which the measure of damage is defined for destruction of perennial crops, whether natural or artificial, because of so many and varying conditions which may affect the result this way or that. This court has experienced that difficulty. Because of the character of the meadow involved, the court, in *Ry. Co.* v. *Jones,* 59 Ark. 105, 26 S. W. 595, held that for its destruction by fire the damage was to be measured "by the cost of re-seeding it and its rental value from the time of its destruction until restored." The court had occasion to examine the same question in *St. Louis I. M. & S. Ry. Co.* v. *Hall,* 71 Ark. 302, 74 S. W. 293, where it held that, under the circumstances of that case the measure of damage to the meadow destroyed by fire was "the difference between the usable value of the land before and after the grass was burned down to the time of trial." In *Kansas City Southern Ry. Co.* v. *Wilson,* 119 Ark. 143, 171 S. W. 484, it was held that the measure of damage for burning of a parcel of land used as a pasture "would be the reasonable rental or usable value of the pasture for the remainder of that season."

Tested by the authority of these cases, the instruction requested and given for the defendant in the case at bar was not an accurate and complete declaration of law. For this reason, however, the defendant cannot complain. From our own cases and the great weight of authority, the correct rule for the measurement of damages in ordinary cases for the destruction of grass or other perennial plants used on lands for meadow or pasture seems to be this: The damage recoverable is the value of the grass or crop at the time of its destruction where no permanent injury is suffered to the soil by the destruction of the roots of the grass or plants. *Atlanta & B. Airline, etc.* v. *Brown,* an Alabama case, reported in

48 So. 73; *Risse* v. *Collins,* 12 Idaho 689, 87 Pac. 1006; *Evans* v. *Highland, etc. Co.,* 27 Utah 475, 76 Pac. 1135; *Byrne* v. *Minneapolis, etc., Co.,* 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; *International & G. N. R. Co.* v. *Saul,* 2 Willson, Civ. Cas. Ct. App. 612; *Thompson* v. *Chicago B. & Q. R. Co.,* 84 Neb. 482, 121 N. W. 443, 23 L. R. A. (N. S.) 310.

In arriving at the damage for the loss and destruction of meadows and pasture, the difficulty seems to arise not so much in the formulation of the rule as in the character of evidence admissible to prove the loss. But it would seem that any evidence which would tend to shed light upon this question is competent. The evidence relating to the rental value of the land necessarily is referable to the purpose for which the land is used and also the nature and character of the product of the soil, and where the land is used for a meadow or pasture, the amount of hay expected on the one hand or the number of animals deriving sustenance on the other, is proper for the consideration of the jury in determining the damage sustained from its loss.

In the instant case, as is said in *Kansas City S. Ry. Co.* v. *Wilson, supra:* "The jury had a right to take into the jury box with them their common sense and experience in the every day affairs of life," in connection with the testimony, adduced in determining the probable loss sustained by reason of the fire. Approximately five months remained of the year in which the fire occurred, during which time the plaintiff's cattle might have been sustained by the pasture, and from 14 to 15 bales secured. These facts, together with the testimony of experienced witnesses as to the annual rental value of the premises, in our opinion afford a substantial basis for the verdict of the jury and the judgment of the court. On this branch of the case therefore the judgment is affirmed.

On the second cause of action the evidence, stated most favorably for the plaintiff, is to the following effect: The 80 acres of land, which plaintiff had leased and which was damaged by the fire, was some distance from his residence. When notified of the fire and its

location, plaintiff hurried to the place where he found a number of men engaged in effort to extinguish the flame. Some of these men were members of the section crew of the defendant. The foreman, however, was not himself engaged in fighting the fire, and the plaintiff said to him that if the fire was not put out, it would burn the house (the house on the premises) and that he (plaintiff) believed that with some water and a sack he could put it out. The foreman answered saying that he could, too, if he were not sick, and, "if you (plaintiff) can, I believe the boys can fight it behind." Plaintiff's testimony was to the further effect that, while engaged in fighting the fire he became very hot and sick, and since that time he has been unable to do any substantial work. As to his physical condition, since the time of the fire, his testimony was corroborated by that of physicians and lay witnesses.

The basis of plaintiff's right to recover on this second alleged cause of action was that his personal injuries were sustained when he was an emergency employee of the defendant and that he became such by reason of the conversation he had with the foreman of defendant, the substance of which has been stated above. This contention is based upon the authority of *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. (2d) 717, in which the rule is recognized and approved that where an unforeseen emergency arises, making it necessary in the employer's interest that his employee have temporary assistance, an implied authority arises for the employee to procure necessary help, and, that where one is so procured by the employee, he is entitled to the same protection as any other employee.

It is questionable whether the defendant's foreman procured the plaintiff's help in fighting the fire. From his own testimony it is to be gathered that his acts in relation to fighting the fire were at his own suggestion, and his subsequent conduct was on his own initiative to which the foreman merely assented. But, if he can be said to have been an emergency employee, he has neither alleged nor proved any negligence on the part of the foreman or any member of the section crew which was the

occasion of the "heat prostration" from the effects of which he still suffers. Plaintiff suggested and adopted his own method of fighting the fire, and proceeded with its execution according to his own judgment without dictation or interference by any of defendant's employees.

Defendant made no contention that the fire was not occasioned by sparks from its passing locomotive and there was no proof made as to the fire escaping from the locomotive because of any negligence on the part of defendant as it was liable for any damage by fire caused by the locomotive because of § 8569, Crawford & Moses' Digest, whether the fire was occasioned with or without negligence. If, however, it may be assumed that some negligent act or omission on the part of defendant resulted in setting out the fire, nevertheless there is no liability for the physical injuries plaintiff has suffered. It is well settled that, before liability can attach to anyone for a negligent act, it must be the proximate cause of the resulting injury and one which, in the light of attendant circumstances, a person of ordinary foresight and prudence could have anticipated. *St. Louis, I. M. & So. Ry. Co.* v. *Bragg,* 69 Ark. 402, 64 S. W. 226; *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816.

It was the duty of plaintiff to use reasonable efforts to himself extinguish the fire and thus minimize his damage; if, in doing so, he was intemperate and injury to himself occurred, it was his own fault and a consequence which could not have been reasonably foreseen from the negligent act, if any, of the defendant in allowing fire to escape from its locomotive. In other words, it was his own act which was the active intervening cause directly producing the injury and not the original alleged negligent act of defendant. See cases cited *supra,* and *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898; *Seale* v. *Gulf, etc., Ry. Co.,* 65 Tex. 274, 57 Am. Rep. 602; *Cook* v. *Johnson,* 58 Mich. 437, 55 Am. Rep. 703; *Logan* v. *Wabash, etc., Co.,* 96 Mo. App. 461, 70 S. W. 735; *Light & Power Co.* v. *Hodges,* 109 Tenn. 331, 70 S. W. 616, 60 L. R. A. 459.

It follows from the views expressed that the verdict of the jury allowing the plaintiff the sum of $200 for

his personal injuries, and the judgment of the trial court based thereon, is reversed, and that cause is dismissed. The judgment for $225 for injury to the meadow and pasture is affirmed.

WHITE *v.* WILLIAMS.

4-3972

Opinion delivered January 20, 1936.

Griffin Smith, for appellant.

J. F. Loughborough, for appellee.

JOHNSON, C. J. This is a continuation of the litigation reported in 187 Ark. 113, 59 S. W. (2d) 23. We there reversed and remanded the cause with directions to overrule the demurrer to the complaint which had been previously sustained by the lower court, and for further proceedings. The suit was originally instituted by a taxpayer against the sheriff and collector of Pulaski County

to require him as such official to pay into the proper depository all fees and emoluments of his office during the years 1931 and 1932 in excess of the constitutional salary of $5,000 per year. Upon trial the chancery court determined from all the testimony adduced that the complaint was without substantial merit and dismissed it for want of equity, from which order this appeal comes. Under repeated opinions of this court we determine equity cases *de novo* upon the record made in the court below (*Gravette Construction Co.* v. *Gregory,* 184 Ark. 1193, 42 S. W. (2d) 987; *Hangen* v. *Brewer,* 185 Ark. 1188, 47 S. W. (2d) 789), but reverse only those cases where the chancellor has found or decreed contrary to a preponderance of the testimony (*Harlan* v. *Edwards,* 182 Ark. 1185, 31 S. W. (2d) 127; *Jackson* v. *Banks,* 182 Ark. 1185, 33 S. W. (2d) 40), and it is also fundamental that the burden of proof rests upon the party litigant who makes an affirmative allegation (*Johnson* v. *Mitchell,* 164 Ark. 1, 260 S. W. 710; *James* v. *Orrell,* 68 Ark. 284, 57 S. W. 931).

With these cardinal principles in mind we proceed to an analysis of the testimony. A witness, Mr. Durden, in behalf of appellant, taxpayer, testified in effect that he was an accountant in the State Comptroller's employ, and as such made an investigation of and stated the account between appellee, sheriff and collector and Pulaski County on the jail receipts and expenditures for the years 1931 and 1932; that from such investigation he found that appellee was due Pulaski County, $27,008.22. This witness further testified that the items allowed by him in his report as expenses for keeping the jail were largely speculative because appellee had kept no books or record from which the actual expenses incurred might be ascertained; but that his allowances for expenses were in line with those incurred by appellee's predecessor in office and also in line with appellee's reported expenses during his first months in office. Appellee testified that he kept no record of the expenditures for jail expenses subsequent to February, 1931, because directed not to do so by Mr. Reed the then State Comptroller whose opinion was based and grounded upon act 81 of 1931, but that

he did know that he made no net profit out of his jail account for either the year 1931 or 1932. Appellee's testimony was corroborated by that of a major in the United States Army who was detailed as quartermaster of the C. M. T. C. at Camp Pike in 1931. This testimony, although treated by us in the most general way, shows that the chancellor's decision rests upon sharply conflicting testimony, and we are not willing to hold that his finding of fact is against the preponderance of the testimony. Appellant's primary insistence seems to be, that since § 4636 *et seq.* of Crawford & Moses' Digest peremptorily direct certain officials to keep record books of fees and emoluments of their office received, a neglect of this duty by such official renders him liable, irrespective of his good faith in the premises. We cannot subscribe to this doctrine. Act 81 of 1931 was a legislative ascertainment that the actual cost of keeping and feeding prisoners in the Pulaski County jail was 85 cents per day per prisoner, and this is true, even though this court subsequently determined that said act was unconstitutional and void; and this is true, even though no affirmative rights could be predicated thereon. A compliance with said act by appellee and his reliance thereon are circumstances tending to show his good faith in the transactions; and, when we consider that the State Comptroller directed compliance with said act, treating it as valid, it certainly negatives any deliberate intent on appellee's part to ignore other statutory directions (*Bailey* v. *Taylor,* 189 Ark. 313, 71 S. W. (2d) 470), and moreover did not relieve appellant of the burden of establishing the allegations contained in his complaint.

Appellant also complains that time was not afforded him by the trial court to investigate and examine certain exhibits filed by appellee in the course of the trial. The conduct of litigation is lodged in the sound discretion of the trial court, and we do not reverse except for an abuse of this discretion. *Collins* v. *Korotopshy,* 36 Ark. 316; *M. V. Railroad Co.* v. *Hamilton,* 84 Ark. 81, 104 S. W. 540. We are not willing to say that this assignment presents reversible error.

The decree is in all things affirmed.

COOK *v.* SHACKLEFORD.

4-4104

Opinion delivered January 20, 1936.

Fred A. Donham and *Owens & Ehrman,* for appellants.

John D. Shackleford, for appellee.

MEHAFFY, J. The appellee brought this suit in the Pulaski County Chancery Court alleging that during the years 1931 and 1932 the then county judges unlawfully contracted debts against the county which could not be paid under the provisions of Amendment No. 10 to the Constitution of the State of Arkansas because said contracts and indebtedness were in excess of the revenues for the years in which the contracts were made. It was alleged in the complaint that the contracts were void.

Appellants filed answer admitting the facts stated in the complaint, but denied that the contracts and indebtedness upon which the claims were based are void, and denied that the payment of the claims would violate the provisions of Amendment No. 10 of the Constitution of the State.

The case was tried on the following stipulation of facts:

"First. It is agreed that the plaintiff is a resident and taxpayer of Pulaski County; that R. A. Cook, B. T. Hoff and R. E. Kinstley are the duly elected, qualified and acting county judge, county clerk and county treasurer, respectively, of Pulaski County, Arkansas;

"Second. That during the years 1931 and 1932 contracts were entered into by the duly authorized officials of Pulaski County for the payment of money from the county general revenue fund that were in excess of the general revenues from all sources for the respective years in which the contracts were made and the indebtedness was created; that claims have been duly filed against the general revenue fund of Pulaski County for different amounts for the approval and allowance of the county court to pay said indebtedness in a total sum of approximately thirty thousand dollars ($30,000); that the claims are for services rendered and merchandise furnished Pulaski County in the operation of its affairs and are just claims but could not be paid because they were in excess of the general revenues for the years in which the contracts were made;

"Third. That the list of claims attached to the plaintiff's complaint are all the just claims against the Pulaski County general revenue fund that have not been adjudicated by a court of competent jurisdiction and are the only claims that the defendants have expressed their intention to pay from the general revenue fund;

"Fourth. That during the year 1934 there was created a surplus in the Pulaski County general revenue fund in the sum of thirty-three thousand, five hundred twenty-three and no/100 dollars ($33,523) in excess of the expenditures from the general revenue fund for the fiscal year of 1934; that Pulaski County's general revenue fund for the year 1935 is sufficient to pay said county's expenses without the use of the surplus created during the year 1934; that the levying court of Pulaski County at its meeting on January 7, 1935, appropriated the said sum of thirty-three thousand, five hundred twenty-three and no/100 dollars ($33,523) for the payment of claims against the general revenue fund that were created by the contracts entered into during the years 1931 and 1932, except those claims created during the years 1931 and 1932 that have been adjudicated by a court of competent jurisdiction as being void and such other claims that, upon hearing, may be found to be fraudulent."

The chancery court held the claims involved in this suit void, as violative of Amendment No. 10 to the Constitution of the State of Arkansas, and issued an order permanently restraining and enjoining the approving or paying of any of these claims. The case is here on appeal.

The only question for us to decide is whether contracts made, or indebtedness created in excess of the revenues from all sources for the years in which the contracts are made, are void.

Amendment No. 10 has been construed by this court many times and in the case of *Stanfield* v. *Friddle,* 185 Ark. 873, 50 S. W.(2d) 237, we said: "The law may therefore be regarded as definitely settled that any contract entered into or allowance made in excess of the revenues of the year in which the contract was entered into, or the allowance made, is wholly void, and the issuance of any county warrants based thereon, adds nothing to their validity, as the warrants are also void."

We have many times approved the statement of the law as set out above. In the case of *Pulaski County* v. *Board of Trustees of Arkansas Tuberculosis Sanitorium,* 186 Ark. 61, 52 S. W. (2d) 972, we said: "While it is to be regretted that the situation is such that the appellee cannot collect its just claims, yet the plain provisions of the Constitution compel the conclusion herein reached."

If a contract in excess of the revenue could be paid under the circumstances in this case, it would defeat the very purpose of the amendment. The amendment provides: "The fiscal affairs of counties, cities, and incorporated towns, shall be conducted on a sound financial basis and no county court or levying board, or agent of any county, shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk or other county officer sign or issue any scrip, warrant, or make any allowance in excess of the revenue from all sources for the current fiscal year."

It will be seen that the contracts involved in this case are prohibited by the Constitution, and, as we have said

before, they are void and cannot be paid. This amendment has been construed many times, and attention is called to the following cases: *Luter* v. *Pulaski County Hospital Association,* 182 Ark. 1099, 34 S. W. (2d) 770; *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30; *Dixie Culvert Mfg. Co.* v. *Perry County,* 174 Ark. 107, 294 S. W. 381; *Lybrand* v. *Wafford,* 174 Ark. 298, 296 S. W. 729; *Polk County* v. *Mena Star Co.,* 175 Ark. 90, 1 S. W. (2d) 554; *Miller* v. *State use Woodruff County,* 176 Ark. 889, 1 S. W. (2d) 998; *Chesnutt* v. *Gates,* 177 Ark. 894, 9 S. W. (2d) 37; *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250.

All these cases hold that contracts made in excess of the revenue for the year in which they are made are void, and if void when made, they cannot thereafter be paid.

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

GRAYSON *v.* GARRATT, CHANCELLOR.

4-4111

Opinion delivered January 27, 1936.

Gaughan, Sifford, Godwin & Gaughan, for petitioner.

Glover & Glover, for respondent.

MEHAFFY, J. Willie Bowie and Lueller Bowie, and Willie Bowie by Lena E. Goodwin, his sister and next friend, filed in the Garland Chancery Court against C. I. Grayson, the following complaint:

"Come the plaintiffs and, for their cause of action against the defendant, allege:

"That Willie Bowie and Lueller Bowie reside in Ouachita County, Arkansas, and that Lueller Bowie is the wife of Willie Bowie, and that Lena E. Goodwin is a sister of Willie Bowie, and that she resides in Garland County, Arkansas, and that the defendant, C. I. Grayson, is a resident and citizen of Ouachita County, Arkansas.

"Plaintiffs allege that Willie Bowie is the son of Monroe Bowie, deceased, and that prior to the death of Monroe Bowie that he made a will, and in that said will, which was probated in Ouachita County, Arkansas, he willed to the plaintiff, Willie Bowie, an interest in certain real estate, a part of which is situated in Garland County, Arkansas. A copy of said will is hereto attached and made a part of this complaint.

"Plaintiff Lena E. Goodwin alleges that the plaintiff Willie Bowie is of a weak mind and is not capable of transacting business, and has not been capable of transacting business for himself for several years, and that she, as his sister, joins with him in bringing this suit as his sister and next friend.

"Plaintiffs allege that on the 24th day of February, 1934, that the defendant, well knowing the inability of Willie Bowie to make a contract, wilfully, knowingly and fraudulently induced the said Willie Bowie to make a deed to him, the said C. I. Grayson, thereby conveying to him his entire interest in the estate which he had inherited from his father, and which was of the reasonable value of $40,000, for a small and inadequate consideration which was expressed in said deed at $750, but all of said sum expressed in said deed was never paid, and which said sum of $750, if it had been paid, was only a small per cent. of the value of the interest of Willie Bowie in said estate. A copy of said deed is hereto attached and made a part of this complaint.

"Plaintiffs allege that, if said deed has any validity whatever, that it could only be treated as an equitable mortgage.

"Plaintiffs further allege that the said Lueller Bowie at the time she was induced to sign said deed was under 18 years of age, and was married to the said Willie Bowie

at the time of the making of the said deed, and was married to the said Willie Bowie at a very tender age.

"Plaintiffs allege that they are now ready, able and willing to pay off whatever amount the court finds the said Willie Bowie is found to owe the defendant, if he owes anything at all.

"Plaintiffs allege that the said Willie Bowie is upward of sixty years of age, and that at the time this purported deed was made that the said Willie Bowie was wholly incapable on account of the condition of his body and mind to transact business for himself on account of disease of his body and the weakness of his mind; that he was easily persuaded to part with his property without adequate consideration; that the defendant was an experienced business man, and, knowing the weakness of the mind of the said Willie Bowie, induced him to enter into this purported deed, and obtained his property in this manner, and which was a fraud perpetrated on his rights."

Plaintiffs prayed for an order fixing the amount due the defendant, if any is found to be due, and an order cancelling the deed and restoring and quieting the title to said property in Willie Bowie, etc.

The petitioner filed a motion to quash service, alleging that a great portion of the land was in Ouachita County, and that the plaintiffs, Willie Bowie and Lueller Bowie, are citizens of Ouachita County, and the suit was a suit *in personam,* and not a suit *in rem,* and the court had no jurisdiction.

A response to the motion to quash was filed, and the motion to quash was overruled. The petitioner then filed his petition in this court for a writ of prohibition.

The attorneys entered into the following stipulation:

"It is agreed by and between Gaughan, Sifford, Godwin & Gaughan, attorneys for the petitioner, C. I. Grayson, and Glover & Glover, attorneys for the respondent, Sam W. Garratt, Chancellor of the Third Chancery District of Arkansas, of which Garland County is a part, that the foregoing matters, consisting of the petition for a writ of prohibition, the complaint in equity in the case

of Willie Bowie and Lueller Bowie, and Willie Bowie by Lena E. Goodwin, his sister and next friend, plaintiffs, v. C. I. Grayson, defendants, No. 12876, now pending in the Garland County Chancery Court, the motion of defendant in that action to quash service, the response of the said Sam W. Garratt, chancellor of the Third Chancery District of Arkansas, of which Garland County is a part, to the petition herein; is a full and complete record of all the matters and proceedings had in said action."

This stipulation was signed by the attorneys.

Petitioner correctly states that the only question for this court to determine is whether the plaintiff's action is local or transitory. He first calls attention to 67 C. J. 61. This authority states that actions purely for rescission of contracts for the sale of land, being *in personam,* and not *in rem,* are as a general rule transitory. The same paragraph from which petitioner quotes contains the following statement: "If, however, the object of the action is to destroy a pretended exchange and to free the land from a cloud, or to determine claims and rights in the land, the action should be brought where the land is located, although it involved the validity of a contract for the cancellation of which it would be proper to bring a direct action elsewhere. There is however authority to the effect that an action to cancel a contract for the sale of land is local, and that an action to rescind an executed contract, and to recover the consideration paid, or an action by the purchaser to cancel his contract and notes and to recover sums already paid, is an action involving a right or interest in real property, which must be tried in the county in which the land is situated."

He next calls attention to the case of *Bullitt* v. *Eastern Kentucky Land Company,* 99 Ky. 324, 36 S. W. 16. The court in that case said: "An action purely for rescission of contract for sale of land or its specific execution is transitory—not *in rem* but *in personam.* * * * When, in the action it is sought to enforce a lien on land which results from the rescission, then the action becomes local." The court then copies the statute with reference to actions effecting real property.

Petitioner then calls attention to the case of *State* v. *District Court,* 169 Minn. 515, 211 N. W. 469. That also was an action to cancel a contract on the ground of fraudulent representations. It was not a suit to cancel a deed.

Attention is next called to *Terry* v. *River Garden Farms Company,* 29 Cal. App. 59, 154 Pac. 476. That is also a case for the rescission of a contract, and not for the cancellation of a deed.

Attention is then called to 27 R. C. L., page 794, § 14. In § 15 of the same volume is the following: "The form of an action is not material if the complaint in fact presents a case involving the determination of the title to realty. This has been expressly ruled in an instance where the action ostensibly was to enjoin threatened trespasses upon lands and to recover the value of minerals theretofore removed."

Attention is called by petitioner to *Arkansas Mineral Products Company* v. *Creel,* 181 Ark. 722, 27 S. W. (2d) 1003. The court in that case said: "We think the demurrer, which raised the question of jurisdiction to grant the relief prayed, should have been sustained, for the reason that the action is local and not transitory." The court then quotes § 1164 of Crawford & Moses' Digest with reference to where cases of the kind must be brought.

Attention is next called to the case of *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark. 422. The court said in that case; in speaking of the statutes above mentioned: "All such actions, whether by name foreclosure, partition, ejectment or without any special designation as to title, whether expressly mentioned in the statute or not, are local within the meaning of this section."

Petitioner also calls attention to the case of *Pickett* v. *Ferguson,* 45 Ark. 177. That was a case holding that a court of equity had power to restrain a party within its jurisdiction from prosecuting an action in another State. Of course that action was transitory.

A number of other authorities are cited and quoted from by petitioner, but one of the most recent is *United States Fidelity & Guaranty Company* v. *Bourland,* 171 Ark. 1, 283 S. W. 13. This was a petition for writ of

prohibition to restrain the chancery court of Sebastian County from proceeding in a certain cause, and the court said: "It must be conceded, and as we interpret the argument of counsel for petitioner, it is conceded that the chancery court of Sebastian County has jurisdiction of the subject-matter of the action therein instituted, which was one to cancel a deed executed by the plaintiffs therein to certain property, including real estate situated in Pulaski County. It is not an action for the recovery of real property or for an injury to real property. It is not a local action, but is transitory and could have been brought in any county where jurisdiction over the persons of the defendants could have been obtained."

Petitioner calls attention to the case *McLeod* v. *Connecticut & P. R. Company,* 58 Vt. 727, 6 Atl. 648. That was a suit for personal injury, and there was no question involved except whether a suit for personal injury was a transitory action. The court discussed local and transitory action, it is true, in a general way, but the only question for the court to decide in that case was whether an action for personal injury was transitory or local.

In the case of *Arkansas Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S. W. (2d) 1003, the court, in discussing suits for specific performance or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to land in another State or country, said that the court had jurisdiction. But the court added: "But this jurisdiction is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience, and the decree in such suit imposes a mere personal obligation enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* on lands in another jurisdiction to create, transfer, or vest title."

This court has passed on similar questions many times, but we do not deem it necessary to discuss all these authorities. This is a suit for the purpose of cancelling a deed, restoring the property to the plaintiff, and quieting the title in him, and also it is alleged that, if the deed should not be cancelled, it be held to be a

mortgage and plaintiff be permitted to pay whatever amount he had received from petitioner, and the deed be cancelled.

Our conclusion is that the action is local, that the chancery court of Garland County has jurisdiction, and the writ is therefore denied.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* SHIBLEY.

4-4102

Opinion delivered January 27, 1936.

Roy Gean and *Pryor & Pryor,* for appellant.

Hardin & Barton, for appellee.

SMITH, J. Appellee recovered judgment for the face of an accident insurance policy issued by the appellant insurance company upon the life of James A. Shib-

ley, her son. The policy was dated November 3, 1933, and the insured died March 8, 1934. The insured was a mechanical engineer, and had been employed as such in Cuba for several years. While there he contracted a disease called Tropical Sprue. This disease was defined by one of the doctors who testified in the case as "an inflammatory condition of the mucous membrane of the alimentary tract from the mouth all the way through, and is an intestinal infection." It is a serious ailment with a high per cent of fatalities, and the victims of it are required to live upon a restricted diet, which excludes all sweets and fats.

It is first insisted for the reversal of the judgment that the application for the insurance concealed the fact from appellant insurance company that the applicant was afflicted with this disease, and that the policy would not have been issued had that fact been disclosed. It is insisted also that the policy never became effective as a contract of insurance because it was therein stipulated that it should not be effective, unless the insured was in good health at the time of its delivery, and it is insisted that he was not in good health at that time.

The following questions and answers appear in the application: "Have you now any disease?" "No." "Are you now affected in any way by any past or present sickness or injury?" "No." "Within the past five years have you had any sickness or bodily injury?" "Yes." "If so describe below which disease or injury you have had within the last five years?" "Nov. year 1932." "Kind of disease or injury?" "Intestinal infection, duration three months." "Do you represent all of your foregoing answers are correct?" "Yes." "Do you understand that you will have no insurance until the premium for the first insurable period is paid, and the policy applied for is issued and delivered to you while in sound health and free from any bodily injury except as provided in a binding receipt?" "Yes."

It is insisted these answers constitute a warranty and were shown to be false, and that the policy was never effective because at the time of its delivery the insured was afflicted with the disease of Tropical Sprue. We

think, however, that the court properly refused to direct a verdict in the insurance company's favor on either ground for the following reasons:

The application for the insurance was taken by R. R. Cornelius, a soliciting agent for the insurer, who wrote the answers above quoted. The application was made for insurance in the sum of $4,000. Cornelius was the associate of the insured. It is certain that, after the application had been made and presented to the insurance company Cornelius called at the home of the insured, who resided with his mother. The insured was away from home engaged in his employment of assistant district engineer of the State Highway Department. Mrs. Shibley was at home, and the testimony is in irreconcilable conflict as to the conversation which then occurred between her and Cornelius.

She testified that Cornelius told her the company required more definite information about the "intestinal infection" mentioned in her son's application. She testified that she told Cornelius everything she knew about her son's condition, that Dr. Krock, her son's physician, who resided in Fort Smith, said her son had Tropical Sprue, and she referred Cornelius to the doctor for more detailed information. Cornelius denied that he was given this information, but this question of fact was submitted under instructions which correctly declared the law applicable thereto. Two circumstances strongly corroborate the testimony of Mrs. Shibley. One of these is that the application had been amended to make the insurance applied for read $3,000 instead of $4,000. The other is that the answer appearing in the original application that the applicant had "fully recovered" was erased by line drawn through those words. Cornelius admitted that these alterations in the application had been made at the office of the insurance company after the receipt there of the application. As proof of the fact that the insured knew of his ailment, the company offered in evidence an application made in December, 1933, by the insured to another insurance company in which he described his intestinal infection as Tropical Sprue. It

appears however that that company, with this information, issued the policy applied for.

Upon the question of fraud in the issuance of the policy and its ineffectiveness as a contract of insurance because the insured was not in good health at the time of its delivery, there was testimony to the following effect: Mrs. Shibley testified that her son was in apparent good health and was regularly engaged in his employment. A physician testified that on August 15, 1933, the insured made application for employment with the Phillips Petroleum Company in Oklahoma, and that the witness examined the applicant to ascertain his physical condition. Applicant advised the witness that he had contracted Tropical Sprue in Cuba, but notwithstanding this information witness was of the opinion that the applicant's condition was good, and he was put to work for the company. Applicant later left this employment, and was employed in this State by the Highway Department.

The law applicable to these facts was declared in instructions conforming to the law as announced in the case of *American National Insurance Company* v. *Hale,* 172 Ark. 958, 291 S. W. 82. In that case the answers in the application were expressly warranted to be true, as they are here. The opinion in that case recites that: "The court, over the objection of the insurance company, on its own motion, instructed the jury that, if they found that the deceased was not in sound health, and that the agents of the defendant had knowledge of such fact, which knowledge they had obtained in the scope of their employment, then the defense of unsound health would not be available, and their verdict would be for the plaintiff; but, if they found that the insured was not in sound health, and the agents of the company, acting within the scope of their employment, had no knowledge of such fact, then the verdict should be in favor of the defendant." After reviewing a number of our decisions and citing a number of cases from other courts, this instruction was there declared to be a correct declaration of the law, notwithstanding the applicant's answers had been warranted to be true, and may in fact have been false.

In so holding our earlier case, *National Life Ins. Co. of U. S. A.* v. *Jackson,* 161 Ark. 597, 256 S. W. 378, was disapproved. The point decided in this last-mentioned case is reflected in the second headnote reading as follows: "Under a policy of life insurance which stipulated that no liability is assumed by the company for any accident, illness or disease occurring or contracted prior to the date thereof, no liability was incurred where insured died from tuberculosis contracted prior to the issuance of the policy, even though the company's agent who delivered the policy at the time knew that insured had tuberculosis." See also *Metropolitan Life Ins. Co.* v. *Minton,* 188 Ark. 456, 66 S. W. (2d) 627.

The jury's verdict is conclusive, therefore, of the fact that the policy was in force as a contract of insurance at the time of its delivery.

A more serious question is whether the insured's death resulted from an accidental injury within the meaning of the policy which insured "against loss of life * * * which resulted solely and without other contributing cause from external injury." Mrs. Shibley testified, on this issue, that on the night of March 8, 1934, her son was at home suffering from an injured foot. While she was cooking supper in the kitchen her son was lying on a bed in an adjoining room. The door bell rang and she passed through his room to answer the call. She had previously stumbled over her son's crutch, which was lying on the floor near his bed. She had picked up the crutch and had stood it up near the head of his bed where he could reach it. As she walked hurriedly through his room to answer the door bell, the heavy end of the crutch leaning against the side of the bed fell, striking her son on the temple. She rushed to him, picked up the crutch, and noticed a red place on his temple. She asked if he was hurt, he answered, "Not much, but it scared him to death." She further testified that her son ate his supper and soon thereafter said, "Let's turn off the lights and go to bed. I am feeling bad." She went into another room, and in a few minutes heard him breathing heavily. She called a doctor, but her son died at 8:30

that night. Dr. Krock, the attending physician filed, a certificate with the State Board of Health in which the principal cause of death was said to be "Tropical Sprue." He expressed the same opinion on the witness stand. It was this disease which produced the cerebral hemorrhage which was the immediate cause of death in his opinion. Such a blow as the insured received from the falling crutch would not have produced a hemorrhage in a normal person. But while Dr. Krock did testify that death was caused by cerebral hemorrhage he did not testify that Tropical Sprue would produce a cerebral hemorrhage. Both he and a Dr. Watson, who testified in the case, said that the disease of Tropical Sprue renders the blood vessels fragile and more easily ruptured than would be the case with a person who had not had the disease. Dr. Krock testified that he knew of nothing but the blow of the falling crutch which could have produced the cerebral hemorrhage, which both doctors testified was the immediate cause of death. Dr. Watson, in answer to a hypothetical question, said that the cause of the insured's death "was hemorrhage to the brain brought on by the blow on his head by the crutch." Both doctors testified that under proper and reasonable care for himself the insured might have lived out his normal expectancy and would at least have been expected to live for many years.

The appellee insurance company insists that the judgment should be reversed, and the cause dismissed because the testimony above recited does not show as the policy requires that the insured's death resulted "solely and without other contributing cause from accidental injury," and a number of instructions were requested which declared in effect that there could be no recovery, if the disease concurred with the accident in bringing about the insured's death.

Upon this issue the court charged the jury that "If you believe from a preponderance of the evidence that said Shibley sustained an injury by a crutch falling and striking upon his head and temple, and that said injury was the proximate cause of his death which followed shortly thereafter, then you are instructed that

the plaintiff would be entitled to recover in this case, even though you may believe that the condition of health produced by the Tropical Sprue left a condition whereby the accident would the more readily produce death."

This last instruction declares the law in effect as stated in the case of *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, and reaffirmed in the case of *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845, in each of which cases an instruction was approved as correct to the effect that the insurance company is liable on its policy of accident insurance "if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury." See also *Missouri State Life Ins. Co.* v. *Barron,* 186 Ark. 46, 52 S. W. (2d) 733.

In the chapter on Accident Insurance, 1 C. J. 452, it is said that the tendency of the courts is to so construe similar provisions in accident insurance contracts as to hold the insurer liable where the accident is a proximate cause of the death, although some disease may have been present as a secondary cause. A number of annotated and other cases are cited in support of this text.

The case appears to have been submitted under instructions conforming to the law as declared in the cases herein cited, and as no error appears, the judgment must be affirmed, and it is so ordered.

HOBBS-WESTERN COMPANY *v.* CARMICAL.

4-4116

Opinion delivered January 27, 1936.

W. N. Ivie, Steve Carrigan and *Duty & Duty,* for appellants.

W. S. Atkins and *Ned Stewart,* for appellee.

BUTLER, J. On the night of April 17, 1934, Glen Carmical, while driving an automobile, his left arm resting in the open window with his elbow extending outside, met a truck loaded with cross-ties coming from the oppo-

site direction. As the vehicles were passing each other, Carmical's elbow came in contact with one of the cross-ties. The impact shattered the elbow resulting in the subsequent amputation of his arm. One, Archie Williams, was the driver of the truck, and John Westmoreland, an agent of Hobbs-Western Company, was riding in the cab with the driver and Charlie Hollis, these three being on the driver's seat. Carmical brought suit against Hobbs-Western Company, Archie Williams and John Westmoreland, and recovered a verdict against the three for damages for personal injury in the sum of $15,000.

We will consider in reverse order the grounds for reversal argued in appellants' brief.

It is insisted that the evidence failed to establish the acts of negligence alleged by the plaintiff (appellee). The negligence alleged and relied on at the trial was that the motor vehicle causing the injury when loaded was in excess of 80 inches in width, and that it was being driven without clearance lights contrary to the requirements of the traffic laws of this State which provide that "every motor vehicle * * * having a width at any part in excess of 80 inches shall carry two clearance lights on the left side of such vehicle; one located at the front, and displaying a white light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle, and the other located at the rear of the vehicle and displaying a yellow or red light visible under like conditions from a distance of 500 feet to the rear of the vehicle." Acts 1927, p. 721, § 48.

The other ground of negligence pleaded was that the cross-ties were so loaded as to permit one of them to extend beyond the others which struck and injured the appellee. It is the contention of the appellants, that the truck was being driven on the proper side of the highway and that the injury was occasioned by the inattention and negligence of the appellee and not through any fault on their part; that he carelessly drove his car too near the rear end of the truck with his elbow negligently extended outside his automobile and that this was the proximate cause of his injury.

The testimony, viewed in the light most favorable to the appellee, is to the following effect: The highway, at the point where the injury occurred, consists of a pavement 14 feet wide with 3 feet shoulders on each side, these being about level with the pavement. Carmical was driving with a young lady companion seated with him on the front, or driver's, seat. He was traveling at about 15 or 20 miles an hour with his left arm resting in the open window on the driver's side, his elbow extending outward approximately 4 inches. He saw the lights of a motor vehicle approaching and drew to his right about even with the outer edge of the pavement. The truck was being driven at about the same rate of speed as the automobile. Carmical passed the front end of the vehicle in safety, but before the two had completely passed each other he suffered a blow to his elbow causing the injury complained of. Immediately after the vehicles had passed each other, the occupants of the truck stopped because of outcry which was heard and the sound of the breaking of glass. Carmical's automobile also stopped and the injured man was driven to the hospital by one of the occupants of the truck. An examination of the load on the truck disclosed the fact that one of the ties near the rear end protruded beyond the other ties and upon this was found blood which showed that it was this cross-tie which struck appellee's elbow. A police officer examined the scene of the accident and found shattered glass and blood on the highway about a foot and a half on the right hand side of the middle of the pavement. The truck was composed of a cab to which was attached a trailer. The trailer was fifteen feet, 10 inches long and it was upon this that the cross-ties were loaded, placed across the bed of the truck from front to rear. They extended back from the front end of the trailer about thirteen feet, no ties being loaded on the last two feet, ten inches of the bed of the truck. The cross-ties were ninety-six inches long, and the truck carried no clearance lights at the front or rear. While this is not negligence *per se,* it is evidence to be considered by the jury of that fact. *Pollock* v. *Hamm,* 177 Ark. 348, 6 S. W. (2d) 541. And this, together with other evi-

dence, is sufficient to submit the question of the negligence of the operator of the truck to the jury.

As to the contributory negligence of the appellee urged by the appellants, but little need be said. This question was submitted to the jury under instructions which are admittedly correct declarations of law. The contention of appellants is based on the fact that appellee's elbow extended outside the window of his automobile about four inches. Automobiles, as to their width, are of standard make and we accept as a matter of common knowledge that under the evidence in this case appellee's elbow would not have extended beyond the outer edge of the running board of the automobile. Certainly, it cannot be said that the minds of all reasonable men would conclude that the conduct of the appellee was negligence.

The contention is also made that the court in instruction No. 2, given at the request of appellee, erred in construing the law relating to the duty to maintain clearance lights to apply to the truck involved, if it, "as loaded," was in excess of 80 inches, and if it had no clearance lights, instructing the jury that it might consider this in passing on the question of the driver's negligence. The contention is that the court erred in thus interpreting the statute for the reason that the statute made no mention of the width of the load being conveyed on the vehicle, but specifically applies only to the vehicle itself and is therefore limited in its application to the width of the vehicle irrespective of the width of the load carried. It is argued that under the construction of the statute given by the court, one operating a truck would have to change the lights to conform to the width of the load carried. We think the construction placed by the court, as applied to the truck in the instant case was correct, for it was constructed so as to carry loads of varying widths. The construction which the appellant would have us adopt would serve to nullify the purpose of the enactment in many instances. That purpose was to promote the safety of those using the highways from an increased hazard arising from meeting and passing vehicles of unusual width. It was this the statute would

safeguard by the requirement for clearance lights, and whether the width arose from the vehicle as constructed, or as loaded, would be immaterial. The "trailer" on which the ties were loaded was an unenclosed rectangular frame upon which the load was placed, and which itself did not exceed eighty inches in width, but was so constructed as to admit a load exceeding that figure and which was ninety-six inches in fact, when appellee was injured.

In construing the statute inquiry should be made as to the object to be accomplished by it, and when this is understood, general words may be narrowed or specific terms expanded to carry out its purpose. *Hermitage Sp. Sch. Dist.* v. *Ingalls Sp. Dist.*, 133 Ark. 157, 202 S. W. 26; *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493; *Gill* v. *Saunders,* 182 Ark. 453, 31 S. W. (2d) 748; *Ark. Tax Com.* v. *Crittenden Co.,* 183 Ark. 738, 38 S. W. (2d) 318.

We pass to the important question involved, namely, whether under the evidence, it can be said as a matter of law that Williams, the driver of the truck, was an independent contractor for whose negligent act Hobbs-Western Company would not be liable; or, was he a servant for whose negligence the company would be liable under the rule *respondeat superior*? The rule governing this question has been well stated in the case of *Mississippi River Fuel Corporation* v. *Morris,* 183 Ark. 207, 35 S. W. (2d) 607, cited by the appellants, which is that an independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to result of his work and not as to the means by which it is accomplished; the decisive question is, had the employer or contractor the right to control the conduct of the person doing the work? The case of Miss. River Fuel Corp. *supra* quoting 14 R. C. L. and *Moore Lumber Co.* v. *Sarrett,* 170 Ark. 92, 279 S. W. 4, cited by the appellants, thus states the rule: "The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the em-

ployer, he is a servant; if not under such control, he is an independent contractor. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work."

It is insisted by the appellants under the rule stated that the undisputed evidence establishes the fact that Archie Williams, the driver of the truck, was an independent contractor, whereas it is appellee's contention that the evidence makes it a question for the jury to say whether Williams was such or a servant of Hobbs-Western Company for whose negligence it would be liable. The evidence on this branch of the case tending to establish the contention of the appellee is to the effect that Westmoreland was the agent of the Hobbs-Western Company at Hope, Arkansas. His general duty was that of tie inspector and he was not as a rule authorized to represent the company in the transportation of ties. The company had a tie yard at Hope and also one at Nashville. The ties on the Nashville yard had been shipped with the exception of a few remaining insufficient to make a car-load. Westmoreland was authorized to have these ties moved from the Nashville yard to the yard at Hope. He contacted Charlie Hollis who had a truck and who had hauled ties for Westmoreland before that time. Westmoreland agreed to pay Hollis eight cents per tie for moving them to Hope. Hollis' truck was out of commission and he told Westmoreland that he could not move the ties himself, but that he would get a man for him (Westmoreland). Williams owned a truck with which he did hauling for different people. It was of the "trailer type." Hollis saw Williams who agreed to haul the ties for eight cents each. This fact was reported to Westmoreland by Hollis and he directed Hollis to bring Williams to his house that night and said that he would go with them for the ties. Williams, accompanied by Hollis, went with his truck to the house of Westmoreland on the night of April 17 and the three proceeded from Hope to Nashville where they loaded 71 ties. The truck had no sides but consisted of a frame upon which

the ties were loaded cross-wise. There is evidence that Westmoreland assisted in loading the ties and when the truck was loaded he got in the driver's seat on the cab of the truck sitting next to the driver, Williams, with Hollis sitting on the outside of the same seat. In this manner they started on the return journey to Hope during which the injury was sustained by Carmical as heretofore stated. When the accident occurred Hollis got in Carmical's automobile and drove him to Hope. Westmoreland remained in the truck with Williams and directed him to the tie yard of the company in Hope and showed Williams where and how to stack the ties.

There is testimony disputing some of the essential facts in the evidence above set forth, but, as the jury, who is the sole judge of the credibility of the witnesses, has resolved the conflict in favor of the appellee, we must accept the above as the proven facts.

Appellants insist that as the undisputed evidence is to the effect that Williams furnished his own method of conveyance, bore the operating expenses of his truck, and for his services was paid a stipulated sum, this establishes his relationship with the appellant company as that of an independent contractor. This contention overlooks the evidence which tends to show the control retained over the work by Westmoreland. A reasonable inference to be drawn from the evidence is that Westmoreland intended to, and did, retain the right to give directions in regard to the details of the work. In the case of *Ice Service Co.* v. *Forbess,* 180 Ark. 253, 21 S. W. (2d) 411, we said: "The conclusion as to the relationship must be drawn from all the circumstances in proof, and where there is any substantial evidence tending to show that the right of control over the manner of doing the work was reserved, it became a question for the jury whether or not the relation was that of master and servant." The circumstances proven in the case at bar raise a question as to the relationship of the truck driver to the Hobbs-Western Company to be determined by the rules announced in the cases cited, *supra,* which question the trial court properly submitted to the jury.

In the case of *Ellis* v. *Warner*, 180 Ark. 53, 20 S. W. (2d) 320, an injury was occasioned by a truck engaged in hauling gravel to be distributed along a public highway. Those engaged in hauling the gravel owned their trucks, paid all operating expenses, worked as and when they desired and were paid 20 cents per ton for a mile haul. The work was done for a firm engaged in the construction of the road and the gravel distributed along the highway as, and where, directed by said firm. Under that state of facts it was held that the question as to whether the operator of a truck was an independent contractor or a servant of the firm was one for the jury.

It is not contended that the verdict was excessive, and since the evidence warranted the submission of the case to the jury, the judgment of the lower court is affirmed.

DICKEY *v.* CLARK.

4-4127

Opinion delivered January 27, 1936.

John A. Fogleman and *R. V. Wheeler,* for appellant.

C. B. Nance, for appellee.

BUTLER, J. The appellant, B. G. Dickey, was the curator of the estate of Charlie Lewis Townes, a non-resident minor, and, as such, leased the lands of his ward for a period of five years to Renfroe Turner, which lease was approved by Judge Oliver, the then county judge of Crittenden County. The annual rental was fixed at the sum of $3,000. Dickey executed a written waiver of the rents for 1932 in order for the lessee to secure advances to enable him to make a crop. In his 1933 annual report, Dickey claimed credit for the rents of 1932 on the ground that the crop made for that year was consumed in the payment of the money and supplies used to make the crop, and that he collected no rent. C. M. Clark, the curator in succession, filed exceptions to the report, which were sustained by the probate court, but on appeal to the circuit court Dickey's claim was allowed. From the decision of the circuit court, Clark prosecuted an appeal to this court which reversed the judgment of the circuit court and remanded the cause for a new trial. *Clark* v. *Dickey,* 190 Ark. 192, 78 S. W. (2d) 824. In that case the court quoted § 1 of act 92 of the Acts of 1931 and stated that prior to the passage of that act curators and guardians were without statutory authority to waive rents of their wards' estates, and that therefore Dickey's justification in waiving the rents of his ward must be measured by the quoted act. The court reviewed the testimony adduced at the trial in the court below, which was to the effect that it was necessary, in order that the lessee might obtain the necessary money to enable him to cultivate the lands of the estate, that the rents should be waived; that during this period of time, because of general economic conditions, it was the universal practice in that section of the State for landowners to waive rentals as an inducement to

third parties to furnish money to the tenants to enable them to cultivate the lands. The court held that this evidence was sufficient to establish the good faith of Dickey in waiving the rentals for the year 1932, but that this was not sufficient to justify the action of the curator, and that he must, in addition, comply with the provisions of the quoted act. In that connection it was said: "It will be noted that the section of the act referred to does not authorize or impower curators or guardians to waive rentals, acting alone, but such power and authority emanates from 'the proper orders of any court of competent jurisdiction.' Therefore the curator must establish that the jurisdiction of a court of competent jurisdiction was invoked and exercised in this behalf before he is justified in claiming the right asserted. On this point it may be said that no effort was made to show that the jurisdiction of the probate court of Crittenden County was invoked or exercised in reference to Dickey's waiver of rentals for the year 1932. No petition was filed praying such authority; no court order was entered upon the records of said court showing the exercise of jurisdiction upon the subject-matter; indeed, no order was ever even filed with the clerk of the probate court of Crittenden County showing or tending to show the exercise of jurisdiction by the probate court upon the subject-matter. It is true, the county judge was approached and signed a paper authorizing the waiver of rentals by Dickey, as curator, for the year 1932, but this is no compliance with the act of 1931. The statute expressly refers to court orders and not to orders effected by the judges of courts in vacation. Therefore the act of the county judge in the premises is no justification."

On or about the day when this case was to be heard by the circuit court on remand, a petition was filed in the county court for an order *nunc pro tunc* for the purpose of making the record show those matters which we held had not been done. The probate court denied the petition, and from its order an appeal was taken to the circuit court where, by agreement, the appeal was consolidated with the main case.

The purpose of a *nunc pro tunc* order is to make the record reflect the transaction which actually occurred, and which is not reflected by the record because of inadvertence or mistake. Its province cannot be extended to make the record show what ought to have been done. In *nunc pro tunc* proceedings the record may be corrected or made to speak the truth upon parol testimony alone, but the evidence thus established should be decisive and unequivocal. *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Tipton* v. *Phillips,* 176 Ark. 308, 4 S. W. (2d) 507; *Tracy* v. *Tracy,* 184 Ark. 382; 43 S. W. (2d) 539.

On the hearing, the evidence considered by this court in *Clark* v. *Dickey, supra,* was introduced as was also the testimony of Mr. Dickey, Judge Oliver, the clerk of the probate court, and other witnesses. The trial court concluded that this evidence was not sufficient to satisfy the rule above announced, and in effect held that Dickey had failed to show a compliance with § 1 of act 92 of the Acts of 1931. It would serve no useful purpose to review the evidence adduced at the former trial or that introduced on remand, as in our opinion it supports the conclusion reached by the trial court.

Affirmed.

TISDALE *v.* TANKERSLEY.

4-4113

Opinion delivered January 27, 1936.

Cravens, Cravens & Friedman, for appellant.

D. L. Ford, for appellee.

BAKER, J. John Tisdale, by this appeal, seeks to reverse a decree of the chancery court declaring a contract he had entered into with the appellee and her husband, Arthur Tankersley, usurious.

Arthur Tankersley was in jail at Fort Smith in December of 1934 awaiting the action of the grand jury upon some felony charge. Bond, which he had been unable to make, had been fixed at $1,500. His wife, Goldie Tankersley, desiring to secure his release from custody, went to John Tisdale, who was said to be a professional bondsman and money lender, and asked Tisdale to make the bond for the release of her husband. Tisdale finally agreed to make the bond and did execute it, and Tankersley was released from jail. The appellee here, Goldie Tankersley, was not able to pay the cash consideration for the bond, nor did she have money enough to pay a fine which had been assessed against her husband upon another charge, the amount of which, together with costs, was $31.70. She and her attorney, on the 24th of December, 1934, upon her last appeal to Tisdale, borrowed money from Tisdale, who wrote a check for the $31.70, payable to the sheriff for the fine and costs against Arthur Tankersley, and Tisdale also wrote another check for $100, which he gave to Mrs. Tankersley, who took the check out of Tisdale's office to some mercantile establishment where she cashed it. She then returned to Tisdale's office and after paying her husband's attorney, who accompanied her, $25, she delivered the remaining $75 to Tisdale.

To procure this money from Tisdale, Mrs. Tankersley and her husband executed to him a deed conveying some property south of Fort Smith, consisting of two acres of ground, improved by a filling station and house, and a tourist camp with several small buildings. This conveyance was by deed in absolute form, purporting to convey a title in fee. At the same time of the execution of this deed, a contract was signed by all the parties. The effect of this contract was that the conveyance of the real property was to secure the payment of the indebtedness that arose when Tisdale gave the two checks above mentioned, one payable to the sheriff for $31.70 and

the other to Mrs. Tankersley for $100, $25 of which she paid an attorney, and $75 of which she returned to Tisdale. The contract provided that, if the indebtedness amounting to $131.70 should not be repaid within 30 days, the deed should become absolute. No dispute arose between the parties as to the effect of the deed and contract, but these instruments are treated by all of the parties as constituting a mortgage upon the real property for the payment of the debt.

The real controversy here, however, arises out of the $100 check. Mrs. Tankersley filed a suit in the chancery court alleging that the actual indebtedness was $50, premium or compensation for the execution of the bond; $25 for money which she delivered to her husband's attorney, and that the remaining $25 of the $100 check for a charge of interest for the 30-day period, or until maturity of the contract for repayment.

Tisdale's contention is that the charge for the bond was $75 and not $50, and that there was no interest charge. He asserts and insists that he refused to execute the bond for less than $75, unless Arthur Tankersley's father would sign the bond, in which event he says he offered to sign it himself for $50, but Tankersley's father would not sign the bond. Therefore, he was entitled, according to his contention, to the charge of $75, which he says was agreed upon, and, on account of the risk in the particular case, he also claims the charge was justified.

As we understand the record, there seems to be proof that bonds are sometimes executed at the rate of $50 for each $1,000 obligation. There is also some proof that the $75 was a reasonable charge. Before this bond was executed, however, it was reduced from $1,500 to $1,000. Several witnesses testified for the appellee as to the agreement made tending to show that the bond was to be executed for $50. Other witnesses testified that the agreement was for $75 and among the witnesses who testified to this effect was the attorney for Mr. Tankersley, who got $25 on his fee out of this $100 check and who aided Mrs. Tankersley in the procurement of this

money from Tisdale, and in having him execute the appearance bond for Tankersley.

Mrs. Tankersley was unable to pay this indebtedness at the maturity date thereof, and Tisdale extended the period of payment at least once and then placed the deed of record, which he had received from Mrs. Tankersley and her husband. Shortly thereafter the suit was filed by Mrs. Tankersley, alleging the facts which she contends are true, as above set out. This is to say, she charged or alleged in her complaint that Tisdale had charged $25 interest on $106.70, which she admitted she owed, making a total indebtedness, evidenced by the contract, of $131.70. She alleged that this was usurious and asked for the cancellation of the deed and contract on account of the consequent invalidity. Just prior to the filing of the suit, Mrs. Tankersley procured from Tisdale a letter to be sent to Judge Sam Lawrence of Fort Smith, from whom she had attempted to borrow money, as she claimed, to repay Tisdale. Tisdale wrote the letter advising Judge Lawrence that he would accept $150, if paid for Mrs. Tankersley on that day, January 24, 1935, and would execute a deed reconveying the property to her. Mrs. Tankersley claims that the $18.30, over and above the contract amount, which she had agreed to pay, was an additional charge of interest made by Tisdale. Tisdale claims that the amount was for expense incurred by him in regard to the loan, including the recording of the deed, delinquent taxes, etc., and to give her some cash she then needed.

It was also shown, in contradiction of what Tisdale said, that the lands were not on the tax rolls. It is urged that this additional charge of $18.30, at the time it was made by Tisdale, was explained by him that it was for interest that had accrued upon the debt.

This proof, however, in regard to the last-mentioned item does not establish in itself a usurious charge, for the reason that it does not show any agreement to pay exceeding 10 per cent. as the contract rate, nor does it show any scheme or plan assigned or agreed to by the appellee to exceed the legal rate. It may have been, and probably was, an injust exaction. The foregoing state-

ment of undisputed facts is not made with the idea that all of the matters in testimony should be set forth, but rather for the purpose of showing the controverted proposition presented here on appeal. Even to the casual reader, it will appear, therefore, that if the testimony on behalf of the appellee be believed, the decree is justified, and must be affirmed. On the other hand, if appellant's witnesses and their statements are believed and appellee's contentions are found untrue, then the cause should be reversed.

We have made the effort, by the foregoing statements, to show that a discussion of the details brought out by the testimony would be of little value.

It is rather difficult to determine, with certainty, what the true facts are, as we do not believe any of the testimony is demonstrably false. The chancellor's findings are not shown to be contrary to a preponderance of the evidence.

Therefore since the trial court found that the price or charge for the bond was $50, that $25 was an interest charge on $106.70 for 30 days, making a total charge of $131.70, the amount for which the parties signed the contract, the whole transaction was void on account of usury.

It is argued that the quantum of proof should be such as to establish the charge of usury by testimony clear and convincing. Such is not our understanding. The facts in regard to the charge of usury may be established by preponderance of the testimony as facts are generally so determined in other civil litigation. *Dickinson-Reed-Randerson Company* v. *Stroupe,* 169 Ark. 277, 275 S. W. 520; *Hogan* v. *Thompson,* 186 Ark. 497, 498, 54 S. W. (2d) 303; *Rouw* v. *Arts,* 174 Ark. 79, 294 S. W. 993.

The foregoing are among the last announcements of this court upon that subject and by them we are bound.

A full and complete consideration of all the testimony discloses no error, and the decree is affirmed.

Since the submission of this appeal a motion suggesting the death of appellee has been filed herein and praying a revivor in her heirs. Judgment here will be in name of heirs.

SYLVESTER *v.* U-DRIVE-EM SYSTEM.

4-4097

Opinion delivered January 27, 1936.

E. W. Brockman and *R. W. Wilson,* for appellant.

Reinberger & Reinberger and *Donham & Fulk,* for appellee.

MCHANEY, J. Appellant's intestate, Charlie Sylvester, was fatally injured by being struck by a car owned by appellee and operated by its employee on the night of February 11, 1934, on Main Street, between Third and Fourth Avenues, in the city of Pine Bluff, and died a short time thereafter. This action was instituted by appellant as administratrix of his estate to recover dam-

ages for his injuries and death. As stated by appellant: "The cause was heard before a jury and submitted solely upon the doctrine of the last clear chance. From a verdict for appellee comes this appeal."

Appellant's first contention for a reversal of the judgment relates to instruction No. 8, requested by her, as follows:

"You are instructed that, even though you might find from a preponderance of the evidence on the whole case that Charlie Sylvester was negligent, yet, if you further find from a preponderance of the evidence on the whole case, that the driver, Ralph Wardlaw, by properly driving the taxi and keeping a proper and constant lookout for persons in the course of his travel, could have discovered the presence of the deceased, Charlie Sylvester, in the street, and by the use of ordinary care and diligence under the circumstances could have avoided striking him, and he failed to do so, your verdict should be for the plaintiff and against the defendant."

The court modified this instruction by striking out the words "could have" immediately preceding the word "discovered," and gave the instruction as thus modified, over appellant's objection and exception to the modification, and this assignment appears to us to be the basis of her principal contention for a reversal.

We think no error was committed in this respect. As stated above, in the language of counsel for appellant, this case was "submitted solely upon the doctrine of the last clear chance." There is no question in this case of negligence on the part of the driver and contributory negligence on the part of deceased. There is some evidence in the record that the driver of the taxi was negligent in driving at an excessive rate of speed, and the evidence is overwhelming that the deceased, while intoxicated, at a late hour of the night, walked or staggered out into the street in the middle of the block, hidden from the driver's view by a parked automobile at the curb, and directly in front of the taxi. But the contributory negligence of the deceased was a bar to the action and appellant did not submit the case on

that theory, but on the theory of "discovered peril" or "last clear chance." "Discovered peril" means peril that is actually discovered and not peril that might have been discovered. As we said in *Missouri Pacific Railroad Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849: "In fact, the doctrine of discovered peril means that, when one person sees another in a place of danger or peril, he must exercise ordinary care to avoid injuring him, and, if he fails to do that, he is liable." And again in *St. Louis S. W. Ry. Co.* v. *Simpson,* 184 Ark. 633, 43 S. W. (2d) 251, we said: "The discovered peril doctrine, or the doctrine of last clear chance, as it is sometimes called, constitutes an exception to the rule that the contributory negligence of the plaintiff is a bar to his action. Under this doctrine, where one discovers the perilous situation of another in time, by the exercise of ordinary care, to prevent injury to him, it is his duty to do so, which is regarded in law as the proximate cause of the injury, and this, too, regardless of the contributory negligence of the injured person. Such a person is regarded in law as having the last clear chance to prevent injury or death to another, and it is his duty to do so."

See also *Johnson* v. *Poinsett Lumber & Mfg. Co.,* 187 Ark. 237, 59 S. W. (2d) 30; *Ark. Power & Light Co.* v. *Dillinger,* 188 Ark. 401, 66 S. W. (2d) 291. In the former case it was held, to quote a headnote: "In an action by a pedestrian struck by a motor-car while walking on a railroad track, an instruction that the discovered peril began, if at all, when it became apparent to the party operating the motor-car that the plaintiff 'was not only upon the track between the rails but that she would remain there' held not error." Appellant relies on the case of *Ark. Power & Light Co.* v. *Heyligers,* 188 Ark. 815, 67 S. W. (2d) 1021. But the instruction there under consideration, and which was held not to be erroneous, did not assume, nor was it conditioned upon, the contributory negligence of the plaintiff. After quoting from § 398, vol. 1, of White's Personal Injuries on Railroads, that the rule "may now be stated to be well-established that the injured person, or his representative, may recover damages for an injury resulting from the

negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part to avoid the injury, after discovering the peril of the injured person." The court then said: "It would appear to be a sufficient answer to appellant's argument upon this subject to say that, if the failure to use care to avoid injuring the person whose negligence had placed him in a perilous position was the proximate cause of the injury, when proper care, after discovery of the peril, would have averted the injury, such failure to use proper care would likewise be the proximate cause of the injury to a person in peril without fault or negligence on his part, and we conclude therefore that there was no error in the instruction."

Likewise in the case of *Ark. Power & Light Co.* v. *Tolliver,* 181 Ark. 790, 27 S. W. (2d) 985, instruction No. 1A for appellee was criticized by appellant as being incorrect under the discovered peril rule. The instruction was not copied in the opinion, but an examination of the record discloses that it does not assume the contributory negligence of the appellee, but the case was tried on the theory that she was in the exercise of due care for her own safety, and the court instructed the jury, that if she were guilty of contributory negligence, she could not recover, even though its motorman was also negligent as alleged. So it will be seen that these cases were not tried on the "discovered peril" doctrine, but upon the rule of negligence and contributory negligence.

Moreover, appellant asked and the court gave her instruction No. 11 as follows: "You are instructed that, although you may find that the deceased was crossing the street at a point other than an intersection, and although you further find that the deceased was under the influence of some intoxicant, and to the extent that he was unable to appreciate the danger to which he was subjecting himself by walking in the street, and the defendant's driver saw and realized his condition, it then became his duty to exercise ordinary care under the circumstances to prevent striking and injuring the de-

ceased; and, if you find that he failed to exercise such care, and that such failure was the proximate cause of the injury, then your verdict should be for the plaintiff."

This was a correct declaration because it required the driver to see and to realize the condition of appellant's intestate,—not that he could have seen and could have realized his condition in a place of danger. In other words, the discovered peril began, if at all, just as in *Johnson* v. *Poinsett Lumber & Mfg. Co., supra,* when it became apparent to the driver that said intestate was in a place of danger. It then became his duty to exercise ordinary care to prevent injury to him, and, if he failed to do so, he was negligent. Numerous other cases might be cited in support of the rule re-announced, many of which may be found cited in the cases mentioned. It follows from what we said that the court did not err in modifying said instruction in the manner stated.

It is next said that the court erred in refusing to give appellant's instruction No. 4, to the effect that the deceased was presumed to be in the exercise of due care for his own safety at the time of the injury, and that the burden is upon appellee to show the contrary, unless it sufficiently appears from appellant's testimony. No error was committed in refusing this instruction, for the reason that, since the case was tried upon the doctrine of "discovered peril" solely, the question as to whether he was in the exercise of due care for his own safety is immaterial, as, regardless of his contributory negligence, if the driver of the taxi actually saw him in time to avoid striking and injuring him by the exercise of ordinary care, and failed to do so, appellant was entitled to recover under the instructions given.

Appellant also assigns as error and argues that the court erred in giving certain instructions for appellee over appellant's objections. We have examined these assignments and find them without merit. It would unduly extend this opinion to set them out and discuss them in detail.

We have carefully examined all of the instructions given and refused and find that the court fully and fairly instructed the jury on the whole case.

It is finally insisted that the court erred in the admission of certain testimony. The court permitted one witness to testify that the deceased appeared to be under the influence of whiskey because she saw him stagger, and another witness to testify that he talked to the driver of the taxi shortly after the accident, and the driver said: "He didn't see him until he stepped out in front of him between two cars and he was right on him before he seen him," meaning the deceased. As to the former witness, who thought the deceased was intoxicated because he staggered, we think the testimony was competent as tending to show the condition deceased was in at the time he left the restaurant where the witness was a waitress; and as to the latter, the testimony as to what the driver said, if error, was invited by appellant who asked the same witness on direct examination as to statements made by the driver.

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

JOHNSON, C. J., and HUMPHREYS, J., dissent.

JOHNSON, C. J., (dissenting). The majority opinion indeed takes this court back to "horse and buggy days" in reference to the doctrine of "last clear chance" or "discovered peril."

As I understand the English language, we expressly held in *Arkansas Power & Light Co.* v. *Tolliver,* 181 Ark. 790, 27 S. W. (2d) 985, to the contrary of the doctrine now announced by the majority. We there said: "The specific vice of the instruction urged upon our attention is that the instruction told the jury that, if the motorman could have discovered appellee's peril in time to have stopped his car and avoided the injury to the appellee, had he used ordinary care with the means at his command, and did not do so, appellant was liable, and it is argued that the court should have limited the degree of care required of the defendant's motorman to ordinary care in stopping the car after he actually discovered the plaintiff in a perilous position upon the track, and also that there was no testimony to show that the motorman failed to keep the lookout required by the exercise of

ordinary care, and that therefore the instruction was abstract in this regard.

"We do not think the instruction inherently wrong or prejudicial."

Demonstratedly this language means what it says: "The motorman could have discovered appellee's peril." This means that the motorman had the duty of keeping a lookout for people in the street and to avoid injury if it could be done by the exercise of ordinary care.

Again in the more recent case of *Arkansas Power & Light Co.* v. *Heyligers,* 188 Ark. 815, 67 S. W. (2d) 1021, we expressly held that the giving of the following instruction was not error. "That if * * * the person in charge of said street car discovered the position of said automobile and the perilous condition of the occupants thereof, or could have discovered same by the exercise of due care, that it became the duty of the operator of said street car to use all reasonable means within his power, consistent with the safe operation of said street car, to avoid the striking of said automobile, and, if he failed to exercise such precaution after he discovered, or could have discovered, such peril, and you should further find by a preponderance of the testimony that the injury to plaintiff, if any, was caused by such failure on the part of the operator of said street car, then your verdict should be for the plaintiff."

The language of the quoted instruction, if it means what it says, certainly committed this court to the doctrine that in all cases where people were using the streets or highways with equal rights each has the duty to keep a lookout for others using such thoroughfare and avoid injuries if reasonably possible. If I am correct in my construction of the language employed by my two associates in the opinion referred to, and this I leave to the judgment of the bench and bar of this State, I submit that the majority is now announcing one rule applicable to drivers of motor vehicles and another rule applicable to street railways, when in fact and under the law there is no difference in duty. On the other hand, if the majority intend to hold that the duties of the motor vehicle

operator and motorman on a street car are identical, then the majority opinion breaks down the rule of *stare decisis* and previous opinions of this court are mere scraps of paper to be used only when the fancy of the court elects.

The majority seem to put much reliance upon *Johnson* v. *Poinsett Lumber Company,* 187 Ark. 237, 59 S. W. (2d) 30, as supporting the view that an operator of an automobile has no duty to keep a lookout for other people rightfully using a thoroughfare. Such is not the letter, spirit, nor effect of the opinion in this case. The facts there were that the Poinsett Lumber Company owned and operated a log tramroad, not a common carrier—and Mrs. Johnson was walking upon this tramroad without right when injured. No instructions were requested, granted nor refused which presented the issue now decided by the majority; and moreover, the issue is not discussed nor decided in the opinion. All other cases cited and relied upon by the majority are equally without force as will be ascertained from a cursory examination.

The position taken by this court in the Tolliver and Heyligers cases cited, *supra,* were deliberately assumed and I assert should be respected as their dignity and importance demand. These two cases are in line with all modern decisions on the question made necessary by the advent of a dangerous instrumentality upon the thoroughfares of the world. *Dorough* v. *Ala. G. So. Ry. Co.,* 221 Ala. 513, 128 So. 602; *Wood* v. *N. Ala. Ry. Co.,* 22 Ala. App. 513, 117 So. 495; *Mobile Light & R. Co.* v. *Fuller,* 18 Ala. App. 301, 92 So. 89; *Handley* v. *Lombardi,* 122 Cal. App. 22, 9 Pac. (2d) 867; *Gundry* v. *Atchison, T. & S. R. Ry. Co.,* 104 Cal. App. 753, 286 Pac. 718; *Sichterman* v. *R. M. Hollingshead Co.,* 94 Cal. App. 486, 271 Pac. 372; *Nicolai* v. *Pacific Electric Ry. Co.,* 92 Cal. App. 100, 267 Pac. 758; *Collins* v. *Marsh,* 176 Cal. 639, 169 Pac. 389; *Sowers* v. *Indiana Service Corporation,* 98 Ind. App. 261, 188 N. E. 865; *Disher* v. *Kincaid,* 193 Iowa 83, 186 N. W. 666; *Boerema* v. *Cook,* 256 Mich. 266, 239 N. W. 314; *Smith* v. *C. R. I. & P. Ry. Co.,* 228 Mo. App. 600, 71 S. W. 842; *Johnson* v. *City of Omaha,* 108 Neb. 481, 188 N. W. 122; *Cleveland Ry. Co.* v. *Masterson,* 126 Ohio St.

42, 183 N. W. 873; *S. W. Mo. Ry. Co.* v. *Duncan,* 139 Okla. 287, 282 Pac. 327; *Emmons* v. *So. Pac. Co.*, 97 Ore. 263, 191 Pac. 333; *Wichita Coca-Cola Bottling Co.* v. *Levine,* (Tex.) 68 S. W. (2d) 310; *Northern Texas Traction Co.* v. *Singer,* (Tex.) 34 S. W. (2d) 920; *Walker* v. *East St. Louis & S. Ry. Co.* (C. C. A. Mo.) 25 F. (2d) 579; *Penn. Ry. Co.* v. *Swartzel* (C. C. A. Ind.) 17 F. (2d) 869; *Kinney* v. *Chicago Great Western Ry. Co.* (C. C. A. Iowa) 17 Fed. (2d) 708.

The doctrine now announced by the majority opinion, if adhered to, will permit a careless and drunken driver of an automobile to fall asleep at the wheel and run his car over and upon the lame, sick and irresponsible rightfully upon the State's thoroughfare and claim immunity because of his want of care.

Under the majority view, a complete defense may be now offered and sustained by a drunken or incompetent automobile driver by merely saying, "I shut my eyes and did not see," therefore no liability. My conception of the law is that this is no defense, complete or partial, and for this reason I most respectfully dissent from the majority pronouncement.

POLLOCK STORES COMPANY *v.* CHATWELL.

4-4114

Opinion delivered January 27, 1936.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Joseph R. Brown, for appellee.

JOHNSON, C. J. This action was instituted in the Sebastian Circuit Court by appellee, Walter Chatwell, against Pollock Stores Company and John McShane to compensate a personal injury alleged to have been sustained by the negligent operation of appellant's automobile upon a public thoroughfare in Fort Smith. Trial to a jury resulted in a verdict and consequent judgment in appellee's favor for the sum of $5,000, from which, appellant, Pollock Stores Company, appeals.

But one contention is urged for reversal, namely: that the jury's verdict is not supported by substantial testimony, but this contention makes it necessary to review the testimony.

The testimony adduced was to the effect that appellant, Pollock Stores Company, is a foreign corporation and owns and operated stores in the city of Fort Smith; that John McShane was at all the times heretofore stated an employee and manager of said stores in Fort Smith, and that on October 23, 1934, McShane directed one Buddy Price a colored boy to drive his personal automobile to its place of storage in said city; that, while this colored boy was performing the service demanded by McShane, he drove the car upon the sidewalk and ran it against and over appellee, inflicting very serious and painful injuries. Appellant argues that the negro boy who was called upon by McShane to drive the car to its place of storage was not an employee of Pollock Stores Company; that the car belonged to McShane and not to the Pollock Stores Company; and that the negro boy while driving the car to storage was performing no duty for it. Specifically, the testimony in behalf of appellee

upon the contention urged by appellant when viewed in the light most favorable to him as we are required to do under repeated opinions of this court was to the effect that the colored boy was at intervals employed by Pollock Stores Company to do janitor services, but that on the day of appellee's injury he was not so engaged, but on the contrary had been specifically told by McShane that his services were not needed that day; the automobile which inflicted appellee's injury was the property of McShane, but it had been used on various occasions by appellant's employees in effecting deliveries of merchandise and making collections of accounts. There is no direct or positive testimony showing that the negro boy was performing any service to or for appellant at the time of appellee's injury except such inference as may be drawn from the facts and circumstances detailed. This testimony is insufficient to support the jury's verdict.

The crux of this case is: Was the negro boy performing service for Pollock Stores Company at the time of the injury? The automobile did not belong to the Pollock Stores Company, and at the time of the injury was being driven to storage and not in actual service for appellant unless it could be determined that it was an instrumentality incident to appellant's business. It is true that under the law McShane's ownership of the automobile is not conclusive that appellant was not interested in its keep and operation. See *Southwestern Bell Telephone Company* v. *Roberts,* 182 Ark. 211, 31 S. W. (2d) 302. But the ownership being in McShane places the burden of proof on appellee to show that Buddy Price was a servant of appellant, and was at the time of the injury engaged in the furtherance of his master's business. See vol. 7 and 8, Huddy's Enc. of Auto. Law, p. 231, and vol. 9, § 6057, Blashfield's Enc. of Auto. Law.

The mere fact that McShane permitted employees of appellant to use his automobile at times in performing services for appellant is too conjectural in effect to compel the conclusion that the automobile at the time of the injury was in performance of appellant's business, or was an incident thereto. It is equally as probable, if conjecture may suffice, that the car was not in such use.

 [redacted]

We do not hold that this testimony was incompetent, but that, standing alone, it is not sufficient to support the jury's verdict.

In view of a new trial we notice that the trial court refused to permit appellee to show by testimony that appellant had liability insurance upon McShane's automobile at the time of appellee's injury. Under our opinion in *Delamar & Allison* v. *Ward,* 184 Ark. 82, 41 S. W. (2d) 760, this testimony was competent and relevant as tending to establish appellant's interest in McShane's automobile, but after admission should be restricted in application and effect as pointed out in the case last referred to.

For the error indicated the cause is reversed, and remanded for a new trial.

[redacted]

THE CIVIL SERVICE COMMISSION OF FAYETTEVILLE *v.* CRUSE.

4-4119

Opinion delivered January 27, 1936.

[redacted]

Rex Perkins and *Price Dickson,* for appellant.

G. T. Sullins, for appellee.

MEHAFFY, J. This action was begun before the Civil Service Commission of the city of Fayetteville, Arkansas. The following notice was served.

"Comes now the Civil Service Commission of the city of Fayetteville, Arkansas, and hereby notifies Neal Cruse that proceedings to discharge the said Neal Cruse from the police force of the city of Fayetteville, Arkansas, have been instituted, and said commission for cause states,

"That heretofore, on February 1, 1935, Tom Sullins, acting as attorney for the said Neal Cruse, met with this commission in executive session, and made the following proposition to said commission: That, if proceedings previously had before said commission resulting in the discharge of Neal Cruse were dismissed in the circuit court of Washington County, Arkansas, the said Neal Cruse would resign from said police force not later than March 1, 1935, and sooner if possible. This commission further alleges that said Tom Sullins was acting within the scope of his authority, and that they relied upon the promises made by the said Tom Sullins, and accepted said proposition, and in accordance therewith did on February 2, 1935, dismiss said charges in the circuit court of Washington County, Arkansas, the sole reason for said dismissal being the representation made by the said Tom Sullins, as attorney for Neal Cruse, that he would resign from the police force of

the city of Fayetteville, Arkansas, on or before March 1, 1935.

"This commission further states that the said Neal Cruse has failed and refused to comply with his part of the agreement, and that his failure to so comply with his part of the agreement constitutes a fraud perpetrated upon this commission; that he is unfit to serve on the police force of the city of Fayetteville, Arkansas, by reason of the fact that his word is of no value, and that no confidence can be placed in him.

"The said Neal Cruse is further hereby notified that he has ten days from the date of the service of this notice upon him in which to file reply, and, if said reply is not filed within said time, he will be discharged from said force without further proceedings.

"Civil Service Commission of the City of Fayetteville, Arkansas.

"By Price Dickson, its Attorney."

The appellee filed motion to dismiss, which is as follows:

"Comes Neal Cruse and moves the commission to dismiss the charges and grounds for discharge herein and for cause states:

"That said charges and grounds as set forth in the notice are not sufficient to constitute a cause for discharge.

"That the commission is without jurisdiction to hear and determine the matters and things set forth in the notice.

"That the commission has failed to provide rules for governing the discharge of members of the police department.

"Respectfully submitted, Neal Cruse."

The commission ruled on the motion and discharged appellee as chief of police. From the order discharging him, he prosecuted an appeal to the circuit court. He has filed an answer, but it is not necessary to set it out, because it was submitted to the circuit court on motion to dismiss, and the circuit court sustained his motion, and entered a judgment reinstating Neal Cruse as chief of police, and gave him judgment for $113.32.

The Civil Service Commission filed a motion for new trial, and this motion was overruled, and the case is here on appeal.

It is first contended by the appellee that the provision of act 28 of the Acts of 1933 requires the commissioners to prescribe rules and regulations, and it is conceded that they have not done this. It is their duty to have written rules, and they could not try any one for a violation of a rule unless they had prescribed the rule, and the rule must have been written. They could not simply have a rule in mind and charge some one with violating it. But there is ample provision made in the act itself for making charges against any officer, and trying him for any crime or misdemeanor, and to determine whether he is guilty or not. No rule would be required to charge a person with the commission of any crime or with any violation of act 28, *supra.*

The act provides the right of appeal from any action of the board to the circuit court within whose jurisdiction the Board of Civil Service Commissioners are situated. The act provides that such trials shall be *de novo,* and the parties to such appeal may introduce any further or other evidence that they may desire, provided the same is legal, relevant and competent. Right of appeal is given from the circuit court to the Supreme Court, and it is provided that it shall here be tried *de novo;* that is, it provides that such appeals shall be governed by the rules and procedure in appeals of equitable cases.

It is contended, however, that the charges made by the commissioners are not sufficient to disqualify appellee for the position of chief of police, and are not sufficient to require him to go to trial.

It appears from the record that there were charges pending in the circuit court against the appellee, and that he agreed that if the commission would dismiss the charges in the Washington Circuit Court, he would resign from the police force not later than March 1, 1935. The Commission, according to the agreement, dismissed the charges on the sole ground that Cruse agreed to resign. They allege that he has failed and refused to comply

with his part of the agreement, and that his conduct constitutes a fraud perpetrated upon the Commission.

Of course, the promise to resign office would not be enforceable against any officer if he were a suitable person and qualified for the office, but if he made the promise for the purpose of getting the charges against him dismissed, this conduct on his part might justify a dismissal.

They further allege that he is unfit to serve on the police force because his word is of no value, and no confidence can be placed in him. If these charges are true, he should be dismissed from the police force. In other words, if he committed a fraud and is unfit to serve, the commission would have a right to discharge him. The charge of fraud and unfitness for office is in general terms, and doubtless, if appellee had requested it, the charge would have been made more definite and certain, but it is sufficient on demurrer to require him to go to trial. His motion to dismiss is, in fact, a demurrer to the complaint.

We think there is ample provision in the law, without any rules, to justify the Commission in trying a person for fraud or for being unfit to hold office.

The circuit court should have overruled the motion to dismiss, permitted the appellee to file answer if he wished to do so, and then proceeded to try the case on its merits.

The judgment of the circuit court is reversed, and the cause remanded with directions to overrule the motion to dismiss, and to proceed with the trial of the case according to law.

MADISON-SMITH CADILLAC COMPANY *v.* SHAUMAN.

4-4107

Opinion delivered January 27, 1936.

Owens & Ehrman, for appellants.

R. E. Wiley, for appellee.

BAKER, J. This case is unusual in many aspects. The appellee bought from Madison-Smith Cadillac Company, in Little Rock, a LaSalle sedan automobile, and paid therefor $3,055. This was on September 29, 1928. He alleged in his complaint that the steering mechanism upon this car was in bad condition from the time of the purchase until May 3, 1930, when the car was wrecked, said wreck having been caused by the defective steering gear. During the period prior to the wreck the car had been returned to the repair shops of the Madison-Smith Cadillac Company on several occasions, but repairs were never successful. The appellee made claims for damages, including doctor's bills and other expenses for injuries suffered by the wife of the appellee at the time of the wreck.

After the said wreck, when the LaSalle automobile was returned to the shop of the appellant for repairs, the estimated cost of such repairs was something above $400. Shauman did not want to pay this price and did not authorize the repairs to be made. A few days later he made a proposition in writing to the Madison-Smith Cadillac Company. His letter, dated June 4, 1930, is as follows:

"Madison-Smith Cadillac Co.,
"Little Rock, Arkansas.
"Attention Mr. Madison.
"Dear Mr. Madison:

"Concerning our conversation regarding the trade of my LaSalle sedan, I hereby confirm your proposition: You to take my car in trade for the Cadillac Fleetwood that you are now driving this coming September and I

to pay you a difference of $2,600. Your car to be in as good condition as of this date, natural wear excepted. You are to have immediate possession of my car to repair and sell and you to deliver your car at a date agreed upon in September. I furthermore state that my car is free from all indebtedness and no liens against same.

"Thanking you very kindly for your consideration in this matter, I am,

"Very truly yours,

[Signed] "Harry E. Shauman."

The answer to this letter was by Mr. Madison, individually, and is as follows:

"Little Rock, Ark.,
"June 7, 1930.

"Mr. H. E. Shauman,
"N. O. Nelson Mfg. Co.,
"Little Rock, Arkansas.

"Dear Mr. Shauman:

"I am in receipt of your letter of the 4th confirming purchase of my Fleetwood Cadillac Sedanette, as follows: I to take delivery of your LaSalle at once, and to deliver to you my car in September, 1930. You to pay me a difference of $2,600. I am to deliver you my car at that time in same condition as of this date, with the exception of natural wear on average mileage in the meantime.

"Yours very truly,
"A. F. Madison (Signed)
"A. F. Madison.

"P. S. Might advise that I am just advised by Cadillac Motor Car Company that they are shipping me the new improved radio which I will install on this car upon receipt."

One of the controversies in this suit is that the Madison Cadillac Company, formerly Madison-Smith Cadillac Company, was not a party to the contract as evidenced by these letters, but that the contract was one between Mr. Shauman and Mr. Madison only; that Mr. Madison, as an individual, accepted the offer of Mr. Shau-

man, and became bound thereby to the exclusion of the corporation.

The view we have of this suit, however, makes it immaterial whether the suit should have been against the corporation or the individual.

This was an exchange or barter of one automobile for another, the difference in values being evidenced by the agreed consideration of $2,600, to be paid by Shauman at the time he was to take over the Fleetwood Cadillac car in September. There was no agreement about the value of either one of the cars set out in this contract. There was, however, an agreement to the effect that the Fleetwood car was worth $2,600 more than the LaSalle car. That is certain and definite.

Upon the trial of the cause the suit proceeded upon a theory that the appellee was the purchaser of the Fleetwood car; that he was paying therefor by the delivery of the LaSalle car and by the settlement of the claim he alleged he had against the defendants for $600 for damages and by the further payment of $2,600, to be made in September.

In the development of the case no effort was attempted as an explanation of the alleged damage claim, except that Shauman makes it clear he intended a settlement of the matter in the contract. If so, it was an unnoted consideration.

In September Shauman says that his financial condition and status had changed, and that he was unwilling to proceed with his contract and pay the $2,600 according to agreement and to accept delivery of the Fleetwood Cadillac car. This is the only reason given for the failure to perform the contract. The Fleetwood Cadillac car was ready for delivery, and the evidence is undisputed that Mr. Madison called Shauman on two or three occasions desiring to make delivery, which was refused; that Mr. Galloway, a salesman of the Madison-Cadillac Company approached Mr. Shauman on one or two occasions in an effort to deliver. Shauman refused and would not pay the $2,600. The car was kept for him until January 22, 1931. At that time the Fleetwood Cadillac car was sold or traded for $950 in cash and two Buick cars.

There was realized from the two Buick cars $940, making a total received for the Fleetwood car of $1,890. Prior to this time the LaSalle car had been repaired and was sold for $1,141. $417.39 had been spent in repairs on the LaSalle car, so the net amount received for it was $723.61, which, added to the $1,890, for which the Fleetwood car was sold, made a total of $2,613.61 that was received for the Fleetwood Cadillac car.

On April 11, 1932, Mr. Shauman wrote Mr. Madison a letter calling attention to a letter written on a previous date, April 2d, in regard to the credits for the LaSalle car. In response to this letter, by Mr. Shauman, on April 11, Mr. Madison, answering, called attention to Shauman's letter of June 4, 1930, the contract letter, and also called attention to the fact that the trade was made between the two parties as individuals. He further said: "The writer held the car for you until the specified time and then held it some little time longer, trying to give you a chance to carry out the agreement." "The writer lost considerable more money by holding the car than he realized out of the wrecked car which you turned in."

These two letters show the attitude of the parties at that time.

Shauman thought that he was losing too much, although he had breached the contract himself, and, accordingly he filed suit, as he contends, not on account of his breach of the contract, but to protect himself against the extreme penalty or losses which he says he suffered by reason of the fact that the appellants had refused to account to him for any part of the contract price that he had paid by trade of the LaSalle car and settlement of his controversy for damages on account of injuries alleged to have been suffered. He had settled his claim for damages, and delivered his LaSalle sedan, but had nothing in return.

The theory of the defense is that, after the appellee had breached the contract, he was the author of his own misfortunes and was not entitled to any accounting for any part of the consideration paid or traded on the purchase of the car he refused to accept.

Conflicting evidence was offered tending to show the market value of the two cars, the Fleetwood Cadillac and the LaSalle, at and prior to the time of the breach of the contract, and also some evidence was offered tending to show the market value of the Fleetwood car at the time it was sold. Among other items of proof in regard to the value of the Fleetwood-Cadillac car, the fact was developed that, after it had been kept in the hope of delivery to Shauman, a new model had been put upon the market, which rendered the Fleetwood car an out-of-date model and very materially reduced in market value.

Shauman contends that upon his breach or failure to accept the Fleetwood Cadillac car, the defendants, after notice to him, should have advertised or sold the car at public sale and accounted to him for the purchase price thereof; that, failing to do so, they must account to him for the market value at the time of the breach, and he argues that the jury, upon the trial of this case, must have found the market value to be at least $3,100, from which, he argues, was subtracted the amount of his debt or obligation, $2,600, leaving a verdict of $500, the amount for which judgment was rendered in his favor.

This argument, made to sustain this verdict, is extremely adroit, but not convincing. On account of contradictory instructions, submitting this case to the jury, the verdict is not conclusive as a finding of any facts. To determine the rights of the parties in this controversy, we attempt an analysis of the material part of the record before us.

If we treat the subject of this controversy, as the parties did upon the trial, as a contract for the sale of the Fleetwood Cadillac car to Shauman, for the delivery of the LaSalle car, and payment of the $2,600, it is necessary that we discuss the written contract between the parties. This contract was not an executed contract. Shauman did not have title or possession actually or constructively. The LaSalle car and the settlement of Shauman's claim for damages, for some undetermined amount, was a "down payment." There was a balance owing of

$2,600. This was to be paid in September, then only was delivery contemplated. So the contract was executory. See distinction between executed and executory contracts. 13 C. J., p. 245, § 11; 6 R. C. L., p. 590.

Shauman, in his letter, the contract, to the defendants, refers to the Fleetwood car as "your car," possession of which defendants were entitled to have until he had performed the contract upon his part by the payment of $2,600. There was never a time from the date that letter was written and offer accepted until the present time that Shauman could have rightfully gotten possession of that car, except by full compliance of his agreement to pay the $2,600. The defendants were not mere bailees, or trustees, nor did they occupy the relative position of a mortgagee in possession. Whether the breach arose out of a wilful refusal to perform or actual inability, can make no difference. No enlarged rights or remedies arise because misfortune had overtaken him. He admits his breach; also that defendants were not in default. Plaintiff therefore cannot maintain his suit. *Harris Lumber Company* v. *Wheeler Lumber Co.,* 88 Ark. 491, 115 S. W. 168; *Berman* v. *Shelby,* 93 Ark. 472, 125 S. W. 124; *Mo. Pac. Ry. Co.* v. *Yarnell,* 65 Ark. 320, 46 S. W. 943; *Kirchman* v. *Tuffli Bros. Pig Iron & Coke Co.,* 92 Ark. 111, 122 S. W. 239.

Since there was no delivery of the Fleetwood car, plaintiff did not have any property therein; so long as the contract was executory, his property lay in the contract. Its validity or enforceability was not questioned.

The court erred in refusing to direct a verdict for defendants. Judgment is reversed, and cause dismissed.

DUKES *v.* COHEN.

4-4112

Opinion delivered January 27, 1936.

Everett Simpson and *W. A. Singfield,* for appellants.

Williamson & Williamson, for appellee Cohen.

John Baxter, for appellee Abroms.

McHaney, J. Appellant, Isabella Dukes Halcomb, is the mother of appellant T. B. Dukes, and is the widow of the late G. D. Dukes, a colored physician, who died some years ago in Dermott, Arkansas, leaving his widow, appellant T. B. Dukes, and M. M. Dukes, his sons, as his sole surviving heirs at law who inherited lot 5, block 1, in Dukes' Addition to Dermott, generally known as the Dukes' estate property. The north 100 feet of this property was occupied by a two-story brick building, the ground floor of which on the main business street of Dermott, was occupied by A. Abroms, who had been a tenant for about 14 years. Another tenant was on the second floor of the building and there were some vacant rooms on this floor. On the south 50 feet of said lot were located some one-story brick shops and store-rooms. A mortgage was held on this property by L. W. Dillard, of Monticello. Isabella owned a life estate in this property, and her sons the remainder interest. The store-room of the two-story building had been rented to A. Abroms at $140 per month, and at the time this controversy arose he was in arrears for rent in the sum of $720. The Dukes heirs had fallen behind in the payment of taxes and insurance on the property as well as interest on the mortgage indebtedness, and Mr. Dillard had noti-

fied them that, unless these delinquencies were looked after, he would require the payment of the mortgage indebtedness. In December, 1933, the city council of Dermott had condemned the two-story building as dangerous. Appellee Joseph Cohen is a dry goods merchant in the city of Dermott and a competitor of appellee Abroms. In December, 1934, appellee Cohen approached Isabella with an offer to buy the two-story building. On the 6th day of January, 1934, appellants made an offer to sell appellee Cohen the north 100 feet of said lot for $500 cash and the assumption of the mortgage in favor of Mr. Dillard. The offer to sell was in writing and is as follows:

"Dermott, Arkansas. January 6, 1934.

"For a cash consideration of $500 (five hundred dollars), we the Duke estate, agree to sell all rights, title, and holdings in the building now occupied by A. Abroms on the first floor and John Baxter and vacant rooms on the second floor.

"We forever give up any rights to title in said building.

"Joseph Cohen to take over mortgage on building now held by Mr. Dillard.

"This property is known as the original Dukes estate.

"(Signed) T. B. Dukes."

Appellee Cohen would not accept this offer at that time but desired to consult with Mr. Dillard, which he did the next day, Sunday, January 7. On January 8, appellants and Sam Nussbaum, the son-in-law of appellee Cohen, went to consult an attorney in Lake Village to get him to prepare a deed for the Dukes heirs to sign. Acting under instructions, the attorney consulted by Nussbaum, with appellants present, prepared a deed for the Dukes heirs to sign conveying the whole of lot 5, by warranty deed to Mrs. Jennie Nussbaum, appellee Cohen's daughter, and in addition an assignment to her of the rent due from A. Abroms to Isabella Dukes; he also prepared a quitclaim deed from Jennie Nussbaum to Isabella Dukes Halcomb to the south 50 feet of said lot for life with the remainder to T. B. Dukes. Appellants

did not wait for the deeds to be prepared but returned to Dermott where some time during the day they sold the north 100 feet of said lot, including the two-story building, to A. Abroms. About eight o'clock on the night of the 8th of January, appellee Cohen presented the deed to appellants, offered to pay the $500 cash for the deed, but they refused to sign same because they had already sold to Abroms. Thereafter, this suit was brought for specific performance against appellants and Abroms. A trial resulted in a decree against appellants, but the court found that specific performance was impossible because Abroms was an innocent purchaser, and he gave judgment against appellants in favor of appellee Cohen for $1,200. This appeal is from that judgment.

We think the learned trial court was in error in so holding, for a number of reasons. The first is that appellants' offer to sell was never unconditionally accepted. The offer to sell was in writing and is set forth hereinabove. There is no acceptance indorsed on the writing, and none is shown in the evidence either orally or otherwise on the terms of the written offer. The second is that appellee introduced in evidence the warranty deed which was prepared by his attorney and which appellants refused to sign which proposed to convey to Jennie Nussbaum the whole of lot 5, block 1, Dukes' Addition to Dermott, Arkansas, and not simply the north 100 feet of lot 5, block 1, which the parties agree the written offer referred to. The third is, that this warranty deed also conveyed to Jennie Nussbaum the past-due rent owing by A. Abroms to appellant Isabella. This matter of the past-due rent was not contained in the offer, and it amounted to $720, which was due in December, 1933, to say nothing of the rent that had accrued for the month of January, 1934. It is no answer to say that appellee Cohen also had prepared a quit-claim deed from Jennie Nussbaum to appellants of the south 50 feet of said lot which she would have signed. It was never contemplated that the title to the south 50 feet of said lot should pass out of appellants, and there might be a very cogent reason why appellants did not desire the title thereto conveyed to her or any other person with a quit-

claim deed back to them therefor, as there might be a judgment against Jennie Nussbaum which would be a lien on the property the instant it passed to her and which she could not convey back to appellants, free from such lien. Neither is it any answer to say that the matter of rents was to be conveyed to appellee and he was to pay the past-due taxes, insurance and interest due Mr. Dillard, because nothing was said in the written offer to sell regarding these matters. In the recent case of *Smith* v. *School District No. 89,* 187 Ark. 405, 59 S. W. (2d) 1022, this court said: "It is elementary law that, where a party submits an offer of a contract, this offer must be accepted without reservations. Any reservations or limitations in the acceptance in law is a rejection of the offer." In the same case this court quoted with approval from the case of *Horgan* v. *Russell,* 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150, the following:

"It is the settled law of this State that, before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms."

We are therefore of the opinion that the written offer as made by appellants was never accepted except upon new conditions and upon new terms imposed by appellee, and that therefore this amounted to a rejection of the offer, and that appellants were free to sell to Mr. Abroms as they did.

The decree of the chancery court is therefore reversed, and the cause remanded with directions to dismiss the complaint for want of equity. It follows also that the appeal and cross-appeal of appellee Cohen is affirmed.

MILLER COUNTY *v.* BLOCKER.
BLOCKER *v.* MILLER COUNTY.

Nos. 4-4115, 4-4122

Opinion delivered January 27, 1936.

James D. Head, for Miller County.

H. M. Barney and *Frank S. Quinn,* for Blocker *et al.*

SMITH, J. The county judge of Miller County allowed claims against that county during the year 1934 amounting to $62,296.07. The county revenues for that year aggregated $52,263.49. In addition to these demands against the county arising in 1934, the county court allowed unpaid demands against the county incurred in the years 1932 and 1933 totaling $15,825.71, thus making

a grand total of $78,121.78 in claims allowed against the county in the year 1934.

In February, 1935, claims were presented to the county court for examination and allowance covering the expenses of the previous November term of the circuit court of Miller County aggregating $2,427.60. This claim covered the fees of both grand and petit jurors, those of the clerk and sheriff, and of the witnesses who had attended the court, and other items, all of which would be classed as essential statutory expenses, which would be paid as such, if the revenues of the county permitted this to be done. The county court disallowed those costs, but they were allowed by the circuit court on the appeal, and the county court was directed to issue county warrants covering these items of circuit court expenses. The county has prosecuted this appeal from that judgment.

Upon the trial of the cause in the court below, a request was made that the law be declared as follows: "When the valid claims for the year 1934 were allowed by the county court (upon which warrants were issued) exceeded the revenue for that year, no other claim of any kind could thereafter be allowed legally nor could any warrant be issued legally thereafter."

The circuit court refused to so declare the law, and upon the contrary declared the law to be that the necessary expenses of a term of the circuit court might and should be paid, although the payment could not be made without exceeding the revenues of the county for the year in which the term of court was held.

The question presented requires us to again consider and construe Amendment No. 10 to our Constitution. It is there provided that: "The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis, and no county court or levying board or agent of any county shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk or other county officer, sign or issue any scrip, war-

rant or make any allowance in excess of the revenue from all sources for the current fiscal year."

It was the opinion of the trial court that if this amendment is read, as it should be, in conjunction with the Constitution of which it has become a part, it should be construed as not prohibiting counties from paying such essential expenses as that of holding terms of courts. The amendment contains no such proviso or exception, and something must be interpolated into or deleted from the plain language of the amendment to find authority to ignore the inhibition that "no county court * * * shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made."

The recent case of *Skinner & Kennedy Stationery Co.* v. *Crawford County,* 190 Ark. 883, 82 S. W. (2d) 22, reviewed the previous case on the subject, and no useful purpose would be served by a repetition of that review. We were soon thereafter again called upon to construe this amendment in the case of *Harrington* v. *Gillum,* 190 Ark. 987, 82 S. W. (2d) 533, in which case, as in the instant case, we were asked to modify our previous decisions to the extent of holding that expenses incurred pursuant to statutory mandate, as distinguished from claims which had arisen through mere contractual obligations, might be paid even though the payment could be made only by exceeding the revenues of the current year. We held, however, that the language of the amendment above quoted did not permit this to be done, and in so holding we said: "There can be but one meaning for the language (of the Constitution) quoted, *i. e.,* that whatever the expense may be and for whatever purpose incurred, it falls within the prohibition of the amendment if in excess of the county revenue. No other purpose is indicated by any expression contained in the amendment. The prohibition is clear and explicit and cannot, and ought not to, be refined away by judicial construction. Any other interpretation of the amendment would not only do violence to its express language, but would serve to defeat the very purpose of its adoption."

The concession is frankly made by appellee, as indeed it must be, that the judgment of the circuit court here appealed from must be reversed unless these and other cases to the same effect are overruled. This we decline to do. These cases were cited and reaffirmed just one week ago in the opinion in the case of *Cook* v. *Shackleford, ante* p. 441, 90 S. W. (2d) 216.

The incidental question is raised whether county revenue accruing and paid into the hands of the county and the circuit court clerks in 1934 are revenues of that year or whether they should be treated as revenues of 1935, since they were not actually paid into the county treasury until January, 1935. That these moneys should be treated as revenue of the year in which they were collected was decided in the case of *Skinner & Kennedy* v. *Crawford County, supra.*

It must be confessed that this construction of the amendment works a hardship upon jurors and others whose attendance upon the term of the circuit court was compelled, and who must now be denied compensation. But this results from the improvidence of the county judge and his failure to make the county's expenditures conform to the limitations of the amendment. It was shown that the statutory expenses of Miller County for the year 1934, including the expenses of the November term, 1934, of the circuit court, aggregated $49,100.92, and that the total receipts of the county for that year were $53,400.07. The statutory expenses might therefore have been paid, all of them, if the county judge had not improvidently incurred obligations of a contractual character which first consumed the county's revenues.

We gave warning of this condition in the case of *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11, where it was said: "It requires no gift of prophecy to see that, if the plain and mandatory provisions of the amendment are given effect, injustice may be done persons who are entitled to compensation from the counties of the State, such as officers of the county, witnesses and jurors, etc. But it is the duty of the county judge to minimize the possibility of this injustice. He must take all these considerations into account before incurring obligations

which a county may and should pay, and, in view of the drastic provisions of the amendment, he should allow a margin of safety. He must measure the county's possible or contingent expenses by the county's ability to pay, and in doing this prudence would suggest the necessity of being able to take care of possible emergencies, such, for instance, as an unusually expensive criminal trial. If he fails to do this, persons who would otherwise be entitled to have claims against a county allowed may be deprived of their just compensation."

The judgment of the circuit court in the case of *Miller County* v. *Blocker, Circuit Clerk,* No. 4115, will therefore be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion.

The companion case of *Blocker* v. *Miller County,* No. 4122, has been submitted along with that of *Miller County* v. *Blocker,* and presents for decision a question which appellant states as follows: "This appeal presents the question as to whether or not, upon the calling-in of all outstanding county warrants in the manner, and for the purposes provided by § 1994 *et seq.,* of Crawford & Moses' Digest of the statutes of Arkansas, the county judge shall, under Amendment No. 10 to the Constitution as construed by the court, distinguish between warrants issued upon valid claims for indispensable governmental expenses essential to the carrying on of the affairs of the county, and warrants issued for contractual dispensable items where the sum total of both classes of warrants issued during the fiscal year have exceeded the total revenues thereof, so as to provide for the reissuance first of the warrants issued for indispensable governmental expenses of the county for such fiscal year, to the exclusion of such contractual warrants as may be necessary to bring the total issue of warrants for both classes of expenses incurred during such fiscal year within the revenues of that fiscal year."

This question is discussed and definitely decided in the case of *Stanfield* v. *Friddle,* 185 Ark. 873, 50 S. W. (2d) 237, and the holdings in that case were reaffirmed in the case of *Democrat Printing & Lithographing*

Company v. *Crawford County,* 191 Ark. 409, 86 S. W. (2d) 552.

This Stanfield case pointed out the distinction between statutory and contractual claims, and the duty of the county court in regard thereto was defined. It was there stated that the county should first pay its indispensable obligations which were incurred in the discharge of the functions of county government imposed by the Constitution or by statute; after which, but not before, the county should pay those obligations which are permissible merely. But if the county judge disregarded this duty, and was not required to so perform it by persons interested in the orderly administration of the county's government, the contractual obligations might be allowed provided the allowance of claims covering them were not in excess of the revenues for the year in which such claims were allowed.

If a warrant issued in payment of a claim which the court has allowed, based upon a contract, is valid at the time of its issuance, it remains valid and its validity is not destroyed by the subsequent issuance of a warrant in payment of a claim which is based upon statutory authority, which last-mentioned warrant was issued after the county's total annual revenue had been expended.

The validity of any warrant depends upon the state of the county's revenues at the time of its allowance. If valid then, it continues to be so. If invalid then, it continues to be void regardless of the subsequent condition of the county's finances. This was the point involved and expressly decided in the recent case of *Cook* v. *Shackleford, ante* p. 44, 90 S. W. (2d) 216.

The judgment of the circuit court in case No. 4122 accords with this answer to the question above stated, and it is therefore affirmed.

THOMASON *v.* PHILLIPS.

4-4128

Opinion delivered January 27, 1936.

Karl Greenhaw, for appellants.

George A. Hurst, for appellee.

BAKER, J. Z. M. Thomason died in Washington County, leaving a will for the disposition of his property. He left two sons, the appellants here, and a third son, Vol. W. Thomason, to whom he bequeathed the sum of one dollar. Vol. W. Thomason had two children, James W. Thomason and Polly L. Thomason. To these children, after making other bequests, the testator willed one-third of the residue of his estate, that is, each of them took a one-sixth part in said estate.

Vol. W. Thomason and his wife, Dessie, separated, and Dessie Thomason later secured a divorce and married Phillips. She was appointed guardian of her two minor children. Vol. W. Thomason conveyed to his wife certain real property, but the most of it was subject to indebtedness that he owed, the payment of which indebt-

edness was incumbent upon her if she expected to keep the property. A part of this property was a residence building at Springdale, Arkansas, upon which there was a debt of approximately $2,000.

The probate court, by order duly made, authorized and directed the executors of the last will and testament of Z. M. Thomason to pay to the guardian, Mrs. Phillips, about $2,000, of the Z. M. Thomason estate, to be used by her to pay off a mortgage upon the homestead, which Mrs. Dessie Thomason had taken over from her husband. She was then residing upon this property with Mr. Phillips, whom she had married after her divorce from Vol. W. Thomason. Mrs. Phillips conveyed this property to her two minor children and used the money to pay off the mortgage. There was another mortgage on some filling station property, which property was in charge or control of Phillips, who operated the filling station upon it. This indebtedness amounted to about $1,200. This mortgage was foreclosed. The property was sold, and Phillips became the purchaser.

About this time the final settlement of the estate of Z. M. Thomason was filed, which showed a balance belonging to these two minor children, James W. Thomason and Polly L. Thomason. Mrs. Phillips, their mother and guardian, filed a petition in the probate court praying for an order directing the executors of the Z. M. Thomason estate to pay over to her as guardian for the two children this $1,200 found to be due upon the final settlement. The executors of the estate opposed this order, and, when it was made by the probate court, appealed to the circuit court, which affirmed the order and judgment of the probate court. From that judgment of the circuit court they appealed.

The appellants urge here, as they did in the probate court and in the circuit court, the fourth paragraph of the will of Z. M. Thomason, which is as follows:

"Fourth. It is my will that my executors shall have full power to sell and dispose of any and all of the property belonging to my estate in any manner that they may deem proper and right, without any process of law or probate proceedings, and they are further au-

thorized, empowered and instructed to then divide the residue of my estate as hereinbefore set out, with strict instructions that all the proceeds of the property to which James W. Thomason may be entitled shall be invested in Government bonds by said executors and kept so invested for the use of the said James W. Thomason until he shall have arrived at the age of 21 years, and with strict instructions that all the proceeds of the property to which Polly L. Thomason may be entitled shall be invested in Government bonds by said executors, and kept so invested for the use of the said Polly L. Thomason until she shall have arrived at the age of 18 years."

The question therefore is, shall the provisions of the will control or govern the disposition of this estate, or shall we approve the substitution of the judgment and order of the probate court, as affirmed by the circuit court?

With the proposition of the expediency or propriety of the judgment of the probate court, as distinguished from the legal authorization for the administration of the estate of Z. M. Thomason, we have nothing to do, nor do we think the probate court had any authority, under the facts here stated, to administer the estate, except under the provisions of the will. The probate court held, in making its order, that the money or property bequeathed by Z. M. Thomason to his two grandchildren did not constitute a trust fund. We doubt seriously the power of the probate court to make such a construction of the will, in order to make a judgment for disbursement.

At any rate, such construction or declaration was erroneous. It is true the testator did not say that he was creating a trust, but he did all that was required to create a trust. He provided a method or means for the holding of the funds and the investment of the accumulations of earnings or profits until the grandson should have attained the age of 21 years and the granddaughter the age of 18 years.

It was his property. His right to dispose of it by will has not been questioned. The power to destroy the will by construction does not exist. *LeFlore* v. *Handlin,* 153 Ark. 421, 240 S. W. 712; *Stifft* v. *W. B. Worthen*

Co., 177 Ark. 204, 6 S. W. (2d) 527; *Hicks Mem. Christian Association* v. *Locke,* 178 Ark. 892, 12 S. W. (2d) 866.

The announcements made in these cases just cited justify completely the foregoing statements.

It is suggested that § 3 of the will gives to these grandchildren one-sixth of the said residue of the estate absolutely. That is true, but the will is not composed entirely of § 3. Section 4 is as much a part of the will as § 3, and it must all be read together. *Webb* v. *Webb,* 111 Ark. 54, 163 S. W. 1167. If there is any conflict, the last provision is controlling. *Little* v. *McGuire,* 113 Ark. 497, 168 S. W. 1084; *Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480.

It is also argued by the appellee that the appellants here made no objection to the first order of the probate court, whereby the $2,000 was paid over to the guardian. No authority is cited as to why this should be repeated, though it is strongly urged that it is reason for the making and enforcement of the second order. We are unable to see or appreciate that argument. The first order was probably made as a matter of expediency, but with that we have nothing to do. It is not before us. It certainly furnishes no legal reason for the second order. It did not become the basis or habit or custom in the course of business, or in any manner justify the disposition of property or disbursement order not in accordance with the will.

We concede that the appellee has presented strong and forceful arguments, no one of which, however, is supported by any citation of authority.

The executors were appointed to administer the estate in accordance with the will. It was and is the duty of the probate court, in the exercise of its jurisdiction, to aid the executors in the discharge of these duties which they have assumed.

The circuit court was in error in affirming judgment of the probate court.

Its judgment is therefore reversed, and the cause is remanded with directions to the circuit court to set aside the order of the probate court directing the payment of this fund to the guardian, that the estate may

be administered properly under the will, and not contrary to this opinion.

TOLLESON *v.* MCMILLAN.

4-4253

Opinion delivered February 3, 1936.

J. H. Lookadoo and *Lyle Brown,* for appellant.
McMillan & McMillan, for appellee.

MCHANEY, J. Appellee brought this action to enjoin the appellant, as collector of taxes for Clark County, from enforcing or exacting a penalty from the taxpayers who pay their 1934 real and personal property taxes at any time prior to and including the first day of October, 1935. Appellant answered admitting that he was exacting the penalty fixed by law where the taxpayer failed to pay either the first or the second installments, and then offered to pay the whole amount before the first day in October. The case was submitted upon the complaint and the answer, and the court held that the only condition upon which the penalty could be charged was failure of the taxpayer to pay his taxes on or before the

first day of October. In other words, the court held that no penalty could be exacted where the taxpayer failed to pay either the first or second or both the first and second installments at the time provided by law, and appellant was enjoined from exacting such penalty. This appeal is from that decree.

We think the court erred in so holding. The time for paying taxes as fixed by § 1066 of Crawford & Moses' Digest was changed and the section amended by act 16 of the Special Session of the Legislature of 1933. This act provided that: "All taxes levied on real estate and personal property by the several county courts of the State, when assembled for the purpose of levying taxes, shall be deemed to be due and payable at any time from the third Monday in February to and including the third Monday in October of the year succeeding that in which such levy is made, and shall be payable, at the option of the taxpayer, in installments as follows: The first installment of one-fourth of the amount of said taxes shall be due and payable on and from the third Monday in February to and including the third Monday in April, the second installment of one-fourth on and from the third Monday in April to and including the third Monday in July, and third installment of one-half on and from the third Monday in July to and including the third Monday in October, and all such taxes remaining unpaid after the periods above specified, shall be considered as delinquent, and it is hereby made the duty of the collector to extend a penalty of ten per cent. against all such delinquent taxpayers that have not paid their taxes within the time limit above specified, and the collector shall collect other delinquent taxes."

The General Assembly of 1935 amended § 1 of said act No. 16 by § 3 of act 282. The only change made by the latter act in the former was in the time for final payment from the third Monday in October as fixed in act No. 16 to the first day of October as fixed in said act 282. The question for determination is, what the Legislature intended by these enactments? Was it intended that the taxpayer should have the whole of the period from the third Monday in February to and in-

cluding the first day of October in which to pay his taxes without penalty, or did it intend to require the taxpayer to make the installment payments as specified, at the times specified, by the imposition of a penalty on such installments as were not made? It is true that the first paragraph of § 3 of act 282 of 1935, which amends § 1 of said act No. 16, provides that all taxes "shall be deemed to be due and payable at any time from the third Monday in February to and including the first day in October in the year succeeding in which such levy is made." If the act said nothing more, the contention of appellee would be correct. But the act did not end there. It continued by saying, "and shall be payable at the option of the taxpayer in installments as follows." The act then provides that one-fourth of the taxes shall be due and payable from the third Monday in February to the third Monday in April, both inclusive; one-fourth from the third Monday in April until the third Monday in July, both inclusive; and one-half from the third Monday in July to the first day of October, both inclusive; "and all such taxes remaining unpaid after the periods above specified shall be considered as delinquent, and it is hereby made the duty of the collector to extend the penalty of ten per cent. against all such delinquent taxpayers that have not paid their taxes within the time limit above specified." We see no ambiguity in this language. Under this statute, if the taxpayer wishes to pay in installments without penalty, he must do so within the times limited in the act. If he wishes to pay the entire amount at one time without penalty, he must do so on or before the third Monday in April. Under § 10,066, Crawford & Moses' Digest, the time fixed for the payment of taxes was from the first Monday in January to and including the 10th day of April, and all taxes remaining due after the 10th day of April were considered as delinquent, and the collector was required to collect a penalty of ten per cent. It was not the purpose of the Legislature, as we gather it from the act now under consideration, to extend the time for payment of taxes without penalty on the whole amount thereof from the 10th day of April to the first day of October, but the

time was extended from the 10th day of April to the third Monday in April in which the taxpayer could pay his taxes without penalty. The amendatory act simply provides that if the taxpayer pays one-fourth of his taxes on or before the third Monday in April, he may have another three months' grace in which to pay another one-fourth of his taxes without penalty, and an additional grace period on one-half of his taxes to and including October 1st in which to pay without penalty. But the act plainly provides that if the taxpayer fails to pay one-fourth of his taxes by the third Monday in April, that one-fourth "shall be considered as delinquent," and the collector is required to extend the penalty of ten per cent. upon that one-fourth. Likewise, if he fails to pay another one-fourth on or before the third Monday in July, he is again delinquent as to that one-fourth to which a like penalty attaches. There is no contention that a penalty would not attach if the taxpayer failed to pay one-half of his taxes on or before October 1st. The construction placed upon the act by the trial court nullifies the very purpose of the act and results simply in extending the time to pay taxes from the 10th day of April to the first day of October.

We must of course gather the legislative intent from the language of the act, but in doing this we must consider the language of the whole act. In other words, we must consider both paragraphs of § 3 of said act No. 282, and, when we do this, we find no ambiguity. Of course if the language of the act is ambiguous or uncertain, the court may look also to the subject-matter of the act, the object to be accomplished or the purpose intended as well as other extrinsic matters which throw light on the legislative intent. *McDonald* v. *Wasson,* 188 Ark. 782, 67 S. W. (2d) 722. But, as stated above, we find no ambiguity in § 3 of said act, when considered as a whole, and we are therefore of the opinion that the court erred in enjoining appellant from collecting the penalty on delinquent installments as provided in the act. The decree will be reversed, and the cause dismissed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* STEPHENS.

4-4124

Opinion delivered February 3, 1936.

King, Mahaffey, Wheeler & Bryson, for appellant.

Lowell D. Gibbons, Ted Goldman and *Geo. F. Edwards, Jr.*, for appellee.

BAKER, J. The injury for which this suit was filed for damages occurred at Atlanta, Texas, on July 11, 1934. Stephens, the appellee, filed his suit in the circuit court of Miller County, Arkansas, alleging that he was standing near the main line of railroad in the town of

Atlanta, waiting for a train to pass in order that he might cross over. He alleges that the train was running at a rate of 40 or 45 miles an hour, and that, as he stood near to the railroad track, he turned and glanced down the track to observe the length of the train when a door or some other object upon a car swung out and struck him. He observed this swinging object or door just as the train was passing, and involuntarily threw up his arm to protect himself, and his arm was struck, and he was knocked down, and in the fall one foot went upon the track and was crushed so that an amputation was necessary. The charge is that the company was negligent in permitting this loose or swinging door to remain unfastened, or so that it did swing out in the operation of the train, to such an extent that he was struck thereby, as he stood waiting for the train to pass. This charge involved a failure to inspect, or, at least, a careless inspection.

Defendants denied the facts alleged in the complaint; denied that a door was permitted to swing or did swing out. Denied that the train was driven at a high speed through Atlanta at the time of the alleged accident; pleaded that, if defendant was standing so near this railroad track as to be struck by the alleged swinging door, he was guilty of contributory negligence. Defendant pleaded further that the plaintiff, instead of being injured in the manner in which he alleged, was attempting to catch the running train and climb aboard, and that in reaching or catching some one of the handholds, that he was thereby jerked or thrown so that his foot fell upon the rail and resulted in the injury.

Upon trial of this case, a verdict was rendered for the plaintiff in the sum of $2,750 and from that judgment this appeal has been prayed. Appellant upon this appeal alleges no error except that the testimony is not sufficient to support the verdict and judgment; and, secondarily, that the trial court erred in refusing to express an opinion upon the motion for a new trial as to the weight or preponderance of the evidence, though expressly requested to do so.

The parties to this litigation seem to have no dispute as between themselves about the fact that the law of Texas fixes and governs the substantive rights of the parties, and, since the case has been filed in Miller County, the law of Arkansas, as it relates to the procedure, necessarily governs.

John Stephens' testimony, stated as concisely as we can make it, is to the effect that he had started across the railroad tracks, along a pathway, which it is conceded had been used in crossing the railroad tracks at this point for many years. He says that he stood within about two and one-half feet of the train, as it passed; that, as he turned, he glanced down the side of the train to observe its length; that the door or some other object on the side of the box-car swung out, and that he threw up his arm to shield or protect himself, and the swinging object struck him on the arm and knocked him down; that in the fall one of his feet was caught under the train and crushed.

On this same train another man, Cliff Johnson, colored, was riding, or, at least, he so testified. He was in a car of the gondola type and says he was looking down the right-hand side of the train as it ran after it left Texarkana, going toward Atlanta, and he testifies that this door swung out from the car, particularly as the train rounded curves, and sometimes on account of high speed. He testified that he saw the door at the time it struck Stephens and knocked him down. Cliff Johnson did not know what kind of car it was from which this door was swinging. He said it had slats like a chicken coop.

The testimony from members of the train crew shows that there was no cattle car on the train, the type described by Johnson; that most likely there was no gondola car after the train left a station called Hoots, where some cars were set out, but there were cars somewhat of the gondola type.

Employees also of the railway company testified as to inspections at Texarkana and also at Marshall, and that these inspections did not show any door loose or unfastened, so that it would swing outwardly from the

side of the train, and it is insisted most strongly that, even if it should be deemed proper to believe the testimony that the door did swing out, this testimony as to the inspections made before the train left Texarkana, and by the train crew upon the run, or trip, tended to prove, at least, the exercise of ordinary care, and that therefore there could not be any liability.

It is also argued that, since the testimony showed that the distance of the outward part of the swing of this door was not exceeding two and one-half or three feet, plaintiff was guilty of contributory negligence in standing close enough to the track to be struck by the door on the moving train.

The record shows that there were several witnesses who testified contradicting the testimony of both Stephens and Johnson in regard to the manner in which Stephens was hurt, several of the witnesses testifying that Stephens was running beside the train, threw up his hand and caught a grabiron, or attempted to do so, and was jerked by the fast-moving train, so that he fell.

Appellant's contention is best stated perhaps, in its thirteenth assignment of error in the motion for a new trial, in which he says: "Plaintiff wholly failed to prove any negligence on the part of defendant, and because the overwhelming weight of the credible testimony introduced in this cause showed that the defendant was not guilty of any negligence which proximately caused the injury of which the plaintiff complained, or in any sense contributed thereto."

If we were permitted, under this assignment of error, to take up questions of fact that were submitted to the jury, to determine, first, whether there was any negligence, second, the weight of the testimony, and, third, the credibility of the witnesses that testified, this appeal would amount substantially to a trial *de novo*.

Plaintiff's testimony and Cliff Johnson's testimony are substantial matters in evidence. Cliff Johnson says he observed, from the gondola car, where he was riding, a door on a car ahead of him, swinging out from the side of the car, as the train ran. The conductor, brakeman, or others who rode in the cupola of the ca-

boose, whose duty it was to observe the train as it ran, failed to see this door swinging out. Whether they negligently failed to observe a thing easily to be seen, without an effort to make an inspection, but only by a casual observance of conditions that prevailed, was decided by the verdict. If Cliff Johnson saw the door swinging, it is possible that the inspection made was perfunctory, rather than actual. In truth, there is a sharp dispute, not only in the statements, but in the effect of the testimony of Cliff Johnson for plaintiff and railroad employees, as well as in the testimony of John Stephens and the employees. The jury alone could decide these issues.

It is more than axiomatic that juries are the sole judges of the weight of the evidence and credibility of witnesses. It is so provided by the Constitution. We fear this has been so often repeated it has become trite or commonplace. But it still bars trial judges from the jury box.

Admittedly these issues of fact were correctly submitted to the jury. The verdict was final, subject to review on appeal, only to determine if it is supported by any substantial evidence.

There was substantial evidence to support the verdict. But it is argued that it was the duty of the trial court to review this verdict. In that contention we agree with appellant.

Upon a motion for new trial the defendant alleged that the verdict of the jury was contrary to the weight of the testimony as given by credible witnesses and insisted that the trial judge, upon the presentation of this motion express an opinion in regard to this matter of the preponderance of the testimony. The court declined to comment upon this matter of a preponderance of the evidence, saying that to do so would be an invasion by him of the province of the jury, and then the court overruled appellant's motion for a new trial. The effect of this failure or refusal to make any comment upon the value of the testimony was not a denial of any right of appellant.

We think this objection brought down to the last analysis is to the effect that appellant is now alleging

that the court erred in not commenting upon the testimony. Appellant certainly cannot say the court did not rule upon his motion and upon every part of it, and his ruling was an approval and an acceptance of the verdict of the jury. It was in effect a determination that it was supported by some substantial testimony.

This matter of approving or rejecting a verdict of the jury by the trial court is one that must appeal to judicial discretion. Discretion, of course, is opposed to arbitrary action, and is not controlled or interfered with by this court upon appeal.

Ordinarily, this power of the court to review or consider judgments rendered by juries is called into action by a motion for new trial. The court, however, may in the exercise of discretion, act upon a verdict at any time during the session of the court at which it was rendered. If, upon consideration of the verdict rendered, the trial court should find that the verdict is not supported by the evidence, or that it is contrary to the preponderance of the evidence, it is, as has been said on many occasions, the duty of that court to set aside such verdict. Crawford's Civil Code of Arkansas, 306.

An examination of the cases there cited, we think will show they are uniformly to the effect that only in the exercise of this judicial discretion shall the trial court interfere with the judgment of the jury. *Taylor* v. *Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962. The Supreme Court there said: "The trial judge still has control of the verdict of the jury after and during the term it is rendered. Because of his training and experience in the weighing of testimony, and of the application of legal rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses, he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed, in their verdict, to do justice and enforce the right of the case, under the testimony and the instructions of the court. This is a necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors."

Again this court said in *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922: "Where there is decided conflict in the evidence, this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for new trial or overruling same. 'The Supreme Court will much more reluctantly reverse the final judgment in a cause for error in granting than for error in refusing a new trial.' *House* v. *Wright,* 22 Ind. 383; *Oliver* v. *Pace,* 6 Ga. 185. 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 foregoing quotations are in exact conformity with our view of the law at this time.

We think it must be conclusive that it is not within our duties to attempt to review, and, after review, substitute our viewpoint for that of the trial court in a matter wholly within the discretion of that court.

We may suggest, as has been said before, that the trial court is more than a mere chairman preserving order in the conduct of trials. He is a vital force in the use of his learning and his experience in the conduct of trials, exercising judicial discretion, which must always be approved, except when it has been demonstratively abused.

Appellant here insists that the court should have given some judicial announcement as to his opinion concerning the weight of the testimony or credibility of the witnesses, as affecting the verdict rendered in this case. The court did that in overruling the defendant's motion for a new trial. In doing so, the court exercised that discretion above mentioned and discussed. In the exercise of that discretion, the trial court may have, without just grounds for criticism, made full comment upon any part or all of the testimony heard in the case, or he could refrain from doing so. Only when courts have announced findings or conclusions and then made orders

contrary thereto has this court, on appeal, corrected such orders to conform to the determined facts or conclusions of the court. *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851; *McCullars* v. *State,* 183 Ark. 376, 35 S. W. (2d) 1030; *Coca-Cola Bottling Co.* v. *Eudy,* 191 Ark. 877, 88 S. W. (2d) 53.

The trial court having overruled motion for a new trial, the matter presented to us is not only the verdict of the jury; it is more than that. It is the verdict of the jury fortified by the approval of the trial court.

Appellant presents this case upon this appeal and argues incidentally that the rights of the parties are determined by the law of the State of Texas, because the injury sued for was sustained in that State. We agree with this contention.

This suit was filed in Miller County, Arkansas, and our courts lend themselves to enforce the rights of parties to litigation, the subject-matter of which is controlled or determined by some other jurisdiction. In the trial of such cases, however, those rights, whatever they are, will be determined by our courts under our own procedure.

It is argued that the quantum of proof necessary to show negligence in this case, under the law of the State of Texas, is not met by the proof tendered upon this trial and appellants cite the case of *Texas and Pacific Railway Company* v. *Endsley,* 103 Tex. 434, 129 S. W. 342.

We may concede that the authority cited supports the contention made, but even then it furnishes no sound reason why we should interfere with this verdict and judgment thereon, because we think it must be conceded that under our procedure there is not only substantial evidence to support the verdict, but the jury has found that it is supported by a preponderance.

Without unduly extending this discussion, we think it only necessary to say that the testimony, given its most favorable consideration to support the verdict, shows that plaintiff was injured by negligence of the employees of the defendant; that plaintiff was not guilty of contributory negligence.

We cannot say as a matter of law, that plaintiff did not have a right to stand near to the railroad track at the place where he was struck by the swinging door on one of the cars of the train.

The question of contributory negligence, properly submitted to the jury, was decided adversely to appellant's contentions.

A consideration of the functions of the law of the place, determinative of the rights of the parties, and the law of the forum, under which these rights were determined, makes clear the fallacy of appellant's arguments relating to the value of evidence as supporting the verdict.

No error appearing, judgment is affirmed.

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

4-4130

Opinion delivered February 3, 1936.

Robert Bailey, E. M. Arnold and *Duty & Duty,* for appellant.

C. C. Wait, for appellee.

JOHNSON, C. J. On October 23, 1912, the Mutual Aid Union of Rogers, Arkansas, a mutual assessment insurance association issued to John N. Stark a certificate of life insurance by the terms of which the life of the insured was indemnified upon a graduated basis for $1,000; the contract by its terms matured eighty months after date of issuance.

All assessments and dues were paid by the insured up to and until February 27, 1927, at which time the certificate lapsed because of nonpayment of the February, 1927, assessment. On March 11, 1927, the insured was reinstated upon the payment of the pastdue February assessment, and as a prerequisite thereto the insured executed the following certificate of good health:

"Health Certificate—To be Signed by the Member.

"Secretary, Mutual Aid Union, Rogers, Arkansas.

Rec'd Mar. 12, 1927.

"Dear Sir:

"I am in receipt of your advice that my certificate No. 457, Circle 12, has become delinquent for nonpayment 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, John M. Stark, Member."

It is the contention of appellant that this certificate of good health was false and fraudulent. The Mutual Aid Union passed out of existence in 1926, and appellant, a stipulated premium insurance company, assumed its obligations by a substituted contract. For collateral purposes the insured transferred and assigned his interest in the contract of insurance to appellee, Bank of Dover, some time prior to 1930. The insured died on January 31, 1933, and proof of death was duly effected

by the beneficiary or the assignee of the insured and liability was denied by appellant, whereupon this suit was instituted.

Upon trial before the court sitting as a jury, a judgment was entered in favor of appellee for the sum of $1,000, the sum provided for in the face of the certificate —attorney's fee and 12 per cent. penalty, from which this appeal comes.

Appellant's primary contention for reversal is that the insured misrepresented his condition of health in procuring his reinstatement of March 11, 1927, and that no liability exists against it for this reason. This contention is grounded upon an issue of fact and rests upon the testimony adduced at the trial. That in behalf of appellant tended to show that on March 11, 1927, the insured was suffering from an advanced case of tuberculosis, while that on behalf of appellee tended to show that on March 11, 1927, the insured appeared to be and was in reasonably good health, considering his advanced age. The testimony adduced by the parties upon this issue of fact was voluminous, and we have purposely refrained from discussing it in detail as it would serve no useful purpose. It must suffice to say that we have carefully considered all the testimony presented by respective parties, and all in all it presented a question of fact for trial court's determination, and we are not willing to say that his finding is not supported by substantial testimony.

Next appellant contends that the trial court erred in admitting in evidence the testimony of Dr. Hollabaugh, the insured's attending physician, prior to death and § 4149 of Crawford & Moses' Digest is cited as supporting this contention. Such is not the effect of the statute cited. Its effect is to keep confidential information imparted by a patient to his attending physician, acquired necessarily to the end that the physician may effectually administer treatment. This statute has never been invoked or applied save at the instance of the patient or his representative in law or estate, and we perceive that of necessity it is only for his protection and that of his representatives. Such has been our pre-

vious construction of this statute. *Mutual Life Insurance Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720; *Hogan* v. *Boatman Construction Co.,* 184 Ark. 842, 43 S. W. (2d) 721. Since appellant cannot invoke the protection of the statute cited this contention is without merit.

Appellant also urges that the court erred in allowing attorney's fee without first hearing testimony in reference to a reasonable charge. Appellant offered no testimony on this issue. This contention is not properly before us for consideration. Appellant's contention in reference to the attorney's fee in the trial court is specifically set forth in its motion for a new trial in the following language:

"The court erred in fixing the attorney's fee at two hundred and no/100 dollars ($200), or any other sum, and taxing same as costs against the defendant herein, to which action of the court the defendant at the time specifically objected and excepted."

This assignment of error does not raise the question now argued by appellant, that the court heard no proof, or, the *quantum* thereof as to a reasonable attorney's fee, but on the contrary raises the issue that no fee should be allowed. Under repeated opinions of this court attorney's fees are recoverable by the successful litigant in cases similar to this one. *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Vaughan* v. *Humphreys,* 153 Ark. 140, 239 S. W. 730.

Lastly appellant contends that the trial court erred in refusing to transfer this action, upon its motion, to equity. This contention is grounded upon the theory of complicated accounts. No showing of necessity for an accounting is made by appellant when measured by the repeated opinions of this court. *Burke Construction Co.* v. *Board of Pav. Imp. Dist. No. 20,* 161 Ark. 433, 256 S. W. 850; *Johnston* v. *American Insurance Company,* 189 Ark. 594, 74 S. W. (2d) 636.

No error appearing, the judgment is affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* PARTAIN.

4-4180

Opinion delivered February 3, 1936.

Carl E. Bailey, Attorney General, *Thos. Fitzhugh,* Assistant, and *Neill Bohlinger,* for appellant.

Miles, Armstrong & Young and *Partain & Agee,* for appellees.

SMITH, J. Appellee Partain brought this suit against the Arkansas Highway Commission, and for his cause of action alleged the following facts. He owns and resides upon certain lots having three hundred feet frontage on Jefferson Street in the city of Van Buren. Just east of Jefferson Street and one block from said street, U. S. Highways 64 and 71, and State Highway 45 are routed on Broadway Street, coming across the Arkansas River from the city of Fort Smith. Such highways have been located by the State Highway Department through the city of Van Buren, from the end of the bridge over the Arkansas River, across or above the tracks of the Missouri Pacific Railroad Company. It is contemplated by the State Highway Department to build and construct, and to cause to be built and constructed, an overpass or viaduct across the tracks of the railroad company in said city of Van Buren leading from and off the bridge across the Arkansas River and along Jefferson Street, adjacent to Partain's residence. The petitioner alleged that the construction of this viaduct or overpass would destroy the value of his property, and that this was about to be done without compensating him for the damages he would sustain.

A temporary restraining order was granted. Pending final submission of the cause, certain citizens and taxpayers of Van Buren who are the owners of real estate in the Fort Smith and Van Buren Bridge Improvement District filed an intervention in which they adopted the allegations of Partain's petition and joined with him in the prayer that the construction of the viaduct or overpass be restrained. They alleged, as an additional reason why this should be done, that the construction of this viaduct in the manner proposed would destroy the value of the bridge across the Arkansas River, which the improvement district had constructed for use by railroads and street car lines. It was alleged that the bridge had been built to accommodate railroad and street car traffic at a cost far greater than would otherwise have been required, and that this was done pursuant to the acts of the General Assembly, authorizing the construction of the bridge. Interveners alleged that the commissioners

of the bridge improvement district were without authority to make any contract or to enter into any arrangement having that result.

Upon the final submission of the cause the relief prayed by the original petitioner and the interveners was granted, and the State Highway Commission, and the contractor to whom the construction contract had been awarded, were permanently enjoined and restrained "from the construction of a viaduct or overpass on Jefferson Street in the city of Van Buren, Arkansas, along side or by the property and homes of the plaintiff and the interveners herein described, or along and over the property of the Fort Smith and Van Buren Bridge District or into, or on, the bridge of said district."

At the trial from which this appeal comes, there was offered in evidence an ordinance of the city of Van Buren which provided "that Jefferson Street between First and Fourth streets, in the city of Van Buren, Arkansas, be and the same is hereby closed, and is dedicated to the construction and use of an overpass to be constructed by the Arkansas State Highway Commission."

There was also offered in evidence an agreement between the commissioners of the bridge improvement district, and the State Highway Commission which recites the purpose and intention of the Commission to construct the viaduct in question and the necessity therefor. In this agreement the bridge district grants to the Highway Commission the right "to construct, complete and maintain at its sole expense viaduct and appurtenances as designed by the Commission's engineer and approved by the U. S. Board of Public Roads." The Commission agreed to construct and maintain the viaduct at its own cost. The Commission also agreed to indemnify and save the district harmless for "damages, loss or destruction either suffered or caused to any person or to any property incident to the construction of the viaduct." It thus appears that while the city has authorized the erection of the viaduct in one of its own streets, it is proposed to have it done at the expense of the State Highway Commission.

Counsel for the appellant Highway Commission say that the proposed improvement is in effect a change of the grade of a street in the city of Van Buren which the council has authorized, and we are cited to the case of *Eickhoff* v. *Street Improvement Dist. No. 11 of Argenta,* 120 Ark. 212, 179 S. W. 367, which holds that the cities and towns have this power. But the same case also held that, while this could be done, yet, if and when done damages resulted to a property owner, the damages must be paid by the city.

There was offered in evidence a resolution adopted by the Highway Commission making provision for the payment of those damages reading as follows: "Motion by Mr. Murphy, seconded by Mr. Black, that funds now in the State Contingent Fund to the amount of fifteen thousand dollars ($15,000) are hereby allocated to job No. 4176, U. S. P. W. Proj. N. R. M. 216-C, for the purpose of paying any damages to privately owned property adjacent to the project which the State might be adjudged to pay by reason of the construction of said project. Motion unanimously carried."

Our attention is also called to act No. 160, of the Acts of 1935, page 438, § 1, reading as follows: "The Arkansas State Highway Commission is hereby authorized, empowered and directed to allocate and use such part of the sum of $15,000 remaining in its custody or under its control from unused Federal funds, as the said Commission may find necessary for the erection of the Van Buren viaduct, or in securing any rights or title to property or paying damages in connection therewith; provided, nothing herein shall be construed as giving to the Arkansas State Highway Commission the power to condemn private property in connection with the building of said viaduct. That, if for any reason said project fails, the said Commission may make such other allocation of said sum of money as it may deem proper."

But, notwithstanding this resolution and this act of the General Assembly, it appears that only $7,000 of this money is now available to pay the prospective damages. This appears from a letter written by the secretary of the Highway Commission to petitioner Partain.

So far as the question of the probable damages and the compensation therefor is concerned, the case is not unlike that of *Campbell* v. *Arkansas State Highway Commission,* 183 Ark. 780, 38 S. W. (2d) 753, in that a viaduct was constructed in one of the streets of Newport, which it was alleged occasioned damages to real estate similar to those which the parties here allege that they will sustain. The fact is stated in the opinion in that case that the State Highway Commission did not institute condemnation proceedings, but that the suit was brought by the damaged property owners after the construction of the viaduct. We held that the construction of the viaduct in the street adjacent to the owners' property was a taking thereof, to the extent that its value had been destroyed, and that damages to compensate that destruction might be recovered. It had not then been held that the State Highway Commission as an agency of the State could not be sued. *Ark. State Highway Commission* v. *Nelson Bros.,* 191 Ark. 629, 87 S. W. (2d) 394.

It is insisted that the resolution of the State Highway Commission, and the act of the General Assembly above quoted show the intention and the ability of the Highway Commission to pay these damages. This is not sufficient. The property owners cannot be required to accept a claim for unliquidated damages as compensation for their property. There is authority in the law whereby the court, in which condemnation is prayed, may require a deposit in court of a sum of money sufficient to pay any and all damages which may reasonably be assessed; and the deposit must be in the registry of the court where the damages will be assessed, which in this case is the circuit court of Crawford County. This deposit is in effect the payment, and in advance, which the Constitution requires as a condition precedent upon which the property must be taken. Such an order of the court and a deposit pursuant thereto places the fund in the hands of and subject to the control of the court. The showing that there is or was money in the State Treasury in a sum sufficient to pay the damages does not suffice. This money is not subject to the order of the court. It might be that the money would be otherwise used, and in this case a por-

tion of it has been devoted to another purpose and the whole of the $15,000 is no longer available to pay the damages. This is especially true here as the court could not order the disbursement of this money until it had been deposited and made subject to its order and its judgment. *Arkansas State Highway Commission* v. *Nelson Bros., supra.*

By § 65 of act 65 of the Acts of 1929, page 334, it is enacted that: "The State's right of eminent domain may be exercised by the State Highway Commission in the same manner as in the case of railroads, telegraph and telephone companies for the purpose of condemning land for highways, bridges, and their approaches, for securing building material, and for any other use which said commission may, under the laws of this State, require property for the carrying out of enterprises entrusted to its supervision; but without the necessity of making a deposit of money before entering into possession of the property condemned."

This act is a declaration of the State's ancient right of eminent domain (§ 23, art. 2, Constitution), but in so far as it permits the State Highway Commission to enter into the possession of private property, without first compensating the owner for the damages sustained by actual payment of the amount of such damages, or by a deposit of money covering them, in the court where this right is sought to be exercised, is violative of § 22 of art. 2 of the Constitution. This section of the Constitution provides "that 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."

The property owner has no cause of action which may be maintained to recover his damages against the State. *Arkansas State Highway Commission* v. *Nelson Bros., supra.* If he permits an agency of the State, such as the Highway Commission to appropriate his property he is limited to such relief as the State may provide. For the loss of his property, or for damage to it which he sustains, this act gives him an unliquidated demand against the State, to be satisfied at the pleasure of the

State. This may not be done under the holding of this court in the case of *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993, where we said: "The State was without power to take possession of the bridge without compensating the owners therefor, and the judgment of condemnation could not have been enforced until the compensation to which it adjudged the owner to be entitled had been paid." This case arose and was decided long after the passage of the act of 1929 above referred to.

It is immaterial what agency, whether State or municipal, proposes to take, appropriate, or damage private property for any public use; it may not be done except upon compensation to the owner for the damages which the taking occasions.

There was therefore no proper tender as required by the Constitution and laws of this State as a condition upon which the property might be taken or damaged prior to the payment of damages, and this taking was therefore properly enjoined.

The State Highway Commission insists, however, that it has been and is now ready, willing and able to compensate the owners for their damages when the city ordinance above referred to has been executed. If this be done in the manner above indicated, the overpass or viaduct may be erected.

This is true unless the interveners have shown cause why it should not be done, even though the property owners are compensated for their damages.

The original act, pursuant to which the bridge was constructed across the Arkansas River, provides that: "The Commissioners shall have power to grant a right-of-way over said bridge to any public utilities upon such terms as the Commissioners shall determine; provided, however, that the concessions which may be granted to public utilities shall not interfere with the reasonable use of such bridge as a public highway." *Shibley* v. *Ft. Smith & Van Buren Bridge District*, 96 Ark. 410, 132 S. W. 444; *Nakdimen* v. *Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 172 S. W. 272; act No. 119 of the Acts of 1909, page 325.

The showing is made that the construction of the proposed viaduct will render the bridge unavailable for use by steam railroads and for street cars as well. It is shown also that the bridge was never used by a steam railroad, but was at one time used by a street railroad. This latter use has now been abandoned.

The implication is clear, if not undisputed, that the building of the viaduct has become a necessary adjunct to highway travel. It is designed and planned to facilitate and make safe highway traffic on National and State highways across the river and the railroad tracks in Van Buren. This is the primary purpose of the bridge. The grant to the utilities of the right to cross the bridge is a secondary purpose, and is not to be made at all, if such grant interferes with the reasonable use of such bridge as a public highway. To make the use of the bridge as a highway secondary or subservient to a possible use by a utility would be, as counsel for the State Highway Commission says, a complete reversal of the restrictions placed upon the Commission by the act itself; and, instead of having a grant to the utility made subject to highway use, we would have the use of the bridge restricted in order that a utility may enjoy its use.

It appears that the State Highway Commission at its own, and at a very great cost is preparing to increase the primary uses for which the bridge was constructed and to safeguard the traveling public in this way, and we think the consent of the Commissioners of the bridge improvement district is not beyond the powers conferred upon them by law.

It follows therefore that the State Highway Commission may build the viaduct pursuant to the city ordinance provided it first makes compensation to the property owners who will be damaged by that action in the manner herein indicated; and while the decree herein appealed from must be affirmed, that action is without prejudice to subsequent proceedings conforming to this opinion.

LEA *v.* BRADSHAW.

4-4140

Opinion delivered February 3, 1936.

Suit by D. E. Bradshaw against Georgia P. Lea and daughter. From an adverse decree defendants appeal.

Lewis Rhoton, for appellants.

Donham & Fulk, for appellees.

BAKER, J. The statement of this case is tantamount to its decision. After foreclosure decree and sale of certain property in Little Rock, appellants filed a motion to vacate and set aside the decree and sale thereunder. Prior to the entry of the decree, the appellants had filed an answer in which they denied some of the material allegations of the complaint, but they particularly relied upon an affirmative defense, in which they alleged that the notes sued upon and the deed of trust had been materially altered after their execution. As abstracted, these material alterations were to the effect that, under the insurance clause of the deed of trust or mortgage, there had been interlined, by typewriting, the amount of insurance, "twenty-five hundred dollars." The appellants asserted, however, that as they had insurance at the time they borrowed the money, they did not intend to contract for insurance, and therefore erased the insurance clause, by running lines through the blanks providing for the amounts, and by marking out and cancelling the insurance clause. There is also an allegation

that the rate of interest had been changed, either in the notes or in the deed of trust, where the notes were described. This last contention appears to have been abandoned and will not be considered.

The decree in this case was rendered in October of 1934. Although defendant had filed answer, and, although the decree recites the presence of attorneys for the defendants, the defendants did not know of this decree until long after it had been rendered and the property had been sold. After defendants filed the answer they expected that counsel for plaintiff would give notice of an intention to call up the matter before the case proceeded to trial. This was not done.

We do not think it was the intention of counsel for plaintiff to act with any degree of unfairness or discourtesy toward opposing counsel, but they most probably assumed that the answer was more nearly formal or dilatory in its purpose than otherwise.

Whatever the explanation of the mistake, its serious effects were recognized by opposing counsel and by the court upon the filing of a motion to vacate the decree and sale of the property. The court reopened the case.

It is argued here on this appeal that the defendants should not have had the burden of setting aside the decree; that their pleadings and motion made a *prima facie* case, and that they were entitled to a trial upon the merits of the case without that burden of overturning the decree previously rendered. We think the effect of the hearing granted by the court was in conformity to the contentions made here by the appellants.

At the time of the hearing parties were making an effort to agree upon the manner of presentation and for what purposes the hearing would be had when the court interposed the following suggestion:

"The Court: The court will just hear the case on its merits, and, if it appears that the defendants have a valid defense the decree and sale will be set aside; otherwise the decree as heretofore entered, and the order confirming the sale will be permitted to stand as heretofore made." Upon this promise the trial proceeded to a conclusion.

However informal that may appear to be, it at least, takes from the contention made by appellants the vital force of the charge that they were entitled to trial of the case upon its merits. The foregoing statement of the court shows this was the only trial, one upon its merits, and, no doubt, if the court had been convinced that there was any defense, as presented by this testimony, to the original complaint, the court would have set aside the decree and then rendered a new decree according to the findings.

In this trial, upon the merits of the case, the defendants developed fully their contention as to the material alterations of the instruments. That part of the deed of trust in regard to the insurance, about which there is a dispute, contains one whole line and about two-thirds of a second line, where a blank begins, in which it was intended that there should be stated the amount of fire insurance and the amount of tornado insurance. It reads as follows: "It is agreed that insurance shall be kept in force, at the expense of the grantors herein, on said property for the benefit of the holder or holders of said note or notes, to the extent of (then in typewriting on the same line) 'twenty-five hundred dollars'." Then follow two blank lines and a further statement about the insurance. On the blank lines there appear to be wavy pen-lines, as indicating the intention to erase, or to fill in these blank lines so that nothing might be written therein, and in part of the same paragraph, following these blank lines, there are marks made across about one-half of the remaining part of that paragraph. There is no marking of the first line and part of the second line, above quoted, as indicating an intention to erase them. It is insisted, however, that the words "twenty-five hundred dollars" were written in by some one after the instrument was executed. This was a matter sharply in dispute as between those who handled these instruments prior to and at the time of their execution.

Mrs. Lea had made application to People's Trust Company to borrow some money. She was not very well, and her daughter was attending, in part, at least, to their business affairs. Papers were prepared and sent out to

the residence and left there for a time. Miss Lea testifies that under directions or advice given by her father in his lifetime, they ran lines through the blank spaces upon the papers so that nothing else might be written therein, when she returned the papers to the bank. She and one of the bank officers discussed this matter of erasures in the instrument. She says he upbraided her somewhat, and said new papers would have to be prepared to be executed. She advised him her mother was ill and should not be disturbed about new papers, but, if the bank was unwilling to accept the papers as they then were, the matter of the loan would be abandoned. We understand that the effect of her statement was that the papers had been executed at that time, after they had made the erasures and run lines through blanks. The officers in the bank say that after that time, the erasures making so little difference as to be really immaterial, the papers were returned to Mrs. Lea and her daughter, who signed them and acknowledged them and the loan was executed. This occurred ..... years ago. That part of the deed of trust relating to the insurance, even if we treat the larger part of the paragraph as deleted, the first line and part of the second line, with the typewritten addition, "twenty-five hundred dollars," was a contract that the mortgagors would carry this insurance, provided defendants' contention that the words "twenty-five hundred dollars" were written in after execution is not found in their favor.

The evidence in this case may be treated as almost evenly balanced. The effect of it, most favorably stated for defendants, however, is that Mrs. Lea and her daughter probably did not intend to contract that they would pay for insurance, as they already had insurance. The bank seemed to accede to this attitude and did not take out any insurance upon this property until the expiration of the policy then in force. The officers of the bank testify, however, that the loan would not have been made if it had been understood that the mortgagors were objecting to insurance upon the property. The objection made at the time the loan was closed was that they did

not want to contract that the bank should carry insurance as they already had it.

Since it is a well-recognized policy, we think known to everybody, that banks, or loan agencies, lending upon real property, require insurance upon the more valuable improvements, and that loans are not made except on condition that such insurance will be carried, it seems highly probable that the bank carried out the contract literally as Mrs. Lea and her daughter desired it carried out, that is, that they permitted the insurance then on the property to continue in force until the expiration date and then wrote other insurance provided for by the deed of trust. Since this is in apparent conformity to the intention of all the parties, the chancellor was justified in finding the issue of fact against the defendants.

The decree is certainly not opposed to the preponderance of the evidence, but seems rather to be supported by it.

We recognize the principle that any material alteration in either the notes or the deed of trust, made after their execution and delivery, would impair their legality, and we think the authorities are also sound that hold that it is not a question of whether the alteration is to the prejudice of the maker of the instrument, but it is a question of whether or not there is the material alteration.

This decision of the trial court, upon the facts, renders other contentions without merit as to substance. Whether the decree should have been set aside before the hearing is immaterial, since the court's finding is to the effect that defendants had failed to establish the affirmative defense they pleaded. The court will not reverse merely for matters of a formal nature. *Washington* v. *Love*, 34 Ark. 93.

Even if there were technical errors, there will be no reversal unless there is prejudice. *Crawford County Bank* v. *Baker*, 95 Ark. 438, 130 S. W. 556; *Minick* v. *Ramey*, 168 Ark. 180, 269 S. W. 565; *Texas Pipeline Co.* v. *Johnson*, 169 Ark. 235, 275 S. W. 329; *Betterton* v. *An-*

derson, 171 Ark. 74, 283 S. W. 364; *Browne-Brun Wholesale Gro. Co.* v. *Hinton,* 179 Ark. 831, 18 S. W. (2d) 369.

We are assuming that this motion was filed at a time within which the relief could be granted as prayed for in the motion to set aside and vacate the decree and have so treated the appeal. We also find from this record, as presented, that the court heard this case upon its merits, not merely the presentation of the motion, but the court went further than appellants argue it was the duty of the court to do. The *prima facie* showing was not required as in *Montague* v. *Craddock,* 128 Ark. 59, 193 S. W. 268. Appellants say that upon showing, under the motion, that there was a *prima facie* defense, it was the duty of the court to set aside the decree. Even if that be conceded to be correct, it appears here that the court permitted trial of the entire case upon its merits, without requiring evidence to make this *prima facie* showing, and then held that the defendants had failed to establish their affirmative defenses.

We are bound by that decree of the chancery court.

Decree affirmed.

CLIFTON *v.* SCHOOL DISTRICT NO. 14 OF RUSSELLVILLE.

4-4228

Opinion delivered February 3, 1936.

Joe D. Shepherd, for appellant.

Robert Bailey and *Eugene Quay,* for appellees.

Pat Mehaffy and *Carl E. Bailey* and *Walter L. Pope, amici curiae.*

HUMPHREYS, J. The question involved on this appeal is whether school districts in this State may buy fire and tornado insurance on the buildings and property in the district in foreign mutual insurance companies authorized to do business in this State.

Specific statutory authority for insuring public property in mutual insurance companies was conferred on any public or private corporation, board, or association, by § 8 of act 652 of the Acts of 1919, which section is § 6026 of Crawford & Moses' Digest, and is as follows:

"Any public or private corporation, board or association in this State or elsewhere may make applications, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee, or legal representative of any such corporation, board, association or estate may be recognized as acting for or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of acting in such representative capacity. The right of any corporation organized under the laws of this State to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred."

Appellant contends that this section only attempts to authorize the purchase of insurance in domestic mutual corporations, and confers no authority to purchase insurance in foreign mutual insurance companies, but this con-

tention is without force when read in connection with § 16 of said act, incorporated as § 6066 of Crawford & Moses' Digest, which is as follows: "Any mutual insurance company organized outside of this State, and authorized to transact the business of insurance on the mutual plan in any State, district or territory, shall be admitted and licensed to transact the kinds of insurance authorized by its charter or articles to the extent, and with the powers and privileges specified in this act, and when it shall be solvent under this act, and shall have complied with the following requirements."

This suit was brought by appellant, a taxpayer, to restrain appellee from buying insurance to protect its property from loss by fire and tornado from Pennsylvania Lumbermen's Mutual Fire Insurance Company, a foreign corporation doing business in this State under permit, and which operates its business under the mutual system without capital stock.

We think act 652 of the Acts of 1919 confers authority upon school districts to buy fire and tornado insurance in foreign as well as domestic mutual companies when foreign mutual companies have complied with all requirements exacted of them in order to write the kind of insurance authorized by their respective charters and articles. The record in this case reflects that Pennsylvania Lumbermen's Mutual Fire Insurance Company has met all such requirements.

Appellants contend, however, that the statutes quoted above authorizing the acceptance by school districts of policies in mutual companies makes school districts members of a private corporation and lends their credit to such corporations in violation of § 5 of article 12, and § 1 of article 16 of the Constitution of 1874, which reads as follows:

"Article 12. Section 5. No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate any money for, or loan its credit to, any corporation, association, institution or individual.

"Article 16. Section 1. Neither the State nor any city, county, town or other municipality in this State

shall ever loan its credit for any purpose whatever, nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants of scrip."

The policy or contract involved in the case at bar fixes a definite maximum premium which the school district must pay and provides for no additional liability against it. The provision referred to provides for the payment of one-half of the premium in cash and limits the assessment premium against it, if it becomes necessary to make such an assessment, to one times the cash premium paid. In other words, a maximum premium is absolutely agreed upon as the extent of liability in any event, one-half of which is to be paid in cash, and the other one-half by an assessment if it becomes necessary. The policy contains no indeterminate liability. This kind of a contract does not make the school district a stockholder in the mutual insurance company, nor is it the lending of the credit of the district to a private corporation. In fact, the written policy involved conforms to §§ 6028 and 6031 of Crawford & Moses' Digest, which are as follows:

"Section 6028. The maximum premium payable by any member shall be expressed in the policy, or in the application for the insurance. Such maximum premium may be the cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium. No policy shall be issued for a cash premium without an additional contingent premium, unless the company has a surplus of at least one hundred thousand dollars or a surplus which is not less in amount than the capital stock required of domestic stock insurance companies transacting the same kind of insurance."

"Section 6031. Such company not possessed of assets at least equal to the unearned premium, reserve and other liabilities shall make an assessment upon its members liable to assessment to provide for such deficiency, such assessment to be against each such member in pro-

portion to such liability as expressed in his policy; provided, the Commissioner may, by written order, relieve the company from an assessment or other proceeding to restore such assets during the time fixed in such order; and provided, that any domestic company which shall be deficient in providing the unearned premium reserve required hereby may, notwithstanding such deficiency, come under this act on the condition that it shall each year thereafter reduce such deficiency at least fifteen per cent. of the original amount thereof, and in such case it may increase its assessments accordingly."

The following cases and texts sustain the validity of the policy involved in the case at bar; *Fuller* v. *Lockhart,* 209 N. C. 61, 182 S. E. 783; *Downing* v. *Sch. Dist. of City of Erie,* (1929), 297 Pa. 347, 147 Atl. 239; *French* v. *Mayor, etc. of Millville,* (1901), 66 N. J. Law 392, 49 Atl. 465; affirmed (1902), 67 N. J. Law 349, 51 Atl. 1109; 1 Joyce on Insurance (2d ed.) 708; 1 Cooley's Briefs on Insurance (2d ed.) 104; 3 Dillon on Municipal Corporations (5th ed.) 1558, note; 5 McQuillin on Municipal Corporations (2d ed.) 959; 1 Cooley on Constitutional Limitations 469, note.

It is unnecessary in this case to consider the charter powers or bylaws of the Pennsylvania Lumbermen's Fire Insurance Company, organized in Pennsylvania, for they do not control or have any bearing on policies issued by it on property in Arkansas. It was decided by this court in the case of *Federal Union Surety Company* v. *Flemister,* 95 Ark. 389, 130 S. W. 574, (quoting syllabus) that: "The liability of a foreign fire insurance company upon a policy issued upon property in this State is governed, not by the charter powers and bylaws of such company nor by the laws of the State under which it was organized to do business, but by the terms of the policy and the laws of this State."

No error appearing, the decree is affirmed.

SMITH *v.* REFUNDING BOARD OF ARKANSAS.

4-4264

Opinion delivered February 3, 1936.

Walter L. Pope and *Leffel Gentry,* for appellant.
Marvin B. Norfleet, amicus curiae.

BUTLER, J. Appellant, as a citizen and taxpayer, in his own behalf, and in behalf of all citizens and taxpayers of the State of Arkansas, by this action sought to restrain the Refunding Board of the State of Arkansas from allowing certain claims presented to it under the provisions of act No. 11 of the Extraordinary Session of the General Assembly in 1934, and to restrain other agents of the State from issuing any vouchers and warrants for said claims and from paying any warrant representing them. The claims were presented to the Refunding Board by the firm of Hill & Evans, contractors. Two of the claims were for anticipated profits which would have been earned, it was said, on highway con-

struction jobs, Nos. 6,112 and 11,049. The contracts for these jobs were made and entered into between the Highway Commission, and the contractors in accordance with the provisions of the statutes. Work was being performed on these jobs pursuant to the contracts, but was discontinued by the Highway Commission because of lack of funds with which to pay for the work, and a voucher was issued and delivered to the contractors for the amount of work performed.

The third claim presented arose under an illegal agreement entered into between the Commission and the contractors for the performance of job No. 11,029. The work on this job was completed and warrants for all the work performed according to the terms of the agreement were issued to the contractors which were all paid except one in the sum of $9,117.09. The contractors filed a claim on this job for the sum of $70,311.98 which, except for that represented by the unpaid warrant, was the amount alleged to be due over the sums received for the work performed on a *quantum meruit* basis.

The trial court sustained a demurrer to the appellant's petition, and, the petitioner electing to stand on his petition, the same was dismissed. From these orders of the court below, this appeal is prosecuted.

It is conceded by appellant that under the decision in the case of *Refunding Board of Arkansas* v. *National Refining Co.,* 191 Ark. 1080, 89 S. W. (2d) 917, the Refunding Board is an executive agency of the State, and under the provisions of the act its duties are executive in character involving the exercise of discretion. It is further conceded that the action of the board, when dealing with those matters within the scope of its jurisdiction conferred by the terms of the act, is not subject to control by the courts. It is insisted, however, that to act on the claims here involved would be beyond the scope of the board's authority, and that the courts may intervene to enjoin the unauthorized action of the board. The authority of the courts in this regard is not questioned by appellee. The controversy arises over the interpretation of those provisions of the act which authorize the board to examine into and allow claims presented to it. The

provisions of the statute thought by the appellee to be applicable are: (1) that part of § 1 which invests the board with "all the powers necessary to carry out the provisions of this act;" (2) that part of § 9 which provides that the holders of certain short term notes, State bonds and "the legal holders of all valid claims against the Highway Commission growing out of contracts for the construction and maintenance of highways shall be entitled upon presentation to the Refunding Board of such short term notes, State bonds or other evidences of said claims, to receive in exchange therefor funding notes of the character hereinafter provided for in this section in an amount equal to so much of the face value of such short term notes, State warrants or claims presented, payment of which is not otherwise provided for by this act;" (3) also, the provision of § 10, as follows: "This act shall not validate any claim, voucher, warrant or other evidence of indebtedness issued under or pursuant to any illegal contracts; no payments thereon or notes or bonds therefor shall be issued until such claim, voucher, or warrant is approved by the Refunding Board or until its validity is finally determined by the Highway Audit Commission or by a court of competent jurisdiction. * * *"; (4) also, that part of § 39 which, after providing for the application of the balance remaining to the credit of the Bond Refunding Fund at the close of business on December 31, 1933, to certain purposes, provides: "The remainder shall be used for the *pro rata* payment of construction warrants and vouchers issued by the Highway Commission remaining unpaid on February 1, 1933, and also short term notes, issued under act No. 15 of the General Assembly, approved April 14, 1932, and all State bonds issued under act No. 167 of the General Assembly, approved March 28, 1933, and short term notes issued under act No. 18 of the General Assembly, approved September 2, 1933, where such short term notes or State bonds were originally issued in payment of a construction warrant, voucher or claim against the Highway Commission, and of claims in favor of contractors for maintenance or construction of highways when such claims are valid claims or compromised or a judg-

ment rendered on same by a court of competent jurisdiction; provided, that not more than 50 per cent. of such construction warrants, vouchers, short term notes and claims including compromise and court judgments shall be paid in this manner." (5) The remaining part of the statute thought to be applicable, and to sustain the contention made by the appellee, and upheld by the court below is § 50, which, after appropriating certain amounts out of the Bond Refunding Fund as it existed at the close of the year of 1933, for certain named purposes, provides in subdivision (d) as follows: "For the purpose of paying *pro rata* the construction warrants and vouchers remaining unpaid on February 1, 1933, issued by the Highway Commission and also short term notes issued under act No. 15 of the General Assembly, approved April 14, 1932, and all State bonds issued under act No. 167 of the General Assembly, approved March 28, 1933, and the short term notes issued under act No. 18 of the General Assembly, approved September 2, 1933, where such short term notes or State bonds were originally issued in payment of a claim against the Highway Commission under the terms of any contract for the construction or maintenance of highways or issued in payment of any valid claim, compromise or court decree and claims in favor of contractors for maintenance and construction of highways, the sum of one million ($1,000,000) dollars or so much thereof as may be necessary to pay fifty (50) per cent. of said warrants, vouchers, short term notes, State bonds and claims."

It is insisted by counsel as *amicus curiae,* in his exhaustive and able brief, that, when the statute is examined in its entirety, authority is found for the Refunding Board to consider and pass upon claims of the nature here involved. As sustaining this contention, counsel places particular emphasis upon the phrase, "the legal holders of all valid claims against the Highway Commission 'growing out of contracts' for the construction and maintenance of highways, shall be entitled upon presentation to the Refunding Board * * * of said claims, to receive in exchange therefor, funding notes * * * equal to so much of the face value of such * * * claims pre-

sented, payment of which is not otherwise provided by this act," in § 9; and upon that part of § 39 which provides for the payment "of claims in favor of contractors for maintenance or construction of highways when such claims are valid claims or compromised or a judgment rendered on same by a court of competent jurisdiction;" and the appropriation contained in § 50 for "payment of a claim against the Highway Commission under the terms of any contract for the construction or maintenance of highways, or issued in payment of any valid claim, * * * and claims in favor of contractors for maintenance and construction of highways;" and in the following language in § 10: "This act shall not validate any claim * * * under * * * any illegal contracts; no payments thereon or notes * * * therefor shall be issued until such claim * * * is approved by the Refunding Board * * *."

It is argued that since loss of anticipated profits is such a demand as may be asserted in the courts, anticipated profits therefore is a valid claim within the provision of § 9. It is also argued that § 10 makes provision for claims on a *quantum meruit* basis for work performed under invalid contracts.

The Bond Refunding Board is a special tribunal, clothed with limited powers and can have none except where same are expressly, or by necessary implication, granted under the provisions of the act of its creation. The investure in the board of all the powers necessary to carry out the provisions of the act cannot serve to extend its jurisdiction and was not so intended. The general power given by § 1 related to only those matters over which the board was given jurisdiction by the provisions of the act. With reference to the allowance and refunding of the obligations of the Highway Commission, the act specified the obligations which might be considered and passed upon by the board. These are warrants and vouchers issued by the commission, short term notes issued under act No. 15 of 1932, State bonds issued under act No. 167 of 1933, short term notes issued under act 18 of 1933, and claims for maintenance and construction of highways. The claim of Hill & Evans on job No. 6112

and job No. 11,049, except the warrant for work performed on the first contract in the sum of $1,022.47 and the warrant for work done on the second contract in the sum of $1,998.79, is not for the maintenance and construction of highways, but for damages in loss of profits sustained by reason of the State breaching its contracts. To concede appellee's contention would extend the provisions of the statute and authorize the board to allow and refund claims of the character not within the legislative intent as gathered from the language employed.

Section 10, relied on to support the claim based on a *quantum meruit* on job No. 11,029, does not refer to claims of that character, but to any "voucher, warrant or other evidence of indebtedness issued under, or pursuant to, any illegal contract." Since there has been no voucher, warrant, or other evidence of indebtedness issued under contract No. 11,029, for work performed on a *quantum meruit* this section has no application and does not tend to support the contention of the appellee.

Certain warrants were issued to appellee indorsed to the effect that the voucher was given and accepted in full and complete settlement for work done and for all claims of any character arising out of, or incident to, the construction. The effect of this indorsement is a matter of dispute between the appellant and the appellees, but this we need not consider as it is our conclusion that the proceeding of the Bond Refunding Board was beyond the authority conferred by the statute and the trial court erred in sustaining the demurrer to the petition of appellant. The decree is therefore reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings in accordance with this opinion.

CLAY COUNTY *v.* RUFF.

4-4133

Opinion delivered February 3, 1936.

Arthur Sneed, for appellant.

J. L. Taylor and *F. G. Taylor*, for appellee.

MEHAFFY, J. Appellee filed his claim against Clay County for the sum of $150, which he claimed was due him as his salary as deputy sheriff for the months of January, February and March of the year 1935, basing his claim on § 3 of act 189 of the Special Acts of the General Assembly of the State of Arkansas for the year 1919. His claim was disallowed by the county court, and he appealed to the circuit court where the case was tried and judgment entered in favor of appellee, the court holding that he was entitled to the salary under the special act above named.

Section 3 of act 189, *supra,* reads as follows: "The sheriff and ex-officio collector shall receive an annual salary in the sum of $3,000 for his services as collector, and all delinquent fees, and as sheriff, shall receive all fees as now provided by law for sheriffs.

"The deputy sheriff in the western district shall receive for his services an annual salary for such, the sum of $600 per year and all fees as now provided by law."

At the general election November 6, 1934, the electors of Clay County adopted initiated act No. 1, § 5 of which reads as follows: "The sheriff and ex-officio collector shall receive as compensation the sum of $2,500 per year, and in addition thereto all his fees, commissions, and other compensations now allowed by law which belong to the sheriff's office, and in addition thereto one-half of the penalties and fees attached for the collecting of delinquent personal property taxes, and shall receive no other or further compensation, emoluments, or perquis-

ites, either directly or indirectly for services rendered as such sheriff and ex-officio tax collector.

"Said sheriff and ex-officio tax collector, may employ deputies at such salaries as he may fix and agree upon, the deputies to be paid by the sheriff out of the salary and fees allowed to him for his services.

"The sheriff shall have charge of the county jail and may appoint a jailer who shall also be ex-officio deputy sheriff, and for whose conduct the sheriff shall be responsible as now provided by law.

"The county shall furnish the jail and equipment and keep the same in repair, and shall also furnish all bedding, clothing, medicine and medical attention necessary for the proper care of prisoners, but nothing more.

"For feeding and keeping prisoners confined in the jail, said sheriff shall receive $1 each day, payable as now provided by law.

"Such portion of the collector's salary and expenses as is due from the State and other State agencies shall be paid into the county treasury, to the credit of the county general fund and shall be used only for the purpose intended.

"The sheriff, as ex-officio tax collector, shall execute a 'surety bond' to cover the first $40,000 of liability for and on account of his or her official acts with some surety and bonding company authorized to transact such business in this State as surety thereon, and, in that event, said collector may file claim for premium paid on such surety bond, and the same shall be allowed and paid as an expense to said office."

The initiated act of Clay County covers the whole subject of county officers and their salaries. The fact that it does not mention act 189 is immaterial. Section No. 5 above quoted, of the initiated act, covers the sheriff of Clay County and his deputies. The first paragraph of § 5 above provides for a sheriff and ex-officio collector, and fixes his compensation. The second paragraph of said section authorizes him to employ deputies at such salaries as he may fix and agree upon, the deputies to be paid by the sheriff out of the salary and fees allowed him for his services. The act does not mention the

Western District of Clay County or any other district, but it applies to all of Clay County, and the act was adopted by the electors of that county. This act went into effect on January 1, 1935, and applied to all of Clay County. We think it necessarily repeals act 189, *supra.*

Appellee claims that the initiated act and act 189 can both stand, and that there is no repugnance. This cannot be true because the initiated act makes provision not only for the sheriff and collector, but for his deputies, and even if there was no conflict between the two acts, the initiated act would repeal the other.

"And there may be an implied repeal of an earlier by a later act although they are not repugnant in the usual sense of the term. Where a statute covers the whole subject-matter of an earlier act, and it is evident that it was intended to be a revision of, or substitute for, the earlier act, although it contains no express words to that effect, it operates as a repeal of the earlier act to the extent that its provisions are revised and supplied." 25 R. C. L. 915.

"It is a well-settled principle of statutory construction that statutes should receive a common-sense construction, and, when this whole amendment is construed together as it should be, and a common-sense construction placed upon it, the conclusion that fixing compensation for county officers is a local act, cannot be escaped." *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779.

It was manifestly the intention of the people of Clay County to provide for their county officers and fix their compensation. These local salary acts have been held valid by this court. *Dozier* v. *Ragsdale, supra; Smith* v. *Cole,* 187 Ark. 471, 61 S. W. (2d) 55; *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. (2d) 72.

Our conclusion is that the initiated act of Clay County repealed act 189, *supra,* and that the circuit court erred in allowing the claim.

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

COCA-COLA BOTTLING COMPANY *v.* HILL.

4-4109

Opinion delivered February 3, 1936.

Wils Davis and *Jas. C. Hale*, for appellants.

C. B. Nance and *R. V. Wheeler*, for appellee.

SMITH, J. Appellee recovered judgment for the sum of $500 to compensate the injury, pain and suffering occasioned by drinking a bottle of Coca-Cola containing particles of glass. For the reversal of the judgment, it is argued only that the verdict is so clearly against the preponderance of the evidence as to shock one's sense of justice. The case of *Chalfant* v. *Haralson,* 176 Ark. 375, 3 S. W. (2d) 38, is cited along with other cases, in support of this contention.

Before reciting the testimony, we restate the rule by which we must view it as announced in the case cited. We there said that we would not reverse a judgment because the verdict upon which it was based was so

clearly against the weight of the evidence as to shock the sense of justice of a reasonable person, and that we could reverse a judgment for lack of testimony only in cases where there was no substantial evidence to support it. We may therefore determine only whether there is any testimony of a substantial character to support the verdict, and we must in passing upon that question, in conformity with settled rules of practice, give to the testimony tending to support the verdict its highest probative value along with all inferences reasonably deducible from the testimony.

When thus viewed, the testimony may be stated as follows: Appellee bought in Earle a bottle of Coca-Cola which had been bottled, sold and distributed by the Coca-Cola Bottling Company of Forrest City. He noticed a gritty substance after drinking a portion of the bottle, and, after pouring a portion of the fluid on a paper, discovered that the substance was glass. Several persons were present and saw it. One of these was a doctor who recommended to appellee that he take castor oil. His teeth and gums were lacerated and bled, and he was very sick after discovering the glass. He suffered pain and great anxiety for a period of four days, during which time he took medicine as directed and passed a small amount of blood.

Testimony was offered showing how the bottles of Coca-Cola were cleaned and filled, which would make it highly improbable that any foreign substance should be found in one of the bottles, after it had been filled. But this question of fact was submitted to and passed upon by the jury under instructions which are not complained of. That testimony showing the care ordinarily used in bottling this drink is not conclusive that there was no negligence from which an injury resulted has been decided in a number of cases, among others, the following, *Coca-Cola Bottling Company* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862; *Coca-Cola Bottling Company* v. *Jenkins,* 190 Ark. 930, 82 S. W. (2d) 15.

A bottle partly filled with Coca-Cola was offered in evidence, which was said to then contain glass, and to be the identical bottle purchased by appellee in Earle. The

introduction of this bottle was not error, and the questions of its identity and proper preservation since its purchase were questions of fact which were submitted to and passed upon by the jury and are concluded by the verdict. *Coca-Cola Bottling Co.* v. *Adcox,* 189 Ark. 610, 74 S. W. (2d) 771.

The only assignment of error argued for the reversal of the judgment is the insufficiency of the evidence, but, as it appears from the facts recited, that a case was made for the jury, the judgment must be affirmed. It is so ordered.

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

4-4129

Opinion delivered February 3, 1936.

Cunningham & Cunningham, for appellant.

Guy V. Head, J. R. Crocker and *L. F. Reeder,* for appellee.

JOHNSON, C. J. On April 3, 1918, appellee, the Federal Land Bank of St. Louis, made a loan to C. M. and Sarah C. Smith of $2,200, payable in equal installments

of $77.50 each, and, to secure the due payments thereof, the Smiths executed a mortgage upon 240 acres of land situated in Lawrence County, Arkansas, the legal description of which is here omitted. Payments were regularly made according to the tenor and effect of the contract up to October, 1931, when payments ceased, and this suit in foreclosure was instituted by appellee in 1934. Sarah C. Smith died intestate in 1932, and left surviving as her sole and only heirs at law her husband, C. M. Smith and Wylie H., Hattie E. and Nancy J., children. C. M. Smith, husband of Sarah C. Smith, died prior to the filing of this foreclosure suit. All heirs at law and assignees of the parties were made parties defendant in the foreclosure action. Appellee, in the foreclosure proceeding, in addition to the usual allegations, alleged; that in 1923 Hattie E. and Wylie J. Smith conveyed to Nancy J. the west one-half of the southwest quarter of section 24, township 15, range 1 west, and that in said deed the grantee expressly assumed and agreed to pay the Federal Land Bank mortgage debt; that Nancy J. and Wylie H. conveyed to Hattie E. the west one-half of the northwest quarter of section 24, township 15, range 1 west, and in said deed the grantee expressly assumed and agreed to pay the Federal Land Bank debt; that Hattie E. and Nancy J. conveyed to Wylie H. the east one-half of the northwest quarter of section 24, township 15, range 1 west, and in said deed the grantee expressly assumed and agreed to pay the Federal Land Bank debt; that in 1928 Hattie E. conveyed the west one-half of the northwest quarter of section 24, township 15, range 1 west to P. S. Cunningham, and in this deed the grantee expressly assumed and agreed to pay the Federal Land Bank debt. All necessary parties were brought before the court by summons or otherwise. P. S. Cunningham filed an answer admitting the execution of the mortgage and note and admitted that default had been made in paying the installments as alleged, but affirmatively set forth that the conveyances between the heirs of the original mortgagors was a mutual partition of the mortgaged lands, and that by purchase he held and possessed the tract as alleged; he further alleged

that the Federal Land Bank judgment should be restricted to a recovery of one-third its debt, and should be declared a lien only against the tract held and owned by him.

The cause was submitted and tried upon stipulation of counsel which established the facts as aforesaid, and in addition thereto that the conveyances between the heirs in 1923 were effected for the purpose of mutual partition, and without other consideration. The stipulation of counsel in reference to appellant's liability is as follows: "That the deed from Hattie E. Pigg and Luther Pigg, her husband, to P. S. Cunningham was a conveyance of the part of said land received by the said Hattie in said division, and the clause in the said deed referring to the mortgage indebtedness assumed and was intended to include only the part of the said indebtedness assumed by Hattie E. Pigg in the division of the lands above referred to." The chancellor entered a decree against appellant for one-third the mortgage debt, accrued interest and delinquent taxes, aggregating $886.99, and against other defendants and owners for the balance of the mortgage debt. It was directed in the decree that the whole tract of land would stand as security for the whole mortgage debt, from which P. S. Cunningham alone appeals.

For a reversal of the decree appellant contends that the Federal Land Bank's suit against him *in personam* upon his assumption in the conveyance of 1928 is an irrevocable election to approve, ratify and confirm the mutual partition between the Smith heirs, and for this reason the chancellor erred in holding his tract of land liable for the whole mortgage debt. No authorities are cited in support of this novel contention, and we have been unable, in our investigation to find authorities supporting it. Fundamentally, it may be said that the Smith heirs could not mutually partition in kind the mortgaged estate, and thereby bind the mortgagee without its consent. Consent is not asserted by appellant save that this suit was an election upon appellee's part to approve and ratify.

Under repeated opinions of this court we have consistently held that a grantee in a deed who expressly assumes and agrees to pay an outstanding mortgage debt against the lands conveyed by accepting such deed binds himself to the mortgagee or his assignees for the debt. This right inures to the mortgagee and his assignees as a matter of law, and no election or other affirmative action upon his part is necessary or required to establish it. See *Pfeifer* v. *W. B. Worthen Co.,* 189 Ark. 469, 74 S. W. (2d) 220, and cases cited therein.

It follows from this that the appellee was not required to and did not make an election in pursuing the remedies sought.

The chancellor decreed that the lands should be offered for sale in separate tracts according to the mutual partition between the heirs, and, if such sale produced the necessary funds, to extinguish the mortgage debt to so report for approval, but that if such sale did not produce sufficient funds to extinguish the mortgage debt that the whole tract should be offered and sold irrespective of the mutual partition between the heirs. This was all to which appellant was entitled under his purchase. *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162; *Walker* v. *Mathis,* 128 Ark. 317, 194 S. W. 702; *Wallace* v. *Hammonds,* 170 Ark. 952, 281 S. W. 902; *Elliott* v. *Cravens,* 182 Ark. 893, 33 S. W. (2d) 373.

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

FIREMAN'S FUND INSURANCE COMPANY *v.* LEFTWICH.

4-4134

Opinion delivered February 10, 1936.

John E. Coates, Jr., for appellants.

Evans & Evans, for appellee.

JOHNSON, C. J. On January 11, 1935, appellee, C. C. Leftwich filed his complaint at law in the Logan Circuit Court against J. D. Leftwich, Coates & Raines, Inc., and the Fireman's Fund Insurance Company, and on the same day he also filed a similar action against J. D. Leftwich, Coates & Raines, Inc., and the Great American Insurance Company. In each suit it was alleged that on October 23, 1934, the defendants contracted to, and did insure against fire certain baled cotton then in storage or warehouse in the town of Magazine, Arkansas, in the sum of $2,500, and that on October 24, 1934, said cotton was destroyed by fire. The prayers were that the premiums due be deducted, and that he have judgment for the balance due plus attorneys' fee and penalties. A motion to require plaintiff to elect was filed in each case, but was passed by the trial court for determination until the testimony was heard. Subsequently, separate answers were filed by the several defendants denying all

the material allegations of the complaints. The court for trial purposes consolidated the two causes first referred to, whereupon testimony was adduced to the following effect: That upon behalf of appellee tended to show that during the last 20 or 25 years he had done a very extensive fire insurance business with Coates & Raines, Inc.; that J. D. Leftwich is appellee's son and is employed by Coates & Raines, Inc., as fire insurance agent in the vicinity of Magazine, and that he had been so engaged for the past several years; that appellee is engaged in the cotton business which requires immediate and effective insurance; that the insurance part of his business was intrusted to his son's care; that the usual course pursued in effecting insurance for the past several years was that appellee would advise his son of the needed coverage, and in all instances the policy or policies had been issued as of the date of application therefor and subsequently delivered; that on October 23, 1934, appellee applied to his son for fire insurance covering 300 bales of cotton then in a certain warehouse, and also 200 bales of cotton located at a certain gin in the town of Magazine, and that J. D. Leftwich then and there accepted the risk and agreed to immediately make effective insurance contracts; that the policies of insurance covering the 300 bales of cotton were executed under date of October 23, 1934, and delivered to appellee; that the policies on the 200 bales of cotton located at the gin were actually executed by the Firemen's Fund Insurance Company and Great American Insurance Company, but were not physically delivered because said companies ascertained that fire had destroyed the property on October 24, 1934, and for this reason appellants' agents refused to deliver the policies to appellee. A vast amount of correspondence between J. D. Leftwich and Coates & Raines, Inc., was introduced in evidence, all of which tended to show that J. D. Leftwich was appellants agent in the vicinity of Magazine, and that all insurance applied for by him for customers prior to October 23, 1934, was written and made effective as requested by him.

The testimony in reference to the loss and the amount thereof is not here reviewed because no con-

tention is urged in this behalf. The testimony in behalf of appellants tended to show that J. D. Leftwich was not the agent of either of the appellants, or, if so, he was merely a soliciting agent without power or authority to make binding contracts.

A trial to a jury resulted in judgments in favor of appellee and against appellants, insurance companies, for the sums sued for, and thereupon penalties and attorneys' fees were duly assessed by the court as prayed, from which this appeal comes.

In briefs and in oral argument it is tacitly conceded by appellants that J. D. Leftwich was their agent in the Magazine vicinity at the times heretofore and hereafter discussed, but the contention is strenuously urged that he was merely a soliciting agent and without power or authority to bind his principal in advance of actual delivery of the policies. In this behalf it is urged that J. D. Leftwich was not registered with the State Insurance Commissioner, as required by § 6062 of Crawford & Moses' Digest, and that by § 6061 of Crawford & Moses' Digest his agency status is restricted to that of a soliciting agent. We have heretofore considered and decided this contention adversely to appellants' contention. In *Continental Casualty Co.* v. *Erion,* 186 Ark. 1122, 57 S. W. (2d) 1025, we disposed of this contention by saying: "It seems settled that statutes, such as those quoted *supra,* are not intended to, and do not, have any effect upon the agent's powers to bind the principal, nor do they change the general law of agency, the powers of an agent being and remaining those only which his principal has expressly or impliedly conferred upon him, to be determined by the applicable principles of the common law relating to principal and agent."

Moreover, the testimony is undisputed that Coates & Raines, Inc., is and was the general agent of appellants in this territory, and it is likewise undisputed that J. D. Leftwich was acting as agent for appellants and Coates & Raines, Inc., at the time and prior to the loss here in controversy. In so far as the issues of this case are concerned, it is immaterial whether or not appellants complied with the sections of the statutes cited *supra,* as they

cannot take advantage of their own neglect in complying with the laws of this State. By the express mandate of § 6062 the duty rests upon appellants to certify to the Insurance Commissioner their agents in this State, therefore noncompliance with § 6062 of Crawford & Moses' Digest has no contractual effect.

In an unbroken line of opinions we have consistently held that the question of agency, and the extent of its power and authority is always a question of fact to be determined from the testimony adduced. *New Hampshire Fire Insurance Co.* v. *Walker,* 178 Ark. 319, 11 S. W. (2d) 772; vol. 8, Cooley's Briefs on Insurance, p. 50.

The testimony adduced by appellee and heretofore set out is amply sufficient to warrant the jury in finding that J. D. Leftwich was not merely a soliciting agent of appellants, but on the contrary had full power and authority to bind his principal from the date of application.

Appellants next contention is that conceding the point that J. D. Leftwich was an agent of general power and authority no contract was made between the parties because their minds never met upon the identity of the company which was to bear the loss, and that the loss occurred before this necessary prerequisite was determined. This contention overlooks the vital point at issue, namely, the authority of J. D. Leftwich. The jury has found from substantial testimony that J. D. Leftwich was appellants' agent in the transactions under consideration and had full power and authority to bind appellants by contract from the moment of application. It is practically undisputed that the application for the insurance in this controversy was made and accepted on the afternoon of October 23, 1934, and the only thing remaining to be done was the clerical transaction of writing the evidence of the contract. This was to be accomplished by appellants' agent, and the insured had nothing to do with it. The testimony reflects that these two policies of insurance were prepared, signed and duly executed as of October 23, 1934, but subsequently the insurers having learned of the loss refused to make physical delivery thereof. Physical delivery of the con-

tracts of insurance is not a prerequisite to their validity and binding effect. *Continental Insurance Co.* v. *Bean,* 188 Ark. 835, 68 S. W. (2d) 460.

Since these policies were actually issued by the duly authorized agent of appellants, the argument that Coates & Raines, Inc., represented other insurance companies is beside the question. An actual designation was made of appellants by those in authority and we prefer to deal with reality instead of conjecture. We understand the general rule to be that when an insurer takes a risk to commence previous to the actual date of the policy, and the property is destroyed before the policy is actually delivered and executed, their being no fraud or concealment by the insured, the insurer will be as effectually bound as if the loss occurred after delivery of the policy. *Hallock* v. *Commercial Co.,* 26 N. J. L. 268; *Koivisto* v. *Bankers' Co.,* (Minn.) 181 N. W. 580; *Nertney* v. *National Fire Ins. Co.,* (Iowa) 213 N. W. 826; *U. S. F. & G. Co.* v. *Goldberger,* 13 Fed. (2d) 779.

If by appellants' designation in the policies as insurer they have been discriminated against as against other insurers represented by Coates & Raines, Inc., or if they have been unfairly dealt with by such designation, it is the fault of appellants' agents and no fault of the insured. It is an established rule of law adhered to by this court in a long line of opinions that, if one of two innocent parties must suffer, the one who put it in the power of a third person to perpetrate the act should suffer the loss. *Williams* v. *Hulse,* 184 Ark. 855, 43 S. W. (2d) 723; *Merchants' Nat. Bank* v. *Home Bldg. & Loan Assn.,* 180 Ark. 464, 22 S. W. (2d) 15. Even so here appellants admitted agents effected appellants' liability and executed the evidences thereof, and they must suffer the consequences instead of casting it upon the insured.

It would serve no useful purpose to discuss in detail the many cases cited by the respective parties, as each of them turns upon its peculiar facts or circumstances. The rule which we have adopted rests upon reason and justice, and we have been cited to no case in conflict with

the rule stated when viewed in the light of attendant circumstances.

Lastly appellants assert that the trial court erred in refusing to require plaintiff to elect as to the defendant he would pursue, and *Unionaid Life Insurance Co.* v. *Crutchfield,* 182 Ark. 825, 32 S. W. (2d) 806, and other cases are cited in support of this contention. Specifically, on this point appellants' contention is that appellees' pursuit of J. D. Leftwich and Coates & Raines, Inc., upon the one hand and appellants, insurance companies, on the other is inconsistent. We cannot agree with this contention. Appellee took the position that one or the other—the agents or the principal—was liable to him for his loss. The liability or lack of liability of either class rests upon identical facts and circumstances adduced in testimony. Under such circumstances we have repeatedly held that separate suits might be consolidated for trial purposes. Section 1080, Crawford & Moses' Digest; *First National Bank of Waldron* v. *Ary,* 180 Ark. 1084, 24 S. W. (2d) 336; *Moore* v. *Rogers Wholesale Gro. Co.,* 177 Ark. 993, 8 S. W. (2d) 457. If such suits may be consolidated for trial purposes, it follows that it would not be prejudicial error to refuse to require an election.

No prejudicial error appearing, the judgment is affirmed.

SOUTHERN KANSAS STAGE LINES COMPANY *v.* HOLT.

4-4266

Opinion delivered February 10, 1936.

Marvin A. Hathcoat and *Carmichael & Hendricks,* for petitioner.

V. D. Willis and *Henley & Rea,* for respondent.

JOHNSON, C. J. This is an original proceeding in prohibition filed by petitioner, Southern Kansas Stage Lines Co., to inhibit the respondent, Jack Holt, Judge of the Fourteenth Judicial District from proceeding to hear and determine the case of *Sam Ruff* v. *Petitioner,* pending in the circuit court of Boone County.

The record reflects that on September 24, 1935, one Sam Ruff filed his complaint in the Boone Circuit Court against petitioner, Southern Kansas Stage Lines Company, and for his cause of action alleged that on August 7, 1935, while in the exercise of due care for his own safety, and while driving on a State highway as he had a right to do by and through the carelessness and negligence of petitioner's bus driver concurred in by the negligence of another, he was severely and permanently injured to his damage in the sum of $3,000. Summons was duly issued on the complaint thus filed, and the same was served upon petitioner in the following manner: first, the sheriff of Boone County on September 24, 1935, delivered to petitioner's ticket agent and representative in Boone County a copy of the summons; second, the sheriff of Pulaski County delivered a copy of the summons to John W. Newman, petitioner's duly designated agent for service in the State of Arkansas, on September 30, 1935.

The recitals of the summons followed the language of § 1140 of Crawford & Moses' Digest as to manner, means, and time for service. No return of the summons was filed in the Boone County clerk's office until December 11, 1935. The Boone Circuit Court met in special

adjourned session on October 24, 1935, and again met in special adjourned session November 28, 1935. On December 11, 1935, petitioner filed its petition and bond for removal to the Federal District Court for the Western District of Arkansas in which Boone County is situated. The court denied the removal because the petition and bond were not filed within the time required by law. Petitioner's contention is that, since the summons were not returned by the sheriff and filed with the clerk in Boone County until December 11, 1935, petitioner was not required to answer or plead to the complaint until that time, and that for this reason the petition and bond for removal were timely interposed. This contention puts form above substance. Section 29 of the Judicial Code, (28 USCA 72) in effect provides that the petition and bond for removal from a State to a Federal court must be filed in the State court at the time or any time before the defendant is required by the laws of the State to answer or plead to the complaint. By § 1208 of Crawford & Moses' Digest, a defendant is required to answer or plead by noon of the first day the court meets in regular or adjourned session after the summons has been served twenty days in any county in the State.

By the plain mandate of the two enactments just cited a petition and bond for removal from a State to a Federal court must be filed in the State court by noon of the first day that such court meets in regular or adjourned session after the summons has been served twenty days in any county. *S. W. Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373. The admitted facts in this case are that the Boone Circuit Court was in adjourned session on October 21, 1934, and on November 28, 1934, both of which sessions were held more than twenty days after the actual service of summonses upon the petitioner.

Fundamentally the purpose of a summons is to apprise a defendant of the pendency of the suit and afford him timely opportunity to be heard on the claim or charge. *Railway Company* v. *State,* 55 Ark. 200, 17 S. W. 806; 21 R. C. L. 1263. The official return upon the

writ after the service is nothing more than the written evidence of the time, place and manner of service to the end that the court to which the return is made may judicially be apprised of its jurisdiction or lack of jurisdiction of the person served. 21 R. C. L. 1315, 1316. Also see *Southern Bldg. & Loan Association* v. *Hallum*, 59 Ark. 583, 28 S. W. 420.

Section 1140 of Crawford & Moses' Digest cited and relied upon by petitioner, directing the time and manner of the return of the summons, does not militate against the views herein expressed. This section of the statutes is merely a mandate directed to the server of process to make a return upon the writ in a timely manner, to the end that the court may judicially know that it has in fact acquired jurisdiction of the person before a judgment is entered.

It follows from what we have said that the petition and bond for removal were filed in the State court too late, and the circuit court was therefore correct in denying the removal of said cause.

The application for the writ of prohibition is denied.

HERRON *v.* SPANN.

4-4150

Opinion delivered February 10, 1936.

Sam M. Levine, for appellant.

E. W. Brockman, for appellee.

HUMPHREYS, J. This suit in replevin was instituted by Dr. C. E. Spann against appellant in the circuit court of Jefferson County to recover certain personal property covered by a mortgage executed by appellant to secure an alleged indebtedness due him, which was evidenced by a note. A copy of the mortgage and note were not attached as exhibits to the complaint. Dr. C. E. Spann executed the affidavit and filed a bond; whereupon, a summons and order of delivery of the property was issued and served. No cross-bond was made by appellant to retain the property, and same was delivered to Dr. C. E. Spann by the sheriff. Appellant in apt time filed an answer and counterclaim against Dr. C. E. Spann. After the trial of the case began, Dr. C. E. Spann filed a reply to the counterclaim. In the course of the trial it developed that the note made the basis of the suit was executed to Mrs. C. E. Spann for a debt due her, and that the mortgage was executed to Dr. C. E. Spann as trustee to secure the debt. Up to that time the case had proceeded as a controversy between Dr. C. E. Spann and appellant. When this discovery was made, counsel for appellant filed a motion to dismiss the complaint because she was not indebted to Dr. C. E. Spann. The court sustained the motion, dismissed the complaint, and discharged the jury. Subsequently, and during the same term of court, upon the showing that Dr. C. E. Spann was acting as agent and trustee for his wife, the court set the judgment dismissing the original complaint aside, granted him a new trial, and allowed him to amend his complaint by substituting himself as agent or trustee for his wife as party plaintiff, and, upon a hearing of the cause, rendered a replevin judgment in favor of appellee as agent or trustee of Mrs. C. E. Spann, from which is this appeal.

The only question, therefore, involved on this appeal is whether the court erred in permitting appellee to proceed in his name as agent or trustee for his wife in the replevin suit. The undisputed evidence is that Mrs. C. E. Spann is and was the real party in interest. Amending the complaint to show this fact did not change the nature of the action. No new issue was interposed

by allowing the case to proceed in the name of Dr. C. E. Spann as agent or trustee for his wife, so it was proper to allow the amendment and treat the affidavit as amended to conform to the proof and to proceed with the case. This court approved a like procedure in the case of *Gunter* v. *Earnest,* 68 Ark. 180, 56 S. W. 876. The court said in that case (quoting syllabus 1): "Where a replevin suit instituted in a justice's court by a husband was tried on the theory that he was suing on behalf of his wife, his affidavit was amendable on appeal to the circuit court, so as to show that the property was his wife's, and that he was suing as her agent."

The principle applied to the facts in that case controls in the case at bar, as the facts in the two cases are not materially different.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* NORWOOD.

4-4131

Opinion delivered February 10, 1936.

Huie & Huie and *Carmichael & Hendricks,* for appellant.

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

HUMPHREYS, J. This is an appeal from a judgment for $1,750 recovered by appellee from appellant in the circuit court of Clark County for damages for personal injuries alleged to have been received in a collision near Chidester between an automobile driven by Mr. DeLaughter and appellant's bus through the alleged negligence of appellant's driver in driving the bus on the wrong side of the road or, after the collision, driving it off the shoulder into a ditch and turning it over. Other grounds of negligence on the part of appellant's driver than the two mentioned were alleged but were abandoned.

Appellant contends for a reversal of the judgment because the court overruled its motion to quash the service. It is first argued that the appellee is a minor and could not become a party plaintiff in contemplation of the law. His disabilities had been removed for all purposes when he instituted this suit. It was ruled in the case of *Merriman* v. *Sarlo,* 63 Ark. 151, 37 S. W. 879, that the removal of the disabilities of a minor generally authorizes the minor to sue or defend a suit without the appointment of a guardian *ad litem.* It is next argued that the service should have been quashed because the summons was served on its station agent at Gurdon in Clark County, instead of being served upon J. E. Wiley, its designated agent. The following cases are authority to the effect that the statute requiring corporations to appoint an agent upon whom process may be served is not exclusive of other methods of service: *Lesser Cotton Company* v. *Yates,* 69 Ark. 396, 63 S. W. 997; *Henrietta Mining & Milling Co.* v. *Henry Johnson,* 173 U. S. 221, 19 S. Ct. 402; and *Meeks* v. *Waggoner,* 191 Ark. 189, 85 S. W. (2d) 711.

Appellant also contends for a reversal of the judgment because the court overruled its motion to quash the

jury panel. This contention was recently decided adversely to the contention of appellant in the case of *American Refrigerator Transit Company* v. *Stroope,* 191 Ark. 955, 88 S. W. (2d) 840.

Appellant also contends for a reversal of the judgment because the court permitted the attorney for appellee to ask certain witnesses introduced by appellant on cross-examination, whether they did not present claims to appellant for injuries they had received in the collision or whether they had not settled with appellant for injuries they had received in the same collision. Counsel for appellant argue that the evidence should be excluded on the ground that compromise settlements were inadmissible. In this case, these witnesses had testified to facts tending to show that appellant's driver was not negligent. The questions and answers were admissible as tending to contradict their testimony, and also to go to the credibility of the witnesses. The counsel for appellant did not ask that their testimony be limited to these purposes. Being admissible for these purposes and without such a request on the part of appellant's counsel, it was not error to permit the questions and answers.

Appellant also contends for a reversal of the judgment on the ground that there was no substantial evidence introduced tending to show appellant's driver was negligent either by driving the bus on the wrong side of the road or by driving it off the shoulder into a ditch and turning it over, and that the court erred in not instructing a verdict for it at the conclusion of the testimony.

There is testimony in the record tending to show that, at the time of the collision, the bus driver was over on the left side of the mark in the middle of the road, and that, had he not been on the wrong side of the road, the collision would not have occurred, and also testimony tending to show that he continued to drive on after the collision some forty yards until he ran into the ditch and turned the bus over, instead of stopping the bus when the collision occurred. The evidence was sharply conflicting as to whether the driver of the bus was negli-

gent in either respect, but, under the conflicting testimony, it was proper to refuse a peremptory instruction and to send the case to the jury under the two allegations of negligence alleged, to which the proof had been directed.

Appellant also contends for a reversal of the judgment because the instructions given at the request of appellee were inconsistent and misleading to the jury. We have carefully read them and cannot discover any inconsistencies between them. They fairly covered the issues involved, and were not misleading.

No error appearing, the judgment is affirmed.

TINDALL *v.* SEARAN.

4-4229

Opinion delivered February 10, 1936.

Geo. F. Hartje, O. M. Young and *W. A. Leach,* for appellants.

A. G. Meehan, J. W. Moncrief and *M. F. Elms,* for appellees.

MEHAFFY, J. At the general election held on November 6, 1934, the qualified electors of Arkansas County initiated and adopted a salary act fixing the salaries of all county officers except surveyor and coroner. The initiated act itself provided that it should become effective on January 1, 1935, and after January, 1935, the salaries fixed in said act have been received by the county officers.

On October 7, 1935, this action was brought by J. W. Searan, as a taxpayer, against the county officers, naming them. The purpose of the suit was to have the salary act declared void and ineffective.

On November 4, 1935, the county officers who were made defendants filed a general demurrer to each separate paragraph of the complaint, and on the same day A. A. Tindall and others, as taxpayers of Arkansas County, intervened and also filed a demurrer to the entire complaint and to each paragraph.

On November 11, 1935, the court overruled the demurrers, and the appellees declined to plead further, whereupon final judgment was entered holding said act to be void and of no effect, and a restraining order was issued, as prayed in the complaint. The case is here on appeal.

The complaint alleged that the salary act was void for many reasons, and attention will be called to the reasons given.

The appellees insist that the questions raised here were not presented either to the trial court or this court in the case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779, nor in any other suit involving the validity of such an act. It is earnestly argued that the questions here raised are controlled by the opinion of this court in *State ex rel. Little Rock* v. *Donaghey,* 106 Ark. 56, 152 S. W. 746.

The only thing decided in the last-mentioned case was whether more than three amendments could be submitted at any one election. The Initiative and Referendum Amendment that had been adopted provided that constitutional amendments might be submitted by the people. Said amendment stated that the people of the State reserved to themselves power to propose laws and amendments to the Constitution, etc. The court held in the Donaghey case, *supra,* that the previous provisions of the Constitution are to be harmonized when not necessarily inconsistent or repugnant, and that, since the Constitution authorized only three amendments, to harmonize the amendment with the Constitution, only three amendments could be submitted, both by the Legislature and the people, and that the first three submitted, if adopted, if more than three were submitted, became a part of the Constitution.

Section 22 of article 19 of the original Constitution provided that either branch of the General Assembly might propose amendments to the Constitution, but that no more than three amendments shall be proposed or submitted at the same time. And, as already said, the court concluded that, when the amendment was considered together with the Constitution, only three amendments could be submitted. After this decision, another initiative and referendum amendment was submitted to the people at the general election, November 2, 1920. This last initiative and referendum amendment expressly provides that no limitation shall be placed upon the number of constitutional amendments.

It is contended by the appellees that a local act cannot be adopted by a county concerning a matter over

which the General Assembly is given exclusive and mandatory control by the Constitution, and that in a recent case this court said: "The Constitution provides that the Legislature, not the quorum court, shall fix the number of deputies and their salaries. * * * 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 the authority to fix the number of deputies and their compensation."

In this connection appellees refer to the case of *Pulaski County* v. *Caple,* 191 Ark. 340, 86 S. W. (2d) 4. We were discussing there § 4 of article 16 to the Constitution of the State of Arkansas. That provision of the Constitution was adopted long before the initiative and referendum amendment was adopted, and when the legislative powers of the people was vested alone in the General Assembly. No one would contend now that the people of the State did not have the right under the Initiative and Referendum Amendment to adopt a law fixing the number of deputies and their compensation. Any law that the General Assembly could have enacted prior to the adoption of the Initiative and Referendum Amendment may now be adopted by the people independent of the action of the Legislature. In other words, the number of deputies and their compensation is to be fixed by law, and authority to fix salaries cannot be delegated to the quorum court or any other body.

Appellees say that it does not appear in the opinion in the case of *Dozier* v. *Ragsdale, supra,* that the question of the constitutionality of the act was raised. We did say, however, in that case: "In 1910 the people of Arkansas adopted a constitutional amendment reserving the right and power to themselves to propose legislative measures, laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the General Assembly. That amendment undertook to provide for local legislation, but it read: 'The people of each municipality, each county, and of the State, reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the General Assembly,' etc.

"No one doubted at that time, and no one doubts now, that the people, in adopting this amendment thought they were providing for local legislation in counties by initiating acts. But it will be observed that the reservation of power and authority to initiate and enact laws was in the same paragraph that the power was reserved to enact constitutional amendments, and this court held that that part of the amendment adopted in 1910 was meaningless." *Dozier* v. *Ragsdale, supra.*

The present Initiative and Referendum Amendment was adopted in 1920. The fact that the people adopted this provision a second time, and having written it in such plain language that it cannot be misunderstood by any one, shows clearly that the people intended to reserve to themselves the right to pass all local laws affecting the counties.

Moreover, in 1926 the people of the State initiated and adopted an amendment to the Constitution which prohibited the General Assembly from passing any local or special act. Therefore there is no possible way to pass a local act except under the provisions of the Initiative and Referendum Amendment. They have not only reserved this right to themselves, but have prohibited the General Assembly from passing any local law. It was contended in the Union County case that the measure adopted by Union County was contrary to the general law of the State, and therefore violative of the constitutional amendment which prohibits counties from enacting local legislation contrary to the general law of the State.

We have repeatedly held that, when one or more counties is exempt from any law, this exemption makes the law local. It is a matter of common knowledge that several counties in the State of Arkansas have adopted local acts fixing the numbers of officers and the salaries for the county, and there is no general law that conflicts with this act.

The Legislature, in 1933, passed act 159. This undertook to classify counties, and directed the State Treasurer to divide all the revenue in the county highway funds among all the counties in the State, fixing as a

basis for the division the population, car license revenue, and the areas of the various counties. It also provided that, in counties having more than one judicial district and a population of not less than 65,000, the funds allowed those counties should be divided between the judicial districts on the basis of the mileage of county maintained roads. We held that this act was void because it was a local act, applied to Mississippi County alone, and we also held that the Legislature could not adopt a classification arbitrarily upon a ground which has no foundation in difference of situation or circumstances, and that a statute which exempted one county is a local act. *Leonard* v. *Luxora-Little River Road Maintenance District No. 1,* 187 Ark. 599, 61 S. W. (2d) 70.

There are some other acts of the session of 1933 fixing the fees that county officers shall charge for certain work, but it does not undertake to fix salaries or compensation for county officers.

We held in *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. (2d) 55, that an act fixing salaries of county officials in all counties except Union was a local act. This act was passed in 1933.

We think all the questions in this case were necessarily decided in the case of *Dozier* v. *Ragsdale, supra,* and in the case of *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. (2d) 72.

Under the Initiative and Referendum Amendment the people of the county could not enact a law contrary to a general law which operated uniformly throughout the State. The expenses of the county are of special interest to the taxpayers in the particular county where the law is enacted. The fixing of salaries and compensation to be paid county officers is of peculiar interest to taxpayers of the county, and it was legislation of this kind that the people intended to provide for. No local matter could be more important to them.

It is argued that the people of a county could not initiate and adopt a law for contesting the election of officers. Of course a county could not do this, but the people of the State could, or the Legislature could. This

would be a general law, but the fixing of the salaries and compensation and regulating the expenses of the counties is an entirely different matter. Even when those salaries were fixed by the Legislature, the number of officers and deputies in each county and their salaries were fixed, not uniformly throughout the State, but according to the needs of each particular county, and if it provided for fixing fees and salaries in the seventy-five counties, the act would be different as it applied to each county.

We have already held, however, that acts of this character are not only local, but of peculiar interest to the taxpayers of the county. As we have said, there are several counties which have enacted local salary laws, and this court said: "Now if a general law must apply throughout the territorial limits of the State, the exclusion of one or more counties from its provisions makes it a local statute." *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. (2d) 55.

This court recently said: "Another reason not less cogent is that Amendment No. 7 permits the exercise of the power reserved to the people to control to some extent at least the policies of the State, but more particularly of counties and municipalities as distinguished from the exercise of similar power by the Legislature, and, since that residum of power remains in the electors, their acts should not be thwarted by strict or technical construction." *Reeves* v. *Smith, supra.*

Appellees cite many authorities on the construction of statutes and constitutional amendments, but we do not discuss them because this court has repeatedly construed the Initiative and Referendum Amendment, and when a court has construed a provision of the Constitution, this construction should be followed unless there is some manifest reason for holding otherwise.

"A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances have so changed as to make a different rule seem desirable. In accordance with this principle,

a court should not allow the facts of the particular case to influence its decision on questions of constitutional law, nor should a statute be construed as constitutional in some cases and unconstitutional in others, involving like circumstances and conditions." 6 R. C. L. 46.

No one doubts that the people, in adopting the Initiative and Referendum Amendment, intended to reserve to themselves the power to control their local affairs, and there is nothing more important to the taxpayers of a county than the regulation of its officers, their compensation, and the expenses of the county.

The initiated act of Arkansas County is not in conflict with any general law, and is not in conflict with any provisions of the Constitution.

Appellee argues that the Constitution of the State has conferred upon the General Assembly by particular and affirmative direction and words the power and duty of fixing all salaries of all officers in the State. That is true, and, prior to the adoption of the Initiative and Referendum Amendment, there was no lawmaking body that could fix these salaries except the Legislature, but in the amendment the people reserve to themselves the right to enact all laws independent of the Legislature. It will not be contended that the people of the State could not initiate and adopt a law fixing the compensation of officers.

The Initiative and Referendum Amendment, like all other amendments, must be construed together with the provisions in the Constitution before its adoption. If the amendment is in conflict with a provision of the Constitution, the amendment must prevail.

Since the adoption of the Initiative and Referendum Amendment the General Assembly cannot enact a local law fixing the salaries of county officers, because this would be a local matter, which is prohibited by the constitutional amendment prohibiting local legislation by the General Assembly.

Since it has been repeatedly held by this court that, under the Amendment to the Constitution above referred to, the counties may initiate and adopt local laws, we

deem it unnecessary to review the cases or repeat what we have heretofore said.

The decree of the chancery court is reversed, and the cause dismissed.

HILL *v.* BUSH.

4-4143

Opinion delivered February 10, 1936.

Dennis W. Horton, Roy D. Campbell and *Archer Wheatley,* for appellants.

J. A. Tellier, for appellee.

MEHAFFY, J. On December 18, 1918, the Equitable Life Assurance Society of the United States issued its policy of insurance on the life of Thomas R. Hardy in the amount of $1,000. Julia M. Hardy, wife of the said Thomas R. Hardy, was named as beneficiary. Thereafter, in 1919, Thomas R. Hardy and Julia M. Hardy borrowed

$500 from F. P. Hill and assigned to F. P. Hill the policy of insurance to secure the payment of the debt. Afterwards they borrowed other money, so that they were finally indebted to him in an amount equal to or greater than the face of the policy.

In September, 1928, S. M. Bush recovered a judgment in the Woodruff Chancery Court against F. P. Hill in the sum of $2,383.57, with interest at 10 per cent. Hill appealed the case to this court, and on November 18, 1929, the judgment was affirmed by this court.

Thomas R. Hardy died May 14, 1934, leaving surviving him his widow, Julia M. Hardy, who was beneficiary in the policy. On June 8, 1934, Bush filed in the Woodruff Chancery Court allegations and interrogatories. Summons and writ of garnishment were issued and served on the Equitable Life Assurance Society of the United States. On June 30, 1934, the Equitable Life Assurance Society filed answer and cross-complaint. Pleadings were filed by F. P. Hill and Julia M. Hardy, and S. M. Bush filed answer to the intervention of Julia M. Hardy, and response to defendant's motion to discharge garnishment and intervention.

On May 13, 1935, the court entered an order dismissing the garnishment, the garnishee having paid the money in the registry of the court. The insurance company is therefore no longer interested in the litigation, and the controversy is between Bush, who claims he is entitled to the money under the garnishment because of his judgment against Hill; Hill, who claims he is entitled to exemption; and Julia M. Hardy, who claims that she is entitled to the fund. Hill also claimed that he was entitled to the proceeds of the insurance policy.

The following is the agreed statement of facts: "It is stipulated and agreed by and between J. A. Tellier, solicitor for S. M. Bush, plaintiff in the above entitled cause, Roy D. Campbell, solicitor for the defendant, F. P. Hill, and Archer Wheatley, solicitor for Mrs. Julia M. Hardy, intervener herein, that the following facts are true and may be used instead of depositions by the parties in the hearing of this cause.

"(1). That on December 18, 1918, the Equitable Life Assurance Society of the United States issued its policy of insurance No. 2,393,080 on the life of Thomas R. Hardy in the amount of one thousand dollars ($1,000), in which policy Julia M. Hardy, wife of the said Thomas R. Hardy, was named as beneficiary.

"(2). That thereafter on January 10, 1919, Thomas R. Hardy and Julia M. Hardy borrowed the sum of $500 from the defendant, F. P. Hill, and executed their promissory note therefor, payable one year after date. As security for said note, the said Thomas R. Hardy and Julia M. Hardy executed and delivered to F. P. Hill their written assignment of said policy. Said written assignment, with said policy of insurance attached thereto with all indorsements made thereon by the said Equitable Life Assurance Society, was delivered to the said F. P. Hill by the said Thomas R. Hardy and the said Julia M. Hardy, and the said F. P. Hill has been at all times and is now in possession of the same. A copy of said assignment styled 'Duplicate of Absolute Assignment,' dated January 10, 1919, with all indorsements thereon, has heretofore been offered in evidence under stipulation of all the parties hereto, which stipulation is dated February 1, 1935.

"(3). That said assignment has never been canceled on the records of the insurance company or otherwise, but it, together with said policy of insurance, remains in the possession of the defendant, F. P. Hill.

"(4). That nothing was paid on said indebtedness of $500, but as time passed other moneys were procured by the said Thomas R. Hardy and Julia M. Hardy from the said F. P. Hill, portions of which money so procured were used in the payment of the premiums upon said policy in question until May 31, 1926, when there was an indebtedness owing to the defendant, F. P. Hill, in the principal sum of $1,000; that on said date the said Thomas R. Hardy and Julia M. Hardy executed and delivered to the said F. P. Hill a promissory note for $1,000, which note reads as follows:

"'$1,000 Cotton Plant, Ark., May 31, 1926.

" 'Twelve months after date, for value received..... promise to pay to the order of F. P. Hill one thousand and no/100 dollars at their office in Cotton Plant, Arkansas, with interest at 8 per cent. per annum from maturity until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment, and protest. Interest payable annually. Given in settlement of all claims to date.

" 'Thomas R. Hardy,
" 'Julia M. Hardy.'

"The original of said note is hereto attached, marked Exhibit B, and made a part of this stipulation. No payments have been made on said note since the date the same was executed, and said entire sum is now unpaid. Said note has at all times been in the possession of the defendant, F. P. Hill.

"(5). That premiums were paid on said policy of insurance up to June 18, 1930, when said policy lapsed by reason of nonpayment of the premium which came due on that date; that, in accordance with its terms, said policy of insurance was converted into a paid-up, nonparticipating term insurance policy in the amount of $1,019 for a period which would expire on August 18, 1940.

"(6). That the said Thomas R. Hardy died on May 14, 1934, and proof of death and claim thereunder was made thereon by Julia M. Hardy and F. P. Hill as assignee, and the Equitable Life Assurance Society has paid into the registry of this court for disbursement to the proper person the proceeds of said insurance in the amount of $1,027.38.

"(7). It is further agreed that the defendant, F. P. Hill, will file his schedule of exemptions in the usual form in support of his claim for exemptions alleged in his motion to dismiss, to which the plaintiff, S. M. Bush, will object and except, and if, after a hearing by the court on the other questions involved in this suit, it should become material to determine whether or not the said F. P. Hill is entitled to his exemptions as claimed, that the

parties will be given additional time in which to adduce testimony relating to the claim of said F. P. Hill for exemptions."

The assignment referred to in the agreed statement of facts is as follows:

"Form of Absolute Assignment.

"To be Attached to and Retained with the Policy for Use as Evidence When Required.

"For one dollar, to us in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged) hereby assign, transfer and set over all our right, title and interest in policy No. 2,393,080 on the life of Thomas R. Hardy issued by the Equitable Life Assurance Society of the United States, with all money now or hereafter due or payable thereon, and all dividends, options, benefits or advantages derived therefrom, including the right to surrender said policy at any time and to receive receipt for the surrender value thereof, to F. P. Hill, as his interest may appear, whose P. O. address is Cotton Plant, Arkansas, and for the consideration above expressed we do also, for our executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above-named assignee, F. P. Hill, executors, administrators and assigns; and his title to the said policy will forever warrant and defend."

This assignment was signed by Thomas R. Hardy and Julia M. Hardy, and acknowledged before the circuit clerk.

There are but two questions for us to decide: First, was Mrs. Hardy or F. P. Hill entitled to the insurance money, it having been paid into the registry of the court by the insurance company, and the insurance company having been discharged? Second, if Hill is entitled to the proceeds of the insurance policy as against Mrs. Hardy, is he entitled to it as against Bush?

The facts are undisputed. It is conceded that the assignment was made by Thomas R. Hardy and Julia M. Hardy, and the policy delivered to Hill, who had possession of the policy at the time Hardy died, and at the

time Bush began this suit. It is conceded that the debt for which the insurance policy was assigned as security has not been paid, but it is also conceded that action on the note is barred by the statute of limitations. It is the contention of Mrs. Hardy that she is entitled to the proceeds of the policy, and that Hill cannot maintain an action for the proceeds because the debt is barred, and the policy was assigned as security for the payment of the debt.

This suit was brought by Bush, and a writ of garnishment issued against the insurance company on a judgment that Bush had against Hill. Mrs. Hardy intervened. Nothwithstanding the debt is barred, Mrs. Hardy cannot maintain an action for the proceeds of the policy without paying the debt.

"The statute of limitations is a bar to the remedy only, and does not extinguish or even impair the obligation of the debtor. It is available in judicial proceedings only as a defense and can never be asserted as a cause of action in his behalf or for conferring upon him a right of action. * * * It follows from what we have said that the issue as to the debt being barred at the time of the death of Henry was an immaterial issue in this action, and the failure of the court to find on an immaterial issue would not warrant the granting of a new trial. It also follows that the evidence, without conflict, showed that the plaintiff's cause of action herein is not barred." *Puckhaber* v. *Henry,* 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75.

The court also said in the last-mentioned case: "Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, the court will deny him the relief he seeks except upon the condition that he shall do that which is consonant with equity. The statute of limitations is a bar to the remedy only, and does not extinguish or even impair the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf."

This court has said: "A pledge is a bailment of goods by a debtor to his creditor to be kept till the debt is

discharged; and a special property in them passes to the creditor, and he may hold them against the pledgor, and, of course, the creditors, who have no better right until redeemed by payment of the debt." *Peet* v. *Burr,* 31 Ark. 34.

"Mrs. Jenkins is not entitled to recover the $960 of Neal if the note upon which it was collected was given to him as collateral security, until she pays the $1,700 note." *Jenkins* v. *Neal,* 52 Ark. 418, 12 S. W. 1015.

Although the debt was barred by the statute of limitations, Mrs. Hardy could not recover the policy or its proceeds without paying the debt. One who has pledged property to secure the payment of a debt will not be permitted in a court of equity to recover the pledge without paying the debt, although the debt may be barred by the statute of limitations.

Where a debt is secured by a pledge, as in the present case, the running of the statute of limitations destroys, of course, the right of recovery on the debt, but has no effect on the right of the pledgee to retain the property until the debt is paid, and to enforce his claim against the property.

Section 7408 of Crawford & Moses' Digest provides that, when the debt is barred, this shall be a sufficient defense in a suit to foreclose or enforce mortgages or deeds of trust. But this has no application where property is pledged and delivered to the pledgee. It does not mention property pledged in this manner. And where the pledgee or creditor held the collateral security before the bar against the original debt, he may continue to hold it after the debt is barred, and the pledgor will not be aided in a court of equity to recover the property without paying the debt. 21 R. C. L. 659, § 23; *New York Life Ins. Co.* v. *Kansas City National Bank,* 12 Mo. App. 479, 97 S. W. 195; *Townsend* v. *Tyndale,* 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513.

It is contended by Hill that the judgment against him was a debt on contract, and that therefore he is entitled to exemptions under the Constitution. The judgment of Bush against Hill was affirmed by this court November

18, 1929. *Hill* v. *Bush,* 180 Ark. 432, 215 S. W. (2d) 604. That was not a suit on contract. The suit was based on collusion and negligence. A contract is an agrement between two or more parties to do or not to do a certain thing. Whatever duty there is, is imposed by the contract as distinguished from a duty imposed by law, and the suit was therefore a suit *in tort,* and not a suit on contract. *Fordyce* v. *Nix,* 58 Ark. 136, 23 S. W. 967; *Miller* v. *Morton,* 73 Ark. 183, 83 S. W. 918; *Logan* v. *Mo. Valley Bridge & Iron Co.,* 157 Ark. 528, 249 S. W. 21.

Attention is called to act 129 of the Acts of 1925, and act 102 of 1933. Act 102 of 1933 is entitled, "An Act to Extend the Exemption Laws of this State." In the first place, the exemptions allowed citizens of the State are fixed by the Constitution. Moreover, neither of these acts has any application to the question here involved. Act 102 of 1933 provides that moneys paid or payable shall be exempt from liability or seizure under judicial process, etc. But neither of these acts undertakes to deal with property pledged, as in this case. This assignment was executed not only by Hardy, but by Mrs. Hardy, and the assignment expressly provides that the parties assign, transfer and set over all of their right, title and interest in the policy. It also provides the right to surrender the policy at any time and receive receipt for the surrender value thereof to Hill as his interest may appear. They also state that Hill's title to said policy will be warranted and defended by them forever.

It follows from what we have said that Mrs. Hardy is not entitled to claim the policy or its proceeds, and that Hill is not entitled to claim exemptions.

The decree of the chancery court is therefore affirmed.

SIMMS OIL COMPANY *v.* JONES, JUDGE.

4-4265

Opinion delivered February 10, 1936.

Mahony & Yocum, for petitioner.

Homer T. Rogers and *L. B. Smead,* for respondent.

BAKER, J. This action is a petition by the Simms Oil Company praying that a writ of prohibition issue to prevent Gus W. Jones, Judge of the Second Division of the Ouachita Circuit Court, from taking and exercising jurisdiction in the case of J. H. Waters, plaintiff, against Simms Oil Company, defendant, filed in that court, and proceeding as No. 3969 upon its docket.

The suit of *Waters* v. *Simms Oil Company* was filed on the 27th day of June, 1935. It was to recover damages for personal injuries alleged to have been suffered by the plaintiff while employed by the defendant on the 6th day of August, 1934, in Union County.

Summons was issued upon the filing of this suit, and was served on George M. Armistead as agent for service, and service was had in Pulaski County. There appears to have been no other agent, officer, or person representing the defendant in Ouachita County. It is undisputed that until a short time prior to the filing of this suit the Simms Oil Company had been engaged in business in Ouachita County, as owner and operator of several oil wells. It was also engaged in business in Union County where it had, with other property, a large warehouse and maintained an office therein.

Upon a motion to quash service in this case, filed by the Simms Oil Company, it was shown that a short time

before the filing of this suit, on or about June 15, the Simms Oil Company had transferred all of its property to the Tide Water Oil Company, and to the Simms Company, a new corporation which had been formed to take over such property as was not wanted or desired by the Tide Water Oil Company. Some deeds were made or executed on or about June 15th, but, not being satisfactory in some respects, other and later transfers were executed and delivered, transferring the same property of the Simms Oil Company. Some of these later conveyances were made after the institution of the suit.

Among other exhibits tendered was a deed from the Simms Oil Company to the Simms Company, dated July 15, 1935, recorded in the recorder's office in Ouachita County, and a later deed by the Simms Oil Company to the Simms Company dated August 29, 1935, and also recorded in Ouachita County.

It is also stipulated that the Simms Oil Company filed a certificate of withdrawal from the State in the office of Secretary of State July 15, 1935, and until that date that the Simms Oil Company was a foreign corporation, duly authorized to transact business in Arkansas, and that George M. Armistead was the agent designated for service in the State.

We think it is unnecessary to give a more detailed statement of the controversy presented here; that it suffices to say that considerable evidence was offered on the motion to quash the service of summons, which motion was filed by the petitioner, entering its appearance solely for that purpose. The court overruled the motion to quash, and on that account this court is asked to issue the writ of prohibition.

The suit of Waters against the oil company is a transitory action, which may be filed and prosecuted at any place where proper service of summons can be had. This is a case wherein the jurisdiction of the circuit court must depend and be determined by the trial court upon facts to be developed in that court. The factors entering into this question are not apparent upon the face of the record, but arise necessarily upon the presen-

tation by evidences of certain factual conditions. Service may be had under these statutes.

Section 1151 of Crawford & Moses' Digest is as follows: "Where the defendant is a foreign corporation having an agent in this State, the service may be upon such agent."

Section 1152 is as follows: "Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporations so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office, or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations."

Section 1174, Crawford & Moses' Digest, is as follows: "An action, other than one of those mentioned in §§ 1164, 1165, against a nonresident of this State, or a foreign corporation, may be brought in any county in which there may be property of or debts owing to the defendant."

If, in the development of this case, it shall appear, from such facts as may be established, that the court has jurisdiction, the trial will, of course, proceed to a judgment. On the other hand, should it be determined from such facts that the court is without jurisdiction, the action will be dismissed. We do not say that the facts presented here are in dispute as between the parties, but the legal effect of such facts are in sharp controversy.

We have held in several cases, the most recent of which is the case of *Chapman & Dewey* v. *Means*, 191 Ark. 1066, 88 S. W. (2d) 29, that we would not undertake to determine facts upon petitions for writ of prohibition. A well-considered case, *Arkansas Democrat* v. *Means*,

190 Ark. 948, 82 S. W. (2d) 256, quotes with approval the announcement of this court in the case of *Finley* v. *Moore,* 74 Ark. 217, 85 S. W. 238: "If the existence or nonexistence depends on contested facts which the inferior tribunal is competent to inquire into or determine, a prohibition will not be granted, though the superior court should be of opinion that the questions of fact have been wrongfully determined by the court below, and, if rightly determined, would have ousted the jurisdiction."

We also approved this same rule of practice in the case of *Equitable Life Assurance Society* v. *Mann,* 189 Ark. 751, 75 S. W. (2d) 232. This case is not essentially different in principle from either of the cases above cited.

We think also that the case of *Sydeman Bros., Inc.,* v. *Wofford,* 185 Ark. 775, 49 S. W. (2d) 363, is authority applicable to the situation that prevails here. Simms Oil Company is making an effort to leave the State. It has the right to do so. However, it may be sued in the State for its obligations when properly served with process as may be determined by facts presented.

If the trial court errs in a determination of jurisdiction upon the facts, that matter may then properly come to us for review upon appeal, but cannot be presented on this petition.

The writ of prohibition will therefore be denied.

TYRA *v.* STATE.

Crim. 3979

Opinion delivered February 10, 1936.

Kerby & Kerby, for appellant.

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

HUMPHREYS, J. This is an appeal from two separate judgments of conviction in the first division of the circuit court of Pulaski County, which were consolidated for the purposes of trial. In one case, he was convicted of violating the Liquor Control Act (Acts 1935, p. 258), and fined $10, and in the other for disturbing the peace, and fined a like amount.

Appellant seeks a reversal of the judgments because the evidence is insufficient to support the verdicts of the jury upon which the judgments are based.

The State introduced evidence tending to show that appellant was drunk, and, while in that condition, was cursing and threatening to kill James Walker, and fired a pistol in the presence of Walker's two daughters, which frightened them very much.

Appellant introduced evidence tending to show that he did not curse, was not drunk, made no threats to kill James Walker, and did not have or fire a pistol.

The evidence pro and con on the issue of guilt was of a substantial nature, and hence it became a question solely for determination by the jury. This court, on appeal, cannot invade the province of the jury to pass either upon the credibility of the witnesses or the weight to be given to their testimony. As far as we can go is to determine whether there is any substantial evidence to support the verdicts of the jury.

Appellant also seeks a reversal of the judgments because the court admitted evidence charging him with having committed other misdemeanors. This assignment of error in his motion for a new trial is not supported by the record. The record does not show that any such testimony was introduced over the objection of appellant.

Lastly, appellant seeks a reversal of the judgment on the ground that the record fails to show that the offenses occurred in Pulaski County. It is true that there is no direct proof in the record to show that they did occur in said county, but venue need not be established by direct proof. The venue in criminal cases may be proved by circumstantial evidence. *Spivey* v. *State,* 133 Ark. 314, 198 S. W. 101; *Atwood* v. *State,* 184 Ark. 469, 43 S. W. (2d) 70; *Ridenour* v. *State,* 184 Ark. 475, 43 S. W. (2d) 60. The charges against appellant were preferred in the municipal court of Little Rock, and the cases were appealed to the circuit court of Pulaski County. In testifying in the cases in the circuit court, the witnesses located the places where the alleged offenses occurred as the street in front of James Walker's residence and in the yard of Mrs. Rhodes, who lived next to the Walkers. Mrs. Alice Rhodes, who was testifying at the trial in the circuit court, said that, "James Walker is my brother, and lives next door to me. We are not on good terms, and all this trouble is on account of family disagreements. I was down town the evening of June 15th and went home with my daughter and Arthur Tyra, and was with him all evening up to and after the alleged trouble. When we went home by James Walker's gate (she then proceeded to tell what occurred)." Considering where she was when testifying, from her reference to going down town and back home with appellant, it may be reasonably and fairly inferred that she was talking about Little Rock. Had she had any other town in mind than Little Rock, she would have named the town. Being in Little Rock, she could well say that she went down town, meaning Little Rock, without saying Little Rock. That inference would naturally arise. If one were in the court house at Fort Smith testifying and should

say "I went down town," without designating the town, the fair inference would be that he was speaking about Fort Smith and not about Greenwood or Mansfield. We think the venue was sufficiently proved by the circumstances detailed in the case.

No error appearing, the judgment is affirmed.

JOHNSON, C. J., and BUTLER and BAKER, JJ., dissent.

JOHNSON, C. J., (dissenting). There is absolutely no testimony, direct, circumstantial, hearsay or otherwise proving or tending to prove that this offense was committed in Pulaski County, Arkansas.

In *Frazier* v. *State*, 56 Ark. 242, 19 S. W. 838, this court expressly held that venue must be established by the testimony, and reversed the case because it was not so established. Again in *Jones* v. *State*, 58 Ark. 390, 24 S. W. 1073, this court held that venue must be affirmatively established by the testimony, and reversed the case for this reason. We have never held, until now, that venue need not be established by testimony, although some progress in this direction was made in the cases referred to in the majority opinion wherein it was held that venue might be established by a preponderance of the testimony. Concededly we have always held that venue or any other issue of fact in a lawsuit may be established by circumstantial testimony, but the circumstances must be such as to lead to the inference. Even in civil matters we have consistently held that jury verdicts cannot rest upon conjecture and speculation. *Turner* v. *Hot Springs Railway Co.*, 189 Ark. 894, 75 S. W. (2d) 675; *National Life and Accident Insurance Co.* v. *Hampton*, 189 Ark. 377, 72 S. W. (2d) 543; *St. L. I. M. & S. Ry. Co.* v. *Enlow*, 115 Ark. 584, 171 S. W. 912; *St. L. I. M. & S. Ry. Co.* v. *Belcher*, 117 Ark. 638, 175 S. W. 418. Let's look at the facts and circumstances in testimony in this case which the majority say establish venue. They say, "The charges against appellant were preferred in the municipal court of Little Rock and the cases were appealed to the circuit court of Pulaski County." Admittedly this is true, but what of it? Even an indictment against an accused is no evidence of his guilt, and we

have so decided many, many times. *McDonald* v. *State,* 155 Ark. 142, 244 S. W. 20; *State* v. *Fox,* 122 Ark. 197, 182 S. W. 906, etc.

Does the majority intend to imply that because appellant was tried in the courts of Pulaski County this is a circumstance tending to show venue? If this be the implication of the opinion then I assert that the conclusions of 16 grand jurors as evidenced by indictment should be considered as testimony establishing the guilt of the accused but this court and all other criminal courts in the United States have consistently excluded indictments as testimony.

Next the majority say, "In testimony in the cases in the circuit court, the witnesses located the place where the alleged offenses occurred as the street in front of James Walker's residence and in the yard of Mrs. Rhodes, who lived next to the Walkers." Just what part of this testimony establishes venue is not pointed out. If it be "The street in front of James Walker's residence," then I suggest that there are James Walkers in practically every county in this State or if it be "in the yard of Mrs. Rhodes, next door to the Walkers," the same suggestion is likewise pertinent. If "street" be the word which establishes venue, then I enlighten the court by saying that Little Rock is not the only town in the State which has streets, for instance Texarkana and Blytheville and many others. Continuing the majority say, "Mrs. Rhodes who was testifying at the trial in the circuit court said that," [now we come to the quintessence] "James Walker is my brother and lives next door to me. We are not on good terms, and all this trouble is on account of family disagreements. I went down town the evening of June 15 and went home with my daughter and Arthur Tyra and was with him all evening up to and after the alleged trouble. When we went home by the James Walker gate." Just what part of this testimony establishes venue is not pointed out save that the majority say, "from her reference to going down town and back home with appellant, it may be reasonably and fairly inferred that she was talking about Little

Rock." This argument is boiled down to this language of the witness, "down town," and this is the criterion for the inference that this crime was committed in Little Rock. If Little Rock were the only town in the State this inference might be drawn but such is not the fact, and it was the height of conjecture and speculation for the jury or this court to judicially declare that Little Rock is the only town in the State.

The majority cite *Ridenour* v. *State,* 184 Ark. 475, 43 S. W. (2d) 60; *Atwood* v. *State,* 184 Ark. 469, 43 S. W. (2d) 70, and *Spivey* v. *State,* 133 Ark. 314, 198 S. W. 101, as supporting their conclusion that the State need not prove venue, but the cases cited do not support this conclusion.

In the Ridenour case the surveyor of Crawford County testified that he was shown the place where the witnesses said the still was located, and that this place was in Crawford County. Compare this with the testimony here that the witness was "down town," or that the crime was committed at "James Walker's place upon a street."

The other cases cited by the majority are equally antagonistic to the majority view, and it is my belief that no appellate court in the United States until now has held that the State need not prove venue. Venue in a criminal case is provided for by constitutional mandate. See art. 2, § 10, of the Constitution of 1874, which provides that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed * * *," and it is my belief that this constitutional safeguard should be respected by the courts and not looked upon as an impediment to the expeditious affirmance of criminal cases.

This case should be reversed and remanded for a new trial.

SWARTZ *v.* DRINKER.

4-4146

Opinion delivered February 10, 1936.

Festus Gillam and *Eads & Rowe,* for appellant.

Hardin & Barton, for appellee.

BUTLER, J. The appellee is the owner of a valuable mineral right in certain lands situated in Sebastian County, and brought the instant proceeding in the Greenwood District of the Chancery Court of said county to cancel tax deeds issued by the Commissioner of State Lands by which said mineral right was conveyed to the appellants, the State claiming title through an alleged forfeiture for the nonpayment of taxes levied against them. The appellee alleged that the forfeiture was void for a number of reasons set forth in the complaint, any one of which, if true, was sufficient to avoid the Commissioner's deed. She further alleged that she was in pos-

session of the lands at the time of the alleged forfeiture, and had been continuously since that time.

The appellants answered without setting up any defense to the action, and without denying any of the allegations of the complaint, but merely stating that the appellants had sued the appellee and others in the circuit court of the Greenwood District of Sebastian County for damages and for possession of the lands, and that that suit was still pending. The court treated the appellant's answer as a motion to dismiss the complaint, and overruled the same. To this action of the court the appellants objected, saved their exceptions, and refused to plead further. The appellee, thereupon, announced ready for trial. The case was accordingly submitted, and the court, after reciting the answer filed, its being treated as a motion to dismiss, etc., and "after hearing the testimony offered in the case, * * * being well and sufficiently advised in the premises, found the issues for the (appellee) plaintiff." The court then made specific findings of fact with reference to the allegations of the complaint, and decreed that the forfeitures were null and void, and also the deed issued to the appellants by the commissioner. The court further decreed that the said deed be canceled, and that the title of appellee be quieted as against the appellants.

The sole contention of the appellants for reversal is that the chancery court was without jurisdiction because of the suit pending in the circuit court. The pleading tendered was not sufficient to establish the contention. It merely recited "that there is a suit pending in the circuit court of Greenwood District of Sebastian County, Arkansas, filed on the 21st day of February, 1935, wherein W. R. Webb is plaintiff and Sophie H. Drinker and others are defendants, which is a suit in ejectment involving the same titles, and between the same parties as are involved in this suit, a copy of which complaint is attached hereto, and made a part hereof marked 'Exhibit A.' There appears to be no affidavit for warning order indorsed on the complaint, or any indorsement of summons issued. Neither does there appear elsewhere in the

record any reference to issuance of summons or proceedings had for warning order except the following:

"STATEMENT OF SUMMONS

"Summons issued of the 21st day of February, 1935, for Sophie H. Drinker, and mailed to the sheriff of county of Philadelphia, State of Pennsylvania, and returned with the following affidavit:

" 'State of Pennsylvania, County of Philadelphia:

" 'Personally appeared before me, Francis M. Connor, notary public, in and for said Philadelphia County, Matthew K. Yates, who, being duly sworn, says that he is a deputy sheriff for Richard Weglein, sheriff of Philadelphia County, Pennsylvania; that the within summons and complaint was placed in affiant's hands for service, and that he made diligent search and inquiry for Sophie H. Drinker, by inquiring at 1429 Walnut Street, city of Philadelphia, State of Pennsylvania, and was unable to find Sophie H. Drinker up to and including June 18, 1935; and that Sophie H. Drinker could not be found within the county.

" 'Matthew K. Yates.

" 'Sworn and subscribed before me this 18th day of June, 1935. Frances M. Conner, Notary Public.

" 'My commission expires, November 16, 1935.' "

(Seal)

"STATEMENT AS TO WARNING ORDER

"Warning order issued: May 25, 1935, against defendant, Sophie H. Drinker.

"Published in 4 consecutive issues beginning May 30, and ending June 20, 1935; in the *Greenwood Democrat,* a newspaper published in said county and district.

"Proof of publication sworn to: June 20, 1935."

We gather from the "statements" copied *supra* that Mrs. Drinker, the defendant in that suit, and the appellee here, was a nonresident of the State, although no such allegation appears in the complaint.

In order for suit to be instituted against a resident, it is necessary that the complaint be filed, a summons thereon issued and placed in the hands of the sheriff for service; as to nonresident defendants, before the case can be said to be pending the provisions of either §§ 1157

and 1158, Crawford & Moses' Digest, or § 1159, *id.*, must be complied with. Section 1157, *supra,* provides that where a defendant is out of the State, a copy of the complaint certified by the clerk with summons annexed warning the defendant to appear and answer within thirty days after the same is served on him may be served upon said defendant anywhere in the United States by some person to whom he is personally known. Proof of the delivery is made by the affidavit of the person making it indorsed on, or annexed to, the certified copy of complaint and summons, in which the time and place of delivery, and the fact that the defendant was personally known to the affiant shall be stated. The officer, before whom the affidavit is made, shall certify that the affiant is personally known to him and worthy of credit. Section 1158, *supra,* is to the effect that when the provisions of § 1157 are complied with, and the papers mentioned in the above section are returned and filed, this is sufficient and deemed an actual service of the summons. The "statement of summons" hereinbefore copied fails to show a compliance with the provisions of §§ 1157 and 1158.

Where a nonresident is constructively served, as a prerequisite to the warning order, the affidavit prescribed by § 1159 must be made, and it is only where the affidavit has been made, and the warning order based thereon issued that the action can be said to be commenced or the cause pending. *Boynton* v. *Chicago Mill & Lumber Co.*, 84 Ark. 203, 105 S. W. 77; *Holloway* v. *Holloway,* 85 Ark. 431, 108 S. W. 837. We think it clear from the effect of our decisions that a strict compliance with the requirements of the statutes, cited *supra,* is required, and, if there is not such compliance, no action is pending. *Missouri Pac. Ry. Co.* v. *McLendon,* 185 Ark. 204, 46 S. W. (2d) 625.

Other questions are argued by counsel for appellee which we find it unnecessary to notice. It is our conclusion that the pleading tendered failed to sufficiently allege the pending of the case in the circuit court, and that therefore the judgment and the decree of the court in

dismissing the appellants' answer, and granting the relief prayed by appellee was correct.

Affirmed.

[redacted]

ATLAS LIFE INSURANCE COMPANY *v.* KENNEDY.

4-4152

Opinion delivered February 10, 1936.

[redacted]

Silas W. Rogers, for appellant.

J. V. Spencer, for appellee.

McHaney, J. Appellee has two policies of insurance on his life in appellant company—one for $1,000 and the other for $2,000. Attached to each policy is a permanent and total disability clause, providing for the payment to him, in the event of such disability, of $10 per month per $1,000 of insurance, "if the insured shall furnish the company with due proof that he has * * * become wholly disabled by bodily injuries or diseases, * * * and will be presumably thereby permanently, continuously and wholly prevented from engaging in any occupation or employment whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days." Another provision is that: "Disability benefits shall be effective upon receipt at the company's home office * * * of due proof" showing total and permanent disability. Total disability is defined to be such that prevents the insured from engaging in any occupation for remuneration or profit, and "disability shall be presumed to be permanent after the insured has been continuously so disabled for not less than three months, and during all of that period prevented from engaging in any occupation for remuneration or profit." Permanent loss of the sight of both eyes, among other injuries, is deemed total and permanent disability without prejudice to other causes of disability. There is also a clause waiving premiums falling due after approval of proof of disability and during same. Any premium due prior to approval must be paid, and those paid after approval are to be refunded.

On May 9, 1927, appellee was severely injured in a tornado or windstorm at Strong, Arkansas, was taken to a hospital where he was treated, and he was found to be so severely injured that his physician thought he would die. On August 8, 1927, he made proof of total and permanent disability, and forwarded same to appellant's home office, where it was received August 10, and the claim was disallowed. On December 1, 1934, he brought this action to recover the accrued benefits for the five years immediately preceding with interest. Later he

amended his complaint to recover for five additional months benefits which had accrued subsequent to the filing of the original complaint, with interest, in the aggregate sum of $2,271.75. He also sought to recover premiums paid subsequent to the making of proof of disability which, with interest, amounted to $74.10, or a total of $2,345.85. Appellant demurred to the complaint which was overruled, and it answered denying liability. Trial to a jury resulted in a verdict and judgment for appellee in the sum of $2,271.75, from which comes an appeal, and a cross-appeal by appellee from the refusal of the court to assess a penalty of 12 per cent. and a reasonable attorney's fee.

For a reversal of the judgment against it, appellant makes a number of arguments under six separate headings. It is first urged that the court erred in overruling the demurrer to the complaint, and that there was a failure of proof. It is contended that appellee should have alleged not only that the policies were in effect on May 9, 1927, the date of the injury, but that he should have alleged and proved they were in effect on August 11, 1927, the date proof was received by it. The correct date proofs were received appears to be August 10, as stamped thereon by the home office. We think it sufficiently appears, both in the allegations and evidence, that there was no default in premiums prior to 1929, when an application for reinstatement was made and accepted. We cannot agree with appellant in this contention.

It is next said the complaint is at variance with the proof. The complaint alleged that appellee is totally blind, and that his eyes have been so affected since May 9, 1927. He also alleged many other injuries causing total and permanent disability, which were received in the windstorm. It is conceded that appellee is now totally blind, and has been so since 1932. His physician testified that he had two very bad fractures of the skull, both depressed fractures, and a bad injury to the leg besides numerous abrasions and bruises on his face, body and hands. The proof tended to show that the injuries received affected his eyes, and that as time passed his vision became more impaired until total blindness came upon

him. Moreover, the proof, considered in the light most favorable to appellee, shows that appellee has been totally disabled since May 9, 1927. Proof of disability was made just three months after receipt of the injuries, and it is undisputed that he was totally disabled during that time, and under the plain provision of the policies above set out on proof of total disability for three months, it is presumed to be permanent. It was proper to prove any fact tending to show disability within the meaning of the policy, and we think no variance is shown.

It is next said the court erred in refusing to declare a mistrial on account of an occurrence in the presence of the jury. Appellee testified that, since he received his injuries, he was given to having "spells" of some kind in which he becomes paralyzed and unconscious, and appellant says he had one of such "spells" and "passed out" in the presence of the jury. The record fails to reflect what happened, but the court, in instructing the jury, asked each juror if anything had happened to prejudice them. All of them answered in the negative. We think the record fails to reflect any prejudice to appellant's rights. Nor do we think Dr. Wharton's testimony as to the nature and extent of appellee's injuries such a surprise as to justify the court in granting appellant a continuance. His testimony supported in part the allegations of the complaint.

Other errors are assigned and argued, that proof of disability was a condition precedent, error in instructions, and estoppel by reason of an application for reinstatement in which appellee stated he was in good health. We will not discuss these assignments at length. Suffice it to say that proof of disability was made showing total disability at that time and from the date of the injury, which under the policy, was presumed to be permanent; that the court fully and fairly instructed the jury; and that no estoppel existed by reason of the application for reinstatement. There was a condition of blindness, and a person might be totally blind yet be in good health.

As to the cross-appeal, appellee failed to recover the amount sued for, so the court properly disallowed pen-

alty and attorney's fees under numerous decisions of this court.

The case will be affirmed both on appeal and cross-appeal.

CARTWRIGHT *v.* BARNETT.

4-4154

Opinion delivered February 10, 1936.

Edwin W. Pickthorne and *E. L. Holloway,* for appellants.

C. T. Bloodworth, for appellee.

BAKER, J. J. M. Barnett died on July 22, 1934. He left surviving him Mrs. Elizabeth Barnett, his widow, Mrs. Morah Cartwright, a married daughter, and Ora H. Barnett, incompetent, his son.

Barnett bequeathed and devised to Mrs. Elizabeth Barnett the larger part of his estate. Barnett's children contested the will in probate court and, losing, appealed to the circuit court. Upon trial in the circuit court, the jury rendered a verdict "for the will." From that judgment this matter is here upon appeal.

The appellee, by a motion to dismiss, calls our attention to certain matters in connection with the transcript.

The motion also asked for a rule upon the clerk of the circuit court to bring up certain records. This part of the motion may be taken as a writ of certiorari, and since the clerk has made the amendments or corrections and duly certified such records, such certified copies may be taken by us as a response to the writ, and the record be thereby amended, as under rule No. 24.

A consideration of this motion disposes of most of the questions presented on appeal. One of the propositions submitted by the motion to dismiss is the statement that there is no bill of exceptions, and a second is that there is no motion for a new trial, and a third is that the transcript of the judgment is incorrectly set forth in the record and abstract.

The purported bill of exceptions presented here has no approval of the trial judge. It is not the work of the official court reporter, but it purports to be a record of the trial to which is attached an affidavit that was subscribed and sworn to by three persons on the second day of October, 1935, before a justice of the peace. The case was tried on the 4th day of April, 1935.

The purported motion for a new trial is a carbon copy of the typewritten sheet, inserted in the record. It has a filing mark upon it as of the 3d day of May, 1935, which was twenty-nine days after the date of the trial. There is a typewritten notation on the margin indicating that the labeled motion for new trial was overruled on that date. Following this marginal notation is the trial judge's name in typewriting.

We cannot tell, although it is in typewriting, whether the time fixed for bill of exceptions is 120 days or 180 days. The purported bill of exceptions shows that it was signed by the parties who swore to it on October 2d. If it had been filed on that day, and the time fixed had been 180 days, it would have been out of time, although it seems not to have been filed at all. From the response of the clerk we find that no copy, or an original was left in his office at any time, either of the so-called motion for a new trial, or the bill of exceptions. There is no kind of evidence by certification or otherwise that the trial judge ever acted upon or signed either of these

instruments, or by any order made them part of the record.

Appellant seems to have misconceived the office of a bystanders' bill of exceptions. Section 1322, Crawford & Moses' Digest, is authority for this now almost unused instrument. By this provision it was intended that a party excepting might by calling bystanders, insert his statement or proposition into the record. This might be done, even against the will of the trial judge. The opposing party could in like manner controvert such matters so introduced. The statute, therefore, contemplates that notice be given in order that the opportunity may be had to file such controverting affidavits.

Here the whole record was made up without regard, or submission to the trial judge with no opportunity to the opposing party to suggest any correction. This was wrong. See *Cox* v. *Cooley,* 88 Ark. 350, 114 S. W. 929; *Southern Improvement Co.* v. *Road Improvement Dist. No. 5,* 168 Ark. 893, 272 S. W. 684. We cannot and do not consider it. *Engles* v. *Okla. Oil & Gas Co.,* 163 Ark. 270, 259 S. W. 749; *Petroleum Producers Ass'n* v. *First Nat. Bank of Van Buren,* 165 Ark. 267, 263 S. W. 965; *L. D. Powell* v. *Stockard,* 170 Ark. 424, 279 S. W. 1001.

Without motion for new trial and bill of exceptions only the judgment may be considered. See authority *Stone* v. *Bowling,* 191 Ark. 671, 87 S. W. (2d) 49.

The appeal was lodged on the last day on which it could have been filed.

The judgment of the circuit court, as presented here by appellant, was rendered upon a verdict, which, copied in the face of the judgment, shows that it was signed by only eight jurors. If the verdict of the jurors, with their signatures, was correctly copied, the verdict and consequent judgment would be of no effect.

Amendment No. 16 to our Constitution makes provision for verdicts to be rendered "where as many as nine of the jurors agree upon the verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict was rendered by

less than twelve jurors, all of the jurors consenting to such verdict shall sign same."

The motion of the appellee to dismiss this appeal, treated as a certiorari, brings up the original verdict. This shows that it was a proper verdict signed by nine of the jurors, not merely eight.

So the only alleged error presented is one wholly without merit.

The judgment is therefore affirmed.

LEWIS *v.* A. HIRSCH & COMPANY, INC.

4-4151

Opinion delivered February 10, 1936.

Jo M. Walker, for appellant.

W. G. Dinning, for appellee.

MEHAFFY, J. The town of Marvell is a municipal corporation duly organized under the laws of the State of Arkansas. In 1916 the town council adopted a fire ordinance which provided, among other things, that the outer walls of all buildings constructed in the restricted area should be constructed of brick and mortar or stone and mortar. This suit was brought by appellant against the appellees alleging that they are the owners of certain lots within the fire zone, upon which they are about to construct a building in violation of the terms of the fire ordinance, and asked that a restraining order be issued to prevent the construction of this building in violation of the fire ordinance.

The appellees filed answer admitting they were about to construct the building in violation of the terms of the ordinance, but alleged that they had obtained a permit from the mayor and city council.

Appellant filed demurrer to this answer, which was overruled, and the court held that the appellant was without authority to bring this suit; that appellant had a full and adequate remedy at law, and his complaint was dismissed. This appeal is prosecuted to reverse the decree of the chancery court.

An amendment to the complaint was filed alleging, among other things, that it is the duty of the mayor and council to enforce the terms of said ordinance, but they, in utter disregard of their duty, have refused and still refuse to enforce the ordinance, and for that reason this suit was brought by appellant as a citizen and taxpayer of said town.

Section 1 of the ordinance made it unlawful to erect or construct or cause to be erected or constructed buildings, unless the outer walls be made of stone and mortar or brick and mortar, within the limits described in the ordinance.

Section 2 of the ordinance prohibited the erection of any house or tenement within the limits unless the walls be of the materials mentioned in § 1, and certain sizes and dimensions.

Section 5 of the ordinance provided that any person violating the ordinance should be fined in any sum not less than five dollars nor more than twenty-five dollars for each offense, and each day constituted a separate offense.

The appellant did not claim to own any property, and did not claim either in his pleading or evidence, that he was damaged in any way. He brings the suit as a taxpayer for himself alone.

The following stipulation was entered into:

"It is agreed by and between attorney for the plaintiff and the attorney for the defendant, that ordinance No. 14, attached as an exhibit to the complaint in this cause, is a true and correct copy of an ordinance adopted by the city council and approved by the mayor of the

town of Marvell, Arkansas, on the date shown, and that the same has not been repealed, amended or modified and is now in force and effect; and that the defendant, Freda Hirsch, is the owner of lots No. 38 and 39 in that part of the town of Marvell known as the original town of Marvell, and that said two lots are situated within the boundaries of the limits fixed by the ordinance aforesaid."

Evidence was introduced tending to show that if the ordinance was enforced it would confiscate the property, and several permits had been granted by the city council to erect buildings in this section of the town in violation of the ordinance. The evidence shows that one application was presented by the appellant. The evidence tends to show that to erect buildings in compliance with the ordinance in this section of the town would be so expensive that the rents would not justify such buildings.

It is contended by the appellant that his demurrer to appellee's answer should have been sustained because appellee admitted in the answer that Freda Hirsch was the owner of the premises described and was about to construct buildings in violation of the ordinance, and that her sole defense was that a permit had been granted by the town authorities. He calls attention to the case of *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380. That was not a suit for injunction, but a suit by a taxpayer to compel a State officer to account for and pay into the State and county treasuries the fees and emoluments of his office in excess of $5,000, the maximum allotted under the Constitution. The court stated that it did not deem it necessary to discuss at length the question of appellant's right to maintain the suit; that his right depended upon whether or not the provision of the Constitution was self-executing; that if the court had reached the conclusion that it was self-executing, a majority of the judges are of the opinion that, since there was no method expressly pointed out by the Constitution for enforcing the provision, a citizen and taxpayer could bring suit after the refusal of the prosecuting attorney to do so.

Appellant next calls attention to *Seitz* v. *Meriwether*, 114 Ark. 289, 169 S. W. 1175. We find nothing in this case that supports the contention of the appellant. This was a suit to prevent the misappropriation of funds or to recover misappropriated funds.

Appellant calls attention to 32 C. J. 48, § 27. The section referred to by appellant states the law to be that equity will grant injunctions to restrain an attempted wrong whenever it clearly appears that in no other proceeding can public or private interests be fully protected, and that the writ will issue at the instance of a private individual who shows he may suffer financial injury if the contemplated wrong is not enjoined. The section immediately following the one relied on by appellant states as follows: "It is sufficient to show that he suffered a special injury different from that suffered by the public at large."

Section 29 of the same volume is as follows: "Subject to some limitations hereafter considered, in order to entitle a person to injunctive relief whether prohibitory or mandatory in its nature, he must establish as against the defendant an actual and substantial injury; and this is true whether the injury is single or continuous."

Appellant also calls attention to 13 R. C. L. 329. There is nothing in the authority referred to that supports the contention of the appellant.

Appellant calls attention to the case of *Merriman* v. *Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574. The corporation involved in that case was a private corporation, but the court said: "The right to bring and the occasion of bringing such actions arises only when and because the proper corporate officers will not, for some improper consideration, discharge their duties as they should do. But stockholders, as such, may not bring such actions at their pleasure and have their rights as individuals growing out of the corporation settled and administered."

Before a taxpayer as such can bring a suit to enjoin a municipal corporation, he must show that he suffers special damages, and he must show that he has

no adequate remedy at law. We said in the case of *Swaim* v. *Morris,* 93 Ark. 362, 125 S. W. 432: "But if the ordinance is valid under the above statute, then the remedy at law is adequate and complete. For the ordinance provides for a fine of $200 for each day during which the ordinance is violated, and for an abatement of the nuisance. So that resort to injunctive relief is entirely unnecessary and improper."

The general rule is that an injunction will not be issued at the instance of a private individual to restrain the violation of a municipal ordinance unless the individual can show that his property will be specially damaged. 19 R. C. L. 77.

In the case at bar the appellant does not attempt to show that his property will be damaged. In fact, he does not show that he owns any property in the town.

The decree is affirmed.

FIRST STATE BANK *v.* COOK.

4-4153

Opinion delivered February 10, 1936.

Festus O. Butt, for appellant.

Nat T. Dyer, for appellee.

BUTLER, J. W. U. McCabe executed his note in the sum of $9,000 to the appellant bank, and, to secure the same, duly executed a mortgage on 6,800 acres of land in Baxter, Marion and Searcy counties, which mortgage was immediately filed for record and duly recorded in each of these counties. The note was dated November 7, 1928, due one year thereafter. The note being past due, and no payments having been made thereon, appellant bank, on October 7, 1931, filed suit for judgment on its debt, and for foreclosure of appellee's equity of redemption on the lands described in the mortgage.

Final decree of foreclosure was entered on April 15, 1935, and the lands ordered sold. At the sale made pursuant to the decree appellant purchased the lands described in the mortgage. At an adjourned term of the court, held on July 19, 1935, the commissioner's report of sale coming up for confirmation, the appellee, Arlin Cook, intervened, objecting to the confirmation of the sale in so far as it affected 200 acres of land included in the mortgage which he alleged he had acquired by pur-

chase from W. U. McCabe, pleading the statute of limitation, and praying that appellant's suit as to these lands be dismissed.

The intervention and objections of the appellee were submitted to the trial court under an agreed statement of facts. The court sustained the plea of the intervention, disapproved the sale, set aside the decree of foreclosure in so far as it affected the lands claimed by the appellee, and quieted the title in him as against appellant. To review that decree is this appeal.

From the agreement of counsel the material facts, briefly stated, are that after the execution and recording of the mortgage from McCabe to the appellant, the appellee, Cook, on the 13th day of June, 1930, purchased the 200 acres of land involved, described as the northwest quarter and the northwest quarter of the northeast quarter, section 19, township 17 north, range 13 west, in Baxter County, for a consideration of $900; that the deed was duly recorded on the day of its execution, and that Cook went into immediate possession thereof, and has since been continuously in such possession, and was so at the time of the filing of the intervention; that at the time of the filing of appellant's suit to foreclose on October 7, 1931, and at no time thereafter, was the appellee made a party to the suit, or any summons issued or served upon him in said proceeding; that he had no knowledge of the existence of the mortgage or the indebtedness which it secured, and no knowledge of the pendency of the action to foreclose until June 29, 1935, when he took immediate steps to inform the appellant of his claim and title to the lands claimed by him. It was further agreed that no notation of any payments was made on the margin of the record of the mortgage in the office of the recorder of deeds for Baxter County, and no notice *lis pendens* was filed at the time of the institution of the suit to foreclose, and that none has since been filed.

Our attention has been called to §§ 7382 and 7408 of Crawford & Moses' Digest. Section 7382 provides that an agreement for the extension of the payment of the debt secured should be by noting the same on the margin

of the record where the mortgage or deed of trust is recorded, and § 7408 provides for the notation on the margin of the record of payments made on the debt secured. These statutes have no application, because no extension agreements or payments were made on the note, and it was not necessary to have any such as the suit to foreclose was instituted well within the statutory period of limitation.

When appellee purchased, he did so with constructive notice that the lands had been conveyed to the appellant by his grantor by mortgage or deed of trust to secure the payment of appellant's debt. His purchase was therefore necessarily subject to the prior rights of the appellant. He was the privy in estate to his grantor, McCabe, and took only such estate as McCabe could convey.

"A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. * * * A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage." 2 Jones on Mortgages, (8th ed.), § 1540, p. 1038. *Less* v. *English,* 75 Ark. 288, 87 S. W. 447; *McIlroy* v. *Mulholland,* 169 Ark. 1212, 277 S. W. 16.

The appellee concedes the effect of the rule stated, but contends that it has no application since the passage of the statute now contained in § 6979 of Crawford & Moses' Digest providing for filing of notice of *lis pendens* and cites the case of *Jordan* v. *Hargis,* 156 Ark. 408, 246 S. W. 476, in support of that contention. The common-

law doctrine of *lis pendens* is that one who purchases from a party pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause, and is bound by the decision that may be entered against the party from whom he derived title. This doctrine has no relation to transactions prior to the institution of the suit, and the statute (§ 6979, *supra*) merely changes the common-law doctrine by requiring that, before third parties can be affected by the suit, a notice of its pendency shall be filed with the recorder of deeds of the county in which the suit is pending, which notice shall set forth certain matters relating to the suit as set out in the statute.

Whatever interest appellee acquired in the lands claimed by him was acquired before the institution of the suit, and manifestly the doctrine of *lis pendens* has no application.

The appellee was a necessary party to the foreclosure proceedings, and, not having been made a party, the decree of foreclosure does not preclude him from setting up any defense which his grantor might have had. He has, however, set up no defense, but the plea of limitation, and that is without merit. The decree of the trial court will therefore be reversed, and the cause remanded with directions to overrule the objections of the appellee, and confirm the sale, subject to appellee's equity of redemption.

PRESSLEY *v.* DEAL, COUNTY JUDGE.

4-4144

Opinion delivered February 10, 1936.

M. E. Vinson, for appellant.

J. L. Bittle, for appellee.

McHaney, J. Appellee is the county judge of Cleburne County, and on the first Monday in January, 1934, the quorum court of said county appropriated out of the county general funds the sum of $300 to pay the expenses of the county judge for the ensuing year. On March 5, 1934, appellee filed his claim for expenses in the sum of $107 for the months of November and December, 1933, and January and February, 1934. He presented the claim to himself as county judge, allowed it and ordered it paid out of said appropriation. On April 14, 1934, appellant, as a citizen and taxpayer, intervened and appealed from said order of allowance to the circuit court. On a trial in the circuit court, the claim was approved and judgment rendered in favor of appellee. Appellant in apt time filed a motion for a new trial which was sustained, and the judgment set aside. The case was again heard by the circuit court, testimony presented, and the case taken under advisement until the September, 1935, term of court. In the meantime, on December 31, 1934, appellee filed another claim against the county, in the sum of $110.62, which was allowed and ordered paid out of the same appropriation, and appellant again appealed from the latter order. The two appeals were consolidated for trial, and the court again found for appellee, and rendered judgment in his favor on both claims on the ground that the appropriation was not made to enlarge the county judge's salary; "that the appropriation for expenses was not made to defray the expenses of the county judge as such, but, because of the excessive amount of work necessary to be done outside the official duties of the county judge, and necessary to procure work and work projects for the unemployables under the several relief agencies then operating in Cleburne County." This appeal challenges the validity of such judgment.

The electors of Cleburne County adopted an initiated salary act at the general election held November 8, 1932. Section 1, of said act, fixes the salary of the county and probate judge at $1,000 per annum to be paid out of the county general fund, and $200 per annum as road commissioner of the county, to be paid out of the unapportioned road funds of the county. This act does not provide for the payment of any expenses of the county judge.

Section 1892 of Crawford & Moses' Digest, provides what appropriations shall be made by the quorum court. It provides, in subdivision No. 7, that said court shall make an appropriation, "to defray such other expenses of the county government as are allowed by the laws of this State." Under this subdivision, it was held by this court in *Nevada County* v. *News Printing Company,* 139 Ark. 502, 206 S. W. 899, that it was the duty of the levying court to levy and appropriate sums sufficient to pay printing claims allowed against the county under the Publicity Act of 1915, page 1511. In other words, the quorum court has the power to make an appropriation to defray such other county government expenses as are allowed by the laws of this State, in addition to those specifically mentioned under the six preceding subdivisions. It is contended by appellee that subdivision No. 7, above quoted, gives the quorum court authority to make the appropriation here involved. It will be noticed that the other expenses mentioned for which an appropriation may be made must be such "as are allowed by the laws of this State." We have been unable to find in the laws of this State, and none has been called to our attention by counsel, where authority is given for the quorum court to appropriate money to pay expenses of the county judge. We do not think that *Easterling* v. *Cook,* 175 Ark. 574, 299 S. W. 1009, is authority for the contention here made. On the contrary, we are of the opinion that the recent case of *Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. (2d) 374, announces the principle that controls this case. It was there held that there was no authority in the law for the county court to purchase a law library for the use of the prosecuting attorney.

We have not reviewed the evidence on which the judgment of the circuit court was based. We think the good faith of the quorum court in making the appropriation, and the good faith of the county judge in making the allowances to himself are unquestioned. But good faith does not give authority to do an act not authorized by law. Since, as we have shown, there is no authority in law for the quorum court to make the appropriation, the act of the county court in allowing the claim in his favor is illegal and void.

The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to disallow the claims, and to cause his order of disallowance to be certified to the county court for its action thereon.

RANDOLPH COUNTY *v.* BROOKS.

4-4173

Opinion delivered February 17, 1936.

A. J. Cole and *George M. Booth*, for appellant.

George H. Steimel and *W. J. Schoonover*, for appellee.

McHANEY, J. Appellee is the former sheriff of Randolph County, having served as such during the years 1931 and 1934, both inclusive. He filed numerous claims for services rendered and expenses incurred during those years, but the county court did not act upon them, made no order of allowance or disallowance thereof until May 1, 1935, when, acting pursuant to a writ of mandamus issued out of the circuit court, the county court passed upon all claims filed by appellee and disallowed same because of insufficient revenue. On appeal to the cir-

cuit court said claims were allowed and ordered paid in the following amounts: For 1931, $367.75; for 1932, $926.90; for 1933, $792.33; for 1934, $853.95,—a total of $2,740.93.

The evidence shows there was a balance or surplus of revenue over expenditures carried over in each of said years to the succeeding years which was sufficient to pay appellee's claims in such year, had they been pressed and allowed. The excess carried over in 1934 into 1935 was the sum of $147.06. In other words, all the revenue for 1934, including that brought over from 1933, was expended except said sum of $147.06.

Under the holding of this court in *Skinner & Kennedy Stationery Co.* v. *Crawford County,* 190 Ark. 883, 82 S. W. (2d) 22, and *Democrat P. & L. Co.* v. *Crawford County,* 191 Ark. 409, 86 S. W. (2d) 522, the maximum amount for which appellee's claims can be allowed is the sum of $147.06, the unexpended balance carried forward into 1935. The reason why this is so is stated in said cases, and it is unnecessary to repeat same here.

The judgment will be reversed, and the cause remanded with directions to allow the claim in the amount stated, and certify same to the county court.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* JAMES.

4-4141

Opinion delivered February 17, 1936.

A. S. Buzbee and *Thos. S. Buzbee,* for appellants.

Williams & Williams and *Leffel Gentry,* for appellee.

SMITH, J. The instant case is not unlike that of *Chicago R. I. & P. Ry. Co.* v. *Wooldridge,* 187 Ark. 197, 58 S. W. (2d) 937. Indeed, the similarity is such that it is controlling here. In this case as in that, the plaintiff was driving, one an automobile, the other a truck over State highway No. 10, from Danville to Booneville; in that case at about 6:00 or 6:15 P. M., in this case between 9:00 and 9:30 P. M. The plaintiff in each case came to the point where this highway is crossed by the track of the appellant railroad company. The former opinion described the situation fully, except that, since the injury in the former case, the State Highway Department has relocated the State highway so that it approaches the railroad track less obliquely. The highway now runs under the railroad tracks at a right angle, thereby reducing the danger of running into any one of the piers supporting the railroad track.

As stated in the former opinion, there is a fourteen-panel pile trestle at this place. In the center of the underpass, which is the middle of the road, there is one of these panels or piers. It divides the highway into two lanes, the east side of which is used by westbound traffic, and the west side by eastbound traffic. The highway runs parallel to the railroad track on the south side until it runs under this track, after which it continues on the north side of the railroad track. Danger signs on each side of the road give warning of the underpass and narrow road, made narrow by the pier in its center, but the curvature of the road itself gives warning to the traveller that the railroad track is being approached, and the outside piles on each side of the middle pier were painted in colors with alternate stripes like a barber pole.

The plaintiff admitted that he had bought a pint of liquor and had taken a few little drinks since leaving home that morning. But he testified that he was not at all intoxicated. That feature of the case is concluded by the verdict of the jury.

The plaintiff testified that his brakes and lights were in good condition, and that he was driving at a speed not

exceeding twenty-five miles per hour, and that his car was under control as he approached the railroad track. He admits that he saw the signs warning of danger, and of the underpass, but he did not realize the danger of striking the center pier in time to avoid doing so. He jammed on his brakes as quick, and as hard as he could, but struck the pier before he could stop, damaging his car and injuring himself.

The cause was submitted to the jury under instructions declaring the law to be that the railroad company was under the continuing duty of maintaining reasonably safe road crossings, whether these be surface or under or overhead crossings. But without considering the question whether the railroad company was negligent, it must be said in this case, as it was said in the Wooldridge case, *supra,* that the plaintiff driver was guilty of negligence directly contributing to his injury.

The plaintiff here had driven through this underpass on two former occasions. He knew he was approaching a railroad. The railing on the road, as well as the signs, gave a warning which he did not heed. The undisputed testimony is to the effect that there is a space of twelve feet in the clear between the center bent or pier of poles, and the adjacent ones on the right and left sides. There was ample clearance for a safe passage. There was no grade. The road is level on both sides of the railroad track, and we think it must be held here as in the Wooldridge case, *supra,* that the negligence of the driver was the proximate cause of the injury.

The case of *Bush* v. *Jenkins,* 128 Ark. 630, 194 S. W. 704, is cited as sustaining the judgment here appealed from. It was held in that case that a railroad company is under the duty to construct and maintain highway crossings, above and below grade, so as not unreasonably to interfere with the free use of the highway by the public.

That was not done in that case. The facts there stated are that: "Five bales of cotton were on a wagon, three on the bottom across the cotton frame, and two lying lengthwise on top of the three bales." This was such a load as might be reasonably expected to have been

on any highway during the cotton ginning season. A highway ran under a railroad track. When the trestle over this road was built, there had been a clearance of twelve feet, but the railroad continued to put cinders on the road until the clearance had been reduced to eight and one-half or nine feet. The driver had never before driven a wagon loaded with cotton under the trestle. The opinion recites that, "as he approached the trestle on the curve and rise, it appeared to him that he could pass under the trestle while sitting on the top bale. When his mules had passed under the trestle, he discovered his dangerous situation, and got down quickly on the front bottom bale and caught the top bale with his right hand to keep from falling and by stooping, saved his head, but his right arm was caught between the top bale and trestle and severely injured." Under these circumstances we declined to hold as a matter of law that the driver was guilty of negligence contributing to his injury.

Here a different situation exists. There was ample clearance with a wide margin for safe passage between the piers or bents. Plaintiff had only to notice where he was going, and what he was doing, and to exercise only ordinary care in driving, to pass under the railroad in safety, failure of which is negligence, and was the cause of his injury.

The judgment must be reversed, and, as the case appears to have been fully developed, it will be dismissed.

JONES *v.* HADFIELD.

4-4175

Opinion delivered February 17, 1936.

Ed I. McKinley, Jr., T. H. Humphreys, Jr., and *Sam T. & Tom Poe,* for appellants.

Horace Chamberlin, Donham & Fulk and *Fred A. Donham,* for appellees.

BAKER, J. O. D. Hadfield was elected and served two terms as the city treasurer of the city of Little Rock. His second term expired April 10, 1933. G. L. Alexander was elected as his successor.

On the expiration of Hadfield's second term he failed to pay over to Alexander, his successor in office, $63,280.07, which belonged to the Firemen's Relief & Pension Fund, of Little Rock. This money had been deposited by Hadfield in the Peoples Trust Company and said company was upon a restricted basis from a time not made certain, but, at least, from March, 1933,

and upon that account was not able to pay all deposits in full.

Alexander, the newly-elected treasurer, made demand for this money, but took no step to make the collection or have it paid over to him as the successor of Hadfield. Peoples Trust Company was taken in charge by the banking department, and there was paid on May 2, 1933, $31,640.03, and later on June 22, 1934, $9,492.01, leaving a balance of $22,148.03 still owing by Hadfield to his successor in office.

To recover this last-mentioned sum or balance, a suit was filed against Hadfield, and against Fidelity & Deposit Company of Maryland, surety upon his bond, to require the payment of this sum of money, and, on account of the fact that the newly-elected treasurer would not join in this suit, the complaint showed that fact and named him as a defendant under the provisions of § 1097, C. & M. Digest.

In the circuit court there was a recovery against Hadfield for the balance due, with interest at 6 per cent. from the date of the judgment. The court found in favor of the Fidelity & Deposit Company of Maryland, and discharged it.

The appeal challenges the correctness of that judgment in that the appellants claim that judgment should have been rendered for interest at 6 per cent. from the date Hadfield retired from office, and that judgment should have been rendered against the surety upon his bond for the same amount.

The appellees tendered several defenses. One is that the two minor appellants showed no interest, such as would permit them to sue. It was contended also that the bond executed by Hadfield was at most only a common-law obligation, by the terms and conditions of which it merely was a guaranty of the honesty or integrity of Hadfield, a fidelity bond, and that there was an express saving or exemption from liability for any loss that might have been occasioned by the deposit of money in any banking institution.

We will attempt by our discussion to dispose of all these matters, not in the order named, for the reason that some of these matters have passed out of the case.

The first proposition we are to discuss is the one of proper parties plaintiff in the prosecution of the suit. Corine Jones and Arthur Jones were minor children of the former fireman who lost his life in the discharge of duty, and they claim they are the prospective recipients of relief from the funds sued for, but on account of the fact that the money was not paid over the relief has not been forthcoming, but has been denied to them. Appellees, however, agree that the city is a proper party. In fact they argue that it is the only proper party. Before the trial of this case, however, the statutory trustees, who have control of the disbursement of this fund, were all made parties to the suit, joining the two Jones children, adopting their pleadings to a large extent, and asking for recovery against Hadfield and surety upon this bond, which recovery meant, not that the Jones children, or any other plaintiff, would recover any money or be favored with the judgment for himself individually, but that such recovery as was had must be against the defendants to require restoration of this money to the particular fund in the custody of the city treasurer. There is no necessity of an elaborate discussion of this matter at this time. It could avail nothing to decide the now mooted question of the propriety of permitting the Jones children to maintain the suit. If these children have in fact no interest in the fund that matter will most probably be properly tested upon claims that they may make or present to the trustees after the funds shall have been collected and paid to the city treasurer. Bonds made by officials to the State or city may be sued upon by any one interested.

It is argued vigorously by the appellees that this is a public fund belonging to the city of Little Rock. Let it suffice to say that if it is such, it is one in which the city has a naked legal title with no beneficial interest whatever. It is true the treasurer is the proper custodian of this fund. That is not disputed by any party in interest, but the fund does not arise out of taxes, li-

cense fees and such other sources of revenue as are under the control of the city government, composed of the mayor and city council. No part of these funds may properly be used by the city government for any purpose whatever. The money creating this Firemen's Relief & Pension Fund arises out of the provisions of act No. 491 of the Acts of 1921. The same act provides for the payment of the money into the custody of the city treasurer, makes it his duty to receive the fund, and provides that his bond shall be liable therefor. Section 15 of act 491 of the Acts of 1921.

The said act also provides for a board of trustees, whose duties are defined by § 14. Any one interested in reading the aforesaid act, and considering the provisions thereof must be convinced at once that the real custodians of the fund are the trustees and the city treasurer. It is conceded the city had a right to sue; if so, it could recover only for the proper custodians. Hence, the question of proper parties plaintiff is no longer of importance, as all interested parties were properly before the court at the time of the trial.

The trustees sued for this money and, since the treasurer was not willing to become a party plaintiff, properly joined him as a defendant and any recovery accrues for the benefit of the fund, but under the statute, it must be held by the defendant, Alexander, as city treasurer, or his successor in office.

The bond executed by Hadfield, the city treasurer, had all of the usual incidents and provisions of the statutory bond. In fact, it was such, but to it was added the following provision:

"It is mutually understood and agreed between all parties hereto, that the said surety shall not be liable to said city of Little Rock, Arkansas, for any loss resulting to said city of Little Rock, Arkansas, by reason of any public moneys being now on general or special deposit or hereafter placed on general or special deposit by or on behalf of the said principal with any bank, depository, or depositories, or by reason of the allowance to or acceptance by said principal of any interest thereon, any law, decision or statute of the State of Arkansas, or or-

dinance of the said city of Little Rock, Arkansas, to the contrary notwithstanding;"

It is contended that the surety company was not compelled to execute a bond and that since it was willing to be sufficiently accommodating to make the bond for the treasurer, it had the right to say upon what conditions or provisions it would execute the instrument. The force of this argument must necessarily have an appeal to every fair-minded, thinking citizen. The right of freedom to contract is not one to be dealt with lightly nor to be thwarted by specious judicial construction. The record does not disclose the fact, if it be one, that the surety would not have executed this bond without having added to it the saving or exemption provision above noted. It is argued, however, that such is the fact and that the city had full knowledge and information in regard to the attitude of the surety upon the bond, and accepted the bond and thereby agreed to this exemption or saving paragraph.

We think appellants might well have conceded this proposition in the presentation of this case upon trial and appeal. Such concession would not have operated to release or discharge the surety.

According to our comprehension, governments are instituted for the benefit of the governed, and the primary purpose of all government and the creation of offices is for the protection of the citizen in all his rights. Under this theory, bonds are required of those handling public funds, not for the benefit of the office-holder in whose possession the funds are placed, but for the protection of the entire citizenship. It is a matter of public policy that security must be given as a condition precedent to a proper qualification for office and for the assumption of the responsibility thereof. The office-holder must yield obedience to the mandates of the law requiring him to give security. If he be unwilling or unable to do this, he cannot properly enter upon the office in the discharge of his duties. Act 491 of the Acts of 1921 takes cognizance of the fact that the city treasurer must have a bond. See § 15.

The ordinance is as follows:

"City officers—bonds of. All city officers hereinafter mentioned that may be now or hereafter elected or appointed, shall, before entering upon the discharge of their respective offices, each take the oath required by law, and give bond, with good security, for the faithful discharge of his office and duty, in the sum and amount as follows, to-wit: * * *; the city treasurer shall give such bond in the penal sum of $50,000; * * * All of the bonds provided for in this section shall be made by some reputable surety or bonding company and the annual premiums shall be paid by the city of Little Rock out of the general revenue fund. * * *. Ord. September 8, 1886." It is authorized by § 7517, C. & M. Digest. The city council of Little Rock had made due provisions for a bond by the ordinance copied above. The foregoing facts are taken from pleadings and agreed statement of facts. Other details will be set out in the discussion.

At the time Hadfield qualified for office the mayor, members of the city council, nor any one else had any right, power or authority to waive any provisions of the statute or ordinance then in force. We are not saying that the city council may not have made a different ordinance, nor are we saying that the Legislature may not have made a different provision, but there was no new ordinance and there was no new legislative act. This fact was known to the members of the council and also to Mr. Hadfield, and perhaps better known to the surety upon Mr. Hadfield's bond, because it attempted to contract against the effect of ordinances, statutes, and decisions of the courts contrary to the saving clause or exemption which is added to the bond. This it was powerless to do. City officers were powerless to consent thereto. The bonding company was without power to legislate by contract and bend the law so as to conform to its desire, nor did it have the power to recall judicial decisions and make them of no effect. The public policy which must govern is declared by statutes and ordinances. Officers who must make bonds do so because required by law. They and their sureties have as much right to ignore the law as they have to waive its salient and salutory provisions. No more.

Appellees insist the bond sued upon in this case is not a statutory bond, such as we have been discussing, but a common-law obligation. Even so, he and his surety contracted "to account for all money coming into his hands, according to law, etc." The interests of the public justify the enforcement of a common-law bond when it has been substituted for a statutory one. But even in a common-law bond, we cannot give effect to contractual provisions and limitations in contravention of statutes and ordinances. "To account for the money that came into his hands according to law" means that at the end of his term he would pay over the amount on hand to his successor. "He will faithfully perform all and singular the duties incumbent upon him" is the measure of the obligation, according to law, and neither one, he nor the surety, can contract, legally, to do less.

The bond under consideration in the case of *Fort Smith-Van Buren Bridge Dist.* v. *Johnson,* 181 Ark. 161, 25 S. W. (2d) 417, is a good example of an enforceable common-law obligation. By comparison of the language of the bond therein and the one under consideration here, the difference becomes obvious. The conditions in the Johnson bond were a part of it, but in the Hadfield bond the conditions are in conflict with its obligations. So if the added or questioned part of the bond sued upon be omitted as it must be as inconsistent with the kind of bond authorized and contemplated by law, then there remains the statutory bond.

Bonds made by officers are statutory bonds. Into them the statute is written. In other words, all of the conditions and stipulations are statutory. Whatever else may be added, by way of limitation or impairment, must be deemed surplusage. *Kansas City Southern Ry. Co.* v. *U. S. Fidelity & Guaranty Co.,* 174 Ark. 318, 325, 295 S. W. 705; *Phillip Cory Co.* v. *Maryland Casualty Co.,* 201 Ia. 1063, 206 N. W. 808, 47 A. L. R. 495; *Von Hoffman* v. *Quincy,* 4 Wall. 535, 18 L. Ed. 403; *Fogarty* v. *Davis,* 305 Mo. 288, 264 S. W. 879; *Duke* v. *National Surety Co.,* 131 Wash. 700, 230 Pac. 102; *Continental Life Ins. Co.* v. *Chamberlin,* 132 U. S. 304, 10 S. Ct. 87, 33 L. Ed. 341, 9 C. J. 35, 52 C. J. 1108, § 199; *Williamson* v. *Williams,* 262

Mich. 401, 247 N. W. 704, 89 A. L. R. 442, 443; *August* v. *Collins,* 260 Mich. 232, 244 N. W. 458; *Chambers* v. *Cline,* 60 W. Va. 588, 55 S. E. 999. Provisions in contravention of the statutes are void. *Southern Surety Co.* v. *Cochine Co.,* 27 Ariz. 473, 233 Pac. 897; *Davis* v. *West Louisiana Bank,* 155 La. 245, 99 So. 207.

Such provisions are surplusage. *Limestone Co.* v. *Montgomery,* 226 Ala. 266, 146 So. 607, 87 A. L. R. 164; *Leach* v. *Commercial Savings Bank,* 205 Iowa 975, 213 N. W. 612, 22 R. C. L. 497, § 177.

The foregoing propositions are supported so generally and by so many of the highest courts of the country as to admit no controversy as to their soundness. Both defendants became liable upon default, April 10, 1933, not for use of funds, or on account of embezzlement, or other shortage imputing culpable misapplication of funds. They are both insurers, the officer under the law, the surety by contract.

Judgment of trial court is reversed, and judgment is entered here for balance of principal, $22,148.03, and accrued interest at 6 per cent. till paid, with costs.

SMITH, MCHANEY and BUTLER, JJ., dissent.

MCHANEY, J. (dissenting). I respectfully dissent from so much of the opinion of the majority as holds the appellee, Fidelity & Deposit Company of Maryland, liable on its bond in this case. The condition of the bond is as follows: "Now therefore if the said principal shall well and faithfully perform all and singular the duties incumbent upon him by reason of his election or appointment as such treasurer of the city of Little Rock, Arkansas, except as hereinafter limited, and honestly account for all moneys coming into his hands as said treasurer of the city of Little Rock, Arkansas, according to law, then this obligation shall be null and void; it is otherwise to be and remain in full force and virtue.

"This bond is executed by the surety upon the following express condition, which shall be condition precedent to the right of recovery hereunder: It is mutually understood and agreed between all parties hereto that the said surety shall not be liable to said city of

Little Rock, Arkansas, for any loss resulting to said city of Little Rock, Arkansas, by reason of any public moneys being now on general or special deposit or hereafter placed on general or special deposit, by or on behalf of the said principal with any bank, depository, or depositories, or by reason of the allowance to or acceptance by said principal of any interest thereon, any law, decision, or statutes of the State of Arkansas, or ordinance of the said city of Little Rock, Arkansas, to the contrary notwithstanding."

If the language, "except as hereinafter limited," in the first paragraph above quoted, and that in the second and third paragraphs were omitted, then we would have a simple statutory bond. But the insertion of said language in the bond conclusively negatives the idea that the surety intended to give a statutory bond, or to be bound at all events. In clear and unambiguous language it contracted against liability for loss of funds on deposit in any bank. In *Union Indemnity Co.* v. *Covington,* 178 Ark. 533, 12 S. W. (2d) 884, in a suit on a contractor's bond given in the construction of a Masonic Temple at Russellville, we said: "But we cannot construe the bond here sued on to be a statutory bond, when its obligations expressly negative that construction. This is not a case where the bond contains conflicting obligations; on the contrary, there is nothing in the bond to indicate that its protection inures to any one except the obligee, the Masonic lodge, and the recital is express that the surety shall be liable only to the obligee. We may construe contracts, but we have no right to make them, and we must therefore hold that the bond protects only the Masonic lodge, and the court was therefore in error in rendering judgment in favor of any of the interveners on the bond, and that judgment will be reversed and the interventions dismissed as to the surety company. *Wallace Equipment Co.* v. *Graves,* 132 Wash. 141, 231 Pac. 458; *Massachusetts Bonding & Ins. Co.* v. *Hoffman,* 34 Ga. App. 565, 130 S. E. 375. See also *City of Erie, to use of Schafer* v. *Diefendorf,* 278 Pa. 31, 122 Atl. 159."

In *Fidelity & Deposit Company of Maryland* v. *Crane Co.*, 178 Ark. 676, 12 S. W. (2d) 872, in a suit on contractor's bond given in the construction of a building at the University of Arkansas, after reviewing a number of cases, from other jurisdictions as well as our own, the late Chief Justice HART, speaking for the court, said: "Therefore, we think it is more in accord with our previous decisions on the subject to hold that the statute does not prohibit the surety from executing a bond expressly restricting its liability to the obligee of the bond, where, as in this case, the bond does not contain any covenant showing that it was intended to be executed in obedience to the provisions of the statute, but, on the other hand, expressly negatives that idea."

It is true that the bonds construed in said cases are bonds of contractors, but they were required by statute, particularly in the latter case, and the statute, § 6913 of Crawford & Moses' Digest, "provides, in effect, that whenever any public officer shall, under the laws of this State, enter into a contract in any sum exceeding one hundred dollars with any person for the purpose of constructing any public building such officer shall take from the party contracted with a bond with surety as provided in the statute, and that the bond shall be conditioned that such contractor shall pay all indebtedness for labor and materials furnished in said building."

I can see no distinction between the statutory requirement in that case and in the case at bar. Section 7517, Crawford & Moses' Digest, provides that the city council may require from its officers a bond with good and sufficient security for the faithful discharge of their duties, and § 2832 provides that the treasurers of cities may deposit public funds in their custody in incorporated banks for safe keeping, and they and the sureties on their official bonds shall be liable. The question in this case is whether they shall be liable regardless of the provision of the bond that the surety will not be liable for money deposited in any bank. We think this court has answered this question, in the case of a public official, to the contrary in the case of *Fort Smith-Van Buren*

Bridge District v. *Johnson,* 181 Ark. 161, 25 S. W. (2d) 417. In that case, the bridge district sued its collector Johnson, and the surety on his official bond for an alleged shortage of $1,260.67. Before entering upon his duties as collector, he gave bond to the district, as he was required to do under the statute in the sum of $10,000. The statute required the collector to give bond "conditioned that they will faithfully discharge the duties of their office, and account for and pay over all moneys that come into their hands, according to law, and the order of the commission." He gave a bond conditioned as follows: "We, William Dewey Johnson, as principal, and the American Surety Company of New York, as surety, bind ourselves to pay Fort Smith & Van Buren Bridge District, Fort Smith, Arkansas, as obligee, such pecuniary loss, not exceeding ten thousand and no/100 dollars, as the latter shall have sustained of money or other personal property by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, or willful misapplication on the part of the principal, directly or through connivance with others, while holding the position of collector in the service of the obligee."

Johnson and the bonding company defended on the ground that the shortage alleged was occasioned by the fact that said sum of money was stolen from his office, without his knowledge or consent and that the bonding company was not obligated under the terms of the bond for property stolen or wrongfully abstracted or willfully misapplied by third persons without knowledge or consent of Johnson and without his connivance. The bridge district contended that the provision of the statute above quoted should be read into the bond. In affirming the judgment in favor of Johnson and the bonding company this court said: "As far as the American Surety Company is concerned, the only important question presented for determination on this appeal, is whether the bond sued upon indemnified appellant against a loss or shortage in the account of its collector in any event, or whether the indemnity was restricted to a shortage or loss in his accounts due to a willful misapplication of the funds by

him. Appellant contends that the trial court erred in restricting the indemnity to the terms of the bond because the statute creating the district provided for a bond to be given by the collector, 'conditioned that they will faithfully discharge the duties of their office, and account for and pay over all moneys that come into their hands, according to law, and the order of the commission'; and that this condition shall be read into the bond, whether written therein or not. The doctrine relative to indemnity bonds in this State, as announced in the cases of *Union Indemnity Co.* v. *Covington,* 178 Ark. 533, 12 S. W. (2d) 884, and the *Fidelity & Deposit Company of Maryland* v. *Crane Company,* 178 Ark. 676, 12 S. W. (2d) 872, 874, is that where the statute requires the giving of such bonds the conditions contained in the statute will not be read into the bond, where 'the bond does not contain any covenant showing that it was intended to be executed in obedience to the provisions of the statute, but, on the other hand, expressly negatives that idea.' In the instant case the obligations in the bond expressly negative the idea that it was intended as a statutory bond. It would do violence to the language of the bond itself to construe it as a statutory bond, for the provisions of the bond negative any such construction.''

As I construe this case it is directly in point with the case at bar, and is an authority which must be overruled in order to hold appellee, Fidelity & Deposit Company of Maryland, liable in this case. Said appellee had all these cases before it in the preparation of its bond in the case at bar. It was the appellant in the Crane case, *supra.* It had a right to rely and did rely upon the authority in these cases in writing its bond in this case. To change this ruling now and hold said appellee liable would, in my opinion, violate the obligation of said appellee's contract contrary to the Constitution of the United States and of this State. As said by Judge HART in the Crane case, *supra:* ''The decision of the court in that case is in accord with our holding in the Covington case above cited. It is also in accord with the spirit of the decision in *Reiff* v. *Redfield School Board,* 126 Ark.

474, 191 S. W. 16. In that case the court held that, in the case of a bond given by a contractor to secure school directors, who were held to be public officers, the bond was executed pursuant to the statute and in obedience to it, and with the intention of complying with its terms, it was a statutory bond, although it did not strictly follow the provisions of the statute. If the court had meant to hold that our statute impliedly prohibits the execution of any bond by public contractors except in obedience to the terms of the statute, the court should have declared such to be the legislative public policy in that case and have rested its decision on the ground that any bond executed by public contractors should be deemed to have been executed in obedience to the statute, and that the parties should have been conclusively presumed to have intended the bond to be a bond executed in obedience to the statute."

If we had held in all these cases, as suggested by Judge HART, that such a bond was executed pursuant to the statute and in obedience to it, and that the statute impliedly prohibits the execution of any bond except in obedience to the terms of the statute, then appellee would have no room to complain. But since we have held expressly to the contrary, both as to contractors' bonds and official bonds, we should not now change the rule and subject said appellee to a penalty which was specifically exempted from the bond, under the authority of our own decisions. I therefore dissent, and I am authorized to say that Mr. Justice SMITH and Mr. Justice BUTLER concur in the views herein expressed.

JOHNSON, C. J., (on rehearing). The importance of the legal questions involved and the earnestness of counsel in presenting them on motion for rehearing has necessitated a review and reconsideration of a vast array of legal authority with consequent delay in final determination. From consideration of the majority opinion it will be seen that the legal questions involved may and should be divided as follows: First, is the bond executed by appellee fidelity company a statutory or common-law obligation? Second, if statutory, should that portion of

the bond in excess of the statute be treated as surplusage? The city ordinance under which the bond was executed is set out in the original opinion and need not be repeated here. The bond executed by appellant surety and upon which this suit is predicated is as follows:

"FIDELITY AND DEPOSIT COMPANY OF MARYLAND
"Home Office, Baltimore, Maryland

"Amount $50,000 No.....

"KNOW ALL MEN BY THESE PRESENTS, That O. D. Hadfield, Little Rock, Arkansas, as principal (hereinafter called 'principal'), and the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, having its principal office in the city of Baltimore, Maryland, as surety (hereinafter called 'surety'), are held firmly bound into the

"City of Little Rock, Arkansas,

in the penalty of FIFTY THOUSAND AND No/100 ($50,000) Dollars, to the payment whereof, well and truly to be made and done, the said principal binds himself, his heirs, executors and administrators, and the said surety binds itself, its successors and assigns, jointly and severally, firmly by these presents;

"Signed, sealed and dated this 31st day of March, A. D., Nineteen Hundred and Thirty-one.

"The condition of the aforegoing obligation is such, that

"Whereas, the said principal was elected or appointed treasurer of the city of Little Rock, Arkansas, for the term beginning April 13, 1931, and ending April 13, 1933.

"Now, therefore, if the said principal shall well and faithfully perform all and singular the duties incumbent upon him by reason of his election or appointment as such treasurer of the city of Little Rock, Arkansas, except as hereinafter limited, and honestly account for all moneys coming into his hands as said treasurer of the city of Little Rock, Arkansas, according to law, then this obligation shall be null and void; it is otherwise to be and remain in full force and virtue.

"This bond is executed by the surety upon the following express condition, which shall be condition precedent to the right of recovery hereunder:

"It is mutually understood and agreed between all parties hereto, that the said surety shall not be liable to said city of Little Rock, Arkansas, for any loss resulting to said city of Little Rock, Arkansas, by reason of any public moneys being now on general or special deposit or hereafter placed on general or special deposit by or on behalf of the said principal with any bank, depository, or depositories, or by reason of the allowance to or acceptance by said principal of any interest thereon, any law, decision, or statute of the State of Arkansas, or ordinance of said city of Little Rock, Arkansas, to the contrary notwithstanding.

"In testimony whereof, the said principal has hereunto set his hand and seal, and the said surety has caused this instrument of writing to be signed by its duly appointed attorney-in-fact and its corporate seal to be hereunto affixed, the day and year first above written.

"O. L. Hadfield (SEAL)
"Fidelity and Deposit Company of Maryland,
"Henry Simpson, Attorney-in-fact,
"Witness."

The bond reflects that Hadfield has been duly elected or appointed as treasurer of Little Rock for the term beginning April 13, 1931, and ending April 13, 1933; the exact penalty required of the city treasurer by the city ordinance is likewise recited and provided for in the bond; and the bond expressly provides that "said principal shall well and faithfully perform all and singular the duties incumbent upon him by reason of his election or appointment as such treasurer of the city of Little Rock, etc.;" other covenants of the bond appear to have been made in strict compliance with the ordinance. A mere casual reading of the bond down to the point of exemption must convince any one that the contracting parties had in mind strict compliance with the city ordinance and the execution of a bond in conformity thereto. Does the exemption clause contained in the bond compel

the conclusion that it was not the intent of the contracting parties to execute a statutory bond? The exemption clause of the bond is the only basis for the contention that the bond is a common-law obligation. It is not claimed that the city officials who participated in the execution and acceptance of the bond had any power or authority by city ordinance to receive or accept any bond of the city treasurer other than the bond provided for in the ordinance. Indeed it is and must be conceded that but one kind of bond is authorized by the statutes of this State and the ordinances of Little Rock promulgated thereunder for the city treasurer, namely; one guaranteeing the faithful discharge of official duties and pay over to his successor in office all trust funds that come into his hands. Was this or some other kind of a bond executed? It is a fundamental rule of law that the surety company well knew at the time of the execution of the bond what the law required, but yet they elected to execute a bond which had all the ear-marks and characteristics of a statutory bond with an unauthorized exemption clause. This unauthorized exemption falls within the well-recognized rule that sureties upon an official bond by virtue of which the official has been inducted into office, cannot when called upon to answer for the official's neglect of duty escape liability upon the theory that the principal was not duly elected, appointed or qualified as such. See Meechem, Public Officials, § 314; 2 Brandt, Suretyship and Guaranty, § 521; *State* v. *Bates,* 36 Vt. 387; *People* v. *Evans,* 29 Cal. 429; *Byrne* v. *State,* 50 Miss. 688; *Taylor* v. *State,* 51 Miss. 79; *Buhrer* v. *Baldwin,* 137 Mich. 263, 100 N. W. 468; *Board of Com. of Hennepin County* v. *State Bank,* 64 Minn. 180, 66 N. W. 143; *Henry County* v. *Salmon,* 201 Mo. 136, 100 S. W. 20. The city authorities being without power or authority to receive or accept a city treasurer's bond other than one conforming to and complying with the ordinance in this respect it follows that the bond in the instant case is a statutory bond or is no binding obligation whatever.

Is the bond a nullity because of the unauthorized exemption clause? In *Trustees of Bath* v. *McBride,* 142

N. Y. S. 1014, the court held that where the form of the statutory bond differed from that prescribed by the statute, if founded upon a good consideration, the liability of the surety should be determined by the statute instead of the language of the obligation itself. In *Western Casualty and Guaranty Insurance Company* v. *Board of Commissioners,* 60 Okla. 140, 159 Pac. 655, the Supreme Court of Oklahoma stated the applicable rule, reading from the second headnote as follows: "Where the depositary bond executed pursuant to the provisions of said § 1540 contains the exact conditions imposed by the statute and in addition other conditions which are not provided by the statute, tending to limit or evade liability, the bond will be upheld as to the conditions imposed by statute, and the other provisions will be treated as surplusage."

Many of the cases cited in the original opinion are to the same effect as those just cited and quoted from and need not be restated here. It must suffice to say that it is generally held that an official bond that contains the exact requirements of the statute under which it is executed and is followed by other provisions not required or recognized by the statute that such bond is nevertheless a statutory bond and the provisions of the bond not in accord with the statute should be treated as surplusage. But it is contended by petitioners that the view here and in the original opinion expressed are in conflict with the opinions in *Union Indemnity Co.* v. *Covington,* 178 Ark. 533, 12 S. W. (2d) 884; *Fidelity & Deposit Co.* v. *Crane Co.,* 178 Ark. 676, 12 S. W. (2d) 872, and *Ft. Smith-Van Buren Bridge District* v. *Johnson,* 181 Ark. 161, 25 S. W. (2d) 417, upon which it relied and in reference to which it contracted.

These cases afford but little support to petitioner's position when properly analyzed. In the first place each of the bonds considered in the cases referred to were patently common-law obligations, made so by the express terms thereof, and we expressly so decided. The bond in the Covington case was entered into between a building committee of a Masonic Lodge, a contractor and a surety

company and guaranteed performance of the contract by the contractor. No element of general public interest in the bond was involved; therefore, the case is no authority here. In the Crane Company case this court expressly found that the surety bond there considered contained no "covenants showing that it was intended to be executed in obedience to the provisions of the statute but expressly negatived that idea." See syllabus, 178 Ark. 676, 12 S. W. (2d) 872. The bond in the Johnson case by its express terms only indemnified against "fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misappropriation of the district's funds; therefore, it contained no covenant or covenants indicating that the bond was executed in compliance with the statute or by its authority. Moreover, the improvement district involved is not sovereign and under the Constitution and law of this State has none of the attributes of sovereignty. This will suffice as we believe, to show that the cases referred to are not controlling here. In the second place, the bonds considered in the cases referred to are merely private contracts as distinguished from official statutory bonds or obligations and the same rule of construction and application does not apply. This distinction has been expressly recognized by this court in *Little Rock Railway & Electric Co.* v. *North Little Rock,* 76 Ark. 48, 88 S. W. 1026. The distinction has likewise been recognized by the Supreme Court of the United States; see *Hunter* v. *Pittsburgh,* 207 U. S. 161, 28 S. Ct. 40; *City of Trenton* v. *New Jersey,* 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937.

Petitioner cites, and relies with confidence, upon the cases of *City of Sedalia, etc.,* v. *American Surety Co.,* 82 Fed. 112. The covenants of the bond there considered were restricted by its terms to "Fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misappropriation on the part of the principal." This is exactly the obligations we considered in the Johnson case, *supra,* and the Circuit Court of Appeals reached the identical conclusion reached by us in the Johnson case; therefore, we have no quarrel with the opinion.

Opinions from other jurisdictions, notably South Dakota, are pressed upon us, but it must suffice to say that each of them may be differentiated either upon the facts or the fundamental law under which the contracts were executed.

Petitioners also contend that if we adhere to our original opinion its effect is to impair the right to contract as vouchsafed by the 14th Amendment to the Federal Constitution, and a great array of authority is cited in support of this contention. We do not pause to discuss in detail the authorities cited because as we perceive they have no application to the facts of this case. It is a fundamental rule of law that the right of the sovereign power to direct that which is for the welfare of the general public cannot be abridged or contracted away by individuals. See 6 R. C. L. 706, and cases there cited. There is uniformity of opinion to the effect that contracts contrary to, or in violation of the Constitution or statutes of a State, are not enforceable. See 13 C. J., p. 255, and cases there cited; also, see *Augusta Bank* v. *Earle,* 13 Pet. 519, 10 L. Ed. 274; *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606. Such being the law and we having determined that petitioner's bond is and was intended to be by the parties, a statutory one it follows that the striking down of a conflicting clause incorporated therein contrary to the statute does not infringe upon the rights of the parties to contract as vouchsafed by the 14th Amendment.

To us the law seems to be clear that when a sovereign, or the representative thereof, contracts with a principal and his surety in respect to his official duties as a receiver of public funds and a bond be executed employing all the covenants required by the statute but containing a clause of exemption from liability not recognized by such statute, such bond should be treated as a statutory one and the exemption, being in excess of the statute, treated as surplusage. The rule as thus formulated and stated not only conforms to the great weight of American authority on the subject but comports with sound reason and logic.

Sovereign States and their subdivisions can act only through duly authorized and constituted agents. Taxes are an absolute necessity to a sovereign State's endurance and operation. The sovereign will and mandate must be adhered to, else by dishonesty or malfeasance of public officials the sovereign may be destroyed. In the instant case if the city officials, admittedly without statutory authority, can contract away the city treasurer's and his surety's liability in respect to bank deposits they may likewise dispense with the necessity for any bond or surety, thereby imperiling the very existence of the sovereign. Such is not the law or the announced public policy of this State, and we believe such construction would be a departure from established precedents, logic and reason. This was the original view, and after the most deliberate consideration we adhere to it.

The motion for rehearing will be denied.

SMITH, MCHANEY and BUTLER, JJ., dissent.

LOCOMOTIVE ENGINEERS MUTUAL LIFE & ACCIDENT ASSOCIATION *v.* VANDERGRIFF.

4-4174

Opinion delivered February 17, 1936.

[redacted]

Horn, Weisell, McLaughlin & Lybarger and *R. S. Wilson,* for appellant.

Partain & Agee, for appellee.

BUTLER, J. Appellee, George W. Vandergriff, sued the appellant Association to recover under the terms of a policy which insured him in the sum of $4,500 against "total and permanent loss of sight in one or both eyes where there is no vision beyond mere light perception." Appellee recovered the amount sued for and this appeal follows.

The first contention made for reversal is that the suit was prematurely brought. This contention is based upon a provision of the by-laws of the Association providing in substance that where proof of permanent loss of sight is made it shall be upon a form furnished by the Association signed by two experienced oculists; that proof of blindness will be held on file at the home office for one year from the date of examination where the eye or eyes have not been removed from their sockets; that no recognition will be made for a claim for impaired eyesight, etc., but for total and permanent blindness only in one or both eyes where there is no vision beyond mere light perception.

Appellee notified the appellant of the impairment of his vision and requested of, and was furnished by,

the appellant a regular form upon which to make his proof of disability. The appellee prepared the proof to which was attached the certificate of two qualified oculists which was forwarded and duly received by the appellant. It is now claimed that the proof was insufficient, but this contention was not made at the time of its receipt, or at any time prior to the filing of the suit. On the other hand, the appellant communicated with its local secretary, Mr. J. B. Lemley of Van Buren, advising of the receipt of proof of loss of sight of the appellee, calling attention to the fact that when he made application for disability insurance the applicant stated that he had not had any trouble with his eyes, and advising that the matter had been referred to the appellant's doctor for investigation for the purpose of determining whether appellee had had any trouble with his eyes prior to the date of his application. In this letter, Mr. Lemley was also asked to make an investigation for the purpose of learning whether appellee had had any trouble with his eyes prior to the application. The letter concluded with the following paragraph: "However, the proof plainly shows that this brother is not totally and permanently blind as our laws require, due to the fact that he has 20/200 vision in the left eye. Therefore we are rejecting his claim, and ask that you so advise him."

It is argued by appellant that the letter, of which the above quotation is a part, is not a denial of liability but merely goes to the form of the proof in that it does not show total and permanent blindness and that the purpose of the letter was to call this to the attention of the appellee so that he might, in a year from the filing of his proof, correct this defect if possible and show total and permanent blindness within the meaning of the policy. This contention entirely overlooks the positive statements of the two oculists to the effect that appellee's left eye had a vision of 20/200, the specific cause of which was stated, and that this had caused "a permanent loss of sight in his left eye," as stated by one of the oculists, and, as stated by the other, "which will prove a permanent loss of vision." In justification of its position re-

garding the sufficiency of the proof, appellant construes the statements made by the oculists as an evasion "as to totality of loss, and no showing of totality was made." We do not so construe the statements of the physicians and perceive no evasion attempted in their answers. Certainly, if appellant was not satisfied with the statements of the physicians, it should have so advised the appellee, but this it did not do. Neither can we agree with the appellant in its claim that its letter was not a denial of liability. It plainly and unmistakably rejected the claim made on the ground that "the proof plainly shows that this brother is not totally and permanently blind as our laws require, due to the fact that he has a 20/200 vision in the left eye." Notwithstanding the statements of the examining physicians to the effect that appellee had suffered a permanent loss of sight in his left eye, appellant arbitrarily determined that a 20/200 vision was not a loss of vision as certified by the physicians, and, for this reason, rejected appellee's claim. It is difficult to perceive how denial of liability could be couched in more explicit and unmistakable terms. It is our opinion that the letter was a denial of liability, and therefore the provision of the by-laws relied on could have no application, for if it is reasonable at all, it is only so in cases where there is no denial of liability and as giving time for further investigation regarding the merits of the claim. By this denial of liability the appellant breached its contract and appellee's cause of action at once arose. *Business Men's Accident Ass'n of America* v. *Cowden,* 131 Ark. 419, 199 S. W. 108; *Old American Ins. Co.* v. *Wexman,* 160 Ark. 571, 255 S. W. 6; *Fire Ass'n of Philadelphia* v. *Bonds,* 171 Ark. 1066, 287 S. W. 587; *Mutual Life Insurance Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433; *Sun Life Assurance Co. of Canada* v. *Coker,* 187 Ark. 602, 61 S. W. (2d) 447; *American National Insurance Co.* v. *Westerfield,* 189 Ark. 476, 73 S. W. (2d) 155.

It is insisted that before appellee could take advantage of a waiver of the by-laws postponing final action on the proof of loss for 12 months, same must have been pleaded in his complaint. There is no merit in this contention. We have not examined the cases cited from

foreign jurisdictions, but our own case of *American Insurance Co. of N. J.* v. *Brannon,* 184 Ark. 978, 44 S. W. (2d) 346, cited, does not sustain the contention made.

The necessary effect of the allegation of appellee's complaint was that liability had been denied, the conclusive proof of which was in the hands of the appellant at the time of the institution of the suit, and it could not have been prejudiced by the alleged defect in the pleading. Moreover, there was no objection to evidence offered relating to the proof of loss.

Insufficiency of evidence. The contention made by the appellant that the evidence was not reasonably sufficient to support the verdict and judgment cannot be sustained. The great preponderance of the testimony is to the effect that appellee has only 20/200 normal vision in his left eye. This is explained as a vision limited to detection of gross motion at six inches, or "the perception of light." As one physician expressed it, "he can see big objects moving—he has light perception. That is practically the extent of his vision." All the other physicians who testified agreed to this estimate of the extent and character of appellee's vision except one who was called on behalf of the appellant and testified that he found the vision of appellee's left eye to be 20/200 of normal and that this would give a better vision than light perception. This witness admitted on cross-examination, however, that a 20/200 vision and a detection of gross motion at six inches "is a little better than light perception, but not much."

It is manifest, when we abandon sophistry and indulge in plain thinking, that where one has no practical use of his eyes he is blind, and the ordinary person having a policy such as the one in the instant case would think that he was insured against blindness—so he is. "The ability to perceive light and objects, but no ability to distinguish and recognize objects, is not sight, but blindness." This, all men know. It would be unfair to the Association to impute to it the intention, by the artful employment of the words, "of light perception," to base its liability upon the frivolous distinction between the power to perceive objects in any character of light with-

out the ability to distinguish one object from another, and that totality of blindness which would make complete darkness. *Tracy* v. *Standard Accident Ins. Co.,* 119 Me. 131, 109 Atl. 490. The contract of insurance should be construed with a view to accomplish the purpose for which the Association was maintained and for which its members paid their premiums, and, when so construed, it is evident that the proof made brings appellee's condition within the terms of the policy. In fact, the evidence establishes liability even when the contract is given its strictest and most literal construction.

The appellant contends that the court erred in submitting to the jury the question of the reasonableness or unreasonableness of the clause in its by-laws providing for a waiting interval of 12 months from the date of the receipt of the proof of loss by the appellant until final action should be taken thereon. If it be conceded that this was error, the same could work no prejudice, for this instruction was unnecessary. As we have already seen, this provision of the by-laws—whether reasonable or unreasonable—has no application in the instant proceeding because of the denial of liability contained in the insurer's letter to its agent, a portion of which has been heretofore quoted. Other instructions complained of have been examined and we find them in harmony with the views expressed.

Objection was made to the argument of counsel for the appellee to the effect that it was stated by him that a finding by the jury against the appellee in this cause would forever preclude his recovery. Whether or not this was a correct statement is immaterial as it appears to have been made in answer to an argument by counsel for appellant and we are unable to see in what manner it was prejudicial. Neither have we been enlightened by counsel in this particular.

It is finally insisted that the court erred in assessing a penalty against the appellant and in allowing an attorney's fee to be charged against it. This contention is based upon §§ 6068 and 6069 and 6071 of Crawford & Moses' Digest as construed by this court in *United Order of Good Samaritans* v. *Meekins,* 155 Ark. 407, 244

S. W. 439, and *Gallagly* v. *American Insurance Union,* 180 Ark. 4, 20 S. W. (2d) 642. Appellant contends that it is a fraternal benefit society within the meaning of the sections of the digest and the decisions cited. It is true, the appellant so designates itself in its by-laws, but the business it transacts is essentially different from that transacted by a fraternal benefit society. In societies of that character the insurance of its members is paid by dues or assessments, while the contract here involved has all the earmarks of those issued by old-line insurance companies; it is styled an "ordinary life" policy; the premiums and reserve are based on the American Experience Tables and the premiums are fixed and payable as in an ordinary life policy. In determining whether the insurer is a fraternal society or an insurance company, the test is not the mere form of the organization, but the business in which it is actually engaged. In *State ex rel. Reece* v. *Stout,* 17 Tenn. App. 10, 65 S. W. (2d) 827, the court said: "Broadly speaking, it may be said that when a company, society, or association, either voluntary or incorporated, and whether known as a relief, benevolent, or benefit society, or by some similar name, contracts for a consideration to pay a sum of money upon the happening of a certain contingency, and the prevalent purpose and nature of the organization is that of insurance, it will be regarded as an insurance company and its contracts as insurance contracts, and this without regard to the manner or mode of the payment of the consideration, or of the loss or benefit." This seems to be the rule approved by the weight of authority. *Farmer* v. *State ex rel. Carruther,* 69 Tex. 561, 7 S. W. 220; *Filley* v. *Illinois Life Ins. Co.,* 93 Kan. 193, 144 P. 257, L. R. A. 1915D, 134.

Couch Encyc. of Insurance Law, vol. 1, § 253, p. 602, lays down the following as a test: "But, as a matter of fact, the question of the nature of the society, with respect to whether or not its contracts shall be regarded as those of an assessment or of an old-line company, is generally regarded as largely controlled by determining whether or not it operates on the assessment or co-operative plan, or on a fixed benefit and premium basis." See

also *Marcus* v. *Heralds of Liberty*, 241 Pa. 429, 88 Atl. 678; *Jones* v. *Commonwealth*, 255 Pa. 566, 100 Atl. 450; *Modern Order, etc.* v. *Bloom*, 69 Okla. 219, 171 Pac. 917; *Block* v. *Valley, etc.*, 52 Ark. 201, 12 S. W. 477; *State ex rel.* v. *Citizens, etc.*, 6 Mo. App. 163; *Ragsdale* v. *Brotherhood of Railroad Trainmen*, 229 Mo. App. 545, 80 S. W. (2d) 272.

We see no circumstances tending to establish the contention of appellant as to the nature of the contract except that it calls itself a fraternal society and applies to the insured the designation of "brother" when denying liability for a disability it had insured him against.

Finding no prejudicial error, the judgment of the trial court is correct, and it is, therefore, affirmed.

McHaney, J., dissents to so much of the opinion as approves the allowance of penalty and attorney's fee.

Coop *v.* Johnson.

4-4170

Opinion delivered February 17, 1936.

W. K. Ruddell, for appellant.

Charles F. Cole, for appellee.

Humphreys, J. This is the second appeal in this case. The opinion on first appeal is reported under the style of *Coop* v. *Johnson*, 190 Ark. 550, 80 S. W. (2d) 70, and is referred to for a statement of the issues involved instead of making another statement of them. The first appeal resulted in a reversal of the decree as to the two-acre tract with specific instructions to the trial court to

foreclose the mortgage lien thereon to satisfy the unpaid part of the purchase money and out of the proceeds of the sale to repay appellee, Mrs. Dean V. Johnson, the amount she actually paid K. A. Kelley for the outstanding paramount title thereto, and to apply the balance, or so much thereof as might be necessary, to the payment of the unpaid purchase money. The original record failed to disclose what Mrs. Dean V. Johnson actually paid for the outstanding paramount title, which was bought from K. A. Kelley for the benefit of herself and the mortgagee, and the case was remanded for proof as to the amount she paid for it. Instead of following the specific directions made, which became and is the law in the case, an attempt was made to try the entire case over, and the proof introduced as to the amount she paid for the two-acre tract is indefinite and uncertain. The record on the retrial of the cause reflects that she exchanged $900 of stock in the Goodwin Drug Company for the note of $500 she had executed to K. A. Kelley for the two-acre tract. The record before us is silent as to the cash market value of the stock. For aught that appears, the stock may have been worthless and without any cash market value whatever. There is no evidence at all to support the finding of the trial court that Mrs. Johnson paid K. A. Kelley $500 for the outstanding title, so the decree on direct appeal is reversed. The decrees against appellee for attorneys' fees are also reversed on cross-appeal as there is no fund now out of which to pay them.

The cause is remanded under the directions made on the former appeal.

BALDWIN *v.* BRIM.

4-4161

Opinion delivered February 17, 1936.

R. E. Wiley and *Henry Donham,* for appellants.

McMillan & McMillan, for appellee.

JOHNSON, C. J. This action was instituted by appellee, Monk Brim as father and next friend of his son, Elect Brim, against appellants, L. W. Baldwin and Guy A. Thompson, trustees for the Missouri Pacific Railroad Company, in the Clark Circuit Court to compensate a personal injury received by the son on September 21, 1934, at Benton, Arkansas, by and through the negligent operation of a train. The complaint in effect alleged that, while Elect Brim lay asleep near appellants railroad track at a place in full view of the operators of their train, had a lookout been kept as required by § 6568 of Crawford & Moses' Digest, the operators of said train carelessly and negligently operated said train over and upon its tracks without keeping the required lookout, and thereby ran said train over and upon said Elect Brim when by the exercise of ordinary care his perilous position could have been discovered and avoided, thereby inflicting upon him very serious personal injuries to his damage in the sum of $3,000.

An answer was filed by appellants denying the material allegations of the complaint, and affirmatively pleading contributory negligence of said Elect Brim in bar of any right of recovery.

Upon trial to a jury of the issues joined, a verdict was returned in favor of appellee and against appellants for the sum of $2,000, and from a consequent judgment entered thereon this appeal comes.

The first assignment of error relates to the court's refusal to quash the jury panel as prayed by appellants, but since this exact contention was presented to and decided by us adversely to appellants' contention in *American Refrigerator Transit Co.* v. *Stroope,* 191 Ark. 955, 88 S. W. (2d) 840, it is not deemed necessary to review the question here.

Appellants next urge that the court erred in refusing to direct a verdict in their behalf, and this contention is grounded upon the alleged insufficiency of the testimony. This suit is predicated exclusively upon a violation of § 6568 of Crawford & Moses' Digest, commonly known as the "Lookout Statute." To make an issuable case for the jury's consideration under the "Lookout Statute" it was necessary that appellee establish by substantial testimony the following facts: first, that the injuries occurred by reason of the operation of a train; second, that the circumstances surrounding the injuries were such as to reasonably lead to the conclusion that the injuries would not have occurred had a proper lookout been kept; and, third, had such lookout been kept, the peril of the injured party could have, by the exercise of ordinary care, been discovered in time to have avoided the injury. *Missouri Pac. Rd. Co.* v. *Williams,* 180 Ark. 453, 21 S. W. (2d) 858; *Huff* v. *Missouri Pac. Rd. Co.,* 170 Ark. 665, 280 S. W. 648; *Blytheville, L. & A. S. R. Co.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881; and *Kelly* v. *DeQueen & E. R. Co.,* 174 Ark. 1000, 298 S. W. 347.

A. That Elect Brim was injured by the operation of appellants' train is established by the uncontradicted testimony.

B. & C. Whether or not a proper lookout was kept by the trainmen operating the cars which produced the injury upon Elect Brim, and whether or not his perilous position could have been discovered, and his injuries avoided by the exercise of ordinary care, the testimony is in sharp conflict. That on behalf of appellee, when

viewed in the light most favorable to him as we are required to do, tended to show that he was lying down asleep near the east rail of its railroad tracks, and that his position there could have been discovered by the trainmen for a distance of approximately one-quarter mile if a proper lookout had been kept, and that the train could have been stopped in less than 1,000 feet. It was also shown that the fireman, at the time of the injury, although the only one in charge of the train who could have seen had he looked, was engaged in other matters, and was making no effort to keep a lookout as required by law. These facts and circumstances are amply sufficient to support the jury's finding that no proper lookout was being kept by the operators of the train at the time of the injury, and that they could have, by exercise of ordinary care, discovered his peril and avoided the injury. True it is that appellants' testimony tended to show that a proper lookout was kept and that, because of certain physical barriers, the injured party's presence and peril could not by exercise of ordinary care have been discovered, and the injury avoided, but this was the issue which was and should have been submitted to the jury.

The contentions urged by appellants have been before this court many, many times, and it would serve no useful purpose to again review and reiterate the established doctrine. See *Missouri Pac. Rd. Co.* v. *Grady,* 188 Ark. 302, 65 S. W. (2d) 539, and cases there cited.

Appellants next complain that the court erred in telling the jury by plaintiff's requested instruction number one that it is the duty of all persons running trains in this State upon any railroad track to keep a constant lookout for persons upon or "along side the tracks, etc." The contention is that "along side the tracks" is an addition to the statute and places a greater burden upon appellants than the statute requires. This exact contention was presented, urged and decided by us adversely to appellants' contention in *Bush* v. *Brewer,* 136 Ark. 246, 207 S. W. 322, therefore it appears unnecessary to review the cases cited on this point.

Complaint is also made of the court's modifying and refusing to give to the jury in charge certain requested instructions which had the purpose and effect to acquit appellants of liability if the contributory negligence of Elect Brim was equal to or greater than the negligence of appellants' servants and employees.

This contention is in the very teeth of the statute. It fixes liability upon the conditions heretofore stated, "notwithstanding the contributory negligence of persons injured," and we have so expressly decided in the cases cited, *supra.* But appellants urge that in other cases, (*M. P. Rd. Co.* v. *Trotter,* 184 Ark. 790, 43 S. W. (2d) 762; *Cato* v. *St. L. Sw. Ry. Co.,* 190 Ark. 231, 79 S. W. (2d) 62; *C. R. I. & P. Ry. Co.* v. *French,* 181 Ark. 277, 27 S. W. (2d) 1021; *St. L. S. W. Ry. Co.* v. *McClinton,* 178 Ark. 73, 9 S. W. (2d) 1060; *St. L. S. F. Ry. Co.* v. *Kirkpatrick,* 155 Ark. 632, 244 S. W. 35), we have impaired the doctrine announced in the cases first referred to, and that this impairment is not only justified, but is impelled by § 6875 of Crawford & Moses' Digest. Such is not the purpose or effect of said section. This section is a part of act 156 of 1919, and the second section thereof expressly provides that the act shall not repeal any statute now in force, enacted for the protection of persons or property against damage done by railroads in this State, but shall be deemed and considered as additional protection to persons damaged by the running of trains in this State. This language negatives any impairment of the "Lookout Statute."

The Gessell and Williams cases cited, *supra,* were decided subsequent to the act of 1919, and we doubt not its due consideration in these cases. The McClinton and Cato cases cited and relied upon by appellants have no bearing upon the issues here considered because they arose under facts where no lookout, however efficient, could have discovered the perilous position of the parties injured. All other cases cited and relied upon by appellants may be clearly distinguished in principle. The Trotter and French cases, *supra,* chiefly relied upon by appellants are not in conflict with the views here expressed. Each of these cases were bottomed upon two

acts of negligence, namely: first, failure to observe the statute requiring the ringing of the bell, etc., see § 8559, Crawford & Moses' Digest; second, failure to keep a lookout as required by § 8568. Under § 8559, Crawford & Moses' Digest, contributory negligence is not excluded as a defense, complete or partial, whereas under § 8568 contributory negligence is excluded as a defense by its terms. So, it definitely appears that both the French and Trotter cases are right in principle, but have no application or controlling effect on the case under consideration because this suit rests exclusively upon § 8568.

Finally, appellants contend that the verdict and judgment for $2,000 is excessive. It is unnecessary to review the testimony in this regard. It suffices to say that the boy was very painfully, seriously, and probably permanently injured, and the jury's award does not appear to be excessive.

No error appearing, the judgment is affirmed.

BALDWIN *v.* SEARS.

4-4160

Opinion delivered February 17, 1936.

R. E. Wiley and *Henry Donham,* for appellants.

Pace & Davis, J. H. Lookadoo and *Tom W. Campbell,* for appellee.

BAKER, J. The complaint filed in this case alleges an injury received by the plaintiff while employed as a brakeman upon one of the freight trains operated by the appellants, who were engaged in interstate commerce, and the cause of action alleged was one that arose under the Federal Employers' Liability Act of 1908, as amended in 1910.

The allegation is to the effect that on the 9th day of December, 1933, the appellee herein was employed as such brakeman upon a train running from El Dorado to North Little Rock, and, as the train was leaving Camden, after having stopped to take water, and while running from 10 to 15 miles an hour, the appellee attempted to catch and get upon an oil tank car, being car LUX 870, and that a grabiron pulled loose from the running board on the left side at the head end of the car, causing

the appellee to fall from the car, striking his hips and back of his head on the dump on the side of the track and throwing him in the ditch below.

The further allegations are descriptive of the method of the fastening of the ends of these grabirons by the insertions of bolts through the running boards that surround the tanks, and upon the bottom sides of the running boards the bolts go through holes in the ends of the grabirons and are held by nuts. One of these nuts had been lost from a bolt, so used in holding the end of the grabiron, and, as the appellee attempted to climb upon the train, one end of the grabiron came loose, causing him to fall.

The record is voluminous, but the fact is not seriously disputed that whatever injury the appellee suffered was caused in the manner described. The accident occurred in the early morning hours before daylight. No one was near, and the appellee was found after the train had gone, or, at least, a short time afterwards he appeared at the depot where he says he was taken by two colored men who assisted him in getting to that place.

A larger part of the testimony in this record relates to the fact of the injury and to the extent thereof.

The first proposition presented upon appeal and brought here is that the court erred in refusing to quash the jury panel. This matter will be passed without discussion, because the question was settled in the case of *American Refrigerator Transit Co.* v. *Stroope,* 191 Ark. 955, 88 S. W. (2d) 840. This is the same jury, drawn by the same jury commissioners whose eligibility was decided in that case. The question was settled there. The writer was not in accord with that opinion, but the question will not again be reviewed here.

The second proposition raised is that the court erred in refusing to give appellants' requested instructions numbers 2, 3, 4, 5, 6, and 7. These instructions will not be set out. It is sufficient merely to state the effect of them.

Instruction No. 2 was to the effect that if the jury find that there was nothing to indicate to the defendants a defect in the handhold, and that the absence of the nut

from the handhold would not have been ascertained by the use of ordinary care and caution in inspecting the same, then the defendants would not be liable. In discussing this proposition, it may be stated that the train was engaged in interstate commerce and that the particular car on which the injury was alleged to have occurred was moving in interstate commerce. A provision of the Safety Appliance Act, 45 USCA, § 4, as amended, provides:

"It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." In 1910 an amendment was passed which provided:

"It shall be unlawful for any common carrier, subject to the provisions of this chapter, to haul or permit to be hauled or used on its line, any car, subject to the provisions of this chapter, not equipped with appliances herein provided for, to-wit: all cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running-boards shall be equipped with such ladders and running-board and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the tops of such ladders." (45 USCA, § 11).

The Safety Appliance Act also gave to the Interstate Commerce Commission power to promulgate rules and regulations as to the location or manner of fastening or affixing safety appliances designated in the act. Such regulations admittedly were legal and provided for the location and secure fastening of handholds. This injury occurred, by reason of a violation of the Safety Appliance Act. That act did not make liability dependent upon the exercise of ordinary care by the carrier. In other words, liability is not dependent upon negligence, but arises upon violation of the Safety Appliance Act, which violation is the proximate cause of the injury.

Instruction No. 3 was to the effect that, as this particular car, LUX 870, belonged to the Lion Refining Com-

pany, the only duty that the defendants owed to the plaintiff was to exercise reasonable care and caution in inspecting the car and the handholds. That was not a proper test. The carrier did not have to accept this car into its train with the defective handhold or grabiron that caused the injury. Upon acceptance of the car in that condition, defendants had the same responsibility as if they had been owners.

Instruction No. 4 is to the effect that if the jury should find that the nut was removed from the bolt holding the handhold after the car had been inspected at El Dorado by the inspectors of the defendants, at the time it was placed in the train, and that same had not been removed for a sufficient length of time to have been discovered by the defendants, they should find for the defendant. An examination of this record does not disclose that the affirmative defense was made that the nut was removed after inspection. There is no proof to that effect and only by conjecture could such a conclusion be reached. Substantial evidence is wholly lacking. There is evidence that the bolt had rusty threads where the nut should have been. In the absence of any proof, the jury should not have been invited to speculate and by speculation find that the original bolt, without rust, was removed and a rusty one substituted therefor. If such was the purpose of the refused instruction, it was abstract.

No. 5 is an instruction to the effect that the plaintiff must have exercised reasonable care for his own safety and protection, and that, if he were negligent or failed to exercise the care that a reasonably prudent person would have done under similar circumstances, then he could not recover. In other words, it was an instruction that if the plaintiff were guilty of contributory negligence he would be barred.

No. 7 is an instruction to the effect that if the defect were observable or apparent that plaintiff must have assumed the risk.

Neither the assumption of risk, nor contributory negligence, is a defense in cases of this kind. The Federal

Safety Appliance Act abolished the defense of assumed risk. 4 USCA, § 7.

So also was the defense of contributory negligence abolished in any case wherein the violation by the carrier of the provisions of the act contributed to the injury or death of the employee. 45 USCA, § 53; *Great Northern Ry. Co.* v. *Otos,* 239 U. S. 349, 36 S. Ct. 124; *Grand Trunk Western R. Co.* v. *Lindsay,* 253 U. S. 42, 34 S. Ct. 581.

These statutes impose absolute duties upon carriers engaged in interstate commerce. These duties are not discharged by the exercise of reasonable care. *Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S. 559, 31 S. Ct. 612. See, also, *St. Louis Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 28 S. Ct. 616.

Even though the carrier does not own the equipment, it becomes liable for substandard or defective appliances, when it uses them in interstate commerce and injuries result to employees therefrom. 2 Roberts Federal Liability of Carriers, p. 1265. *Johnson* v. *Great Northern Ry. Co.,* 178 Fed. 643; *U. S.* v. *Chicago Great Western Ry. Co.,* 162 Fed. 775.

The authorities herein cited justify the instructions given and the refusal to give those requested by appellants. It is not necessary to attempt a further analysis of the instructions or to support our position by further citations.

Only one other matter is presented for our consideration. We are asked to say that the verdict is excessive. Upon what theory? The testimony of experts, who say there is no injury as the result of the fall. This testimony is contradicted by other experts who are equally positive the appellee is totally disabled and incapacitated to earn a living or to enjoy whatever of life remains, but doomed to grow progressively worse with added suffering till death.

There is an imposing array of witnesses, scholarly men, at the top of one of the great learned professions. They brought to the jury perhaps 30 or more X-ray pictures. They "read" or "interpreted" these pictures. They expounded their theories elaborately and conclu-

sively, with resulting confusion and irreconcilable conflict.

We are helpless. We know of no method to check for truth and error. Counsel have not suggested any, though they are experts also in their sphere. We say that in all seriousness, but for a purpose.

Expert testimony is offered, according to theory, to explain to the jury matters discernible or understood only by reason of special learning. It would be hard to discover a better example of the futility of expert testimony than is found here.

Appellants have the naive consolation that the verdict is the composite conclusion of 12 practical citizens. It is supported. *Western Union* v. *Turner,* 190 Ark. 97, 77 S. W. (2d) 633.

No error is shown. Affirmed.

DUMBROSKI *v.* STATE.

Crim. 3981

Opinion delivered February 17, 1936.

Fred A. Snodgress, for appellant.

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

MEHAFFY, J. This action was begun in the criminal division of the North Little Rock Municipal Court against the appellant, Ed Dumbroski, for wife and child abandonment. He was tried, convicted, and appealed to the circuit court of Pulaski County.

On October 17, 1935, he was tried in the circuit court and convicted, and his punishment fixed at a fine of $50, and the jury also made a finding that he was the father of the child of the prosecuting witness. He was tried under § 2596 of Crawford & Moses' Digest, and the circuit judge told the jury in one instruction: "The section of the law upon which this is based is as follows:", and then reads to the jury § 2596 of Crawford & Moses' Digest.

This section of the digest was amended by act 331 of the Acts of 1923. The title of this act is as follows: "An act to amend § 2596 of Crawford and Moses' Digest of the statutes of the State of Arkansas." The act then provides that act 52 of the Acts of 1909, which is § 2596 of Crawford & Moses' Digest, "be and the same is hereby amended to read as follows." The act then changes § 2596 in several particulars. The age of the child in the original act is 12 years, and in the amended act, 14 years. The punishment was changed.

It therefore appears that § 2596 of the digest was not the law at the time of the trial, and the court erred in reading it to the jury as the law upon which the charge was based.

In each of two instructions given by the court the words "without good cause" were omitted. The jury was told in effect that if they believed beyond a reasonable doubt from the testimony in the case that the defendant was the father of the child and that he neglected and refused to provide for and support it, and abandoned the same, he would be guilty as charged. The jury should have been told that if he neglected and refused to provide for the child and abandoned the same, without good cause, he would be guilty as charged. This error is in both instructions numbers 5 and 6.

If appellant abandoned his wife and child and had good cause to do so, he would not be guilty.

For the errors indicated, the judgment of the circuit court is reversed, and the cause remanded for a new trial.

BEESON *v.* CHAMBERS, CHANCELLOR.

4-4258

Opinion delivered February 17, 1936.

Charles W. Mehaffy, for petitioners.
Evans & Evans, for respondent.

SMITH, J. S. H. Kincannon & Sons executed a chattel mortgage to the Bank of Magazine to secure an indebtedness of $1,800 due the bank. The Kincannons are residents of Booneville, and the mortgage was recorded in Logan County, in which county the towns of Magazine and Booneville are both located. The debt secured by the mortgage was not paid, and suit was brought December 24, 1934, in the chancery court for the Southern District of Logan County, of which district of the county the mortgagors were still residents when the suit was filed. A receiver was appointed who qualified as such and took possession of the mortgaged property. On December 31, 1934, he filed with the court an

inventory of the property of which he had taken possession.

On June 19, 1935, the plaintiff bank filed an amendment to its complaint with a petition for a citation for contempt of court. This pleading alleged that E. W. Beeson, acting for the Beeson-Moore Stave Company, a domestic corporation of which he was president, had taken into his possession and had converted to his own use, and that of the stave company, the heading covered by the mortgage from the Kincannons, of which the receiver had taken possession, under order of the court. It was prayed that Beeson and the stave company be made parties defendant, and that a citation issue against Beeson requiring him to show cause why he should not be cited for contempt in taking, removing and appropriating property in the custody of the court through its receiver. Beeson is a resident of Pulaski County, and the stave company has its office and place of business in that county.

Summonses were issued against Beeson and the stave company on this amendment to the complaint, and they were both served in Pulaski County. Separate motions were filed by Beeson and the stave company to quash this service, which motions were overruled by the chancery court; whereupon a petition was filed in this court to prohibit the Logan Chancery Court from proceeding further upon this amended complaint.

The relief here prayed is asked upon the ground that the chancery court of Logan County has no jurisdiction of the subject-matter, or over the persons of the petitioners herein, upon the service of the process had upon them. In other words, having been served with process in Pulaski County, they cannot on that service be made parties to the pending suit in Logan County for the reason that there is no joint liability between them and the original defendants in the foreclosure suit. The argument is that the foreclosure suit is one action and a suit for the conversion of the mortgaged property is another and a separate action, and, there being no joint liability, the respective defendants must be separately sued and service must be had upon these petitioners

where the one resides, and the other has its place of business.

We do not concur in this view. The chancery court of Logan County had jurisdiction of the foreclosure suit. Section 1176, Crawford & Moses' Digest. As an incident to this jurisdiction, it had the power to appoint a receiver to take charge of the mortgaged property, and this had been done. Section 8612, Crawford & Moses' Digest. This is a transitory action, and was brought in the county where all the mortgagors reside and were served with process. The chancery court was exercising a jurisdiction which it clearly has. Beeson and his corporation have interfered with this jurisdiction by converting the subject-matter thereof. By so doing they became subject to the jurisdiction of the Logan Chancery Court under the service of process had upon them.

The chancery court has the inherent power to preserve its dignity and to enforce its jurisdiction. It had jurisdiction to foreclose the chattel mortgage; and the proper and requisite service had been had upon the mortgagors to exercise this jurisdiction, and the court had taken the subject-matter of the litigation into its custody through its receiver. This jurisdiction could not be defeated by the asportation and conversion of the subject-matter of the litigation and the wrongdoer stepping over a county line. The court had power, having properly acquired jurisdiction of the subject-matter, to direct its process to any part of the State for service, for the purpose of preserving that jurisdiction. It has been held in many cases, one of the latest being that of *Moore* v. *Price,* 189 Ark. 117, 70 S. W. (2d) 563, that: "When a chancery court acquires jurisdiction, it has the right to conduct the matter to an end, and decide all matters involved in the chancery suit."

In Clark, on the Law of Receivers, vol. 1, § 626 (2d ed.) it is said: "It would be a vain thing for a court to appoint a receiver and make orders affecting parties and affecting the property in the custody of the court, unless the court had power to enforce such orders. * * * No rule is better settled than that when a court has appointed a receiver, his possession is the possession of

the court for the benefit of the parties to the suit, and all concerned and can not be disturbed without leave of court, and that if any person without leave intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor. * * * There is no question but that the court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive by any one."

For the reasons herein stated, the prayer for prohibition to the Logan Chancery Court must be denied, and it is so ordered.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* COLE.

4-4166

Opinion delivered February 17, 1936.

Rainey T. Wells and *O. D. Thompson,* for appellant.
D. H. Howell, for appellee.

SMITH, J. Appellee sued and recovered judgment against the appellant insurance company upon a policy of insurance, which it had issued to him. The policy sued on is designated a "combined benefit certificate," and by its terms obligated the insurer to pay the beneficiary the sum of $3,000 upon the death of the insured, while in good standing or to pay one-half of that amount to the insured himself in the event of total disability.

It is not questioned that the policy was effective at the time of the institution of this suit. It is denied that the insured is totally disabled within the meaning of the policy, and it was denied also that he had made proper proofs of his disability. For the reversal of the judgment, it is also insisted: (a) that the court erred in holding one Bradley competent to serve as a juror in the trial from which this appeal comes; (b) that the testimony of Dr. J. M. Stewart was improperly admitted; and (c) that error was committed in permitting certain affidavits accompanying the claim for disability benefits filed with the insurer to be read in evidence. These assignments of error will be discussed in the order stated.

Without reciting the testimony, it may be said that it is abundantly sufficient to support the finding that appellee is totally disabled. The testimony of Dr. Stewart contains a detailed statement of the insured's condition, and the admission of this testimony is one of the errors assigned. It appears that the insured was examined by Dr. Stewart, at the suggestion and expense of the insurer, and it was objected by the insurer that the doctor's report was of a confidential nature. It appears, however, the insured's attorney consented to this examination upon the condition that he be furnished a copy of any report made to the insurer. There was nothing confidential about this report, as it was to be made to the opposing counsel. Moreover, the privilege between physician and patient inures to the benefit of the patient who may waive the privileged character of the testimony of the physician, which was done here.

The question of the insured's disability was submitted under instructions, which have frequently been approved by this court; and the testimony fully sustains

the finding that the insured was totally and permanently disabled.

The competency of one Bradley, a member of the regular panel to serve as a juror was raised. It does not appear whether he served or was excused although the juror was declared by the court to be competent. We do not recite the *voir dire* examination of the juror for the reason that it does not appear that the party objecting to his competency had exhausted his peremptory challenges. It was said by Chief Justice COCKRILL in the case of *Mabrey* v. *State,* 50 Ark. 492, 8 S. W. 823, that the right of peremptory challenges is conferred as a means to reject, and not to select jurors, and that where the record of the trial fails to show that the defendant had exhausted his peremptory challenges, his objection that a juror was improperly held competent is unavailing in the appellate court, because the failure to challenge is an implied admission that the juror was unobjectionable. That holding has been consistently followed in many subsequent cases.

The court permitted counsel for the insured to read, over the objections of counsel for the insurer, the affidavits of three physicians each of which was to the effect that the insured was totally and permanently disabled.

These affidavits were attached to the deposition of the secretary of the appellant insurance company in response to a cross-interrogatory requesting him so to do. The secretary had stated in answer to a direct interrogatory that: "The association has refused to pay Isaac L. Cole's claim for permanent disability benefits on the ground that he has failed to furnish satisfactory proof that he is permanently and totally disabled." The answer had alleged the failure of the claimant to make the proof of disability required by the constitution and by-laws of the organization. In overruling the objection to the reading of these affidavits, the court admonished the jury that they should not consider the affidavits of these physicians as proof of disability. He further said: "I am permitting the statements of the physicians to be read to you, not as substantive testimony of the plaintiff's condition now, but as part of the application to the

company for disability allowance." In other words, they were admitted for the purpose of showing that proof of disability had been made. Restricted to this purpose, the testimony was competent.

There appears to be no error, and the judgment must be affirmed. It is so ordered.

KITCHENS *v.* CITY OF PARAGOULD.

4-4275

Opinion delivered February 17, 1936.

W. W. Bandy and *Jeff Bratton,* for appellees.

HUMPHREYS, J. The pleadings in this case present the sole issue of whether a city of the first or second class in this State may lawfully and irrevocably pledge the net revenues derived from the operation of a municipal light plant owned by it to better secure the payment of the bonded indebtedness created for the purpose of purchasing the necessary machinery and equipment with which to construct a municipal light plant and distributing system therefor.

The facts are that, pursuant to an ordinance duly passed by the city council of Paragould, the qualified voters of said city authorized a bond issue of $100,000 to procure money with which to build and construct an electric light plant in and for said city and to provide a distributing system therefor, and that the city of Paragould is now ready to accept a loan of $100,000 from the

P. W. A., and the grant of $90,000 with which to purchase the necessary machinery and equipment to build a municipal light plant and distributing system by pledging the net income therefrom after paying the expense of operation and maintenance to secure the payment of said bond issue.

The chancery court ruled that such authority and power existed in the city of Paragould and its officials, and, from the decree dismissing appellant's complaint seeking to enjoin them from pledging the net income to be derived from said plant for such purpose, an appeal has been duly prosecuted to this court.

There is no inhibition in our Constitution as originally adopted, or any amendment thereto against cities of the first and second class irrevocably pledging net revenues to be derived from the operation of municipally owned light plants to pay an indebtedness incurred or to be incurred for the construction of light plants and distributing systems. The power and authority to construct such plants is clearly conferred on cities of the first and second class by amendment No. 13 to the Constitution, and to procure the money with which to construct them by an issue of interest-bearing bonds by and with the consent of a majority of the qualified electors of said municipalities.

The sense of the qualified voters of Paragould was tested by vote on January 31, 1933, and a majority of the legal voters in said city voted for a bond issue of $100,000 to procure the money to build and construct a light plant, and to provide a distributing system for same.

Certainly, under this broad grant of power, such cities have the power and authority to pledge the future net income from the operation of a light plant and distributing system to the payment of the bonded indebtedness issued in the construction of the plant.

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

STORTHZ *v.* MIDLAND HILLS LAND COMPANY.

4-4155

Opinion delivered February 17, 1936.

House, Moses & Holmes and *Eugene R. Warren,* for appellants.

Cockrill, Armistead & Rector, for appellees.

JOHNSON, C. J. This appeal comes from a decree of the Pulaski Chancery Court refusing to cancel restrictive covenants on certain real estate, and in granting an injunction prohibiting appellants from constructing a store building upon said property.

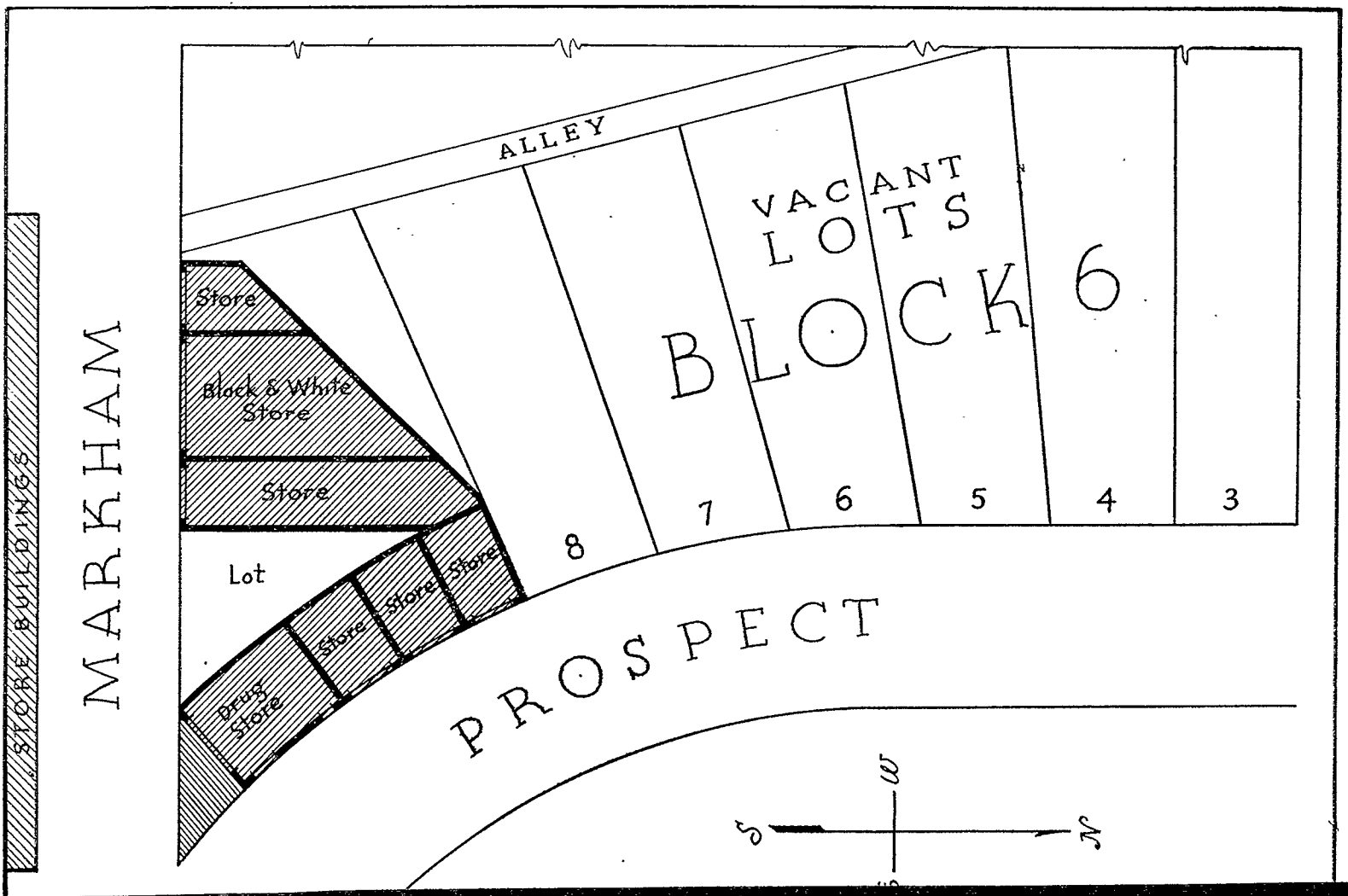
The pertinent facts necessary to an understanding of the issues involved are as follows: in 1926 appellants, Joe and Sam Storthz, purchased lots 3 to 8, inclusive, in block 6 of Midland Hills Addition to the city of Little Rock, and in each of the deeds conveying said property the following covenant appears:

"It is understood and agreed by the grantors herein, and this conveyance is made upon the express condition that the said Sam J. Storthz and Joe Storthz, their heirs

and assigns, shall not erect any residence on the said lots to cost less than $2,500, and that the said lots will not be used for other than residence purposes."

All deeds conveying property in this subdivision contained restrictive covenants similar to the one quoted *supra*. At the time of appellants' purchase in 1926 there was a store building located upon lots 9 and 10 in block 6, immediately adjacent to appellants property. The plat on the opposite page seems to clarify the situation and location of all the property:

Appellants instituted this proceeding as aforesaid against their immediate grantors, alleging that subsequent to their purchase or conveyances the property lying on the south and southeast of their property has grown into a sizeable business district, and that because of this condition their property has become without value for residential purposes; also because of said restrictive covenants in their muniments of title against commercial houses the property can not be disposed of for commercial purposes. The prayer was that the restrictive covenants be canceled as clouds upon their title, and for all other proper relief. By interventions and answer of interested parties, the allegations of appellants' complaint were put in issue, and by affirmative plea an injunction was prayed against appellant, prohibiting construction of a store building upon their property. Appellants' testimony produced upon trial tended to show that they paid $1,500 each for the lots purchased in 1926, and at that time there were no commercial or store buildings in the vicinity save that located on lots 9 and 10; that at the present time there are commercial or store buildings on the south side of Markham Street, but outside the restricted area as follows: Two grocery stores, a drug store, cleaner shop, a shoe shop, and a restaurant; that east on Markham Street, on the south side, there are located a store building, filling station, and a poultry house. All these buildings are within one or two blocks of appellants' lots. The testimony further tends to show that appellants have been unable to find any one willing to purchase their lots for residential purposes, and that the restrictions against commercial or store buildings


STORE BUILDINGS
MARKHAM
ALLEY
VACANT LOTS
BLOCK 6
Store
Black & White Store
Store
Lot
Store
Store
Store
Drug Store
8
7
6
5
4
3
PROSPECT
W
S
E

renders it impossible to sell for commercial purposes, and for these reasons the property is without value; that lots 6, 7 and 8 have value for commercial purposes, but have no other substantial value. The testimony in behalf of appellees tends to controvert that of appellants, but in the main the facts are not in material dispute.

From the facts thus stated, the following legal questions arise: First, may restrictive covenants in deeds be canceled in equity? Second, if so, does the testimony adduced by appellants warrant such cancellation? Third, if not, may equity enjoin a threatened violation of the restriction?

Adverting to the first query of law, we conclude that the weight of authority is to the effect that equity will and should entertain a bill which has the purpose of cancelling a restrictive covenant in a deed as a cloud upon title wherein it is alleged that the conditions surrounding the property have so changed as to utterly destroy its value for the purpose for which the restriction was promulgated to prevent, and that this change of conditions is due to no fault on the part of the petitioner and will work no irreparable injury to others. *Osius* v. *Barton,* 109 Fla. 556, 147 So. 862, 88 A. L. R. 394; *Rector* v. *Rector,* 114 N. Y. S. 623; *McArther* v. *Hood Rubber Co.,* 221 Mass. 372, 109 N. E. 162; Tiffany on Real Property, §§ 1425, 1457 and 1458; 18 C. J. 402.

Stated another way, equity should entertain jurisdiction to cancel a restrictive covenant in a deed where it would be oppressive and inequitable to give the restriction effect as where the enforcement would have no other result than to harass or injure the one without accomplishing the purposes for which originally made. 18 C. J., p. 400, § 465; *Star Brewery Co.* v. *Primes,* 163 Ill. 652, 45 N. E. 145; *Russell* v. *Harpel,* 20 Ohio Cir. Ct. R. 127; *Antes* v. *Manhattan R. Co.,* 116 N. Y. S. 697; *Jackson* v. *Stevenson,* 156 Mass. 496, 31 N. E. 691; *Roberts* v. *Scull,* 58 N. J. Eq. 396, 43 Atl. 583; *Moore* v. *Curry,* 176 Mich. 476, 142 N. W. 839; *Orne* v. *Fridenberg,* 143 Pa. 487, 22 A. 832; *McClure* v. *Leaycraft,* 183 N. Y. 36, 75 N. E. 961. The reasoning just stated is consonant with

our previous opinions dealing with analogous subjects. *Pfeifer* v. *Little Rock,* 169 Ark. 1027, 277 S. W. 883.

For the reasons stated therefore we conclude that equity has jurisdiction to grant the relief prayed in appellants' complaint, and that it should be exercised if the testimony adduced warrants that conclusion.

Referring to the second query, that of the sufficiency of the testimony adduced, the testimony reflects that the change or changes in the circumstances and surroundings of appellants' property is due almost if not solely to changes to and in property lying without, but adjacent to the restricted addition in which appellants' property is located, and is not due to any physical change or changes in or to the property actually located and situated within the restricted area or addition. Notwithstanding the restrictions in this addition have been in force and effect for the past 10 years, no violation thereof has ever occurred, according to the undisputed testimony. Many property owners in this restricted addition most seriously object to encroachments upon the residential restrictions, and they all asserted a grave and irreparable injury to their homes if appellants are permitted to ignore said restrictions.

It has been held by respectable authority that the fact that the restricted property is of less value for residential purposes than it would be for some other purpose is no valid reason to ignore the restriction (*Spahr* v. *Cape,* 143 Mo. App. 426, 122 S. W. 379), and that encroachments on the outside of the restricted area do not necessarily justify an invasion of the restricted territory. *Noel* v. *Hill,* 158 Mo. App. 426, 138 S. W. 364; *Pierce* v. *St. Louis Union Trust Co.,* 311 Mo. 262, 278 S. W. 408; *Harvey* v. *Rubin,* 219 Mich. 307, 198 N. W. 17.

The cases relied upon by appellants as to the proof or the quantum thereof necessary to warrant a court of equity in canceling a restrictive covenant do not justify their position.

Trustees of Columbia College v. *Thacher,* 87 N. Y. 311, 41 Am. Rep. 365, cited and relied upon by appellants, is not in point. There the testimony reflected that new conditions had so entirely and completely changed the

original situation of the property as to render the restrictions no longer serviceable. This conclusion was entertained because of the construction of an elevated railway in front of the premises; the location of a depot and other conditions which rendered the property useless for residential purposes. No comparable condition is reflected by the testimony here adduced. *Jackson* v. *Stevenson,* 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, and other cases cited and relied upon by appellants are of similar import and effect to that of the Thacher case, *supra.* In point of fact we think the instant case falls more nearly within the rule announced in *Spahr* v. *Cape, supra,* and *Pierce* v. *St. Louis Union Trust Co., supra,* and cases there cited.

We are therefore of the opinion that no such changed condition of the surroundings of appellants' property has been shown by the testimony as to warrant the interference of a court of equity, and that the trial court was correct in so deciding.

Finally, did the court err in enjoining appellants from violating the restrictive covenant? This question seems to be answered by our first conclusion, stated heretofore. If equity should and does take jurisdiction for the purpose of canceling a restrictive covenant in a deed, it appears to be a corollary that it may and should enforce such restriction by mandatory directions if the conditions have not so changed as to warrant cancellation, and this is especially true where the party is openly defying the covenant. But, aside from this, the great weight of authority is to the effect that equity will entertain jurisdiction and enjoin a threatened violation of a restrictive covenant even in an independent action. See 8 R. C. L., § 178, title "Deeds," page 1117, and cases there cited.

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

STANDARD OIL COMPANY OF LOUISIANA *v.* DYKES.

4-4158

Opinion delivered February 17, 1936.

T. M. Milling and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

J. S. Thomas and *Coulter & Coulter,* for appellee.

McHANEY, J. Appellee was an oil pumper in the employ of appellant and had been for many years. On May 26, 1934, at the request of the appellant and under its rules requiring all of its employees so to do, appellee was vaccinated against smallpox by his own physician. The vaccination was effective, and his arm became sore and inflamed. On June 21, 1934, appellee suggested to his foreman that, on account of the condition of his arm from the vaccination, he would like to lay off for a few days. The foreman told him that it would be inconvenient to get a man to take his place, and that, if he felt he could do so, he would like for him to continue his work, which he did. About 10 o'clock on the night of June 21, shortly before going off duty, his shift being from 2 P. M. to 10 P. M., he undertook to treat the oil in tank No. 2 by switching it from that tank to another in order to work a substance out of the oil referred to in this record as B. S., which we understand

to mean basic substance or basic sediment, consisting of a mixture of water and other substances not good for the oil. In doing this it became necessary to open a valve or stopcock in the pipe line attached to tank No. 2 in order to permit the oil to be pumped out of that tank through the pipe line to another tank. It was necessary to turn the core in the valve with a wrench so as to turn the opening in the core parallel with the pipe so that the oil would pass through. The core of this valve had no nut on the end thereof. Ordinarily the cores in the valves do have nuts which are tightened up in order to hold the valve closed and prevent the leakage and waste of oil. In opening the valve it is necessary to loosen the nut and sometimes tap the nut end of the core so that it may easily be turned with the wrench. In attempting to loosen the core in the valve at tank No. 2, appellee tapped the nut end of the core with his wrench, holding his left hand on the other end of the core to prevent it from falling out. For some reason, either by striking the core too hard with the wrench or in removing his hand from the other end of the core, he permitted it to fall out of the valve and this caused the oil in the line to spurt out over him, some of which got upon the inflamed sore upon his arm caused by the vaccination. This was on the night of June 21, 1934.

He brought this action against appellant to recover a large amount of damages on March 7, 1935, in which he alleged that appellant was negligent on a number of grounds in connection with the incident above referred to, and that the oil contained a poisonous and foreign substance that caused an infection in his vaccination wound which resulted in a serious case of arthritis or injury to his left ankle from which he has suffered permanent and total disability. Appellant denied the allegations of negligence contained in the complaint, pleaded assumption of risk and contributory negligence as bar to the action.

The case was tried to a jury which resulted in a verdict and judgment against appellant in the sum of $15,000.

A number of errors are assigned for a reversal of the judgment against appellant, but we think it neces-

sary to discuss only one of them. Appellant requested the court to direct a verdict in its favor at the conclusion of the evidence for appellee and again at the conclusion of all the evidence, which was refused by the court, and we agree with appellant that the court erred in this respect because there is no substantial evidence to sustain the verdict. Assuming without deciding that appellant was negligent in the manner alleged in the complaint and that appellee did not assume the risk and was not guilty of contributory negligence as a matter of law, still the verdict is based upon speculation and conjecture and cannot be permitted to stand. There is no proof in this record that the crude oil which appellee was attempting to work or treat by circulating it from one tank to another, contained any poisonous substance, or, if we assume it contained a poisonous or foreign substance, that it did or could have caused the particular injuries of which appellee complains. Practically all of the witnesses, if not all of them, agree that crude oil is not poison in the sense that it contains germs which might affect appellee in the manner complained of. On the contrary, the proof is that crude oil is an antiseptic. Appellee's own physician testified that the germ causing his trouble was not in the oil, but would have to be on the body and taken into the wound by the oil. He did not testify that such did happen, but did say that, if he had a germ on his arm, it could get into the vaccination wound and cause the infection resulting in arthritis of which appellee complains, without the aid of the oil. The most that can be said of the testimony, without reciting it in detail, is that the oil might have caused an infection, not that it did. But this is purely speculation and conjecture. A number of physicians testified on both sides that arthritis is the result of a focal infection, sometimes caused by bad teeth, sometimes by bad tonsils and most frequently by an infected prostate gland, resulting from gonorrhea, and gonococcal germs were found by three of the physicians in a smear of appellee's prostatic fluid. It was their very definite opinion that appellee's arthritis was caused by this condition, but, whether it was or not, just as it is regarding the oil, is a matter of specula-

tion and conjecture. As we said in the recent case of *Marathon Oil Company* v. *Sowell,* 191 Ark. 865, 88 S. W. (2d) 82: "The law, however, does not permit verdicts and judgments to rest upon speculation and conjecture. *National 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 is 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 the 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.' "

We do not set out the evidence in detail in regard to this matter, as no useful purpose could be served thereby. It is sufficient to say that the evidence as to what causes appellee's arthritic condition is speculative and conjectural, and therefore not sufficient to sustain the verdict and judgment in this case.

The judgment will therefore be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

It is so ordered.

THE HOME INSURANCE COMPANY *v.* HALL.

4-4177

Opinion delivered February 24, 1936.

Verne McMillen, for appellant.

J. V. Spencer, for appellee.

Barber & Henry and *Troy W. Lewis, amici curiae.*

JOHNSON, C. J. This action was instituted by appellee, Mrs. Celesta Hall, against appellant, The Home Insurance Company of New York, in the Union Circuit Court to recover certain damages to her automobile which were alleged to have been insured against by appellant insurance company. By answer, appellant controverted the material allegations of the complaint and affirmatively pleaded that appellee's contract of insurance was canceled by it on December 12, 1934, in form and manner provided for in the contract of indemnity. Upon trial to a jury, it was stipulated between counsel that a policy of insurance was issued by appellant and in favor of appellee, dated September 8, 1934, indemnifying her against damage to her automobile by collision to the extent of $500; that her automobile was damaged by collision on January 12, 1935, to the extent of $300.50, and that the full premium had been paid.

The policy of insurance contained the following clause: "This policy shall be canceled at any time at the request of the assured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be canceled at any time by this company by giving the assured

five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro-rata premium for the expired term, which excess, if not tendered, shall be refunded upon demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. *Notice of cancellation mailed to the address of the assured stated in this policy shall be sufficient notice.*"

Two witnesses on behalf of appellant testified that on December 29, 1934, they prepared and mailed to appellee at her established address at El Dorado, Arkansas, notice of cancellation of her policy of insurance. Appellee testified that she did not receive appellant's notice of cancellation although residing at the time at the address stipulated in the policy. J. V. Spencer, appellee's attorney, testified that he discussed the merits of this controversy with Mr. Knight, appellant's adjuster, prior to the filing of the suit, and that he admitted that appellant's office in New York did not mail notice of cancellation to appellee.

After submission of the cause upon instructions, not here complained of, the jury returned a verdict in favor of appellee for the sum stipulated as her damages, and a judgment was duly entered thereon from which this appeal comes.

Appellant's contention for reversal is that the facts in reference to the mailing of the cancellation notice by appellant in New York is undisputed, and that the trial court erred in refusing to instruct the jury as a matter of law that there was no liability. The cancellation clause in the contract of insurance existing between appellant and appellee gave to the insurer the undoubted right to cancel the policy by strictly complying with its provisions. *Commercial Union Fire Insurance Co.* v. *King,* 108 Ark. 130, 156 S. W. 445. Appellant's contention that the testimony in reference to the mailing of the notice of cancellation is not controverted is grounded upon the theory that the testimony of J. V. Spencer is hearsay, and, as such, incompetent; and, moreover, if competent, that the testimony does not reflect that the adjuster had authority to make such admission. We think the admission of ap-

pellant's adjuster that no notice had been mailed by appellant's office to appellee canceling her policy of insurance was competent. Appellant's adjuster Knight testified that he is appellant's adjuster, and, in response to a question in reference thereto, testified as follows: "With full authority to speak and act for the company? A. Absolutely." In reference to the power and authority of a general agent, and especially one who has power to adjust and settle claims against his principal, we stated the applicable and controlling rule in *Industrial Mutual Indemnity Co.* v. *Thompson,* 83 Ark. 574, 104 S. W. 200, as follows, reading from the second headnote: "A superintendent of agencies of an insurance company who is authorized to adjust and settle claims against the company is authorized to waive a forfeiture for nonpayment of premiums, though the policy provided that this could be done only by writing, signed by the president, vice-president or secretary."

If an agent of an insurance company who has power and authority to adjust and settle claims against his principal has power and authority to waive forfeiture of a policy for nonpayment of premiums in the teeth of the policy as held by us in the case last cited, we can conceive of no principle of law which would inhibit such agent making admissions contradictory to his principal's contention as advanced in the trial of this case. The logical effect of the opinion last cited is that an insurance adjuster while acting in the line of settling and adjusting claims against his principal, has the power and authority of the president, vice-president or secretary of such principal. See *Reserve Loan Life Insurance Co.* v. *Compton,* 190 Ark. 1039, 82 S. W. (2d) 537, and cases there cited. This reasoning is in line with respectable authority. See *Flaherty* v. *Continental Ins. Co.,* 46 N. Y. S. 936; *Roberts* v. *Insurance Co.,* 90 Mo. App. 142, 72 S. W. 144.

We conclude therefore that the admission of appellant's adjuster to appellee's attorney was not merely hearsay, but, on the contrary, an admission of his prin-

cipal against interest, and that the adjuster possessed apparent authority to make it.

No error appearing, the judgment is affirmed.

McHaney and Butler, JJ., dissent.

Bryant Truck Lines, Inc., *v.* Silver Fleet of Memphis, Tenn., Inc.

4-4163

Opinion delivered February 24, 1936.

Horace Sloan, for appellant.

Bruce Ivy, James W. Wrape and *Myron T. Nailling,* for appellee.

Johnson, C. J. Appellant, Bryant Truck Lines, Inc., is a Missouri corporation, engaged in the transportation

of property for hire. Appellee, Silver Fleet of Memphis, Tenn., Inc., is a Tennessee corporation engaged in business similar to that of appellant. On October 6, 1934, appellant's and appellee's respective truck and trailer attachments, while traveling U. S. Highway No. 61 in opposite directions, collided at a point in the State of Missouri, and both trucks and trailer attachments were greatly damaged. This suit was instituted by appellee against appellant in the Mississippi Circuit Court to compensate the damage to its truck and trailer, caused by the collision. The gravamen of appellee's complaint was that appellant's truck driver negligently negotiated its truck into appellee's truck and trailer, thereby damaging them in the sum of $2,500. A summons was issued upon the complaint thus filed, which was served by the sheriff of Mississippi County upon appellant's designated agent for service in this State. This service was obtained in Mississippi County. Appellant moved the trial court to quash the service of summons and return thereon because the parties plaintiff and defendant were foreign corporations, and that the cause of action arose in the State of Missouri; and that appellant does not maintain a principal place of business or branch office in Mississippi County. The motion to quash being overruled by the trial court, appellant answered the complaint by general denial, and thereupon filed its cross-complaint against appellee, alleging that appellee's truck driver negligently negotiated its truck and trailer into appellant's truck and trailer and thereby damaged same in the sum of $1,250.

Upon trial to a jury, appellee succeeded, and its damages were assessed at $1,750, which was subsequently reduced by the trial court to $1,650, and this appeal comes from a consequent judgment.

The testimony adduced by the respective parties is in irreconcilable conflict as to the proximate cause of the collision, and it would serve no useful purpose to set it out in detail. The respective drivers of the trucks endeavored to lay the blame for the collision upon the other, and each driver is sustained in his partisan view by other testimony. This will suffice to show that appel-

lant's contention that the verdict of the jury is not sustained by substantial testimony is without merit.

Appellant's next contention for reversal is that the circuit court of Mississippi County did not have jurisdiction to hear and determine the cause of action set forth in appellee's complaint because: first, that appellant has no principal place of business or branch office in Mississippi County; and, second, that both appellant and appellee are foreign corporations, and that, the cause of action having arisen in a foreign State, the courts of this State should not entertain jurisdiction.

Appellant is in no position to invoke the doctrine asserted. By the filing of its cross-complaint against appellee for damages to its truck and trailer in the collision which occurred in the State of Missouri, appellant has invoked the jurisdiction of the courts of this State and thereby has waived any and all irregularities in the service of process and the jurisdiction of the courts. *Federal Land Bank* v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696; *Torrence* v. *Benton,* 189 Ark. 963, 76 S. W. (2d) 74.

Next appellant urges that prejudicial error was committed by the admission of certain testimony in reference to the physical condition of one of appellant's truck drivers several hours before the collision. Conceding, without deciding, that this testimony was inadmissible, it by no means follows that the error was prejudicial. The trial court expressed the view, in the presence and hearing of the jury, that the testimony was inadmissible unless the jury should find that the same driver was driving the truck at the time of the collision. No effort was made to effect this connection, and the incident passed out of the case.

Finally, appellant contends that the damages awarded by the court and jury are excessive. We have concluded that this assignment is well taken. Mr. Schilling, the president of appellee corporation, testified that the market value of his company's truck, immediately prior to the collision, was $800 or $900, and that his company received $150 for it in a subsequent exchange for a new truck. This testimony demonstrated that appellee

was not damaged in excess of $700 by reason of the destruction of its truck. The testimony also reflected that the market value of appellee's trailer, immediately prior to the collision, was $900, and that subsequent thereto its market value was $300. This testimony reflected a net loss upon the trailer of $600. From this it appears that appellee's damages could not have exceeded $1,300, and to this sum the judgment will be reduced.

No error appearing, save in the amount of the award, which may be cured by a remittitur here, the judgment is reduced and affirmed.

CONNER *v.* CONNER.

4-4169

Opinion delivered February 24, 1936.

A. M. Coates, for appellant.

K. T. Sutton, for appellee.

HUMPHREYS, J. Appellant obtained a decree of divorce from appellee on the ground of abandonment in the chancery court of Phillips County, and was awarded the custody and care of their three children. Alimony of $25 a month for twenty-four months and an attorney's fee of $50 were allowed to appellee, and the costs of the suit were adjudged against appellant. Appellant ap-

pealed from that part of the decree allowing alimony, attorney's fee, and costs against him.

Appellant contends that the decree making these allowances should be reversed because, in this particular case, the proof reflects that appellee deserted her home, husband and children without any cause whatever. According to the weight of the testimony, appellee willfully deserted and absented herself from appellant for over a year without reasonable cause, which is a ground for divorce in this State. Notwithstanding the fact that the wife may be the guilty spouse, the trial court, in the exercise of a sound discretion, if the facts and circumstances in the particular case warrant it, may allow her alimony, attorney's fee, and costs. This power is inherent in the court, although not provided by statute. This court said in the case of *Prior* v. *Prior,* 88 Ark. 302, 114 S. W. 700, that: "Whether dependent upon enlarged powers conferred by the statute or not, we think it is settled that a court has the power to allow alimony to a wife against whom a decree for divorce is granted on account of her misconduct."

Appellant and appellee were married on the 8th day of December, 1919, and lived together as man and wife harmoniously until the 15th day of January, 1934, and to the union three children were born, one son and two daughters. They had only $600 between them when they were married, but by industry and frugality on the part of both, they lived well, and, in addition, appellant acquired a comfortable home, a rent house, a small farm, an interest in a five and ten cent store, and some money, perhaps as much as $2,000. At the time the unfortunate separation occurred, the children had attained the ages, respectively, of ten, thirteen and fifteen, and had been and were attending school. When appellee abandoned appellant, she took none of the property except a few personal effects and repaired to the home of her mother, where she has since resided. During the years of her married life she was a kind, loving and devoted mother and a helpmeet to her husband. Appellant has ample means out of which to pay the small monthly allowance adjudged to her by the trial court. Having the power and

authority to make the allowance, it seems to us the court was not overly generous or extravagant in fixing the small monthly stipend necessary for appellee's maintenance and support, nor in the allowance of $50 to pay the attorney who represented her in the trial of the cause. She put her best years into the matrimonial venture, bore three children for appellant, and deserves some reward for the good she did, although to blame for the separation. We are not willing, under the particular facts of this case, to say the trial court abused his discretion in making the small allowances to her and adjudging all the costs of the proceedings against appellant. The record reflects that appellant has been willing at all times to overlook appellee's waywardness and has kept the door of the home open and sought her return. Who knows? If the lamp of love and longing continues to burn, she may see the error of her way, return to the once happy home, take up the broken strand of life and follow it to the end. In the meantime, this ill-guided woman should not be thrown on the charity of the world and permitted to suffer for food and raiment. It would be heartless, unjust and inequitable to deny her a meager support for a period of two years.

The decree is in all things affirmed.

CHAPMAN & DEWEY LUMBER COMPANY *v.* ANDREWS.

4-4192

Opinion delivered February 24, 1936.

Buzbee, Harrison, Buzbee & Wright and *Joe C. Barrett,* for appellant.

Richardson & Richardson, for appellee.

McHaney, J. Appellee sued appellant for damages for personal injuries sustained by him, a broken leg, when he was struck by a piling which he was assisting in loading at appellant's piling yard at Weona, Arkansas. The action was defended on the ground, among others, that appellee was not in its employ, but that the loading of piling at its Weona yard on board cars was let to an independent contractor, one Haley, and that, if appellee were negligently injured, it was an act for which Haley was responsible, and not appellant. Trial resulted in a verdict and judgment against appellant for $3,000.

For a reversal of said judgment, appellant first urges that the trial court erred in refusing to direct a verdict in its favor on the ground that appellee was not in its employ, but in the employ of said Haley who, it is contended, was an independent contractor. In other words, we are asked to say, as a matter of law, that appellee was not appellant's employee, but that of Haley, and that Haley was an independent contractor. This

question was submitted to the jury upon instructions requested by both parties, which fully covered the law of independent contractor.

We cannot agree with appellant that the court erred in refusing its request for a directed verdict in its favor. On the contrary, we are of the opinion that the question was one for the jury. We have many times held that "an independent contractor is one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the employer only as to the result of his work." Headnote, *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. (2d) 320. Also that such status is usually a question of fact for the jury. It is the duty of the court to define the relationship, and for the jury to determine its existence. *Ellis & Lewis* v. *Warner, supra.* In this case, the facts are sufficient to take the question to the jury. While it is true that Haley had a contract to load piling for appellant at so much per lineal foot, and that he paid appellee for loading piling at Weona, it is also true that appellant directed the loading, what, when and how to load, and directed appellee and the other employees in such work, furnished all the utensils and tools, except the team of mules, used in the loading. It kept a foreman or inspector on the job at all times, whereas Haley was frequently not there. These facts are sufficient, if believed by the jury, to show that Haley was an employee of appellant, and that it retained and exercised control over the work, and that he did not represent the will of appellant only as to the result of his work. See *Hobbs-Western Tie Co.* v. *Carmical, ante* p. 59, 91 S. W. (2d) 605.

Error is also assigned and urged for a reversal of the judgment because of the admission of certain testimony over its objections and exceptions. It is said that appellee was erroneously permitted to testify as to work done for appellant in loading piling at its Marked Tree yards. An examination of his testimony, as abstracted by appellant, shows that such information as was elicited on this subject was first brought out on cross-examination. On redirect examination he was further questioned about

his work at the Marked Tree yards. We do not think any prejudicial error was committed, but, if so, it appears to have been invited. Also it is said that the testimony of three other witnesses for appellee in the employ of appellant should have been excluded because of vagueness as to the time of their work with reference to the time of appellee's injury, both before and after the injury. We think their testimony as well as that of appellee was competent as bearing on the issue of independent contractor.

It is finally argued that the judgment is a nullity, because the First or Civil Division of the Poinsett Circuit Court, in which the case was tried, was not in session. The record shows that at 8 o'clock A. M., May 13, 1935, the day fixed by law, the first division of said court was opened by Judge Killough, one of the regular judges of said court, pursuant to agreement with Judge Keck, the other judge, who was absent. After court was opened, Judge Killough "became unable to continue to hold such court," and a special judge was elected pursuant to law. It is contended that, since Judge Keck was absent, Judge Killough, whose duty it was to hold court on the same day in another county, had no power to open court for Judge Keck in Poinsett, then go away, and have a special judge elected. By act 138 of 1911, two divisions of the circuit court of the Second Judicial Circuit were provided for, and that the two judges shall determine between themselves in which division each shall preside, and that they "may alternate at their option and by agreement in the holding of the courts of said two divisions * * *." The record shows the two judges agreed that Judge Killough should hold this court in Poinsett County, and that he did, pursuant to that agreement, open court, but became "unable to continue to hold such court." Just why he became unable to continue is not reflected in the record, except in appellant's motion for a new trial.

We think the court was properly constituted, in session with a properly elected special judge, and that the judgment rendered is valid.

It follows that the judgment must be affirmed. It is so ordered.

TURNER *v.* WELLFORD SPECIAL CONSOLIDATED SCHOOL DISTRICT.

4-4164

Opinion delivered February 24, 1936.

John L. Carter, for appellant.

W. W. Grubbs, for appellee.

SMITH, J. Upon the reversal and remand of the case of *Merritt* v. *M. W. Elkins Inv. Co.,* 188 Ark. 166, 60 S. W. (2d) 15, two of the school warrants there involved, aggregating $1,010, issued by the Wellford School District, were assigned to W. C. Turner, who alleges in the answer filed by him in the proceeding from which this present appeal comes that he had purchased those two warrants in good faith and in reliance on the opinion of this court in the case above cited.

In that case a bond broker alleged ownership of the school warrants as compensation paid him by the school district for services performed in refunding the outstanding bonded indebtedness of the school district, amounting to $18,500. The school district had, pursuant to the authority conferred by act No. 169 of the Acts of 1931, page 476, authorized the refunding of the bonds, and

taxes had been collected for that purpose. The broker sought to require the county treasurer having custody of those taxes to pay his commission out of them by redeeming the warrants issued in payment for his services. It was ordered by the trial court that the relief prayed be granted.

It was pointed out in the former opinion that these warrants could not be paid out of the surplus of those taxes, as this would operate to give the broker's warrants a preference over other outstanding school warrants. It was there said that any surplus remaining after discharging the refunding obligations in any year should be credited to the general fund of the school district out of which these, and other warrants issued by the school district in discharge of its general obligation, should be paid in the order of their date and registration number.

That litigation between the broker and the treasurer, as custodian of the school district's funds, proceeded upon the assumption that there was no question about the validity of the warrants and the liability of the district thereon and the right of the holder thereof to collect the warrants in the order of their date and registration number. The school district itself was not a party to that proceeding and is, of course, not bound by it. After the remand of the cause the school district filed a suit to cancel these two warrants upon the ground that the consideration for them had failed, and also that their issuance had not been authorized at a legal meeting of the members of the school board. From a decree granting the relief prayed is this present appeal.

The opinion on the former appeal is conclusive of the power of school districts to pay a brokerage fee for services in connection with refunding operations in a proper case.

It was shown, at the trial from which this appeal comes, that the president of the school board was not present at the meeting of the board at which the refunding contract between the school district and the broker was made; but it was shown also that he was advised of the intention of the board to meet, and of the purpose of the meeting, and that he gave his assent in advance to

the proposed arrangement; and later signed the warrants, which completed the contract, which the school board had authorized.

The law does not require the attendance of all the members of a school board to constitute a legal meeting. It suffices if all the members are present; or that all had notice and that a majority have attended, pursuant to the notice.

The decree from which this appeal comes is not contrary to this view; but the relief prayed by the school district was granted, and the treasurer was enjoined from paying the warrants for the following reason: The contract between the school district and the broker creates the relation of principal and agent, and, in the performance of the agency, "reliance was placed upon the integrity, credit and responsibility of the contracting agent, and that such contract is one that cannot be assigned or the performance of which cannot be delegated to a third party without the consent of the principal"; and that the assignment of the warrants to the present owner is in effect an assignment of the contract of the school district, and is not binding upon it. The court found also that the bonds had not been refunded, and the district was not liable for that reason. The parties agree, as indeed they must, that, although the warrants are negotiable in form, they are not negotiable instruments in the sense of the law merchant, and they are therefore subject to any defenses in the hands of the present holder which might have been made against the person to whom they were originally issued. *Dubard* v. *Nevin,* 178 Ark. 436, 10 S. W. (2d) 875.

Now the original contract between the school district and the broker was to the following effect. A fee of 7 per cent. was to be paid for refunding outstanding bonds aggregating $18,500, which made a commission or fee of $1,295, had all the bonds been refunded. Three warrants were issued covering this fee, one for $285, which was paid, leaving a balance of $1,010 evidenced by the two warrants hereinbefore referred to. The original contract between the school district and the broker was in writing, and it was therein recited that "we agree at

the end of each year, beginning January 30, 1934, to ratio and pay to the district that proportion of the net fee that the amount of bonds unredeemed for that year bears to the total amount of bonds to be refunded." The practical meaning of this contract is that 7 per cent. was to be paid upon the bonds refunded. None of the bonds were actually refunded, and for this reason also the court declined to award the present owner of the warrants anything.

It appears, however, that, before assigning the warrants, the original broker negotiated and contracted with the owner and holder of $10,000 of the bonds for their refund; but the district declined to pay the interest thereon, as it was under the legal obligation to do, and, for that reason only, the $10,000 in bonds were not refunded.

We think it very clearly appears that the original broker had earned his fee of 7 per cent. on these bonds, amounting to $700, but he has been paid $285. The district is liable therefore only for the difference amounting to $415. The two warrants aggregating $1,010 are therefore valid obligations of the school district to the extent of $415, and they may be filed with the treasurer for payment in that amount, in the order of their date and registration number.

The decree of the court below will be reversed, and judgment rendered here for appellant conforming to this opinion.

SHEPPARD *v.* SHEPPARD.

4-4178

Opinion delivered February 24, 1936.

Thacker & Winter and *Jay M. Rowland,* for appellant.

Edwin W. Pickthorne, for appellee.

BAKER, J. The controversy presented upon this appeal is a sequel to the decision rendered on March 17, 1930, in the case of *Sheppard* v. *Sheppard,* 181 Ark. 367, 26 S. W. (2d) 88. It appears from the opinion in the case just cited that the court had refused to grant a divorce to either party on the ground that neither had been a *bona fide* resident of the State of Arkansas for the requisite time, prior to the filing of the suit. However, the trial court had made a temporary order awarding to Mrs. Sheppard rents and income from a house at 233 Henderson Avenue, Hot Springs, Arkansas. Mr. Sheppard had appealed from that part of the order granting to his wife rents and profits from this piece of property. Mr. Sheppard had deeded this property to his father, O. C. Sheppard, who had been made a party by Mrs. Sheppard in order that the deed might be canceled.

The decree of the chancery court for the rents and profits, or possession of the Hot Springs property, as maintenance, was affirmed on appeal, but reversed and remanded on cross-appeal with directions to cancel the deed to O. C. Sheppard.

This left Mrs. Sheppard in possession of the property, or, at least, she had the right to collect rents and profits therefrom. Later Mr. George E. Sheppard returned to South Dakota, where he and wife had lived just prior to the time he came to Arkansas.

He filed his suit there, charging desertion, asking for a decree of divorce. Upon the decree being granted in his favor, awarding him a divorce, he came back to Hot Springs, Arkansas, and filed a motion or petition in the old case praying relief from the decree of the court, awarding rents and profits accruing from the property at 233 Henderson Avenue, Hot Springs, to Mrs. Sheppard. Upon trial the court granted the relief prayed for by Mr. Sheppard and ordered Mrs. Sheppard to deliver over the property to him. No appeal was taken from that decree. Thereafter, numerous motions, demurrers, or pleadings were filed challenging the validity of the orders and decrees of the court as having been made without jurisdiction and without power in the trial court to change or modify its former order after it had been affirmed on appeal. All these were decided against appellant, but she has not appealed from any of the orders or decrees.

Mrs. Sheppard alleges she had been unable to appeal her case, awarding to her former husband the Hot Springs property, because the stenographer had lost her notes of the trial, and there was no way to make up the bill of exceptions.

After all these adverse experiences, appellant filed a new pleading designated as "bill of review," after having obtained permission of the court to do so. The errors alleged to have been "apparent upon the face of the record" were the same matters she had already presented on prior dates by motions and demurrers. The idea was to present all the issues and retake the evidence

and appeal from any adverse ruling, as we understand her contention. A demurrer, sustained by the court, prevented further progress of the plan. An appeal from this action of the court presents some matters for consideration.

Appellant urges that because of the fact the matter of allowance to her of the rents from the Hot Springs property had on appeal been affirmed, the trial court was without jurisdiction to change or modify its former order.

This proceeding is provided for and the remedy is frequently invoked. Section 3510, Crawford & Moses' Digest. *Kurtz* v. *Kurtz,* (1881) 38 Ark. 119, 125; *McConnell* v. *McConnell,* 98 Ark. 193, 198, 136 S. W. 931.

But it is urged that no mandate from the Supreme Court had been lodged in the chancery court, except after the institution of the proceeding to modify, more than a year after the opinion was rendered upon appeal. The mandate was filed by her consent. Her position now is that such consent could not give jurisdiction. The chancery court already had jurisdiction. After the filing of mandate the trial court then had official knowledge that the appeal was no longer pending in the Supreme Court.

The mandate served as evidence of a jurisdictional fact, the proof of which could have been waived by the parties, as was held to be true in the case of *Bertig Bros.* v. *Independent Gin Co.,* 147 Ark. 581, 228 S. W. 392.

Moreover, without the express consent of appellant to the filing of the mandate, she had invoked the jurisdiction of the court by her pleadings, seeking affirmative relief, in the matters of both alimony and divorce. Section 3499, Crawford & Moses' Digest. *Newell Contracting Co.* v. *Elkins,* 161 Ark. 625, 257 S. W. 54. Appellant cannot play fast and loose as she may think to her advantage.

We are favored with a voluminous argument relative to the validity of the divorce granted to George E. Sheppard in South Dakota. The contention is to the effect that, Sheppard having failed in the proceeding in Garland County, Arkansas, upon a charge of indignities, he

could not sue in the South Dakota Courts for divorce on a charge of desertion.

Appellant wholly misconceives the effect of the decree rendered in Garland County. The court decided "that neither party has been a *bona fide* resident of the State of Arkansas for a period of one year next before the commencement of the action," and so dismissed the action.

This was not an adjudication upon the merits for or against either party upon any alleged ground of divorce.

The so-called "bill of review" cannot be used, as appellant seems to think, as a vehicle to gather up the lost evidence in the former trials, to cart it here for re-examination, long after the time for appeal has expired.

Under the conditions every presumption of sufficiency of evidence and regularity of proceedings must be indulged by us.

Decree is affirmed.

SANDERSON *v.* THOMAS.

4-4176

Opinion delivered February 24, 1936.

[redacted]

H. M. Barney, Frank S. Quinn and *James D. Shaver,* for appellant.

A. L. Burford and *B. E. Carter,* for appellees.

BUTLER, J. Action by Sanderson to cancel a collector's tax deed issued to W. M. and R. B. Thomas and to quiet title against them and others who were made defendants. From a decree dismissing plaintiff's complaint for want of equity and quieting title in the defendants, is this appeal.

The collector's deed under which defendants' claim is based is a void tax sale with alleged possession under the deed for more than two years prior to the institution of the suit. By its decree the trial court found that the defendants had been in actual possession of the lands in controversy, cultivating same since the date of the tax deed, and that neither the plaintiff nor his predecessors in title were seized or possessed of the lands or any part thereof within two years next before the commencement of the suit.

The land involved is a forty-acre tract in Miller County, and the facts upon which the decree is based are not in dispute. W. M. and R. B. Thomas owned a tract of land lying west of, and adjoining, the forty acres in question. In clearing the mill site, they went over their line and cleared a triangular strip of ground along the west side of the forty four hundred and thirty-five feet long, and an average of thirty feet in width. This occurred several years before the date of the collector's deed, June 11, 1928. Each year after said strip of land was cleared the Thomases cultivated it in various crops and continued their possession in this manner for more than two years after the date of the deed, and were in possession at the time suit was instituted. They did not extend their possession after the date of the collector's deed, but cut some timber at varying times from the forty-acre tract, all of which was woodland except the cleared strip amounting to 29/100 of an acre.

The statute upon which defendants' claim of title is based provides: "No action for the recovery of lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the Collector or Commissioner of State Lands, Highways and Improvements, for the nonpayment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for nonpayment of taxes, or who may hold such lands under a donation deed from the State shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action. Act of January 10, 1857, § 1, p. 80." Section 6947, Crawford & Moses' Digest.

At the time the Thomases took possession of the strip of land above described they did not have color of title to the forty acres, but were mere trespassers. The appellees contend that their possession, so taken, is to be deemed a holding of the land by virtue of the purchase thereof at a sale by the collector, so as to extend their possession constructively over the whole tract, and, where this possession is continued for two years after the date of the collector's deed without possession having been extended or enlarged, it is sufficient to make the statute above quoted available. In support of this contention appellees rely chiefly upon the case of *Bon Air, etc. Co.* v. *Parks,* 94 Tenn. 263, 29 S. W. 130. In that case the owner of the legal title brought a suit in ejectment to recover possession of a tract of land containing 1,175 acres. The proof showed that the defendant, without color of title, and as a mere trespasser, inclosed forty or fifty acres of this land, built houses thereon, and had been in the adverse possession thereof continuously, cultivating it and occupying it as a home from 1874, and that his possessory right to the inclosure was perfected in 1881, by reason of the seven-year statute of limitation. In 1882 he made an entry to the entire 1,175-acre tract. He procured a grant, issued in 1889, based upon his entry made in 1882. The chancellor de-

creed in favor of the defendant, and the Supreme Court modified and affirmed the decree. Just what the modification was is not shown in the opinion. The conclusion reached by the editor of the opinion as reflected by the headnote would seem to support appellee's contention. We have been unable, however, to discover any case supporting the Tennessee case, nor have we been cited to any by learned counsel except that of *Wade* v. *Goza,* 78 Ark. 7, 96 S. W. 388, which, it is contended impliedly supports appellees' contention "that one who is in possession as a trespasser and gets his tax deed and who remains in possession for more than two years thereafter, has acquired the title." We do not so interpret that case. There, the defendant was in possession under a donation deed based upon an alleged forfeiture for the tax of 1882. The contention was that the forfeiture was void. The court reviewed the evidence and concluded there was nothing in the record to impeach the donation deed, and reversed the judgment of the trial court in favor of the plaintiff. It approved an instruction to the effect that the period of limitation began to run from the date of the donation deed where the proof showed defendants were in possession. In this connection, the court said: "If they (defendants) had not acquired title under their donation deed by the two-year statute of limitation prior to the institution of the suit for possession, they could not acquire it after that time and while the suits were pending." In this case there is nothing from which it may be inferred that the original entry was a trespass, but rather that it was not, for, under the statutes in force at the time of the donation, an entry and residence on the land under an application for donation was a prerequisite to the issuance of the donation deed. Act April 4, 1887, § 6675, Crawford & Moses' Digest. The entry and possession of the defendants was therefore by the authority of the State upon land claimed by it, and the possession prior to the issuance of the donation deed had no elements of a trespass.

We are of the opinion that the possession taken by appellees was not under, or by virtue of, the tax collector's deed, so as to make the statute available in sup-

port of their title, and that, the possession first taken being a trespass, such possession must have been extended or enlarged after the date of the collector's deed before the statute will begin to run. The general rule is stated in 2 C. J. 234, § 505, as follows: "One who without color of title enters upon a tract of unoccupied real property and takes visible, open, and notorious possession of a part thereof cannot extend his possession so as to embrace the whole tract merely by obtaining color of title thereto subsequently to his entry and continuing to occupy only the land of which he originally took actual possession." We think the case of *Masters* v. *Haynes*, 169 Ark. 1177, 278 S. W. 12, cited by appellant, by analogy supports the general rule quoted.

It is not seriously contended that the entry upon the lands after the procurement of the collector's deed and the cutting of some of the timber therefrom are sufficient to constitute adverse possession, and, indeed, it is not. It has been frequently held by this court that where lands in controversy have been invaded from time to time for the purpose of cutting firewood, making rails, posts and boards, even though conducted through a considerable period of time, these acts are not sufficient to constitute adverse possession under § 6947, Crawford & Moses' Digest. The case of *Earle Improvement Co.* v. *Chatfield*, 81 Ark. 296, 99 S. W. 84, is a typical case which has been followed in a number of later cases. The reason there stated is that the occupancy of woodland must be of such a continuous and unequivocal character as to reasonably indicate to the owner visiting the premises that such use and occupation indicates an appropriation of ownership in another.

The strip of land occupied by the appellees had been in their continuous possession for more than seven years prior to the date of the collector's deed, but not under a claim of ownership. This is the effect of the testimony of W. M. Thomas. Therefore, the appellees have acquired no title by adverse possession to said strip of land.

It follows from the views expressed, that the trial court erred in rendering its decree in favor of the ap-

pellees, and the same is hereby reversed, and the cause remanded with directions to grant the relief prayed by the appellant.

LOWDEN ET AL., TRUSTEES C. R. I. & P. RY. CO. *v.* QUIMBY.

4-4191

Opinion delivered February 24, 1936.

Thos. S. Buzbee, A. S. Buzbee and *H. T. Harrison,* for appellants.

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

BUTLER, J. In an action for damages for personal injuries, appellee recovered a judgment from which is this appeal.

The injuries were occasioned by the crashing of an automobile in which appellee was riding into a freight car, while it was blocking a crossing in the town of Banks, Arkansas. The collision occurred between two and three o'clock, A. M. From the testimony adduced by the appellee, it is shown that he, accompanied one Mondell Harvey from Warren, where they lived, to El Dorado *via* Hampton, and it was on the return journey from El Dorado that the accident occurred. Appellants operated a mixed train from Crossett to Tinsman. On the night of the accident the train stopped a short distance before reaching the town of Banks, on its journey from Crossett to Tinsman, and picked up an empty car for the purpose of moving it to Banks and placing it upon a sidetrack. The depot was located at a point where the highway crossed the railroad, and the sidetrack was a short distance north of that point. When the train reached

Banks, it was stopped with the locomotive, and some of the cars north of the crossing, and other cars extending south. The conductor went to the depot for the purpose of depositing the mail and registering the arrival of his train at that point. While he was engaged in this duty, the engine was detached from the train, and was being used to place the empty car on the sidetrack. Just as this operation had been completed, the automobile in which appellee was riding collided with the boxcar standing on the crossing, resulting in severe injuries to the appellee.

It was alleged that the accident was the result of the concurring negligence of the appellants and Mondell Harvey, the negligence of the former consisting in obstructing the highway, and of the latter in neglecting to stop, look and listen for trains, and in carelessly driving his automobile against the boxcar. The highway on the side from which appellee was approaching the railroad crossing was straight for a distance of about nine hundred feet west of the railroad, and crossed it at right angles. From the distance mentioned the highway descended at a grade of approximately three per cent. for the first seven hundred feet. For the next one hundred feet the grade was approximately two per cent., and from that point to the railroad it was less than two per cent. At three hundred feet from the track the highway was 7.2 feet higher than the track; at two hundred feet it was 4.4 feet higher and at one hundred feet it was 1.7 feet higher.

The evidence, relating to the operation of the automobile and the circumstances under which it approached the track, is not in dispute and is gathered from the testimony of the appellee. The automobile was being driven by Mondell Harvey, and was owned by his father. From the crest of the declivity and until the collision, it was being driven at thirty miles per hour. Harvey and appellee were both familiar with the highway at this place, and knew where the railroad crossing was, and that they were approaching it. The driver of the automobile did not stop, look or listen as he approached the crossing, and in this connection the appellee stated: "I didn't

have any cause to look. I was familiar with the highway and knew there was a railroad crossing there."

It is conceded by appellee that Mondell Harvey was negligent in the operation of the car, and that this was a contributing cause to the accident, but he argues that this negligence cannot be imputed to him. This argument is based upon the proposition that appellee did not own the car, and had no control over the driver, and that the "lay of the land" was such as to prevent the lights of the automobile from shining ahead, so as to disclose the presence of the boxcar on the crossing. There is evidence that the color of the average boxcar is red, and appellee stated that the first he saw of the car were the rods under it; that the lights from the automobile were shining under the car until he got right to it.

To sustain the contention that Harvey's negligence is not imputable to appellee, the cases of *Graves* v. *Jewel Tea Co.,* 180 Ark. 980, 23 S. W. (2d) 982, and *St. Louis & S. F. Railway Co.* v. *Steele,* 185 Ark. 196, 46 S. W. (2d) 628, are cited. In the Graves case, which arose out of the collision of two cars, the testimony as to how each car was being driven at the time and the circumstances immediately preceding was in dispute. Because of this, the question of whether the invited guest was guilty of any negligence which contributed to her injuries was submitted to the jury. In discussing this instruction we said: "While it is true that the negligence of Murphy cannot be imputed to appellant riding with him as his guest, it was the duty of appellant to exercise ordinary care for her own safety, and a failure to exercise such care, which contributed to her injury, would constitute contributory negligence on her part, barring a recovery." In the Steele case, *supra,* the guest was riding in an old Ford car, which, having reached the crossing of the railroad tracks, almost stopped running, and the guest, fearing that the car would be struck by a fast train which was approaching, jumped from the car, fell on the track and was injured by the train. It appeared that the driver of the car and the employees of the railroad were both negligent. The guest sued the railway

for damages, and to this action the railway set up as an affirmative defense the plaintiff's contributory negligence. This court approved the instruction based upon that phase of the case, and in that connection said: "Appellee was required to exercise ordinary care for his own safety under the circumstances; and, if it appeared to him, as it evidently did, that the car was going to be struck by the train, he had the right, of course, to make the effort to get out of the car and avoid the danger, and was not necessarily negligent in attempting to do so, and certainly not guilty of contributory negligence as a matter of law that would bar his recovery, or of negligence at all, if the jury found, as they might have done, that a person of ordinary care and prudence might have made such an attempt in the emergency."

The facts in the cases cited are essentially dissimilar to those in the case at bar, so that the question of appellee's negligence or exercise of ordinary care must depend upon the facts of this case. These, stated most favorably for him, and derived largely from his own testimony, are to the effect that he was entirely familiar with the situation just ahead on the highway on which they were driving; that he observed the negligent conduct of the driver of the automobile, and, although riding on the front seat with him, did not warn him or remonstrate regarding his negligence, and did not, himself, look for possible danger ahead. He judged he had no cause to look and sought to justify his failure to observe the car on the crossing by the fact that the lights of the automobile, because of the declivity in the highway, did not light the way ahead. This fact was an added reason why he should have looked, especially when the driver was approaching the crossing at thirty miles an hour with no precaution for their safety.

The testimony of one of the witnesses for the appellee was to the effect that while he was sitting in his house seventy-five yards away from the crossing he could see the bulk of the boxcar and heard the noise made by the moving locomotive, which was equipped with a headlight, and there were lights at the rear of the train just

south of the depot. Certainly then, appellee and his companion should have seen the obstruction, or have been apprized of the presence of the train, had either of them been using any care for their own safety.

If it be conceded that actionable negligence on the part of appellants has been shown, this does not relieve drivers of automobiles upon the highway of exercising some degree of care for their own safety; nor does it excuse a guest, having knowledge of the driver's negligence, of doing something in an attempt, by persuasion or otherwise, to have the driver correct his fault. We think it clear, judged by his own testimony, that appellee was guilty of negligence, and that his injuries were not occasioned by the operation of the train, but by the negligent operation of the automobile while the boxcar was standing on the crossing. The cases cited by appellants sustain the conclusions we have reached. Among these is the case of *St. Louis, etc. Ry. Co.* v. *Guthrie,* 216 Ala. 613, 114 So. 215, 56 A. L. R. 1110; *Scott* v. *Delaware, etc. Co.,* 226 N. Y. S. 289, and *Missouri Pac. R. Co.* v. *Price,* 182 Ark. 801, 33 S. W. (2d) 366.

Having reached the conclusion that appellee's negligence was the proximate cause of his injuries, it becomes unnecessary to notice the other questions raised by counsel, and, as the case appears to have been fully developed, the judgment of the trial court is reversed, and the cause dismissed.

HEILIG *v.* HASKINS.

4-4189

Opinion delivered February 24, 1936.

John A. Fogleman and *R. V. Wheeler*, for appellant.

E. C. Gathings, for appellees.

McHaney, J. This suit was instituted September 23, 1931, by J. A. Heilig and W. A. Brown, trustee, to foreclose a deed of trust given by appellees to secure their promissory note to said Heilig. Answer was filed admitting the execution of the note and deed of trust, pleading a partial payment and denying any indebtedness for taxes, recording fees and insurance. Certain other defenses were set up.

During the pendency of the action and on March 11, 1934, said J. A. Heilig died intestate. On March 18, 1935, this action was revived by order of the court in the name of J. Augustus Heilig, as administrator of the estate of J. A. Heilig, deceased. On August 14, 1935, appellees moved to dismiss, because no order of revivor had been made with or without consent, and within the period provided by law. The court sustained the motion, dismissed the cause, and this appeal followed.

In so doing the court erred. Section 1066, Crawford & Moses' Digest, reads as follows: "An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made, except that, where the defendant shall also have died or his powers have ceased in the meantime, the order of revivor on both sides may be made in the period limited in the last section."

We have frequently held that the period of limitation for revivor runs from the first day the court in which the action is pending is in session after the death of the party who is plaintiff, and not from the date of death. *Anglin* v. *Cravens,* 76 Ark. 122, 88 S. W. 833; *Keffer* v. *Stuart,* 127 Ark. 498, 193 S. W. 83; *Ætna*

Life Ins. Co. v. *Taylor,* 128 Ark. 155, 193 S. W. 540; *Prager* v. *Wootton,* 182 Ark. 37, 30 S. W. (2d) 845. And this may be done, if within one year, without consulting the defendant, and without any notice. *Keffer* v. *Stuart, supra.*

The record in this case discloses that the October, 1933, term of the Crittenden Chancery Court convened on October 16, 1933. On that date court was adjourned to January 11, 1934, and on said latter date court was adjourned to court in course, or *sine die.* The regular March, 1934, term was convened on March 19, 1934, the time fixed by law, and this was the first day the court was in session after the death of J. A. Heilig, and the first day an order of revivor could have been made. As stated above the cause was revived by proper order on March 18, 1935, and was therefore within the period of limitation as fixed by law.

But appellees contend that there is no affirmative showing that court was not in session between March 11, 1934, the date of Mr. Heilig's death, and March 19, 1934. On the contrary, the record affirmatively shows that the court was adjourned on January 11, 1934, to court in course which was March 19, 1934. Therefore no session of court could have been held between said dates. Appellees also contend they were entitled to notice, and that none was given. This is answered against appellees in *Keffer* v. *Stuart, supra.*

The judgment is reversed, and the cause remanded with directions to overrule the motion to dismiss, and for further proceedings according to law.

WISEMAN *v.* ARKANSAS WHOLESALE GROCERS' ASSOCIATION.

4-4282

Opinion delivered February 24, 1936.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh,* Assistant, and *Millard Alford,* for appellant.

E. B. Dillon, Rowell, Rowell & Dickey and *S. S. Jefferies,* for appellee.

MEHAFFY, J. This suit was begun in the Pulaski Chancery Court by the Arkansas Wholesale Grocers' Association to restrain Earl R. Wiseman, Commissioner of Revenues of the State of Arkansas, from collecting the sales tax on sales made by wholesale grocers to retail merchants of wrapping paper, paper bags, and twine. The following is the complaint filed by appellees.

"Plaintiff states that plaintiff is an unincorporated association of wholesalers and jobbers, resident of the State of Arkansas, with a membership of approximately fifty members located and domiciled in various cities and towns throughout the State and engaged in the sale by wholesale to retail merchants, among other things, of wrapping paper, paper bags and twine, and brings this suit for and on behalf of the members of plaintiff association and as representative of a class for all jobbers and wholesalers in Arkansas engaged in selling, at wholesale to retailers wrapping paper, paper bags and twine.

"Plaintiff further states that said defendant is the duly qualified and acting Commissioner of Revenues of the State of Arkansas, and, as such Commissioner, did, in October, 1935, issue and promulgate a ruling that all wholesale houses in Arkansas selling 'such materials as Coca-Cola glasses, fountain straws, paper napkins, vinegar pumps, wrapping paper, paper bags and twine, etc., to the merchants for use, will be required to collect the sales tax and report same.'

"Plaintiff further states that said ruling by said Commissioner was made, and the collection of a Sales Tax is now being enforced, by said Commissioner upon wrapping paper, paper bags and twine by the purported authority of act No. 233 of the Acts of the General Assembly of the State of Arkansas for the year of 1935.

"Plaintiff further states that the wrapping paper, paper bags and twine upon which said Commissioner has ruled that he is entitled to collect a sales tax, and upon which he is now collecting a sales tax, are sold and disposed of in the following manner: The wrapping paper, paper bags and twine are sold at wholesale to various and sundry retail merchants in the State of Arkansas, and they are used by said retail merchants for the purpose of wrapping up, tying and as containers for various and sundry articles of merchandise purchased by the customers of said retail merchants.

"Plaintiff states that no sales tax is due the State of Arkansas upon wrapping paper, paper bags or twine as above described, for the two following reasons:

"1. The said sales tax, namely, aforesaid Act No. 233, is a tax upon consumption, or the ultimate consumer, and that wrapping paper, paper bags and twine sold as above described are sold for resale by the retailer, and are resold by the retailer to his customer although no specific charge is made for wrapping paper, paper bags or twine.

"2. That wrapping paper, paper bags and twine sold in the above manner are, under the definition set out in said act No. 233, materials used for processing and, under the provisions of said act, are not subject to a sales tax.

"Plaintiff further states that said defendant is now wrongfully, illegally and without authority of law collecting a sales tax upon wrapping paper, paper bags and twine sold by plaintiff in a manner aforesaid, and will continue to collect said sales tax unless enjoined by this court.

"Plaintiff further states that he has no complete or adequate remedy at law for the wrongful collection by said defendant of said sales tax upon said wrapping paper, paper bags and twine.

"Wherefore, plaintiff prays that an injunction be granted by this court, restraining and prohibiting said defendant from collecting any Sales Tax upon the sale by a wholesaler to a retailer on wrapping paper, paper bags and twine to be used in the regular course of his business in the manner heretofore set out, and for all other proper relief.

"Signed,
"E. B. Dillon,
"S. S. Jeffries,
"Solicitors for Plaintiff."

The following demurrer was filed by the appellant:

"The defendant, Earl R. Wiseman, Commissioner of Revenues, demurs to plaintiff's complaint filed herein because said complaint on its face does not state facts sufficient to constitute a cause of action.

"Signed, Millard Alford, Attorney for Defendant.

"Thomas Fitzhugh, Assistant Attorney General."

The court overruled the demurrer and appellant declined to plead further, and the court entered a decree finding that act 233 of the Acts of the General Assembly of the State of Arkansas for the year 1935 does not impose a sales tax upon wrapping paper, paper bags or twine sold by a wholesaler or jobber to a retail merchant, to be used by said retail merchant in the regular course of his business for the purpose of wrapping up, tying, and as a container for various and sundry articles of merchandise purchased by the customers of said retail merchants. The court restrained Earl R. Wiseman, Commissioner of Revenues, from collecting or attempting to collect any sales tax upon the above-named articles.

Act 233 of the Acts of 1935 is styled, "Arkansas Emergency Retail Sales Tax Law." Paragraph (b) 1 of § 3 of said act reads as follows:

"(b) 1. The term 'sale at retail' shall mean any transaction, transfer, exchange, or barter by which is transferred for a consideration the ownership or any personal property, thing, commodity and/or substance, and/or the furnishing, or selling for a consideration any of the substances and things hereinafter designated and defined, which such transfer, exchange, or barter is made in the ordinary course of the transferor's business and is made to the transferee for the consumption or use or for any other purpose than for resale. The term 'sale at retail' includes conditional sales, installment lease sales, and any other transactions when the title is retained as security for the purchase price, but is intended to be transferred later. 'Sale at retail' shall not include sales of materials for further processing."

Paragraph (i) of § 3 of the act reads as follows:

"(i) The test of a sale at retail is whether the sale is to a consumer for use and not for resale. Sales of goods which, as ingredients or constituents, go into and form a part of the tangible personal property for resale by the buyer are not within the act; also sale of tangible personal property where other property is accepted as part of purchase price, such personal property so accepted to be resold, is not subject to tax."

The only question for our determination is whether, under act 233, wrapping paper, paper bags and twine are sold to the retail merchant for resale.

The appellee stated in its complaint: "The wrapping paper, paper bags and twine upon which said Commissioner has ruled that he is entitled to collect a sales tax and upon which he is now collecting the sales tax are sold and disposed of in the following manner: The wrapping paper, paper bags and twine are sold at wholesale to the various and sundry retail merchants in the State of Arkansas, and they are used by said retail merchants for the purpose of wrapping up, tying, and as containers for various and sundry articles of merchan-

dise purchased by the customers of said retail merchants."

The appellee also states in its complaint that the articles mentioned "are resold by the retailer to his customer, although no specific charge is made for wrapping paper, paper bags and twine."

As a matter of fact, these articles are used by the retail merchant in the conduct of his business, and are absorbed by the dealer in the reasonable conduct of his business. That is, they are taken care of out of his profits, and not added to the selling price. If a merchant should purchase a truck from the wholesale merchant to be used in the delivery of goods and merchandise, the fact that he used the truck would require that the price of it be absorbed out of his profits in the reasonable conduct of his business, but no one would say that he bought it for resale. It is a matter of common knowledge that the price of the trucks, scales, showcases, wrapping paper, paper bags and twine are all taken care of in the same way.

The statute imposes a tax upon that which is consumed and used, and exempts only that which is sold for resale. The Illinois court said: "This act is not limited to persons whose only business is keeping a store or otherwise disposing of personal property in small quantities for use or consumption at a given location, after having bought their merchandise, goods, wares or chattels from those who sell in large quantities. If any one sells tangible personal property for use or consumption, and not for resale, and does so not occasionally, but as a business or occupation, regardless of how he acquires title to the thing sold or who has produced it, his occupation is covered by this act." *Franklin County Coal Co.* v. *Ames*, 359 Ill. 178, 194 N. E. 268.

The court in the same case also said: "Turning to the contention of the appellants that theirs is a wholesale and not a retail business, this act defines sales at retail as 'any transfer of the ownership of or title to tangible personal property to the purchaser for use or consumption, and not for resale in any form as tangible personal property'."

In the above case there was a sale of coal, and the contention was made, not only that the company produced the coal, but that they sold it at wholesale. The quantities of goods sold, or prices at which they are sold are immaterial in determining whether or not a sale is at retail, within this act, because the act itself provides that the term "sale at retail" shall mean any transaction, transfer, exchange or barter by which is transferred for a consideration the ownership of any personal property, thing, commodity or substances, or the furnishing or selling for a consideration any of the substances and things designated and defined in the act, and it makes no difference whether this is sold in large or small quantities, nor by whom it is sold, if it is sold to the transferee for consumption or use, or any other purpose than resale.

Retail sales have been defined as sales to consumers, rather than to dealers, or merchants for resale. It is not contended that the retail merchant is engaged in selling paper bags, paper or twine. In fact the appellee states that there is no fixed price for these articles. There is no fixed price because there is no sale by the retail merchant, but the articles are used and consumed by the retail merchant in the reasonable conduct of his business.

This court has defined "sale" as follows: "A sale is a contract for the transfer of property from one person to another for a valuable consideration."

In the instant case, however, it is conceded that there is no fixed price for the above-mentioned articles. These articles are not only used by the merchant in the conduct of his business, but they often carry advertisements.

The Alabama court said, in speaking of sales tax: "It may be said to be common knowledge that tax burdens of all kinds are figured by every business in connection with, or as a part of its overhead expense, and prices fixed to yield a net profit. The consumer pays the tax." *Woco Pep Co. of Montgomery* v. *City of Montgomery,* 219 Ala. 293, 121 So. Rep. 64.

The court in that case also said: "The usual idea of 'absorbed by the dealer' is taken care of out of his profits and not added to the selling price."

In construing statutes it is the duty of the courts to give them a reasonable, sensible interpretation, and where the language is clear and unambiguous, it is only for the courts to obey and enforce the statutes. *Boyer-Campbell* v. *Fry,* 271 Mich. 282, 260 N. W. 265, 98 A. L. R. 827.

"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." *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. (2d) 1007; 61 C. J. 391; *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29; 26 R. C. L. 313 *et seq.;* 2 Cooley on Taxation, (4th ed.) 1403, § 672.

Our conclusion is that the sales of the articles mentioned were made to the retail merchant for consumption and use, and not for the purpose of resale.

The decree of the chancery court is reversed, and the cause is remanded with directions to sustain the demurrer and dismiss the complaint.

KINNEY *v.* THOMAS.

4-4188

Opinion delivered February 24, 1936.

J. B. Milham, for appellant.

Arthur C. Thomas, for appellee.

MEHAFFY, J. The appellant, W. J. Kinney, for a number of years owned two 40-acre tracts of land. On March 12, 1931, W. J. Kinney borrowed $1,500 from the appellee, R. Thomas, and executed his notes, and to secure the payment of said notes he executed a mortgage on the 80 acres of land. He gave notes as follows: $150 due December 10, 1931, $200 due December 10, 1932, $200 due December 10, 1933, and $1,000 due December 10, 1934, the notes bearing interest at 10 per cent. per annum. Lula Kinney, his wife, joined in the mortgage, waiving her rights of dower and homestead and redemption. W. J. Kinney failed to pay either of the first two notes, and in March, 1933, a storm damaged the residence by blowing off part of the front porch, and damaged the roof and wall paper in some of the rooms. Wind and tornado and fire insurance was carried on the building payable to mortgagee as his interest appeared.

On May 18, 1933, appellee Thomas collected from the insurance company $185, the amount of damages to the buildings, and on the same day filed his foreclosure suit without giving credit for the insurance. Thomas carried the storm insurance, paid for it, and when he collected the $185 he spent all of it, except $27, in building a new porch on the house, repairing the rooms, also painting the house, and gave the appellants credit for $27.

A decree of foreclosure was entered on November 20, 1933. The judgment was for $2,031.50. The appellants were given sixty days in which to pay the judgment. Appellant, W. J. Kinney, was endeavoring to secure a loan in order to pay Thomas. He had been trying for some time to get the money, and had been unable to do so.

The commissioner appointed by the court advertised the land for sale on March 2, 1934, but on that day and before the sale was made, appellants, still thinking that they might be able to procure a loan, the parties agreed that the appellants should make a deed to the lands to the appellee, and that appellee would allow them sixty days in which to close up their loan and pay off the judgment debt. Finally when they were unable to get a loan, the deed having been made at the time the land was ad-

vertised for sale, Thomas had the deed recorded. When the land was offered for sale by the commissioner, the appellee, R. Thomas, bid $2,000, and Ed Kinney bid $2,500. Ed Kinney was advised by the commissioner at the time that he would have to make bond. This sale was on Saturday, and the commissioner gave Kinney until Monday to get sureties on the bond, the commissioner having prepared the bond for Ed Kinney. On Monday Kinney sent the bond to the commissioner signed by himself, Dan Kent and J. L. Smith. The commissioner investigated the condition of Ed Kinney and the sureties. He found that there was a judgment against Dan Kent, and that he had nothing above his exemptions; that Ed Kinney had no property, real or personal, and Smith had nothing above exemptions. It is agreed that the above statements are true. The commissioner then went to the office of Mr. Milham, attorney for appellants, and advised him that he could not accept the bond. At the time that Kinney bid the $2,500, the commissioner in the presence of Thomas, advised Kinney that, if he did not make the bond, the sale would be declared to the appellee, Thomas.

The undisputed facts show that all parties agreed to this. In other words, the parties agreed, when Kinney made his bid, that, unless he gave the bond with sufficient sureties, the commissioner would accept Thomas' bid.

This suit is brought to have the deed executed by the appellants to Thomas declared a mortgage and canceled. They asked that the sale then be made under the original decree, and this was done, the court holding that the deed was a mortgage, and ordering a sale under the original decree as requested by appellants.

W. J. Kinney testified that appellee Thomas had tried to help him all he could. The appellants filed a motion in the chancery court asking the court to set aside the sale, and it was the contention then of appellants, and is their contention now, that the sale was not made according to law, and that it was irregular and unfair. The evidence is undisputed that it was made by agreement of all the parties. The debt due Thomas was approximately $2,400, and he bid $2,000. Ed Kinney bid

$2,500. The commissioner evidently did not think the Kinney bid was made in good faith, but was trying to help the appellants all he could, and gave them time in which to make the bond, but it was agreed by all parties that, if he did not make the bond, the commissioner should accept the bid of Thomas. Moreover, while Thomas bid only $2,000, he waived a deficiency judgment, and, in effect, his bid was the same as Kinney's, or within a few dollars of it.

It is apparent from the record in this case not only that Thomas has acted with absolute fairness, but, as testified by Kinney himself, he has tried to help Kinney all he could. It is contended however, that the price is inadequate, and for that reason the sale should be set aside. Several witnesses testified that in their opinion the 80 acres was worth from $4,000 to $5,000. There is, however, no evidence in the record anywhere that they could sell it for any more than Thomas' bid, and there is no evidence that any other person would give that much for it. The evidence shows that, in Kinney's efforts to get a loan, the largest sum he could borrow on the 80 acres was $1,000.

The evidence of appellant's witnesses as to the value of the property is contradicted by a number of witnesses who testify that it was worth approximately $2,500. There is no evidence in the record of any fraud or bad faith on the part of Thomas, and, in fact, the Kinneys do not claim that they have not been treated fairly. It is true, appellants, in their brief, say that the sale was unfair, but the undisputed evidence shows not only that it was agreed to by Thomas and Kinney, but that all parties agreed that, if Kinney did not make his bond, the bid of Thomas would be accepted.

We have many times held that mere inadequacy of price in the absence of fraud, is not sufficient to set aside a sale. We think, however, in this case the price was not inadequate. When numbers of witnesses testify that its value is not in excess of $2,500, and when appellants were unable to secure any loan in excess of $1,000, we think the evidence shows that there was no inadequacy of price.

The chancery court, after a consideration of all the evidence, confirmed the sale, and the decree is correct, and is therefore affirmed.

MOHR *v.* MAYBERRY.

4-4186

Opinion delivered February 24, 1936.

Harold Watkins, for appellant.

Jerry Witt, C. H. Herndon and *Edna Watson,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Montgomery County establishing a private road for appellee across a nine-acre farm owned by appellant as a way in and out from his own farm of thirty acres to State Highway No. 27, connecting Mt. Ida with Washita, and awarding appellant $10 as damages to his nine-acre farm for the road taken. The proceeding was originated in the county court of said county under §§ 5250-5251 of Crawford & Moses' Digest, which provides, in part: "When the lands, dwelling house or plantation of any person is so situated as to render it necessary for the owner thereof to have a private road from such lands, dwelling house or plantation to any public road or navigable watercourse over the

lands of any other person, and such person shall refuse to allow such owner such private road, it shall be the duty of the county court, on petition of such owner, * * * to appoint the viewers to lay off said road," and, upon the report of the viewers, "the court shall be of the opinion that it is necessary for the petitioner to have said road from said lands, dwelling house or plantation from said public road, * * * an order shall be made establishing the same as a private road, and the person applying for such road may proceed to open the same."

The road established ran through the middle of the nine-acre tract, cutting appellant off from his pasture and water so that in using his pasture he would have to build fences and gates to go from one part of his farm to the other. This would result in much expense and inconvenience to appellant or his tenant. At the time appellee began the condemnation he had a way by open road after passing off his own land on the west side thereof in and out to said highway, which was a longer way than the proposed way in and out over appellant's nine-acre tract. The purport and effect of the testimony introduced by appellee was that it was inconvenient to travel the additional distance in order to get out to said main highway. Mere inconvenience is not a sufficient showing to entitle one to condemn a private right-of-way over another's land. The statute giving a right to condemn a private road is based upon a reasonable necessity, and not merely upon the inconvenience of the petitioner. This court, in the case of *Pippin* v. *May,* 78 Ark. 18, 93 S. W. 64, said:

"In determining whether such a road is necessary, the court must, of course, take into consideration not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not."

In the instant case, to take the private road would split appellant's nine-acre farm in half and cause him to maintain fences and gates and to drive or lead his stock

across the private way to the pasture and water. The effect would be to almost destroy the convenient use of appellant's farm. The evidence is not sufficient to support the finding and judgment of the court that the necessity exists to grant appellee a private way over and across appellant's farm. Neither is the evidence sufficient to show that appellant and his neighbors acquired any rights in the way selected by prescription.

The judgment is reversed, and the cause is remanded with directions to the circuit court to vacate the order of the county judge allowing appellee a private way over and across appellant's nine-acre farm.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* COLE.

4-4198

Opinion delivered March 2, 1936.

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

H. L. Methvin, Edward S. Maddox and *Maddox & Greer,* for appellees.

JOHNSON, C. J. On January 2, 1934, the application of Anna Carmack for a juvenile certificate of insurance for the sum of $500 upon the life of her daughter, Nellie Glover, was received by Fred Blakemore, the resident agent of appellant, Sovereign Camp, Woodmen of the World, in the vicinity of Trumann, Arkansas. The monthly premium of thirty cents was paid in cash on the date of application. The application was immediately transmitted by Blakemore to appellant's home office, and on January 11, 1934, a juvenile certificate of insurance was duly issued as requested in the application and returned to Blakemore for delivery. On January 12, 1934, Blakemore in person delivered the certificate of insurance to Anna Carmack. On January 14, 1934, Nellie Glover died. On January 15, 1934, Anna Carmack assigned the certificate of insurance to Dollie Marie Cole, who owned and operated an undertaking establishment in the vicinity, to induce the interment of the insured's body. The assignee of the certificate of insurance duly effected proof of death and claimed the proceeds of the certificate of insurance, but liability was denied by appellant, and this suit was filed to enforce payment of the certificate. The suit was filed by the assignee of the certificate of insurance in the Poinsett Circuit Court, and appellant interposed the defense that the insured was not in good health at the time the certificate of insurance was delivered as required by the certificate of insurance and the constitution and bylaws of appellant. This was the sole contention urged by appellant in the lower court to defeat liability, and it is the sole contention here. Upon trial to a jury, under instructions not here complained of, it found this issue against appellant's contention, and this appeal seeks a review of this finding of fact.

The law is well settled in this State that, when it is established that a policy of insurance has been duly executed, the premium paid, the policy delivered and proof of death made, a *prima facie* case is made in behalf of the beneficiary or assignee, and the burden then shifts to the insurance company to show that the insured was not in

good health at the time of delivery. *Old American Insurance Co.* v. *Hartsell,* 176 Ark. 666, 4 S. W. (2d) 25; *National Life and Accident Insurance Co.* v. *Robinson,* 181 Ark. 1, 24 S. W. (2d) 878; *Knights and Ladies of Security* v. *Lewellen,* 159 Ark. 400, 252 S. W. 585.

The testimony upon the affirmative defense that the certificate was not delivered during the good health of the insured, when viewed in the light most favorable to appellee, as we are required to do, is to the following effect: On January 4, 1934, Nellie Glover was stricken with measles, but on January 12, 1934, when Mr. Blakemore delivered the certificate of insurance she was up, and about the premises; she was called into the presence of Mr. Blakemore by her mother, and he personally delivered to the child the little juvenile pin which accompanied the certificate of insurance. Mr. Blakemore testified that the child appeared to be "all right," otherwise the certificate of insurance would not have been delivered at that time.

Appellant introduced in evidence the death certificate of the insured, required by law to be filed, which reflects that the death of the insured was due to malaria and other contributing causes, "Measles, January 4, 1934, to January 9, 1934." From the testimony heretofore referred to and quoted, the jury was warranted in finding that the certificate of insurance was delivered by appellant's agent with full knowledge that the insured had recovered or was recovering from the attack of measles. Appellant's agent saw the child and was also advised by its mother of its present state of health, and no material fact or circumstance was withheld from appellant's agent prior to or at the time of the delivery of the certificate. Indeed, no concealment or fraud is intimated in reference to the state of health of the deceased at the time of the delivery of the certificate of insurance, and the record is wholly void of any such intimation. Under these facts and circumstances the law is that appellant is estopped to deny that the certificate was delivered during the good health of the insured. We have repeatedly held that knowledge of an agent acquired in the line of his duty is imputed to his principal, thereby working

an estoppel to gainsay such information. *Sovereign Camp W. O. W.* v. *Key,* 148 Ark. 562, 230 S. W. 576; *Sovereign Camp W. O. W.* v. *Newson,* 142 Ark. 132, 219 S. W. 759; *Peebles* v. *Columbian Woodmen,* 111 Ark. 435, 164 S. W. 296.

Section 6195 of Crawford & Moses' Digest does not conflict with the views here expressed, and we expressly so decided in the Key and Newson cases, cited, *supra.*

The court's instructions to the jury in charge, conforming to the views heretofore expressed, need not be discussed separately or in detail. The question of waiver of provisions of certificate was not an issue in the case, and the court was correct in refusing to instruct upon this issue.

We need not again stop to examine the legal elements of estoppel. It suffices to say that we have applied the doctrine in the cases heretofore referred to and cited, and they cannot be distinguished in principle from the legal elements of this case.

No error appearing, the judgment is affirmed.

DABBS *v.* GUARANTEE FUND LIFE COMPANY.

4-4200

Opinion delivered March 2, 1936.

P. L. Smith, for appellant.

Cranny & Moore and *O. A. Featherston,* for appellee.

SMITH, J. The Guarantee Fund Life Company, hereinafter referred to as the company, issued a $2,000 insurance policy in 1917 on the life of Jonathan Dabbs in which his wife was named as the beneficiary. This policy was kept in force until 1929 when, on the application of the insured, it was exchanged for another, in which his wife was also named as beneficiary. This policy was numbered 718,722. The annual premium of $91.80 was last paid on July 26, 1930. Including this payment the policy had a cash loan value of $82.19. Correspondence began September 8, 1931, between the insured and the company regarding the lapse of the policy for nonpayment of premium. At that time the year covered by the last premium payment and the additional 31 days of grace had expired. On October 26, 1931, the insured wrote the company the following letter: "Send me cash surrender of $82.19 and I will hold no claim on policy Number 718,722."

The right to withdraw this money was one of the options which the insured had. The other options were to take either paid-up or extended insurance. There is some testimony to the effect that the signature to this letter was not that of the insured; but it is an undisputed fact that he was paid this exact sum of money by the company.

The insured died in September, 1934, and in February of the following year this suit was brought by the widow and beneficiary of the insured to recover the face of the policy, less the loan made thereon. That complaint, filed in the chancery court, alleged that the policy had been cancelled without the consent of the beneficiary and that the insured had been induced to cancel his policy by the false and fraudulent representation that the policy had lapsed, and could be reinstated only upon a re-examination of the insured showing him to be then in an insurable condition. It was alleged that the insured made application for reinstatement and was fraudulently rejected on the ground that he was not then in good health, when his health was good.

The decree, from which is this appeal, contains findings of fact against all these contentions, which do not appear to be contrary to the preponderance of the evidence.

The beneficiary testified that she paid all the premiums, which had been paid, and was ready and able to pay others. She does not testify, however, that either she or her husband, the insured, had paid any premium subsequent to July 26, 1930. This payment extended the policy to July 26, 1931, and through the grace period of 31 days thereafter. Had the loan value of the policy been then applied to the payment of the premium it would not have sufficed to continue the policy in force until the date of the insured's death. By the express terms of the policy it is stipulated that a re-examination of the insured would be required, in the event of a lapse through nonpayment of premium. Such provisions are valid and must be enforced, when invoked. *Woodmen of the World* v. *Jackson*, 80 Ark. 419, 97 S. W. 673. The insured was advised in his lifetime, that his policy had lapsed, and he submitted to a medical re-examination to secure reinstatement. He was advised of his rejection on account of unfavorable tests of his urine. There is no substantial proof of any fraud in this examination. The insured was apparently satisfied. At least the letter copied above so indicates.

The findings of the court against the plaintiff's allegations do not appear to be contrary to the preponderance of the evidence, and the decree must, therefore, be affirmed. It is so ordered.

METROPOLITAN LIFE INSURANCE COMPANY *v.* WHITE.

4-4195

Opinion delivered March 2, 1936.

Moore, Gray, Burrow & Chowning, for appellant.

A. D. Camp and *Philip McNemer,* for appellee.

BUTLER, J. On November 1, 1926, Della White, the appellee, procured a policy from the appellant company in the sum of $801 on the life of Burnest Washington, her son. Premiums were payable weekly and were duly and regularly paid until June 5, 1933. At that time the appellee had no money with which to pay the premiums and the policy lapsed. Previous to this, she had procured a loan on the policy in the sum of $8.40. Burnest Washington died on January 28, 1934. Due proof of his death was made, liability was denied, and this suit followed resulting in a verdict and judgment in favor of appellee, from which is this appeal.

It was admitted that on the 5th of June, 1933, the policy had a cash surrender value of $28.17, which, with the loan deducted was sufficient to pay the premiums up to, and beyond, the death of Burnest Washington. The case was defended on the ground, among others, that appellee could not maintain the suit for the reason that she was not named as beneficiary in the policy sued on. There is no merit in this contention. The undisputed evidence is to the effect that at the time the policy was issued Burnest Washington was a minor. Appellee, herself, procured the policy, and, with the knowledge of the company, paid all of the premiums from the date of issuance up to June 5, 1933. Appellee procured the loan

of $8.40, and was at all times recognized as the beneficial owner of the policy which was taken out with the understanding that if she survived the insured she would be entitled to its benefits.

At the time the policy lapsed for the nonpayment of the premium due June 5, 1933, appellee had procured policies from the appellant company on her own life and on the lives of four of her children besides Burnest Washington. Appellant contends that the policy on the life of Burnest Washington was surrendered and its value applied to the payment of the policies above-mentioned which were then in arrears; that there remained $6.26 of the reserved value of the $801 policy which was applied to the procurement of a policy in the sum of $178 on the life of Burnest Washington; that all the policies, including the one for $178, were paid on for several weeks thereafter and then lapsed for the nonpayment of other premiums falling due; that the $178 policy was delivered at the home of the appellee to one of her daughters and that appellee accepted the policies and paid on them with the full understanding that the $801 policy was cancelled. This contention of the appellant is supported by the testimony of Mr. L. B. Jones, the agent of the company who attended to the transaction, as well as by the testimony of other employees of the appellant. To further support this contention, a form was introduced in evidence, prepared by the company and providing for the surrender of the $801 policy, which was signed by the insured, Burnest Washington. On this form was a place for the signature of "The Premium Payer" who, in this instance, was Della White, but her name was not signed thereto. Contradicting the contention of appellant is the testimony of appellee who stated that when she was unable to pay the premiums she sent for Mr. Jones, the agent of the company, and gave him the Burnest Washington policy and the premium book with the understanding that so much of the cash surrender value as was necessary would be applied to the payment of the premiums until such time as she would be able to pay them from her earnings; that this was in July, 1933. She waited for quite a while for the return of the policy and

finally, after some delay, contacted Mr. Jones and asked why her policy had not been returned. He informed her that it had been sent to the home office for the purpose of having the loan approved, and that it had not yet been returned. About this time, or shortly thereafter, appellee received a memorandum from the home office which dissatisfied her, and she went again to appellant's office in Little Rock "trying to get some kind of understanding about what Mr. Jones had done with the policy." She also went to the Insurance Commissioner, and afterward, to a prominent attorney of the city to get some help in "straightening the matter out." In March, 1934, Mr. Jones gave her a small check, amounting to $18.72, which she presumed was the full value of Burnest Washington's policy and which she indorsed March 31, 1934, and delivered to the collector of Pulaski County in payment of her taxes. Appellee further testified that the $178 policy said to have been issued in lieu of the $801 policy was never received by her and had never been in her possession. Appellee had only two daughters residing at her home, and these testified that said policy had never been delivered to them.

It was in evidence, and appellant contends that the check for $18.72, cashed by appellee on March 31, 1934, had been delivered to her and tendered as the paid-up value of the $178 policy, and her receipt thereof was the acknowledgment of full satisfaction of all demands against the company.

Della White, the appellee, is a negro woman and although able to read and write she claims that she did not understand the effect of the transaction with the company with respect to the $801 policy. We think the evidence substantiates her statement. The attorney she consulted, who is not connected with the present litigation, is beyond question an astute and able lawyer, yet he was unable to understand the explanation given by the agent of the company when he was attempting to straighten the matter out. With reference to this, he said: "I called up the Little Rock office and Mr. Jones came over to see me and went into a long detailed ex-

planation concerning the situation. I could hardly understand it." If this attorney could not comprehend the conduct of the appellant company with respect to the Burnest Washington policy, it could hardly be expected that Della White would, and it is not remarkable that she was dissatisfied with the conduct of appellant's agents. Even they admitted that she was dissatisfied.

Counsel for the appellant suggest certain discrepancies in the testimony of appellee and call to our attention a letter written by one of her daughters to the company, which she authorized, tending to refute her contention and to support that of the appellant. This, however, was a question for the jury, for it, and it alone, is the judge of the credibility of witnesses and the probative value of their testimony. Giving to the testimony of the appellee the probative effect to which the jury found it was entitled, we find substantial evidence to warrant the conclusion reached by the jury.

Over the objection and exception of the appellant, the court, in its instruction No. 1, told the jury as a matter of law that where an insurance company has funds in its hands available for the payment of premiums, in the absence of instructions to the contrary, it is its duty to apply the funds to the payment of premiums to prevent a lapse of the policy, and that in this case if the company had such sum available to pay the premiums on the policy sued on up to the date of the death of the insured, its verdict should be for the appellee; and in instruction No. 3, the court declared this to be the duty of the jury even though Burnest Washington signed an agreement with the company to surrender the policy for cancellation if this action on his part was not agreed to by the appellee. The argument is made, first, that the policy did not provide for such an application of the cash surrender value but that it could be applied to the purchase of a nonparticipating free policy which, in this case, would have been for $81 if there had been no indebtedness against the policy, and that, since Della White was not named as the beneficiary, her assent to the surrender for cancellation made by Burnest Washington was not necessary, and that the trial court erred in instruct-

ing otherwise. A sufficient answer to these contentions, as has been previously noted, is that from the very inception of the policy appellee was treated as the beneficial owner and the sum representing the cash surrender value was treated as available for the payment of premiums. The $8.40 loan which has been heretofore noted was procured for that purpose and was thus used.

The cases cited by the appellee make clear the duty of the appellant with regard to the application of the value of the policy to the payment of the premiums, and as is said in *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 505, 58 S. W. 355: "The doctrine does not arise out of the peculiar facts of any particular case. It does not depend upon contract, custom, or course of dealing for its existence and potency. It has its origin in that fundamental principle of justice which will compel one who has funds in his hands belonging to another, which may be used, to use such funds, if at all, for the benefit, and not to the injury, of the owner; for his consent to the one and dissent to the other, will be presumed." See also *Reliance Life Ins. Co.* v. *Hardy,* 144 Ark. 190, 222 S. W. 12; *Missouri State Life Ins. Co.* v. *Brown,* 188 Ark. 1136, 69 S. W. (2d) 1075, and cases therein cited.

In support of the proposition that appellee, although not specifically named as the beneficiary in the policy, was not bound by the unauthorized action of the insured and was entitled to maintain this suit, attention is called to the recognition by the company in its contract of insurance of its right to make payment to the person equitably entitled to the same by reason of having incurred expenses on behalf of the insured; and also to the case of *Reilly* v. *Henry,* 187 Ark. 420, 60 S. W. (2d) 1023, which recognizes the equitable interest of one who pays the premiums and who has possession of the policy. The trial court submitted to the jury, under proper instruction, the question of whether the policy was surrendered for the purpose of cancellation, and its conclusion that it was not so surrrendered being supported by substantial testimony, and no error appearing in the instructions given by the court, it follows that the judgment is correct, and it is, therefore, affirmed.

WILKERSON *v.* HOOVER.

4-4203

Opinion delivered March 2, 1936.

G. E. Morris and *Ralph E. Ray,* for appellants.

Trimble, Trimble & McCrary, for appellee.

MEHAFFY, J. M. B. Wilkerson and his wife were married on February 12, 1914, and lived together until March 7, 1930. Their home was at England. They had no other real estate. Mrs. Wilkerson brought suit for divorce in the Lonoke Chancery Court, and on March 18, 1930, a decree was entered by the chancery court granting her a divorce and custody of their two children. The decree also recites: "It is further considered, ordered, adjudged and decreed that the plaintiff be and she is hereby given exclusive possession and control of the homestead of plaintiff and defendant located in the town of England, Arkansas, for the use and occupancy of plaintiff and said minor children." The decree contained the following also: "The court doth retain control of this cause of action for the purpose of conserving the rights of plaintiff and defendant with reference to said homestead and with reference to the custody and control of said minor children."

Mrs. Wilkerson continued to live in the homestead until September, 1931, when she married a Mr. Lescher of Pennsylvania, and moved with her children to Pennsylvania, where she resided with Lescher as his wife until December. About the middle of December, 1931, she returned to England, Arkansas, and procured a divorce from Mr. Lescher, and remarried Mr. Wilkerson. She and Wilkerson lived together after this last marriage for about 18 months, and lived on the homestead at England for a year of that time, and then moved to the hotel and lived there for six months. She and Wilkerson again separated, and she obtained a divorce from him a second time.

While Mrs. Wilkerson was living in Pennsylvania, the appellee, Mrs. Sarah May Hoover, loaned to W. B. Wilkerson some money. He was already indebted to her in the sum of $700, and she let him have $300 more, and he executed a note and to secure the payment of said note, executed and delivered to Mrs. Hoover a mortgage on the homestead at England.

This suit was brought by Mrs. Hoover, the appellee, against M. B. Wilkerson, Mrs. M. B. Wilkerson, and Gerald Wilkerson and Sadie Wilkerson, minors, to foreclose the mortgage. Mrs. Wilkerson filed separate answer, and separate answer was filed for Gerald and Sadie Wilkerson. The decree of divorce granted on March 18, 1930, was not put on record for more than a year after it was rendered, and before it was put on record the mortgage was executed. The chancery court found in favor of appellee, and found that she had a first lien on lot 10 and 15 feet off the side of lot 11 in block 7 in the town of England. A sale of the land was ordered, and this appeal is prosecuted to reverse the decree of the chancery court.

It is the contention of the appellants that Mrs. Wilkerson and her children, under the terms of the first divorce decree, acquired vested property rights in the property of Wilkerson superior and paramount to appellee's mortgage. Appellants cite and rely on 18 C. J. 317. That was where a deed was made giving the unrestricted use of the real estate in perpetuity. Here we have a decree

which gives to Mrs. Wilkerson and the children exclusive possession and control of the homestead of appellant and appellee, not in perpetuity, but for the use and occupancy of appellant and her minor children. The decree also recites that the court retains control of the cause of action for the purpose of conserving the rights of appellant and appellee, with reference to said homestead. This, we think, conclusively shows that Mrs. Wilkerson was given the exclusive possession, not permanently, but to use it and occupy it as a homestead, the court retaining control of the cause of action for the purpose of protecting the rights of both parties.

Attention is next called by appellants to the case of *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205, and they quote as follows: "The remarriage of a widow and her removal to the homestead of her second husband, does not work a forfeiture of her previously existing right in the homestead of her former husband." That is a very different situation from the one we have here. In that case it was the widow claiming the homestead, and the Constitution provides that: "If the owner of a homestead die 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, provided that if the owner leaves children, one or more, said child or children shall share with the said widow and be entitled to half the rents and profits 'til each of them arrives at 21 years of age—each child's right to cease at 21 years of age—and the shares go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate." Section 6, art. 9, Constitution of Arkansas. The court in the case cited by appellants, therefore, simply held that under the Constitution the widow was entitled to the homestead whether she resided on it or not. There is, however, no such provision with reference to divorced women.

This court, however, settled the question of the rights of a divorced woman under a decree almost exactly like the one here. The chancery court in that case entered a decree in which it was stated: "The court finds that said parties own a home in the city of Texarkana, Arkansas, which is now occupied by said plaintiff and her two said children, and the court adjudges that she may continue to occupy the same and hold the household goods." The court further said in that case: "That the plaintiff keep possession of said home, household goods and children, etc." The court then said: "Did that decree divest any part of appellant's title to, or interest in the property, so that he was no longer the unconditional and sole owner thereof, within the meaning of the insurance policy? * * * Now it is seen from an inspection of the decree that the court did not designate the specific property, both real and personal, to which the wife was entitled, nor did it order a sale of the property for division. The effect of the decree both as to the personal property and the real estate was merely to award the possession thereof temporarily to the wife, reserving the question of division or designation of the wife's portion, for future determination. It did not purport to divest any part of appellant's title of the property, nor to diminish his interest therein. The fact that the possession was temporarily awarded to appellant's wife, did not affect his title to the property, and notwithstanding that award, he continued to be the sole and unconditional owner of the property within the meaning of the policies. * * * He is not merely the owner of an undivided interest, but he is the sole and unconditional owner until his wife's interest be asserted and carved out. The title remained vested in the husband solely and unconditionally until it was divested by a decree of the court designating the specific property to which the wife was entitled." *Hix* v. *Sun Ins. Co.*, 94 Ark. 485, 127 S. W. 737.

Here Wilkerson remained the sole and unconditional owner of the property. When appellant married and moved to Pennsylvania, taking her children with her, she abandoned her right to occupy the homestead, and Wil-

kerson had the right to mortgage it to secure the payment of his debts.

Section 6283 of Crawford & Moses' Digest is as follows: "In all cases where any court of chancery shall decree a conveyance of real estate, or that real estate pass, the party in whose favor the decree is made shall cause a copy thereof to be recorded in the recorder's office of the county in which the lands passed or to be conveyed lie, within one year after making of such decree; and if such decree be not recorded within such time, it shall be void as to all subsequent purchasers without notice."

Appellant argues that this question was not raised in the court below and not developed by the evidence nor passed on by the chancellor, but Mrs. Wilkerson alleged in her answer that she was given the exclusive possession and control of the homestead in England, Lonoke County, Arkansas, for the use and occupancy of her and her children. This put the matter in issue, and she could not have introduced the copy of the decree without showing the date when it was recorded. But since Wilkerson remained the sole owner of the property, he had a right to mortgage it while she was living in Pennsylvania as the wife of another man.

Counsel refer to cases where there was a separation by agreement, or where there was divorce from bed and board, and they have no application here. After Mrs. Wilkerson had married Lescher and lived with him a short time in Pennsylvania, she returned to Arkansas and sued Lescher for divorce, and was granted a divorce. Shortly thereafter, she remarried Wilkerson, and they lived on the homestead in Lonoke County for about one year. They then left the homestead and lived at a hotel for six months, and then she again sued Wilkerson for divorce and obtained a decree.

A remarriage of the parties annulled the divorce. 19 C. J. 349. "The remarriage annulled the judgment of divorce and restored the parents to all their marital rights over their children as if they had never been divorced." *Cain* v. *Garner,* 169 Ky. 633, 185 S. W. 122, L. R. A. 1916E, page 682; vol. 2, Schouler on Marriage,

Divorce, Separation and Domestic Relations, 2078. After the remarriage of Mr. and Mrs. Wilkerson the situation was the same as if they had never been divorced. She and the children lived with him on his homestead, and when the last decree of divorce was granted, nothing was said about property at all, and it therefore left Mr. Wilkerson the absolute and unconditional owner of the property, and since the mortgage had been executed while Mrs. Wilkerson was the wife of another man, living in another State, she acquired and had no interest in the homestead superior to the rights of the mortgagee.

The decree of the chancery court is affirmed.

SMITH *v.* PAGE.

4-4126

Opinion delivered March 2, 1936.

Griffin Smith, for appellants.

Carl E. Bailey, Attorney General, and *Thomas Fitzhugh,* Assistant, for appellees.

HENRY ARMISTEAD, Special C. J. The action from which this appeal arises was filed in Pulaski Chancery Court, June 17, 1935, by appellant, as a taxpayer, and State Comptroller, against the Auditor and Treasurer of State, alleging that the Legislature of 1933 failed to appropriate funds for the payment of salaries of prosecuting attorneys for the period from July 1, 1933, to June 30, 1935; that the prosecuting attorneys hold salary vouchers or warrants for part of this period, issued under the provisions of act 227 of 1935; that unless restrained the Treasurer will pay these warrants from current cash balances standing to the credit of the general revenue fund, or the general revenue sinking fund, and the Auditor will issue certificates of indebtedness to prosecuting attorneys covering salary installments for which no appropriation was made. It was asked that the Treasurer and Auditor be enjoined from doing these things, which were alleged to be illegal because of no legislative appropriation or the limited appropriation under act 227. The defendants demurred to the complaint. September 12, 1935, the court sustained the demurrer and dismissed the complaint, and also enjoined the issuance or payment of warrants based on allowances under act 227 and ordered the cancellation thereof and the issuance of warrants for the unpaid salaries and their payment from the current general revenue fund.

The question presented is whether the relevant provisions of the Constitution of Arkansas are to be construed as requiring a legislative appropriation before the salaries of prosecuting attorneys can be paid or whether the Constitution authorizes such payment without legislative appropriation. We hold that the Constitution provides a continuing appropriation, for this purpose, and that the salaries may be paid without legislative appropriation.

Prosecuting attorneys are constitutional State officers, § 24, art. 7, Const.; *Griffin* v. *Rhoton*, 85 Ark. 89, 107 S. W. 380, acting in a *quasi*-judicial capacity. *Holder* v. *State,* 58 Ark. 473, 25 S. W. 279; 481. Section 2, art. 19, Const., provides: "* * * Prosecuting attorneys shall each receive a salary, to be established by law, which shall not be increased or diminished during their respective terms * * * provided, that the salaries * * * herein mentioned * * * shall never exceed per annum * * * the sum of $400." (The Constitution permits and the statute provides that they shall also receive fees, the maximum for salary and fees being $5,000 per annum. Sec. 23, art. 19).

Section 28, Schedule, provides that this salary is to be paid per annum "for their services" for the period of two years from the adoption of this Constitution, and until otherwise provided by law.

The salary has since been fixed at $200 per annum, ($400, 7th Circuit), act June 2, 1911; § 8692, Crawford & Moses' Digest; act March 4, 1933.

The constitutional provisions on the subject of legislative appropriations and payments and fixing of salaries are as follows: Section 29, art. 5: "No money shall be drawn from the treasury except in pursuance of specific appropriations made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years."

Section 30, art. 5: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments of the State; all other appropriations shall be made by separate bills, each embracing but one subject."

Section 12, art. 16: "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."

From 1875 to 1933, the Legislature made appropriations for these salaries to be paid out of general revenue. These appropriations were set forth with the provisions

for the judicial branch of the Government. In 1933 the salaries provided by the Constitution for prosecuting attorneys were not appropriated. The usual appropriation for this purpose was resumed in 1935.

The Legislature in 1931 appropriated large sums in biennial, supplemental and deficiency measures. In the next two years deficits occurred in the revenues. Taxes were not paid or the tax sources fell off, as is known to all. Before the passage of appropriation bills in 1933, act 4 of January 27 was adopted. It provides that "no State officers, bureau, commission, department or institution, *excepting only the constitutional officers and the courts,* shall function or operate unless there has been a prior appropriation by the General Assembly to pay the expenses of such operation."* The Comptroller is to keep advised at all times as to the actual revenues and probable receipts, and report to the Governor, who shall have authority to reduce any and all appropriations, "*constitutional allowances*" excepted. Act 5 was adopted January 27, 1933. It provides that on and after July 1, 1933, 20 per cent. of all moneys accruing to the general revenue fund from all sources shall be placed in a sinking fund for the purpose of retiring obligations of the State payable from the general revenue fund and outstanding against that fund on January 10, 1933; that from and after the passage of the act all unexpended balances and all accruals to the general revenue fund are impounded, and all thereof, except the portion going into the sinking fund, are set apart for the payment of current expenses of the various departments of the Government, to the end that the State may operate on a cash basis and within the limits of its income and pay its outstanding obligations; that after the passage of the act no more than 80 per cent. of the unexpended balance as of January 10, 1933, of the appropriation for any institution, department, or agency for the biennial period ending June 30, 1933, shall be drawn, with this proviso: "* * * The provisions hereof shall not apply to or affect the salary of any officer where such salary is fixed by

*Acts 1933, p. 1181.

the Constitution and the amount payable on such salary shall be deducted from the appropriation before the percentages herein provided for are computed."

It will be seen that this act does not impound or appropriate for the sinking fund any part of the general fund necessary to pay salaries fixed by the Constitution.

Act 230, adopted March 28, 1933, creates a Commission composed of three State officers to adjust claims filed with the Comptroller prior to March 9, 1933, and appropriates sums from various funds for such purposes, including $70,000 from the general revenue fund, *"subject to the terms of act 5 of the Acts of 1933 or any subsequent amendments thereto."* The Commissioners, after allowing claims, may allow vouchers therefor, for which the Auditor may issue warrants to be paid from the general revenue sinking fund.

It is seen from the foregoing that constitutional salaries, that is salaries of constitutional officers, and the fund from which payment would be made, are not included in, but are excepted from, the operation of these statutes.

Act 227 was adopted March 27, 1935. It provides a claims commission "for the period terminating with the convening of the 51st General Assembly." The Commission is to audit, adjust and allow all claims presented in the form of bills in either branch of the 50th General Assembly, and all filed with the State Comptroller prior to the effective date of the act. Sums for payment of claims so allowed are appropriated from various funds, including $93,165.40 from the general revenue fund, and as to such claims as are so audited. "Warrants issued in payment of claims against the general revenue fund shall be payable from the general revenue sinking fund in sequence of dating, but shall not have priority over general revenue sinking fund warrants and vouchers executed prior to 1933, or claims allowed by the special claims committee established under the provisions of act 230 of 1933."

We hold that acts 5 and 230 of 1933 and act 227 of 1935 are to be construed together, and there is no repeal of the provision in act 230 and in act 5, excepting from

the jurisdiction of this Commission the matter of salaries of constitutional officers, and, therefore, the provisos making the exception, are to be read as a part of all the law on the subject; that the payment of salaries of prosecuting attorneys is not intended to be deferred to any such sequence as is set up in the later act. The salaries are payable out of the general revenue fund, or out of so much of that fund as may have been specially appropriated by act 227 to this purpose, but without deference in sequence to other claims. If the prosecuting attorneys have accepted warrants on their face payable only under the terms of act 227 of 1935, they are not bound thereby to submit to the terms of the act, but are constitutionally entitled to be paid without the limits of such act.

"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." *Pulaski County* v. *Caple et al.,* 191 Ark. 340, 86 S. W. (2d) 4. To the same effect see *Duncan* v. *Scott County,* 68 Ark. 276, 57 S. W. 934; *Cobb* v. *Scoggin,* 85 Ark. 106, 107 S. W. 188; *Glavey* v. *U. S.,* 182 U. S. 595, 45 L. ed. 1247, 21 S. Ct. 891.

"The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation." 46 C. J. 1027, Officers, § 275.

"As a general rule, an agreement by a public officer to render the services required of him for less than the compensation provided by law is void, as against public policy." 22 R. C. L. 538, Public Officers, § 235.

The rule seems to be well settled in most jurisdictions that a contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law is contrary to public policy and void. *Werner* v. *Hillman Coal & Coke Co.,* 300 Pa. 256, 150 Atl. 471, 70 A. L. R. 967, Annotation 973.

In contending that these unpaid salaries may not be paid in the absence of specific legislative appropriation, appellant relies upon the provisions of § 29, art. 5 of the Constitution. We do not construe that section as

applying to the payment of the salaries of constitutional officers. It controls payments from the Treasury of matters not covered by constitutional appropriation. In the case of *Dickinson* v. *Edmondson,* 120 Ark. 80, 178 S. W. 930, the taxpayer sought to restrain the Auditor and Treasurer in disbursing common school funds on the ground that there was no legislative appropriation for such purposes. This court held that § 29, art. 5, did not control; that the Constitution appropriates the fund continuously, and no specific legislative appropriation is required for its expenditure. In other States and over a long period, constitutional provisions similar to § 29, art. 5, have been construed so as not to conflict with other constitutional provisions, and, therefore, as not to defeat the purpose of a Constitution, which is to establish a Government of three coordinate branches, all of which must operate through officers who must be paid their salaries as fixed, regardless of whether or not the Legislature specifically appropriates therefor. There are many well-considered cases on this subject. The principles set forth are a part of the body of constitutional law. Among the reasons for their adoption are these: The kind of Government the people adopted contains three coordinate branches. In assigning the Government to three different departments the people intended to secure to each its independency of action and to insure this they have provided for the officers of each to be paid for their services and inhibited the Legislature from diminishing the pay during the term of office. The Government can be carried on only through the instrumentality of individuals and their services can be obtained only by being paid for. No coordinate branch of the Government may stop its machinery by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of other branches. The Constitution expressly declares they shall receive their salaries, and they shall not be diminished during the term of office. (Section 11, art. 19, Const., Ark. 1874.) The object of the people in establishing a constitutional Government would be defeated if one coordinate department could destroy another, or any function of the other, by denying

pay to its officers. An appropriation is made *by law* in a Constitution which establishes the office, says that the officer shall be paid, and that his pay shall not be diminished in the term of office.

In Oklahoma the salary of Supreme Court Judges is fixed by the Legislature, the Constitution providing that there shall be no change during the term of office, and also containing a provision similar to § 29, art. 5 of our Constitution. The Legislature failed to appropriate the full amount of the justices' salaries in 1933, reducing the monthly installment. A special Supreme Court held that the full amount should be paid; that the Constitution for that purpose of its own provisions operated as a continuing appropriation. *Riley* v. *Carter,* 165 Okla. 262, 25 Pac. (2d) 666; 88 A. L. R. 1018. This opinion reviews and adopts the principles of a leading case, *Thomas* v. *Owens,* 4 Md. 189, and discusses other sound opinions on the subject, and observes that it is not to be held that the people intended that the Legislature should have power to create a condition whereby only those who possess sufficient wealth to forego the payment of salaries shall administer the affairs of State.

On this point it is said by the Alabama Supreme Court, in holding void an attempt to prorate the constitutional salaries, "salaries are paid to public officials not so much as an equivalent for services performed, as for the purpose of enabling them, while in office and in the performance of public duties, to be relieved of the necessity of constant watchfulness for the necessities and comforts of life." A headnote of that case is: "Legislature cannot compel, by proration, where revenues are insufficient, reduction of salaries of constitutional and statutory officers." *Abramson* v. *Hard,* 229 Ala. 2, 155 So. 590. Controlling cases cited by appellees are *State ex rel. Rotwitt* v. *Hickman,* 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403; *Grimball* v. *Beattie, Comptroller General,* 174 S. C. 422, 177 S. E. 668; *Windes* v. *Frohmiller,* 38 Ariz. 557, 3 Pac. (2d) 275.

Section 29, art. 5 places a time limit upon legislative appropriations. This does not apply to constitutional

appropriations, which are continuing, even though the amount is fixed by statute. 59 C. J. 259.

Section 30, art. 5 provides that the general appropriations bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments of the State. If that provision of the Constitution is a mandate for the Legislature always to adopt such a general appropriations bill, it is not in the nature of things self-executing so far as the Legislature is concerned, but the Constitution self-executes it.

We affirm the judgment of the chancery court in sustaining the demurrer and dismissing the complaint. No petition for a mandatory injunction is before the court, and, therefore, none may be awarded. The judgment is reversed, and modified as to that. It is to be assumed that the officers of State will follow the law as herein stated.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* WHITE.

4-4185

Opinion delivered March 2, 1936.

[redacted]

A. H. Kiskaddon and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

R. W. Wilson, for appellee.

SMITH, J. James L. White, a young man, was shot and killed by two other young men, who, to conceal their crime, placed the body of the deceased upon the track of the appellant railroad company, where it was run over and badly mutilated by one of appellant's trains.

In order to get the body on the track they carried it from a public highway, across the railroad right-of-way, and lifted it over the fence, inclosing the right-of-way, and over a ditch running parallel to the railroad tracks.

The nearest crossing of the railroad, by any road, was more than a half mile from the place where the body was found. The deceased was twenty-three years old, but was unmarried and lived at the home of his father, who brought this suit to recover damages for the mutilation of the body, and from a judgment awarding damages in the sum of $500 is this appeal.

Liability is predicated upon two counts (a) negligence in the operation of the train, which resulted in the dead body not being discovered, and (b) failing to promptly and properly gather up the remains of the body after it had been run over.

The trial court declined to charge the jury that the "lookout statute" (§ 8568, Crawford & Moses' Digest) did not apply, for the reason that the dead body was neither a person nor property, within the meaning of that statute, and, therefore, there was no duty to keep the lookout required by the statute referred to. The refusal to so instruct the jury is one of the errors assigned for the reversal of the judgment.

There are two answers to this assignment of error. The first is that the aid of the statute was not invoked. The second is that the statute does in fact apply. There was evidence which is sufficient to support the finding that it was an act of negligence for appellant's train to run over the dead body, although as the court charged the jury, its attitude to the railroad company was that of a trespasser. Had this been a live person instead of a dead person he would have been a trespasser. He would have been there without business or invitation, and without the knowledge or consent of the railroad company.

So that, under the tests whereby we determine whether a live man was a trespasser, we must conclude that this was the attitude which the dead body occupied to the railroad company.

The railroad company was in no manner responsible for the wrongful act of placing the body on its track. Its liability must be determined by a consideration of what thereafter occurred, but in the determination of that question, the provisions of the "lookout statute," *supra,* must not be disregarded.

It is true that the statute requires the lookout to be kept for persons and property upon the railroad track, and in one sense this dead body was neither a person nor property. But it was the body of James L. White who had been a human being which could not be cast aside or mutilated as an inanimate object, having neither rights nor value to any one. It had the right of sepulture, conferred by the simplest and earliest practices of civilized peoples. Society generally, and his next of kin specially, were under the duty of giving his body burial, and these latter had the right to perform that duty decently and in order; to bury the body in the condition it was in when life departed, and the denial of this right, whether wilfully or through negligence, is an actionable wrong.

One of the leading cases on the subject is that of *Larson* v. *Chase,* 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, which is annotated in 14th L. R. A. 85. It was there held, as is indicated by the headnotes in that case, that the right to the possession of a dead body, for the purposes of preservation and burial, belongs, in the

absence of any testamentary disposition, to the surviving spouse, if one there be, and, if not, to the next of kin, and that this right is one which the law recognizes and will protect, and that for any infraction of it—such as an unlawful mutilation of the remains—an action will lie.

It was there also held that in such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no pecuniary damage is alleged or proved.

We are cited to two cases, in each of which the railroad was sued for the mutilation of a dead body. The earlier case is that of *Long* v. *Chicago, R. I. & P. Ry. Co.*, 15 Okla. 512, 86 P. 289, 6 Ann. Cas. 1005, 6 L. R. A. (N. S.) 883. It was there held that the parents of an infant child were not entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant.

Cases like our case of *Peay* v. *Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463, are cited, where it was held that damages were not recoverable for mental anguish in the absence of physical injury or other actionable wrong.

The other case, and one which we think sounder in reason, is that of *Kyles* v. *Southern Ry. Co.*, 147 N. C. 394, 61 S. E. 278; 16 L. R. A. (N. S.) 405, where it was held that the mutilation of a dead body, either wantonly or negligently, was itself an actionable wrong and that, "where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may, in an action for damages, recover for the mental suffering caused by the injury." It was also said in this opinion, by the Supreme Court of North Carolina, that, "while a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right, which courts will recognize and protect; any violation of it will give rise to an action for damages."

It was also there said, after a review of numerous cases, that the courts of America and other Christian

and civilized countries hold that dead bodies are *quasi* property and that any mutilation thereof is actionable.

We conclude, therefore, that it is the duty of all persons running trains in this State, upon any railroad, to keep a lookout for dead persons lying on the track, as well as for other persons or property.

The reasoning of the Supreme Court of North Carolina, in the case by that court above cited, leads to the conclusion that, where a railroad has mutilated a corpse, whether responsible for the death or not, it is under the duty of gathering up the body and its fragments found on the track, and decently preserving them for burial, and that a negligent failure to perform this duty confers a cause of action upon the person having the right to sue for the mutilation.

As has been said, the plaintiff here alleges two causes of action: (a) negligently mutilating the body, and (b) negligently failing to promptly and properly gather up the remains of the body after it had been run over.

As we have said, there was sufficient testimony, which we do not recite, to support a recovery upon the first ground stated; but there was no testimony sufficient to support a recovery upon the second ground. The body was run over about 2:04 A. M. by a north-bound passenger train, about two and a half miles north of Fordyce. The engineer and fireman testified that they did not know that they had struck the body. A south-bound train also passed the point where the body was found during the night, but there was no showing that this train also struck the corpse.

The train which ran over the body reached Pine Bluff, which was a division point, and another engineer and engine were supplied. The engineer testified that upon leaving the engine at Pine Bluff he made the usual and required inspection from the outside and found no indication of anything being wrong. When the shop men made their inspection they found the head of the deceased in the running gear of the engine. The railroad agent at Fordyce was notified by telegraph. He got in communication with the coroner, as it was his duty under

the law to do (Section 1576, Crawford & Moses' Digest), and that officer appears to have gone to the scene of the decapitation without unreasonable delay. The station agent also directed the section foreman to go and to send his men to search for the body and they appear to have been present when the coroner arrived. The agent later went himself. It was not shown that there was anything which the railroad could have done that was not done in the way of gathering up and protecting the remains. When the head of the dead man was found in the machinery of the engine it was sent to an undertaker to be prepared for burial, and when the head was identified, it was sent without delay to the father of the deceased for burial with the remainder of the body, which, in the meantime, had been buried as the corpse of an unknown person. After the head was found the remainder of the body was exhumed and all of it, except a hand, which was never found, was buried by the father near his home.

In the chapter on "Dead Bodies," 17 C. J. 1143, the law is stated to be "that a railroad company is not liable for failure to collect the mutilated remains of a body found on its tracks, where the coroner intervened and performed that duty."

This statement of the law is made upon the authority of the case of *Awtrey* v. *Norfolk & W. Rd. Co.*, 121 Va. 284, L. R. A. 1918D, 279, 93 S. E. 570, and may be approved with qualifications, if indeed there is anything in this decision of the Court of Appeals of Virginia to the contrary, that this is true, provided there had been no negligent failure of the railroad company, which exposed the corpse to the spoliation of animals, human or otherwise, or the disintegration of the weather before the coroner took possession.

We have no way of knowing upon which of the two causes of action the verdict of the jury was based, and we must, therefore, reverse the judgment for the error of submitting the question of failure to gather up and protect the remains.

If it be found by the jury, upon the retrial, which is here ordered, that the operatives of the train were guilty

of negligence in running over the body, testimony may be offered as to the manner and extent of the mutilation as affecting the mental anguish suffered, occasioned thereby, as distinguished from the grief occasioned by the death of the deceased, for which the railroad company is not liable.

Judgment reversed, and cause remanded.

PROTECTIVE LIFE INSURANCE COMPANY *v.* TIBBS.

4-4210

Opinion delivered March 2, 1936.

Brewer & Cracraft, for appellant.

W. G. Dinning, for appellee.

JOHNSON, C. J. This action was instituted by appellee, Earnest Tibbs, executor of the estate of Alexander Tibbs, deceased, against appellant, The Protective Life Insurance Company of Birmingham, Alabama, and The Lincoln Reserve Life Insurance Company also an Alabama corporation, in the Phillips Circuit Court to recover the proceeds of a life insurance policy. The complaint in effect alleged that on August 28, 1924, the Lincoln Reserve Life Insurance Company issued to Alexander Tibbs its policy of insurance whereby the life of the insured was indemnified against death in the sum of

$3,000; that all premiums were paid up to November 28, 1932; that the policy on that date had a cash reserve of $868.40, but that the insured owed the company upon a loan, the sum of $665; that after deducting the loan from the reserve of the policy there was a balance due to the insured as cash reserve the sum of $203.40 which was sufficient to purchase extended insurance and to keep the policy in full force and effect until after the death of the insured. The death of the insured was alleged to have occurred during the life of the policy, and it was further alleged that appellant, Protective Life Insurance Company, had expressly assumed the contractual liabilities of the Lincoln Reserve Life Insurance Company, thereby becoming liable to appellee for the full face value of the policy. It was further alleged that due proof of death had been executed and liability denied prior to the institution of this suit. By way of answer, liability was denied in behalf of the Protective Life Insurance Company and by consent of the parties the issues joined were submitted to the trial court without the intervention of a jury. The facts of the case are not in material dispute and may be summarized as follows: In addition to the facts heretofore stated, it appears from the testimony that on January 11, 1933, the Lincoln Reserve Life Insurance Company was adjudged a bankrupt by the United States District Court for the Northern District of Alabama, and all its assets were placed in receiver's hands for distribution to creditors. A few days subsequent thereto, the court in which the bankruptcy proceedings were pending, and the Superintendent of Insurance for the State of Alabama approved an assumption agreement between the Lincoln Reserve Life Insurance Company and appellant, whereby appellant assumed the outstanding liabilities of the Lincoln Reserve Life Insurance Company, as follows:

"Protective agrees to and does hereby reinsure all policies of insurance of the Lincoln in force on January 11, 1933, including all annuity and/or supplementary contracts, and all policies reinsured by Lincoln, and extended term and paid-up insurance policies in force by their term of said date, and agrees (except as herein provided)

to carry out all the provisions and agreements contained in said policies subject to any and all defenses against claims under or actions upon said policies which Lincoln might lawfully have asserted had this contract not been made, and subject to the lien hereinafter specified."

* * *

"As part of the consideration moving the Protective to execute this agreement and to assume the liabilities herein assumed, there is hereby established and placed against each policy and contract reinsured and assumed by Protective here under a lien equal to the full legal reserve thereof, including dividend and coupon additions and accumulations, and an adequate reserve for disability and double indemnity benefits, if any, and less the sum of any indebtedness and accrued interest existing against the policy on the effective date of this contract, as such reserve has been or under the laws of the State of Alabama should be established and carried by the Lincoln as of the 11th day of January, 1933."

"When the amount of any policy indebtedness and/or lien (hereinafter mentioned) with interest thereon on any Lincoln policy now or hereafter paid up equals or exceeds the reserve thereon, then any such policy shall cease and determine, except that all such policies shall continue in force and effect for sixty days from the effective date of this contract."

The rider sent out by the Protective Life Insurance Company to the policyholders of the Lincoln Reserve Life Insurance Company was to the following effect:

"This is to certify that the policy above mentioned issued or assumed by Lincoln Reserve Life Insurance Company, Birmingham, Alabama, has been assumed by Protective Life Insurance Company, Birmingham, Alabama, subject to the conditions of the policy and to the terms of the reinsurance agreement, a copy of which is attached hereto and made a part hereof, and all future amendments thereto, conditioned upon the insured paying the premiums to Protective Life Insurance Company in the amounts and at the times and on the terms required by said policy."

It is admitted that the insured paid no premiums to the Protective Life Insurance Company subsequent to the approval of the assumption agreement.

The trial court found that appellant was not liable to appellee under the assumption agreement for the face value of the policy, but determined that it was liable to appellee for the balance of the cash reserve of the policy, and rendered judgment accordingly, from which appellant appeals and appellee cross-appeals.

Appellant's first contention is that the adjudication of the Alabama Bankruptcy Court that the Lincoln Reserve Life Insurance Company was insolvent canceled the policy of insurance held by Alexander Tibbs, a resident of this State, although he had no notice or knowledge of the court's proceeding in Alabama. Appellant is in no position to invoke the doctrine asserted, were it conceded that such is the law. By the express terms of the assumption agreement, appellant recognized the validity of all outstanding contracts theretofore made by the Lincoln Reserve Life Insurance Company and expressly agreed to assume due and prompt payment thereof upon the conditions provided in the assumption contract; therefore, it appears unnecessary to discuss or decide this very interesting question, so thoroughly briefed by counsel.

The policy of insurance which is the subject-matter of this lawsuit is an Arkansas contract, and was issued by the Lincoln Reserve Life Insurance Company when it was solvent and doing a life insurance business in this State. Although, the record is silent on the subject, we conclusively presume in this case that the Lincoln Company had complied with the laws of this State qualifying it to do business here. Therefore, we presume that the Lincoln Company had on deposit in the State of Alabama, securities of at least $100,000 cash value as required by § 6059 of Crawford & Moses' Digest or had complied with § 5980 of Crawford & Moses' Digest. These statutes were promulgated for the benefit of policyholders in this State, and all persons or corporations dealing with such pledged assets necessarily do so with full knowledge of them. Under the facts and circumstances just related

appellant is conclusively presumed to have received under its assumption agreement all trust assets of the Lincoln Company whether on deposit in this State or in the State of Alabama, and we consider the questions now before us in the light of these facts and circumstances.

We now proceed to an examination and construction of the assumption agreement. It may be stated at the outset that it is our duty to construe the assumption agreement between appellant and the Lincoln Reserve Life Insurance Company from the language employed therein and avoid absurdities if possible. Evidently it was not the purpose or the intention of the contracting parties to take the cash reserve allocated on all outstanding contracts of insurance and convert it to the use of some other class of beneficiaries or to permit the Protective Life Insurance Company to convert such reserve to its own use and benefit without corresponding obligations. To avoid this absurdity, we believe and so hold, that it was the intention and purpose of the contracting parties that the Protective Life Insurance Company would assume and pay all outstanding liabilities of the Lincoln Reserve Life Insurance Company, conditioned, however, that the cash reserve of all outstanding Lincoln Reserve Policies should be subordinated for the purpose of extended insurance, paid-up insurance or other benefits of similar intent, purpose and effect, and that this subordination might be removed in the future by actual payment of future premiums by the insured to the Protective Life Insurance Company. On the other hand, if the insured or the policyholder elected, as they had the absolute right to do, to refuse to accept the plan of reinsurance offered by the contracting parties, then and in that event the proportionate part of the total assets received by the Protective Life Insurance Company allocated to these policies should be held in trust for the benefit of those who had created these assets. See *Casteel v. Ky. Home Life Ins. Co.*, 258 Ky. 304, 79 S. W. (2d) 941.

From this construction of the contract of assumption, it follows that appellee is not entitled to recover the face value of the policy of insurance from the Protective Life Insurance Company because neither he nor the in-

sured accepted the reinsurance plan by actually paying future premiums to appellant, but, on the contrary, repudiated the plan by refusing to pay such premiums. It follows from this that the cross-appeal must be affirmed.

On direct appeal it may be said that it follows from our construction of the contract heretofore stated that appellee is entitled to recover the *pro rata* proportion of the assets allocated to his contract of insurance which passed into the hands of the Protective Life Insurance Company as trustees. See *Lovell* v. *Insurance,* 111 U. S. 264, 4 S. Ct. 390; *Casteel* v. *Ky. Home Life Ins. Co., supra.*

Our holding here is in line with the trend of our previous opinions under analogous facts and circumstances. In *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, 130 S. W. 574, we held a surety liable on a qualifying bond irrespective of an adjudication of insolvency of the principal in a foreign jurisdiction. Had the Lincoln Company filed a surety bond as required by § 5980 of Crawford & Moses' Digest, cited *supra,* instead of a qualifying certificate under § 6059, as it did, there could be no doubt but that, under our opinion in the Flemister case, *supra,* we would hold that this cause of action might be maintained against the surety. Appellant is in no better position than a paid surety as we believe. But appellant seriously contends that the conclusions just stated are not applicable to the facts here presented for the reason that appellant's liability was adjudicated and determined in the Alabama Federal District Court. We did not so construe the contract of assumption as we have heretofore pointed out. Moreover, the insurer was not a party to the Alabama suit, and had no notice of its pendency. Under such circumstances it is fundamental that appellee is not bound by the adjudication. See *Federico M. Man. Co.* v. *Great W. Fire Ins. Co.,* 173 La. 905, 139 So. 1, 79 A. L. R. 1256, and cases therein cited, also appended case note.

The question then arises in reference to measure of appellant's liability. *Prima facie* the value of appellee's

contract is the balance of the cash reserve of the policy, and this is conceded to be $203.40. If all assets received by appellant in trust as hereinbefore defined are of less value than the cash reserve, the burden was upon it to show the actual cash value of the reserve at the time of the execution of the assumption contract. This it has failed to do.

The trial court based its judgment against appellant upon the cash reserve of the policy, and, since no evidence was offered by appellant in contradiction thereof, the court was correct in deciding as it did. It follows that the judgment attacked on direct appeal is correct, and must be affirmed.

HOGE *v.* MORGAN.

4-4206

Opinion delivered March 2, 1936.

Malcolm T. Garner, for appellant.

Robert D. Lee, for appellee.

McHANEY, J. Appellee is the widow of Frank M. Morgan who died intestate in Pulaski County in March, 1934. In June, 1934, appellant was appointed administrator of the estate of said Morgan, and thereafter, on or about July 1, collected from the Metropolitan Life Insurance Company the face value of a policy of life insurance held by Morgan in the sum of $333.25, payable

to his estate. On July 9, 1934, appellee petitioned the probate court to set aside and allow to her the sum of $300 of such estate as the widow of said deceased under § 80, Crawford & Moses' Digest. Upon the hearing, the probate court denied her petition and awarded the whole estate to appellant; he contending that the policy had been assigned to him by deceased to secure him for medical services rendered over a considerable period of time prior to Morgan's death. Appellee prosecuted an appeal to the circuit court, where, on a trial *de novo* before the court sitting as a jury, a finding was made that there had been no assignment of said policy to appellant, that the funeral expenses had been paid, and that the proceeds of said policy constitute the entire personal estate of said deceased, and that appellee as widow is entitled to $300 thereof. Judgment was entered accordingly.

It is contended by appellant for a reversal of the judgment that life insurance policies are mere choses in action and subject to assignment, and that the insured did assign said policy to appellant as a creditor, who thereafter paid the premiums and kept said policy alive. It is true that life insurance policies are assignable, unless contrary to their terms. The policy in this case in express terms provides: "Any assignment or pledge of this policy or of any benefits hereunder shall be void and of no effect." Moreover, there is no substantial evidence to support a legal assignment, even though said policy were assignable. There is no writing to this effect indorsed on the policy or otherwise, and the policy was not in appellant's possession. This court has sustained parol assignments of policies which are assignable, in cases where the policies were delivered to the assignees, as equitable assignments, see *Citizens' Bank* v. *Moore,* 134 Ark. 554, 204 S. W. 619, or as a gift *causa mortis.* See *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. (2d) 19. Here there was no delivery.

Again appellant's claim is not founded on an assignment. He collected and held the money as administrator. It was the property of decedent's estate and constituted the whole estate. Clearly, therefore, under § 80 of Crawford & Moses' Digest, appellee was entitled to

have awarded her the sum of $300, funeral expenses having been paid, regardless of the fact that appellant is a creditor and has paid premiums to keep the policy in effect.

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

SCHLEY *v.* DODGE, CHANCELLOR.

4-4293

Opinion delivered March 2, 1936.

E. Charles Eichenbaum, for petitioner.

Talley, Owen & Talley, for respondent.

MCHANEY, J. Petitioner, who is a nonresident, brings this original action in this court to prohibit the respondent, as judge of the Pulaski chancery court, from hearing and determining an allegation in a complaint for divorce by her husband that a written property settlement agreement theretofore entered into between the parties was obtained through fraud, was without consideration, and is void, and should be cancelled. It is not contended that the court has no jurisdiction of the person of petitioner, but to quote the language of her counsel: "Our sole contention is that, though the petitioner may be found to have entered an appearance to the divorce proceedings, such appearance does not confer upon the court the privilege of adjudicating issues clearly in excess of his jurisdiction."

The property settlement agreement does not involve the title to real, but only personal property,—household goods, an automobile, and one-half the earnings of a certain trust fund of which the New York Trust Company is the trustee and petitioner's husband is the beneficiary. Equity has jurisdiction to cancel or reform written instruments. *Foster* v. *Dierks Lumber & Coal Co.,* 175 Ark. 73, 298 S. W. 495. We are not now concerned with the rule of evidence relating thereto, or as to whether cancellation should or should not be granted. We are only concerned at this time with the jurisdiction of the court in the premises.

This question has been several times decided adversely to petitioner's contention. In *Bowers* v. *Hutchinson,* 67 Ark. 15, 53 S. W. 399, Mr. Justice BATTLE, speaking for the court, after quoting from an English decision, said: "In this country the courts, as a general rule, have enforced covenants and promises in deeds of separation relating to the maintenance of the wife and property, provided they are based upon a sufficient consideration, are fair and equal, are reasonable in their terms, and are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into, or immediately follows." In *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369, this court held that equity has jurisdiction to cancel and will cancel on proper grounds an antenuptial settlement between husband and wife. In *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931, this court sustained the chancery court in cancelling a separation agreement between husband and wife, citing *Bowers* v. *Hutchinson, supra.* So it necessarily follows that the court has jurisdiction of the subject-matter. Since the court has jurisdiction both of the persons of the parties and of the subject-matter of the action, the petition will be denied.

It is so ordered.

MILLER *v.* BENTON.

4-4193

Opinion delivered March 2, 1936.

R. W. Wilson and *Danaher & Danaher,* for appellant.
Reinberger & Reinberger, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the chancery court of Jefferson County to recover $8,900 plus accrued interest at 7 per cent. since January 1, 1933, and to impress a lien therefor on the property of B. W. Benton, deceased, who had bequeathed and devised his estate to appellee. The amount claimed was fixed by two $5,000 notes, Nos. 1 and 2, which had been executed on the 4th day of November, 1929, to appellant by B. W. Benton in part payment for his undivided one-half interest in the business and assets of the Benton-Miller Oil Company, and two insurance policies for $5,000 each on the life of appellant, in which B. W. Benton was named as beneficiary. The entire consideration paid for said one-half interest and the insurance policies was $20,000, evidenced by the notes aforesaid and two other notes, Nos. 3 and 4 for $5,000 each. The notes were payable on January 3, 1932. The sale was closed by contract of even date with the notes,

and was, in effect, a dissolution of the partnership firm of Benton-Miller Oil Company. Under the terms of the contract, the assets and management of the firm passed to B. W. Benton, who assumed all of the indebtedness against it. The business was, thereafter, operated by B. W. Benton until he died on the ..... day of ....., 19..... The business became involved, and was about to be thrown into bankruptcy, so that in order that B. W. Benton might make a statement of his assets and liabilities that would appease his other creditors and prevent bankruptcy proceedings, appellant and B. W. Benton entered into a supplemental written contract, by which notes Nos. 1 and 2 were surrendered and canceled. The contract for the cancellation of the two notes contained the following paragraphs:

"It is understood and agreed that, should the said Benton-Miller Oil Company, prior to the death of either party to this instrument, be sold for such a sum as would have entitled the party of the first part to a sum of twenty thousand ($20,000) dollars as his one-half share of the net proceeds of the sale as of the date of the original contract, then, and in that event, this supplement shall be null and void, and the said B. W. Benton shall be liable to the said Will Miller for the face value of note No. 1 and note No. 2."

Subsequent to June 25, 1931, and before May 14, 1932, B. W. Benton paid interest only on all four of said notes. After his death, his widow, as legatee and devisee under his will, took charge of all of the property and thereby assumed all of his indebtedness, including the indebtedness to appellant. On January 1, 1933, she paid to appellant the sum due on note No. 3, being $5,000 plus accrued interest, and about August 1, 1933, she paid him the amount due on note No. 4, being $5,000 plus accrued interest, and also paid interest on all four notes up to January 1, 1933. These notes, or the amount due on them, were paid by appellee out of money she received from insurance companies on policies on B. W. Benton's life, and bonds owned by her individually and not out of the property that had been devised to her. The receipt appellant executed to appellee when she made the last

payment in August, 1933, says: "Being the full and complete settlement by Anastacia Benton of all indebtedness due to me." At the time the final payments were made to appellant and the receipts were executed, appellant released in writing all interest he might have in the two insurance policies which had been carried on his life in favor of B. W. Benton as beneficiary. At the time appellee made the final payment to appellant and took his receipt and release of any interest in the policies, no claim was made that she or her husband's estate owed notes Nos. 1 and 2, which had been canceled and surrendered. The estate of B. W. Benton was insolvent at the time he died, and all creditors compromised and settled with appellee for much less than their claims. Appellant testified that he loaned notes Nos. 1 and 2 to B. W. Benton to enable him to make a favorable statement to his creditors with the understanding that they would be returned to him and that owing to nervousness and an unsettled condition of his mind resulting from worry and physical disability, he did not read nor understand the contract in which he surrendered and canceled said notes. Also that he was not entirely at himself when he made the settlement, executed the receipts to appellee, and released his policies of insurance. He was supported in his statement that he loaned notes Nos. 1 and 2 to B. W. Benton by Mrs. Hunter, who testified that, at the solicitation of B. W. Benton, she persuaded appellant to lend the notes to him. The other witnesses who approached appellant to get him to turn notes Nos. 1 and 2 over to B. W. Benton testified, in substance, that they discussed the situation of the business with and advised appellant to surrender and cancel the notes in order that B. W. Benton could continue the business and prevent bankruptcy proceedings, and thereby enable him to pay notes Nos. 3 and 4. They all testified that appellant was capable of comprehending and did understand the situation and surrendered and canceled the notes and executed the contracts, receipts, and releases of his own accord and not because of undue influence exerted over him by them. Up to the time of the settlement and since, appellant has transacted all his

business, and as far as the record shows is doing so intelligently.

The chancery court found all the issues for appellee and dismissed the complaint of appellant for want of equity, from which is this appeal.

Appellant contends for a reversal of the decree because the surrender and cancellation of notes Nos. 1 and 2, made the basis of his suit, was without consideration and void; and, if not, that he was unduly influenced by friends and relatives to surrender and cancel them.

The continuation of the business was necessary in order for appellant to collect his notes. Its successful operation was the only security he had for the payment of the indebtedness. On account of the depression, the assets had shrunk in value and the earnings therefrom had decreased until the commercial creditors were about to institute bankruptcy proceedings and place it in the hands of a receiver. In order to continue the business, it became necessary to make up a statement that would satisfy the creditors, and in order to do this appellant, through the advice of his friends and relatives, surrendered and canceled notes Nos. 1 and 2. As a result of this action on his part, the business was continued, and appellant was enabled to collect notes 3 and 4 in the amount of about $10,000 in addition to interest on the four notes until he settled with appellee, who had acquired the business by bequest from her husband. It is apparent from the record that his loss would have been much greater than it was had he not canceled and surrendered notes Nos. 1 and 2. He therefore profited by the transaction. Appellant relies upon the rule of law that a debtor cannot satisfy his debt by paying a part of it and leaving the remainder of it unpaid, and cites the case of *Reynolds* v. *Reynolds*, 55 Ark. 369, 18 S. W. 377, in support of his position. There is an exception to this rule to the effect that if the party relinquishing the whole debt in part payment thereof receives a possible benefit, such possible benefit is sufficient consideration for the release of the entire indebtedness. This exception may be found in the case cited. The

instant case comes within the exception, as he received a benefit from the transaction.

Appellant also contends that he did not actually surrender and cancel the notes, but only loaned them to B. W. Benton. His written contract in surrendering and canceling them, as well as the weight of the oral evidence, is against him.

Appellant also contends he should not be bound by his written contracts, receipts, and releases, because he was incapable of transacting business, and was unduly influenced to execute the contracts, receipts, and releases. We are unable to say, after a careful reading and consideration of all the testimony in the case, that the finding of the chancellor is contrary to a preponderance of the evidence.

The decree is therefore affirmed.

WASHINGTON NATIONAL INSURANCE COMPANY *v.* CLEMENT.

4-4201

Opinion delivered March 2, 1936.

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

John R. Thompson and *Robert L. Rogers, II,* for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant to recover $165 for injuries he sustained while in an automobile on an insurance policy issued by appellant to him providing payment to him of $30 a week during total disability resulting from an accident while in an automobile. Appellant admitted the issuance of the policy, that same was in force and effect at the time of the accident, and total and partial disability as a result thereof, which damaged appellee in the sum of $165, but denied liability on the ground that appellee was injured while driving his car in an intoxicated condition contrary to law, specifically setting out a clause in the policy which provided that the policy did not cover any injuries sustained by appellee while violating the law.

In the course of the trial, appellant proved that appellee was convicted in a court of competent jurisdiction for a violation of the criminal law by driving his car while intoxicated at the time he received the injuries made the basis of his suit on the insurance policy. It also proved by other witnesses that the appellee was intoxicated at the time he received his injuries.

Appellee introduced witnesses who testified that he was not intoxicated at the time of the accident.

Upon the conclusion of the testimony, appellant requested a peremptory instruction on the ground that appellee's conviction in a court of competent jurisdiction was conclusive of the issue of fact as to whether appellee was intoxicated at the time of the accident, and was *res judicata* as to the fact in a subsequent civil proceeding. The trial court refused to peremptorily instruct a verdict for appellant, and over the objection and exception of appellant sent the case to the jury to determine whether appellee was intoxicated at the time he received his injuries, instructing them that if he was intoxicated at the time to return a verdict against him in favor of appellant.

The jury returned a verdict in favor of appellee for $165, penalty, and attorney's fee, and from the judg-

ment rendered in accordance with the verdict defendant has duly prosecuted an appeal to this court.

Appellant contends for a reversal of the judgment on the ground that the court erred in sending the case to the jury.

The evidence was in conflict as to whether appellee was violating the law by driving his car while intoxicated unless his conviction for the crime was conclusive and binding in a subsequent civil action. In 15 R. C. L., page 1000, § 476, it is stated:

"The general rule is that a judgment in a criminal prosecution is no bar to a subsequent civil action arising from the same transaction, and that the record of the criminal cause is not competent evidence in the civil action, save for the single purpose of proving its own existence, if that becomes a relevant fact, in which case not only is it admissible, but it is conclusive for the purpose of establishing the fact that it has been rendered. It cannot, however, be given in evidence in a civil action to establish the truth of the facts on which it was rendered. Hence one prosecuted and convicted of a criminal charge is not thereby estopped from maintaining a civil action and proving therein that he was innocent of the offense of which he was convicted."

The general rule is also stated in 34 C. J., page 970, § 1387, as follows: "By the great weight of authority, and in the absence of any statute to the contrary, a judgment or sentence in a criminal prosecution is neither a bar to a subsequent civil proceeding founded on the same facts, nor is it proof of anything in such civil proceeding, except the mere fact of its rendition."

No error appearing, the judgment is affirmed.

PRIESTLY *v.* FURST.

4-4182

Opinion delivered March 2, 1936.

Westbrooke & Westbrooke, for appellant.

Bruce Ivy, H. L. Methvin and *Kenneth Rainer,* for appellee.

JOHNSON, C. J. Two separate actions were instituted by appellees, Berdie Furst and Mahalia Henderson, in the Poinsett Circuit Court against appellant, Ed Priestly, seeking damages for personal injuries alleged to have been sustained by and through appellant's negligent operation of his automobile at a time when appellees were his invited guests. By answers the material allegations of the complaints were put in issue. The two actions were consolidated for trial purposes, and upon trial to a jury, resulted in verdicts in favor of appellee, Berdie Furst, for $1,500 and appellee, Mahalia Henderson, for $2,500, and from consequent judgments thereon comes this appeal.

Appellant's primary contention for reversal is that the trial court erred in refusing to direct a verdict in his favor. This contention is grounded upon two propositions: first, that the uncontradicted testimony shows that appellant was not negligent in the operation of his car; second, that the negligent operation of Melton's car was the sole proximate cause of the collision. This assignment necessitates a summary of the testimony adduced by appellees which is to the following effect; appellees reside in Memphis, Tennessee; a few days prior to September 12, 1932, appellant invited appellees to go on a fishing trip in Indian Bay near Forrest City, Arkansas, where appellant maintained a house boat. The trip was made in appellant's automobile. On September 12, 1932, as aforesaid, and upon the return trip of the party from the fishing trip, and at a point near Forrest City, appellant's automobile collided with an automobile owned and driven by one Melton. Prior to the collision appellant's automobile was being driven east, and Melton's automobile was being driven west, both of which cars were traveling upon the concrete highway, extending from Little Rock, Arkansas, to Memphis, Tennessee. Immediately prior to the collision appellant was driving his car at a speed of fifty-five or sixty miles per hour when Melton's car was discovered pulling out from behind a wagon which was traveling on his side of the highway, and in the same direction. This occurred at a time when appellant's car was 150 or 200 yards distant from the Melton car. Appellant immediately reduced the speed of his car to 25 or 30 miles per hour, but thereafter made no effort to stop the car or avoid the collision. Appellant testified in reference to the circumstances immediately prior to the collision as follows: "Q. How far were you down the road when you saw this car attempting to pass the wagon? A. I would say about 100 yards. Q. And he pulled out to go around the wagon when you saw him 100 yards down the road? A. He had passed the car and attempted to go around the wagon, yes, sir. Q. And you knew he was on your side of the road? A. Yes, sir. Q. You didn't slow down until you got right at him? A. No, sir. Q. There

wasn't anything in the world to keep you from stopping your car, was there? A. No, sir, I could have possibly stopped dead still. Q. You discovered then that you were not going to be able to pass? A. Yes, sir. Q. In what distance could your car be stopped going at the speed you were going? A. I would think you would stop in 30 feet. Q. He was 150 feet from you and you discovered you were not going to be able to pass? A. Yes, sir."

Appellees were very seriously, if not permanently, injured by the collision.

Appellant's admissions, while a witness in the case, quoted *supra,* were amply sufficient to sustain the jury's finding that he was negligent in failing to stop his car and avoid a collision with Melton's car, therefore the contention that the verdict is not supported by substantial testimony is without merit. *Peay* v. *Panich,* 191 Ark. 538, 87 S. W. (2d) 23, cited and relied upon by appellant has no application to the facts of this case.

Appellant next contends that the court erred in giving to the jury in charge appellee's request number three, as follows: "You are instructed that, if you find that Melton was guilty of negligence, that would be no bar to recovery on the part of the plaintiffs, and if you should find that Priestly was also guilty of negligence causing or contributing to the injuries complained of, then plaintiffs would have a right to recover, regardless of the negligence of Melton."

We have repeatedly held that where two concurring causes produce an injury which would not have occurred in the absence of either—either or both are liable for the consequent damages, if the one injured is not in fault or negligent. *Healey & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. (2d) 242.

Other assignments of error are urged in reference to instructions requested, granted and refused, but it would unduly extend this opinion to discuss them separately. It must suffice to say that the instructions given by the trial court to the jury in charge, when considered as a whole, presented the controverted issues fairly and without substantial error.

Finally appellant contends that the verdict and consequent judgments are excessive. The testimony on behalf of Berdie Furst reflects that she received injuries to her back, leg and a ruptured blood vessel in the collision, and that she had not completely recovered at the time of the trial, which was two years subsequent to the collision. On behalf of appellee, Mahalia Henderson, the testimony shows that she received a broken arm, injuries to her side and other abrasions in the collision, and two years subsequent to the injury she was unable to perform work done prior to the injury, and moreover she was forced to wear a cast for two months around her arm, and it is now in a crooked and weakened condition. This testimony is amply sufficient to sustain the verdicts.

No error appearing, the judgments are affirmed.

CRABTREE *v.* BONNER.

4-4213

Opinion delivered March 9, 1936.

J. P. Clayton and *Mark E. Woolsey,* for appellants.

T. A. Pettigrew, for appellees.

HUMPHREYS, J. On the 14th day of May, 1934, appellants brought suit in ejectment in the circuit court of Franklin County, Charleston District, against appellees to recover the possession of the S½ of the NE¼, section 25, and the N½ of the NE¼, section 36, in township 9, range 29 west, containing 240 acres, more or less, alleging that they are owners thereof by inheritance from their mother, who died in the year 1905, leaving her surviving her husband, John Crabtree, and appellants, who

are her only children and heirs. It was alleged in the complaint that the father, John Crabtree, had curtesy rights in said real estate, the fee being in them subject to the curtesy rights of their father, who died on the first day of June, 1932. And it was also alleged in the complaint that appellees are in the unlawful and wrongful possession of the real estate. Appellees filed an answer denying that appellants are the owners of said real estate or that they (appellees) are in the unlawful and wrongful possession of said real estate, but that they (appellees) are in the rightful possession thereof by purchase through mesne conveyances from John Crabtree and appellants, who joined in the warranty deed to said lands to Leonard Burcham on the 20th day of October, 1904, in consideration of $1,700 paid to them in cash. That appellants were authorized to execute said deed under a decree removing appellants' disabilities, who were, at the time, minors of the ages respectively of 13, 15, and 17 years. They also pleaded the statute of limitations and laches as additional affirmative defenses.

Copies of the mesne conveyances, including said decree, or muniments of title, were filed as exhibits to the answer.

A reply to the answer was filed by appellants attacking the validity of the decree removing their disabilities and denying that they were barred by limitations and laches.

Other issues were joined in the pleadings which it is unnecessary to set out, as the case went off on demurrer raising the validity of the decree removing the disabilities of appellants so that they might convey said real estate to Leonard Burcham, through whom appellees acquired title; and, whether appellees are barred.

On motion of appellants, the cause was transferred to the chancery court, where the demurrer was sustained to the complaint, and the cause was dismissed without a trial upon the merits, from which is this appeal.

The first question arising is whether the decree removing the disabilities of appellants is void or whether voidable only. At the time the decree was rendered, chancery courts in this State were authorized to remove

the disabilities of minors generally and for all purposes so that they might transact business the same as an adult after they had attained the age of 14 years, but not before.

This court held in the case of *Doles* v. *Hilton,* 48 Ark. 305, 3 S. W. 193, that a judgment removing the disabilities of a female minor under the age of 14 years is void and is open to collateral attack. Referring to the decision in *Doles* v. *Hilton, supra,* in *Dalton* v. *Bradley Lumber Company,* 135 Ark. 392, 205 S. W. 695, this court said: "The necessary effect of this decision is that no testimony could have been heard or showing made which would have authorized the court to remove the disabilities of these minors, and the action of the court in doing so was *coram non judice.* The proceeding is as void as if there had been no statute on the subject, because the statute has no application to minors under the age of 14."

This rule was reiterated and applied in the case of *Tays* v. *Johnson,* 173 Ark. 223, 292 S. W. 122. Under the ruling in the cases referred to, the decree as to the minor who was 13 years of age was absolutely void and subject to collateral attack. As to the minors who were 15 and 17 years of age, respectively, the decree was voidable and not subject to collateral attack, and this is a collateral attack upon the decree. They should have brought a suit to set aside the decree within the time prescribed by law after arriving at their majority. Having failed to do this, they are barred the same as adults would be. The decree being void and ineffective as to the minor who was only 13 years of age when it was rendered did not have to move to set aside the decree after attaining her majority. As to her, it did not amount to more than a blank sheet of paper. Her right of action to recover the property did not accrue until the death of her father, John R. Crabtree, who owned a curtesy interest therein. He died on the first day of June, 1932, and she had seven years from that date to institute her suit.

The decree dismissing the complaint as to Lindsey Crabtree and Gertrude Atkinson is affirmed. The de-

cree dismissing the complaint as to Pearl White is reversed, and the cause is remanded for further proceedings in accordance with the law.

PLUNKETT-JARRELL GROCER COMPANY *v.* FREEMAN.

4-4194

Opinion delivered March 9, 1936.

Gordon E. Young and *Martin, Wootton & Martin,* for appellant.

F. D. Goza and *McMillan & McMillan,* for appellee.

MEHAFFY, J. This action was begun in the Hot Spring Circuit Court by the appellee to recover damages which he alleged were caused by the negligence of

the appellant. He alleged that he was driving a Ford roadster along the paved highway from Hot Springs to Arkadelphia and was about three and one-half miles from Hot Springs when a truck belonging to the appellant, which was being driven toward Hot Springs by one of appellant's employees, was carelessly and at a reckless rate of speed driven against and struck appellee's roadster, damaging the roadster, and causing injuries to the appellee by breaking his arm, middle finger, palm, wrist, forearm, and elbow in 10 places; that he suffered loss of blood, bruises, torn ligaments and muscles on the left side of his body, causing him physical and mental pain and anguish and disfigurement, and that his injuries were permanent.

The appellant filed answer denying all the material allegations in the complaint. The cause was tried by jury. There was a verdict and judgment in favor of appellee for $10,000. A motion for new trial was filed and overruled, and the case is here on appeal.

Appellant's motion for a new trial contains 21 assignments of error, but only three are argued in its brief. Since the other assignments of error are not argued, under our rules of practice they are deemed to have been waived or abandoned. *Reed* v. *State,* 103 Ark. 391, 147 S. W. 76; *Hurley* v. *Oliver,* 91 Ark. 427, 121 S. W. 920; *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283, 214 S. W. 9; *Shawmutt Lbr. Co.* v. *Waites,* 122 Ark. 224, 182 S. W. 907; *Fitzhugh* v. *Leonard,* 179 Ark. 816, 19 S. W. (2d) 1010; *Austin* v. *J. R. Watkins Co.,* 185 Ark. 85, 46 S. W. (2d) 16.

The three assignments of error argued by appellant are, first, that the evidence is insufficient to support the verdict; second, that the court erred in giving instructions to the jury; third, that the verdict is excessive.

Ralph Plunkett, president of appellant, testified that the company operates 16 stores in the State of Arkansas, located at Little Rock, Hot Springs, Malvern, Hope, Ashdown, Nashville, Fordyce, Pine Bluff, and Stuttgart, and operates approximately 42 trucks. It is a matter of common knowledge that there is a paved high-

way from Little Rock to Texarkana, going through Arkadelphia. There is also a paved highway from Little Rock by way of Benton, where it leaves the Arkadelphia highway and goes to Hot Springs. There is a paved highway from Hot Springs to Arkadelphia. This highway connects the two above-mentioned highways.

August Lefler testified in substance that he is married, 32 years of age, and has lived in Arkadelphia since 1932, and in that year was operating a bus from Arkadelphia to Hot Springs; on August 10, 1932, Lefler was operating his bus on the highway. This was the date that the accident occurred. He left Hot Springs about 3:30 in the afternoon driving toward Arkadelphia on the paved highway, and saw the collision between the roadster driven by appellee, and truck which ran into it and hit him. He was about 100 or 125 yards from where the accident occurred. He testified that the truck was on the wrong side of the road, and after the accident the truck continued without stopping, and he saw as it passed him, that it was a Plunkett-Jarrell truck. The truck was dark-colored. He saw the appellee's car, which had been in the wreck. He was acquainted with appellee, but did not tell him that he saw the accident. He thought the case had been settled. On cross-examination he said that he operated on schedule, and the day of the accident they were scheduled to leave Hot Springs at 3:30 in the afternoon, but left about 15 or 20 minutes late and had an hour's delay with his car on the road: he knew the appellee two or three years prior to the accident, and had seen him often after the accident. He heard the collision, and the truck came past him toward town. The truck did not stop, and the accident made no particular impression on him. He knew of no serious trouble. When he went on he saw the roadster at Gilliam's Landing, and they were working on the roadster, and he recognized appellee at the time. Also a Mr. Dodson was a passenger. He did not know what damage had been done. Witness did not know about appellee's having filed suit, and after he found out the case had not been settled he did not want to go into court.

George M. Green, manager of appellant's branch in Hope, Arkansas, keeps a record to show where the trucks were on August 10, 1932, in the form of sale records for the day, and delivery by the trucks on their regular routes; he examined the records for his territory and his trucks were not in the vicinity of Hot Springs at that time; on that date they had no hauls from Little Rock, and their trucks were all confined to local deliveries. He testified that if any occasion had arisen to haul merchandise to his branch office from Little Rock, his trucks would not have used the Arkadelphia-Hot Springs highway, but would have passed by Malvern, which is 20 miles nearer. On cross-examination this witness testified that they hauled merchandise from Little Rock to their branch office, and he knew they went by Malvern because that was the straightest way, and because of the time they would consume; he was not familiar with the Hot Springs branch.

Tim Schultz, an employee of the appellant, is manager of the Hot Springs branch, and he testified that a record was kept of the trips made on August 10, and that on that date an accident did not happen to either of their trucks. He also testified that the furthest customer that he had on the road from Hot Springs to Arkadelphia was C. C. Batterson, whose business is located a mile beyond the end of the car-line, and that they did not make deliveries beyond Batterson's; that the injury occurred on Wednesday, and that they made deliveries to Batterson on Monday and Thursday, and served no other stores except Batterson's, between there and the river; that his records showed that on August 10 deliveries were made to the Oaklawn Race Track; he did not ride with the truck, but knew where the men went from what they reported, and he made his records from their reports; he has no way of telling if some driver drove a truck on the highway between Oaklawn and the river, but does not think they did because there was no occasion. Trucks from the Little Rock branch make deliveries to the Hot Springs branch weekly. He has never seen trucks from Malvern, Hope or other cities in Hot Springs. Appellant operates regular routes, one of which runs toward Little Rock, to Browes Station, two

miles. The other route toward Little Rock is made three times a week, on Monday, Wednesday and Friday, and August 10 was Wednesday. Men by the names of Robert Cheshire, Albert Howard and Roy James had driven trucks for Plunkett-Jarrell, but they did not deliver to Harris Mackey.

Luke Graves, another employee of appellant, testified that he was the driver of one of the trucks, and that on no occasion did he drive his truck beyond Batterson's store on the Hot Springs-Arkadelphia highway, nor did any one else. His truck was not where the accident occurred on August 10, and he did not have his truck beyond Batterson's store. He said the other truck was operated by Mack Wilson. Witness could not remember where he was on June 5, 1934, or August 8, 1933.

Mack Wilson, another employee of appellant, also testified that the Hot Springs branch operated two trucks, and in August, 1932, they delivered on Benton Street and Malvern Avenue. The other truck had another route; that he drove the Arkadelphia-Hot Springs highway as far as Batterson's store which is one mile from Oaklawn, and is the longest delivery on that route from Hot Springs. He did not deliver merchandise to Gilliam's Landing, nor beyond Batterson's store. He knows nothing of the accident which took place on August 10 in which a Plunkett-Jarrell truck collided with one driven by appellee. He never had an accident there, and it could not have happened without his knowledge. Gilliam's Dairy is about one mile and one-half beyond Batterson's. Witness testified that he never drove appellant's truck at any time except where orders were to be delivered, and the company's orders were obeyed by him. Does not know where he was on July 18, 1934, but knows he went to Batterson's store once a week. Made his regular run on August 10, 1932, and to Malvern Avenue that morning; he did not make a trip on the Arkadelphia highway; that if any trip was made on this highway he was the driver, and made a trip to Oaklawn on August 10.

Lloyd Alexander, another employee of appellant, testified that he was manager of appellant's branch at Malvern; that the trade territory from Malvern branch

extends from Point Cedar, Arkadelphia, Sparkman, Willow, Butterfield, Leola, Prattsville, Traskwood, and Bismarck. The Malvern trucks do not serve customers between Bismarck and Hot Springs. In going to Bismarck they take the road to Social Hill, which passes by Arkadelphia. They have customers there, but no customers from there to Hot Springs. The Malvern branch has three drivers. There is no reason for appellant's truck from Malvern to pass over the road from Bismarck to Hot Springs on company business. Sometimes his trucks coming back to Bismarck from Malvern, would go to the Caddo and come through Donaldson, which was a better way to Malvern.

Coy Linvall testified that he was shipping clerk and salesman at Malvern and would take orders for merchandise, and the company trucks would follow behind and make deliveries. His branch in 1932 did not sell merchandise to stores between Bismarck and Hot Springs, and they had no deliveries on the Hot Springs highway beyond Bismarck. This witness on cross-examination testified that the drivers are not supposed, in making deliveries, to return by Hot Springs, and if they did that, he did not know about it; that Mr. Beason, a driver, told that he had gone around back by Hot Springs, and Beason made two trips by Hot Springs; witness never went that way and is not familiar with the trucks and cars on the Hot Springs-Arkadelphia highway on August 10, 1932.

Doyle Jones testified that his route was from Poyen to Leola, and occasionally by Point Cedar, which was by Social Hill on the pavement to Bismarck. In August, 1932, the company did not supply any stores on the Hot Springs-Arkadelphia highway from Hot Springs to Bismarck. He testified also about the kind of trucks operated by appellant, and car operated by appellee, and said that one of the company's trucks could not be driven so that the left front wheel would hit a part of the car; that the appellant's truck would have hit the wheel of the other car before it hit the side.

Theo Bennings, another driver, testified that he had never had occasion to drive over the Hot Springs-Arkadelphia highway.

The appellee testified that he is a man of family, having five children from three to ten years old; has lived in Clark County all of his life; is 34 years of age; he then testifies about returning from Hot Springs to Arkadelphia and being hit by a truck and injured. After his injury the passenger took the wheel and drove to Gilliam's Landing, and then they went to Levi Hospital in Hot Springs, where he remained 29 days; suffered a great deal of pain. He testified about the appearance of the car or truck that hit him, and he was also asked about statements that he was alleged to have made to Mr. Lookadoo, Mr. Akers, and others, and about Mr. Lookadoo bringing a suit for him against a different company.

A letter was introduced which showed that appellee's wife had written to Mr. Bob Harris. There is quite a good deal of testimony, but all of the evidence shows that the truck which struck appellee was the kind of truck owned and operated by appellant. Lefler testified that he saw the name of appellant on the door, and appellant's witnesses testify that the name, as testified to by Lefler, was on all their trucks.

We do not set out the evidence as to how the accident and injury occurred because the facts with reference to this matter are not disputed. The appellant does not contend that appellee was not struck and injured by a truck in the manner described by him. Its contention is that the evidence is not sufficient to show that the truck belonged to it, or that it was in the control of one of its drivers.

Lefler was accustomed to traveling the Arkadelphia-Hot Springs highway, on which this injury occurred, and he testified that this was a Plunkett-Jarrell truck, that it had the Plunkett-Jarrell name on it. Appellant's witnesses testify that the trucks used by it are of the kind described by appellee's witnesses, and that the sign is on the door of all their trucks. Mr. Plunkett calls attention to the fact that on one occasion, when they sold a truck to International Harvester Company, and it sold it to a negro, that it still had the Plunkett-Jarrell name on it, but that he took steps immediately to have it taken off. There is no evidence anywhere in the record that

a truck belonging to any one other than the appellant has ever been used in that section with appellant's name on it. Appellant, as we have said, has 16 stores, and names nine of the places where the stores are located.

The evidence is undisputed that the trucks of the appellant were in constant use around Arkadelphia, Hot Springs, Malvern, Hope, and Nashville. There is no dispute about this, and there is no claim that trucks owned by any other persons with Plunkett-Jarrell's name on them ever traveled on these highways. It is true that the evidence of appellant's witnesses was to the effect that the truck drivers had certain routes; that they followed the route of the salesmen and delivered goods wherever sold on the route; but it is not claimed that anybody had any control over them, or gave them any directions as to the route they should go, and the undisputed evidence shows that on some occasions they would go different routes to the same place. The evidence shows that in delivering goods to Bismarck they would sometimes go by Donaldson, and sometimes go another route, and in delivering goods to Bismarck from Malvern, a glance at the map will show that it is practically the same distance to go by Hot Springs and travel the Hot Springs-Arkadelphia road to Bismarck, as it is to go by Donaldson.

Mr. Lindvall, salesman and shipping clerk in the employ of appellant at Malvern, testified, and this question was asked him: "So far as you know those men could have made deliveries out there, and might have come back by Hot Springs?" He answered: "As far as I know they might." He was asked if any of the truck drivers ever told him they had gone around by the lake and back by Hot Springs. He said Mr. Beason told them twice, and that two trips to his knowledge were made around by Hot Springs to Malvern. He also said that the drivers never told him which way they went except he knew that they occasionally came back through Hot Springs.

Another witness, when asked by appellee's counsel about using that particular road, was not permitted to answer. The appellant objected, and the court sustained

the objection, telling the appellee's attorney he should confine it to about the time of the accident.

Mr. Plunkett testified that all these trucks that are driven in various cities are driven by men employed by the company.

The evidence showed that the trucks used on that road, other than appellant's, were of a different color from appellant's trucks. Whoever was driving the truck did not stop after the accident, but proceeded, in violation of law, and the jury may have believed that the witness, if he testified, would not testify that he was about the place of the accident, because whoever was the driver of the truck, caused the injury by his negligence, and violated the law by running away from the accident. The rule is that the evidence of an interested witness is not considered as undisputed, although there may be no testimony contradicting him. It is a question for the jury whether he is telling the truth. Witnesses testified that appellee had made certain statements which were in conflict with his testimony at the trial. Appellee denied this.

It should be held in mind that the testimony of these witnesses was given a long while after the alleged conversations with appellee, and the evidence shows that one of these witnesses was in such condition that he probably did not know what appellee said, and the other witness did not contradict appellee. "It is a common experience of those dealing with human testimony that conversations are very imperfectly remembered, particularly where the exact language used is sought to be recalled after a considerable lapse of time, where the words spoken were of indifferent interest to the hearer, so that he would have no occasion to treasure them up in his memory, or where the statement was made in loose, casual or random conversation. In addition to this, testimony as to the admissions or other oral statements of a person not called as a witness is open to the objection that it is easily fabricated or the statement may have been imperfectly comprehended, wrongly interpreted or misunderstood by an honest reporting witness. For these reasons such testimony is regarded as

weak and even dangerous evidence, which should always be received with caution; and the distrust of this character of evidence has even found expression in statutes providing that testimony as to oral admissions should be scanned with care or requiring the court to instruct the jury that such testimony should be regarded with caution. It is, however, the province of the jury to weigh such evidence and give it the consideration to which it is entitled, and it may be sufficient to support a decision." 22 C. J. 290 *et seq.*

The credibility of the witnesses and the weight to be given to their testimony are questions solely for the jury, and proof of a fact does not have to be made by any particular kind or class of evidence, but the triers of fact may seek the truth within the field of the evidence to the utmost boundaries of reason, which rational men of common sense might set, without passing beyond the line between the field of probabilities and the field of conjecture. 23 C. J. 53.

Appellant calls attention to *Callas* v. *Independent Taxi Owners' Association,* 66 Fed. (2d) 192. The court in that case said: "The president of the corporation called by the plaintiff as a witness of necessity, on cross-examination testified that the company did not own any cabs and never owned one, and that Schou had never been a member of the association. * * * But the charter of the company was in evidence, showing its authority to operate taxicabs. The car was operating as a taxicab at the time of the accident, bearing the peculiar colors and tradename of the defendant company; and consequently was legally presumed to be in the custody, and on the business of the person whose name it bore. Whether the effect of this presumption was overcome by the testimony of the president of the company that it did not own a cab, and his intimations that it was not in the cab business, was a question of fact for the jury, and consequently its decision as a question of law by the court, was error. So far as the liability of the defendant was concerned, the plaintiff's cause rested wholly upon a presumption. There was no direct evidence as to who was the owner of the truck that inflicted the injury, nor as to who was in

charge of it when the injury occurred. There was evidence, however, that the truck bore the name of the defendant company. This was sufficient to establish not only *prima facie* that the defendants were the owners of the truck, but also that it was then in charge of their servant or employee. This was presumptive evidence, and as has frequently been ruled, was quite sufficient to carry the case to the jury."

In the instant case the evidence shows that the appellant owns 42 trucks, and 16 places of business; that it constantly delivers merchandise in those trucks, using the highways; that the truck was the kind of truck used by appellant, and had appellant's name printed on the door. There is no evidence that any other person or company used trucks like this to deliver merchandise in that section of the country. As said in the case just cited, it was a question of fact for the jury, and was sufficient evidence to establish the ownership of the appellant, and that it was being operated by its employee at the time of the accident.

Appellant next calls attention to *Arkansas Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. (2d) 45. The court in that case said: "The evidence, when viewed in the light most favorable to the appellee, as we must do in determining its sufficiency, was such that minds of reasonable men might differ as to the cause of the injury, and we cannot set the verdict aside on this account.

"It is next insisted that there is no sufficient showing that the truck that caused the accident was appellant's property, was being used at the time of the accident in its business, or that the driver of the truck was in its employ, and that he was engaged in the business of appellant at the time of the accident. It is undisputed that the truck that caused the accident had appellant's name printed or painted thereon. It is further undisputed that this truck or a like truck bearing the name of appellant, traveled over this highway daily. The evidence further shows that a short time prior to the accident, while appellee and another were in Warren, they saw this same truck and the same driver who caused the

accident, delivering bread or other articles of merchandise to a customer in Warren."

The court held that this evidence was sufficient to establish the fact that the truck belonged to the appellant, and that it was being operated at the time of the accident by its employee, and that this was sufficient to raise the inference that at the time of the accident he was acting within the scope of his employment, and in the furtherance of his master's business.

Attention is next called by appellant to *Spencer's Administrators* v. *Fisel,* 254 Ky. 503, 71 S. W. (2d) 955. In that case the court said: "Where the evidence involves issues of fact about which fair-minded men might honestly differ as to the conclusion drawn therefrom, whether controverted or not, or if legitimate inferences thereupon tend to support the plaintiff's cause of action, or if the facts support his contentions, the issues should be submitted to the jury. Only when all facts and circumstances taken together fail to establish the plaintiff's cause of action, or the inferences that can reasonably be drawn therefrom fail to establish the case, it may be regarded the evidence was not sufficient to require the issues be submitted to the jury for determination."

It is true that the evidence in this case is largely circumstantial, but facts may be established by circumstantial evidence as satisfactorily as by direct evidence. This court has said: "According to the familiar rule, this court must give to these circumstances their highest probative value in favor of the appellee, and indulge every inference which is reasonably deducible from them, in support of the finding of the jury." *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. (2d) 798; *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. (2d) 760.

"The settled rule which has been many times approved by this court, is that a well-connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reason-

able minds might draw different conclusions." *Hanna* v. *Magee,* 189 Ark. 330, 72 S. W. (2d) 237.

Appellee calls attention to many authorities, all holding that in cases where there is no direct evidence as to who was the owner of the truck, but where the evidence shows that the truck bore the name of the defendant company, was a business truck, and engaged in the character of business that appellant was engaged in, that this is sufficient to establish not only that the defendants were the owners of the truck, but it was also then in charge of their servant or employee. We do not discuss these cases because we think this court has settled this question beyond controversy.

Appellant next urges that this cause should be reversed because the court gave instruction No. 6 requested by the appellee. That instruction reads as follows: "If you find from the evidence that the truck which injured the plaintiff belonged to the defendant, Plunkett-Jarrell Grocer Company, and that the defendant operated its truck over this highway for the purpose of making deliveries to its customers, then from these facts a presumption arises which, if unexplained, justifies you in finding that at the time of the collision the truck was being operated for the defendant's benefit."

Appellant's first objection to this instruction is that there was no evidence that the truck belonged to the appellant, or that appellant operated its trucks over that part of the highway where the accident occurred, for the purpose of making deliveries to its customers.

We do not agree with appellants in this contention. We think there is substantial evidence to sustain the verdict of the jury finding that this was appellant's truck, and that it operated over this highway for the purpose of making deliveries to its customers.

Appellant's next objection is that there is no evidence that defendant's trucks made deliveries in the vicinity of the accident. We think the inference that it did deliver goods in this vicinity is supported by the circumstances.

It is next contended that the damages are excessive. The appellee is 34 years old. At the time of his injury

he was engaged in operating a sawmill. He was earning from $3 to $5 a day, and his expectancy was approximately 36 years. His arm was broken in a number of places. Some of the fractures were compound fractures, with bones protruding from the flesh. The elbow is so injured that it is of no service to him whatever. He was confined to the hospital for 29 days, suffered pain considerably for five or six months, is permanently injured and totally disabled from carrying on his work. The verdict was for $10,000, and we do not think, when all the facts and circumstances are considered, that this was excessive.

The judgment is affirmed.

BAKER, J., not participating.

McHANEY, J., (dissenting). I regret that I cannot agree with the majority in this case, for I am of the opinion that the evidence, viewed in the light most favorable to appellee, as we are required to do, is not sufficient, under our previous holdings, to fix liability on appellant. The vital question in the case is: was the truck that struck and injured appellee owned by appellant and operated at the time by its employee in its business? The appellee did not know whose truck it was, did not know who the driver of it was and at first thought it was a yellow truck. He thought it was a yellow truck so strongly that he employed counsel who brought an action for him in the Garland circuit court against the Shell Petroleum Company in which he sought damages in the sum of $3,000 for his injuries. He says his uncle did this but it was done with his knowledge and consent. Buck Dodson who was riding in the roadster with appellee at the time of his injury testified it was a yellow truck with a bed on it, the kind used for hauling gas tanks, and looked like it had a tank on it and an overhanging body where five-gallon cans can be placed on the side of the oil tank. It is conclusively shown that appellant does not own any yellow colored trucks.

One witness for appellee, Lefler, testified that he saw the accident and that the truck that struck appellee passed him on the highway. He was asked whose truck

it was and answered: "Plunkett-Jarrell Grocery truck. I seen the sign on the door." And that it was 1½-ton truck with a stick body and a tarpaulin. This was all the evidence tending to show that it was appellant's truck that struck appellee. No witness undertook to say who the driver was or that the truck and driver were on any business for appellant. Forgetting for the moment the proof on behalf of appellant, conclusive to my mind, that it had no truck on that highway on the date of the injury further out of Hot Springs than Batterson's store, some two miles from the scene of the accident, and that its truck was not involved in same, and assuming that Lefler's testimony is sufficient to take the question of the ownership of the truck to the jury, still there is no proof as to who the driver was, whether an employee of appellant or not, or whether, if an employee, he was about his master's business, or on a mission of his own. We have never held bare proof of ownership of the car is sufficient, and no case will be found in our reports to that effect. Suppose a thief had stolen appellant's car, had the accident and returned the car, or suppose the driver had loaned it to a friend to go on a mission of his own. It seems to me that ownership and relation of employer and employee, master and servant, or principal and agent, must be shown. Then a rebuttable presumption of fact arises that the car was operated in the master's business. In *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6, there was no dispute about the ownership of the truck. Appellant not only owned the truck but paid the license on it. The question in dispute was, not the identity of the driver, but whether he was an employee or an independent contractor. This question was held to have been properly submitted to the jury, and it was held that since it was appellant's truck and, as found by the jury, operated by his employee: "This was *prima facie* evidence, at least, that the truck was being operated for appellant at the time appellee was injured." Also in *Mullins* v. *Ritchie Grocer Company,* 183 Ark. 218, 35 S. W. (2d) 1010, there was no question about the ownership of the car, nor as to who the driver was or whether he was

an employee of the appellee. The court said: "Lewis, a salesman and collector for the Ritchie Grocer Company, was furnished an automobile by the company to use in the furtherance of his master's business. He was in the general employ of the master and was allowed the exclusive use and control of the automobile. The accident happened on a week day; and, under the authorities above cited, this made a *prima facie* case in favor of appellant upon proof of negligence. The negligence of Lewis was proved, and, in fact, was conceded by counsel for appellee. The *prima facie* case made by proof of the facts stated was not overcome merely by proof that Lewis, by the terms of his employment, was not required to work on Saturday. Such evidence was a circumstance only tending to show that he was not acting in the course of his employment at the time the accident occurred. Neither can it be said that the fact that the accident occurred at eleven o'clock, which was after usual business hours, *overcomes* or defeats the *prima facie* case made by appellant. It is a matter of common knowledge that servants in the discharge of their duties often are delayed or prevented from completing their work during usual business hours. In the present case, the fact that the order blanks of the company were in the car was a circumstance, however slight, it might be deemed by the jury, tending to show that Lewis was in the furtherance of the business of the company at the time the accident occurred. See *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S. W. (2d) 840."

The same thing is true as to *Casbeel* v. *Yantis-Harper Tire Co.*, 183 Ark. 912, 39 S. W. (2d) 306, and *Arkansas Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. (2d) 45. A mere reading of these cases shows they are not authority for appellee in this case.

Here, the only proof is that a truck having appellant's name on the door struck appellee. We are asked to presume from that not only that it was appellee's truck, but that it was being operated by its employee on its business. Before I can give my consent to take $10,-

000 away from appellant and give it to appellee, something more must be shown.

I respectfully dissent and am authorized to say Mr. Justice SMITH concurs with the views here expressed.

MISSOURI PACIFIC RAILROAD COMPANY, L. W. BALDWIN ET AL., TRUSTEES, *v.* MOBLEY.

4-4217

Opinion delivered March 9, 1936.

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

J. W. Westbrook, for appellee.

BUTLER, J. The appeal in this case is to reverse a judgment for $110 for the killing of appellee's mare by the operation of a train at a public crossing in Traskwood, a village on the Missouri Pacific Railway. At this point the railroad runs north and south, and a wagon road crosses it at right angles from east to west. The

appellee contends that his mare was killed because of the failure of the servants of appellant company to give the statutory signals and to keep a proper lookout for persons and property on or near the railroad tracks. The killing of the mare was admitted, but the action was defended on the ground that the accident was unavoidable.

The contentions for reversal are that incompetent testimony was admitted relative to the value of the mare, that certain instructions given were incorrect declarations of law, and that the undisputed evidence established the defense set up by appellant in its answer. The testimony complained of is that given by certain witnesses who were permitted to testify as to the value of the animal killed without qualifying as to their knowledge of the market value of horses at the time and place of the accident. These witnesses placed the value from $100 to $125, and described the animal killed, stating that it weighed from 1,000 to 1,100 pounds, was about seven years old and a good work animal. They gave it as their opinion that an animal of that character was worth the sums mentioned. Other witnesses testified that they knew the value of such animals and what they were selling for, and placed the value around $125. We must indulge the presumption that the jury was comprised of men of ordinary information, and its verdict for $110 demonstrates that no prejudice could have resulted from the introduction of the testimony complained of. The verdict was not excessive, and the competent evidence would have justified a larger amount.

We have examined the instructions complained of in connection with others given at the request of the appellants. We have also examined the instructions requested by the appellants which were refused, and conclude that no prejudicial error was committed by the trial court in the giving or refusal of instructions. The instructions are in effect similar to those given in the case of *Mo. Pac. Ry. Co.* v. *Foltz,* 182 Ark. 941, 33 S. W. (2d) 51, where the same objections were made as are made to the instructions in the case at bar. In that case, we said: "The effect of our statute (§ 8562, Crawford

& Moses' Digest) * * * is to make proof of the injury by operation of the train *prima facie* evidence of want of ordinary care on the part of the operatives in charge of the train, which would warrant a finding against it for damages resulting from the injury on its failure to produce any evidence tending to establish the exercise of ordinary care on the part of its servants. That is all that the instructions complained of do. * * * No fair interpretation of these instructions supports the contention of the appellant that the court meant to say or that the jury would understand that the presumption mentioned should be weighed as evidence against the testimony showing the exercise of due care, but only in the absence of any evidence the law imputed negligence to the appellant."

The appellee's mare was killed by a moving train. Therefore, under the statute, *supra,* the burden rested upon the appellants to establish a compliance with the requirement as to the giving of signals and the keeping of a proper lookout, and that they were in the exercise of ordinary care at the time of the accident. *Missouri Pac. Rd. Co.* v. *Mitchell,* 170 Ark. 689, 280 S. W. 627; *St. Louis-San Francisco R. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. (2d) 992. The instructions given which were complained of declared this rule, and fairly submitted to the jury the contentions of the respective parties.

The principal contention is based upon the refusal of the trial court to instruct the jury to return a verdict in favor of the appellants. Those who operated the locomotive at the time of the accident testified that the required signals of blowing the whistle and ringing the bell had been given as the train approached Traskwood, and were continued until the time the animal was struck. They also testified that they were keeping a constant lookout, and did not see the animal in time to avoid injuring it, even had they exercised the greatest effort to check or stop the train. It is upon this testimony that appellants ground their request for an instructed verdict, contending that there was no evidence which disputed that given by the engineer and fireman.

Just south of the crossing and a short distance therefrom on the east and west side of the railroad were

two little stores where a number of men were gathered who witnessed the accident. Some of these testified that, as the train approached the crossing going south, two horses approached the track along the wagon road about ten or fifteen feet apart, walking at an ordinary gait. The first horse passed the crossing in safety, and the one behind which belonged to the appellee had almost crossed when two or three sharp blasts were made by the whistle of the locomotive. This evidently alarmed the animal so that instead of continuing across the track it turned toward the south and was almost immediately run over and killed. There is a curve in the railroad track to the north of the crossing and an embankment on the west side of the track extending north for about a quarter of a mile. The evidence as to the distance north to the point of the curve is in dispute, the appellants contending that it is about 750 feet, and witnesses for appellee testifying that standing on the track at the crossing they could see to the north up the track a quarter of a mile. West of the railroad the wagon road passes along a "cut" and emerges from it before reaching the railroad track. Just how deep this cut is at any point or where, with reference to the right-of-way, it ceases does not appear. The engineer testified that when he first saw the animal it was between fifty and seventy-five feet away, and that there was nothing he could have done to check the speed of the train sufficiently to avoid the accident, but neither the engineer nor the fireman testified that the curve or embankment on the west side of the track would have prevented their seeing the animal as it approached from the west, and the fireman admitted that he could see ahead "'way down the track." The horses were approaching the track from the engineer's side of the train, and we think that his failure to testify that he could not have seen them as they approached is a circumstance tending to rebut his testimony that he was keeping a constant and efficient lookout ahead. It was the duty of the engineer and fireman to keep a lookout on the right-of-way as well as on the track ahead so as to enable them to see objects near, or approaching, the track. *Missouri Pac. Rd. Co.* v. *Green,* 177 Ark. 217, 6

S. W. (2d) 26; *C. R. I. & P. Ry. Co.* v. *Stiles,* 161 Ark. 155, 255 S. W. 559.

In the case of *St. Louis-San Francisco Ry. Co.* v. *Cole, supra,* relied on by the appellants, the facts were that a wagon and mules approached the railroad track from the fireman's side of the locomotive. He presumed they were in charge of a driver. There was intervening obstruction which prevented his discovery that a driver was not in charge, and after he made this discovery he immediately notified the engineer. The engineer, however, was unable to check the train in time to prevent striking the animals. The jury returned a verdict in favor of the railroad company, and this court held that the above was substantial evidence to support the verdict. The Cole case is dissimilar to the instant case and does not control.

In *Barnes* v. *Mo. Pac. Ry. Co.,* 158 Ark. 640, 251 S. W. 675, relied on by appellants, (not officially reported), a dog was killed by the operation of a train as it approached a station. Both the engineer and fireman were keeping a lookout and did not see the dog which "evidently ran suddenly upon the track from his master's residence when the train approached the station. The testimony of the engineer and of the witness who saw the train hit the dog overcomes the *prima facie* case of negligence made by showing that the dog was killed by a running train." Thus, it will be seen that this case has no application to the facts of the instant case.

As there is substantial evidence to support the verdict, and no error appears, the judgment of the trial court is affirmed.

WRIGHT *v.* KAUFMAN.

4-4218

Opinion delivered March 9, 1936.

A. A. McDonald, for appellants.

Hill, Fitzhugh & Brizzolara, for appellee.

BAKER, J. The appellants here were plaintiffs in the trial court. They brought this suit, attempting to set aside a decree of foreclosure and sale of real estate nearly or about four years after the confirmation of the sale. The complaint alleged that they were owners of lots 9 and 10, block 12, of Foltz Addition to the city of Fort Smith. The first allegation was that the advertisement for the sale of the property was published in the *Saturday City Item,* a weekly newspaper, and that said newspaper did not have a *bona fide* circulation as contemplated by law.

They alleged next that the judgment or decree was procured by fraud practiced by the defendant upon the court and plaintiffs, and that they were prevented from making a defense by fraudulent conduct of the defendant Kaufman. They pleaded further that on the 25th of April, 1925, they conveyed their property by deed to Kaufman as security for money he was to advance to them, or pay for them to others in the sum of $1,986.67, the money to be repaid within five years.

They say that they are colored people, ignorant of business affairs, but, having confidence in Kaufman, they

relied altogether upon him in the preparation of all conveyances and contracts which they signed.

They say that during the period of five years, for which the contract was to run, they paid all State, county, water, bridge and other taxes assessed and charged against the property; that they made their last payment on October 25, 1930, and that the payment at that time was made with the distinct understanding on their part, and on the representations of Kaufman, that he would not foreclose on the property, but would rent the house and collect the rents and apply same on the balance owing on the loan.

At the time they procured this money they were living in Fort Smith, but on or about the first day of June, 1928, they moved to Los Angeles, California, and thereafter carried on all negotiations by mail. They pleaded that on February 1, 1931, they received a letter from C. W. Knott, dated January 27, 1931, notifying them that suit had been brought by Kaufman to foreclose the mortgage he held. They thought there was some mistake and wrote to an attorney at Fort Smith asking him to investigate the matter for them, but, failing to receive a reply, they were advised by an attorney in Los Angeles, California, that there was probably some mistake and paid it no more attention until they were notified, on April 13, 1931, by a telegram from Kaufman, which read: "Purchased your property at foreclosure sale. What shall I do with the furniture stored in the house? Please advise at once. Henry Kaufman."

They then had some one write the clerk at Fort Smith, and found that judgment had been rendered for $1,364.03. Failing in their efforts to employ attorneys, plaintiff, Josie Wright, returned to Fort Smith about September 10, 1933, more than two years after the sale, and later her husband, Dave Wright, returned to Fort Smith on February 5, 1935.

They further say that they had a "good, meritorious defense and a valid one, and were prevented from making same by the false and fraudulent misrepresentations of the defendant, as more fully appears from said letters of defendant which are too voluminous to include herein."

In their further pleading they allege that the amount of the indebtedness was $779.64, and pleaded that the judgment was for $589.39 more than Kaufman was entitled to receive. The commissioner's deed to Kaufman was made April 16, 1931. They also insist that the delay in bringing this suit does not in any manner work to the disadvantage of the defendant, and that they have not been guilty of laches as they brought the suit as soon as it was possible for them to do so. They pray that they be allowed to prove their defense to the suit; that said sale be declared void, set aside and cancelled, and that an accounting be ordered between the parties.

They amended their complaint and pleaded that certain repairs were made upon the house in order that it might be rented; that they made these expenditures under a belief that there would be no immediate foreclosure, and that Kaufman would continue to collect rents; that he had written them showing that he had deposited in the bank $35.23; that he claimed to have paid back taxes, sewer and water, in the amount of $88.40, but he had not paid these items, and that after the foreclosure upon the property he had withdrawn from the joint account of Wright and Kaufman, made up of rents, $75; that this was done after the sale was confirmed. Attached is a statement showing the amount paid out by Kaufman, and they also made an exhibit of a letter written by Kaufman and a statement which he enclosed in the letter, said letter being dated November 3, 1930. He advised in that letter the collection of some money, showing he had received $180, and that he had paid out $144.77, and that the balance he was presumed to have deposited in the bank with such rents as may have been collected.

The defendants filed a demurrer to this complaint. The court sustained the demurrer and dismissed the complaint. From that decree is this appeal.

Whatever the merit this complaint may apparently have upon a casual reading, an examination disclosed very little substance therein.

We desire to suggest in the beginning of this discussion that those who attack judgments and decrees of the courts and seek to set them aside must do so in accord-

ance with some of the well recognized principles of law as declared by statute or set forth by the decisions of the courts. If this were not true, the verity of judgments and decrees of courts would perish. No litigation could ever be ended. The passing years would suggest to some astute counsel some new method of attack.

These two old negroes had been away from Fort Smith for about three years when this suit was filed. Service was had by warning order. They plead that the attorney *ad litem* had given them notice of the pendency of the suit. When they failed to hear from an attorney at Fort Smith to whom they had written, they felt secure in their belief that there was some mistake and paid no more attention to the matter until after a decree was rendered and sale of the property had when Kaufman advised them that he had purchased the property. After receipt of a telegram from Kaufman, advising them that he had purchased the property, they still had time to challenge the validity of the sale, which they say was made without proper advertisement. They did nothing, however, to prevent a confirmation of a sale, which cured whatever alleged defect existed therein.

After this sale they had a right to proceed within the time provided by statute to set aside the alleged erroneous decree rendered on constructive service, and to correct the alleged injustice which they now claim. They failed, however, to avail themselves of this remedy as provided by statute. Section 6266, Crawford & Moses' Digest; *Owen* v. *Union Central Life Ins. Co.,* 191 Ark. 1014, 88 S. W. (2d) 1002.

This it seems ought to be sufficient in itself to prevent further inquiry into the decree, sale and confirmation.

However, taking up some of the matters alleged in the complaint, it seems conclusive that the plaintiffs, appellants here, have not been really prejudiced. There is nothing in their contention that Kaufman required them to convey the property to him by deed instead of mortgage. In his suit against them the instrument is treated as a mortgage or deed of trust and foreclosed as such.

They alleged that he practiced a fraud upon the court. This is a more nearly general conclusion than a statement of fact, and we fail to see that any fraud was practiced. No specific act has been pointed out to us, nor can such a conclusion be reached from a combination of all acts pleaded. The letter which Kaufman wrote to the appellants before the foreclosure suit was filed contains no promise or agreement that he would not foreclose or that he would permit continuous delays in payments, merely because he was collecting the rent upon the property. Whatever interpretation Wright and his wife may have put upon this matter, such conclusions as they plead were not warranted. The letter is offered as an exhibit to substantiate the allegation. Such exhibit is controlling rather than the allegation of the complaint. The letter is the foundation of the charge. *Beavers* v. *Baucum,* 33 Ark. 722; *Koons* v. *Markle,* 94 Ark. 572, 127 S. W. 959.

The alleged overcharge for taxes, or the failure to keep the money on deposit in the bank, resulting in a decree for an erroneous amount or a larger amount than was justified does not authorize the vacation or setting aside of the decree. This was a matter which might have been tried and is not now open to attack. *Estes* v. *Lucky,* 133 Ark. 97, 201 S. W. 815.

They allege that their debt was not in default at the time of the foreclosure, but that does not open a way for collateral attack upon the decree.

It seems clearly apparent that the chancellor was correct in sustaining the demurrer. The plaintiffs alleged no reason or cause whereby the decree might have been vacated.

The case of *Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308, and *Dent* v. *Atkinson,* 191 Ark. 901, 88 S. W. (2d) 826, are controlling here.

The decree is therefore affirmed.

BAUM *v.* FOX.

4-4216

Opinion delivered March 9, 1936.

[redacted]

G. W. Botts, for appellant.

George E. Pike, for appellees.

MEHAFFY, J. John T. Wright, of DeWitt, Arkansas, died in 1926 and left surviving him his widow, Sarah H. Wright; his son, W. J. Wright, and three daughters, Nellie McAdams, Mary B. Gresham, and Emma Pearl Baum. On September 14, 1921, John T. Wright made a will as follows, omitting the formal parts:

"I, John T. Wright, being of sound mind and good understanding, do make and declare this to be my last will and testament. I wish to bequeath to my beloved wife, Sarah H. Wright, my house and three lots, corner of South Fourth and Morrison Street, No. 723. Also my liberty bonds and one note in First National Bank, and mortgage given to both wife and I by Mr. B. H. Turner, and my other moneys that may be received after all debts are paid. If she needs any assistance in man-

aging the property, I appoint my son, W. J. Wright, to assist to the best of his ability. After death of the said Sarah H. Wright after the debts are paid all property and moneys are to be equally divided among my four children:

"W. J. Wright, Mary B. Gresham, Nellie McAdams.

"Except Pearl Baum not to receive her share until she is 45 years of age to be kept in trust for her until then.

"John T. Wright."

This action was brought by appellant in the Arkansas Chancery Court on April 6, 1934, for the purpose of having the will construed and for appellant's part of the estate.

Clarence Fox and Tee Fox, his wife, were made defendants because they were indebted to Wright and had given to him their promissory notes.

Appellant alleged that Sarah H. Wright and other appellees had used the estate for their benefit, and that under the will she was entitled to one-fourth of it when she became 45 years old.

Appellees filed answer denying the material allegations in the complaint. They also filed a demurrer which was not passed on by the court.

It was agreed that Sarah H. Wright, the widow of John T. Wright, was 83 years of age, and that no letters of administration or executorship had been issued, and no bond filed, and that Sarah H. Wright had received and collected all the moneys which had been paid or realized by the estate, and converted same to her own use and benefit. There was no other evidence introduced.

The court below decided that Sarah H. Wright took a life estate, and that she had the right to use the same or so much thereof as may be necessary for her benefit and support. The court also found that the appellant was not entitled to receive any part or parcel of the estate at this time, and that the suit was prematurely brought as to her rights under the will, holding that she was not entitled to any part of the estate until the death

of Sarah H. Wright, although the court found that she was more than 45 years old.

There is no dispute about the validity of the will, and the only question is whether, under the terms of the will, appellant is entitled to any part of the estate until the death of Sarah H. Wright.

The cardinal rule of construction of wills is to ascertain the intent of the testator and give it effect, unless the testator has attempted to accomplish a purpose or make a disposition of property contrary to some rule of law.

"The intention of a testator is to be collected from the whole will, and from a consideration of all the provisions of the instrument, taken together, rather than from any particular form of words. The intention is not to be gathered from detached portions alone, and the court should not consider merely the particular clause of the will which is in dispute." 28 R. C. L. 215, 216.

The first paragraph of the will bequeaths to Sarah H. Wright all of the property of the testator without any qualification at all. We hold this to be not a life estate, but an estate in fee simple. The paragraph has another clause as follows: "After the death of the said Sarah H. Wright after the debts are paid all property and money are to be equally divided among my four children." The following clause is added: "Except Pearl Baum not to receive her share until she is 45 years of age to be kept for her until then."

The rule with reference to conveying or creating a fee simple is stated in R. C. L. as follows: "By the earlier common law it was an established rule that a devise of lands without words of limitation conferred on the devisee an estate for life only. An exception was soon recognized in the case of a will, so that an estate in fee could be given without the use of the technical words required in a conveyance or deed, the gift in such a case being known as an executory devise. Modern legislation has largely abolished the former rule so that words of inheritance or perpetuity are no longer necessary to devise a fee, and whenever an estate in lands is created by a will, it will be deemed to be an estate in fee simple,

if a less estate is not clearly indicated. Especially when the testator shows that he desires not to die intestate, the courts will construe his will as creating a fee rather than a life estate, and thus avoid a partial intestacy." 28 R. C. L. 237, 238.

In this particular case, however, in order to determine whether the appellant is entitled to her share of the estate now, it is immaterial whether Sarah H. Wright took the fee or a life estate, because the appellant, under the terms of the will, was not to receive anything until the death of Sarah H. Wright. It is the contention of the appellant that she should receive her portion of said estate when she reached the age of 45 years, this being a later clause in the will. But the whole will must be construed together. Every part of it must be considered, and, when this is done, it was the manifest intention of the testator that Sarah H. Wright should receive the property, and, if any part of it were left at her death, it was to be divided among the four children, with the provision however, that the appellant should not receive her share until she reached the age of 45. There is no conflict between this provision of the will and the other provisions. The children are not to receive anything until the death of Sarah H. Wright, and if the appellant was not 45 years of age at that time, then her share would be kept in trust for her until she reached that age.

Appellant calls attention to the case of *Little* v. *McGuire,* 113 Ark. 497, 168 S. W. 1084. The court in that case said: "If any conflict exists, it would be our duty to construe the last provision as controlling, but where all the provisions can be construed together without doing violence to the language of either, it is the duty of the court to do so.

"The rule is that, where different parts of a will are totally irreconcilable, the last overthrows the former, but that rule is never resorted to except for the purpose of escaping total inconsistency."

The case of *Cox* v. *Britt,* 22 Ark. 567, cited and relied on by appellant, is to the same effect, so far as conflicting clauses are concerned, as the case of *Little* v. *McGuire, supra.* But the will in the Cox case expressly limited

the estate to the life of the legatee. It used the term, "during my natural life," but the court said "my" before the words "natural life" was undoubtedly a clerical mistake, and to give effect to the manifest intention of the testatrix as collected from the context, must be read "her." That is, it limited the estate to her natural life.

Appellant next calls attention to the case of *McKenzie* v. *Roleson,* 28 Ark. 102. The court in that case said, in discussing the repugnancy between the provisions: "There is certainly no repugnancy between the provisions of the original will, appointing a trustee and defining his duties, and the provisions of the codicil appointing an executor and directing him to execute the will in every particular."

Appellant next calls attention to 40 Cyc. 1180. This paragraph discusses inconsistent provisions of a will in the disposition of property, but, after stating the rule as to a codicil making a disposition of property inconsistent with the disposition made in the will, the paragraph reads: "But in order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention."

Appellant calls attention to *Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480. The court in that case said: "It is the rule that where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down or diminished by any subsequent, vague and general expressions. * * * "If it is clearly the intention of the testator that the devisee shall own the fee simple, his subsequent language directing that what remains of the property at the death of that devisee shall devolve upon a particular person or class of persons will not cut down the fee to a life estate." This case also approves the rule that where there is an irreconcilable conflict, the last provision prevails.

Appellant calls attention to the case of *Horrocks* v. *Basham,* 139 Ark. 116, 213 S. W. 372. That will pro-

vided that if Basham's son, by his own efforts accumulated an estate of the value of $15,000 clear and unincumbered, or in any event when he shall have reached the age of 45 years, that estate should be turned over to him. It was perfectly clear in that will that, if he accumulated the estate of $15,000, it should be turned over to him, but whether he did that or not, in any event it should be turned over to him when he was 45 years old.

The will in the instant case provides that at the death of Sarah Wright the property should be divided among the children, but that Pearl Baum should not receive her share until she was 45 years old. She could in no event receive it before the death of Sarah H. Wright, and, if she died before appellant was 45 years old, appellant could not receive it until she became 45 years old.

Holding, as we do, that Sarah H. Wright received the fee, it becomes unnecessary to discuss the other questions referred to by counsel.

Upon appeal in an equity case the trial is *de novo,* and if the decree is correct, it will be affirmed, although the chancellor based his holding on the wrong ground. This court has said: "The court was therefore in error in decreeing in favor of appellees on this ground. But this does not call for a reversal of the decrees if for other reasons they were correct." *Murphy* v. *Murphy,* 165 Ark. 246, 262 S. W. 677.

We think the decree of the chancery court is correct, and it is therefore affirmed.

JOHNSON, C. J., dissents.

BRIDGES *v.* INCORPORATED TOWN OF GATEWAY.

4-4211

Opinion delivered March 9, 1936.

Clyde T. Ellis and *Vol T. Lindsey,* for appellees.

JOHNSON, C. J. This action was instituted in the Benton Chancery Court by appellants, W. F. Bridges *et al.,* citizens and taxpayers of the locality affected, against the mayor and city collector of the incorporated town of Gateway, Arkansas, and Reed Adcock, the tax collector within and for Benton County, to restrain and enjoin an alleged illegal exaction. The complaint in effect alleged: that the town of Gateway in Benton County was on August 22, 1934, incorporated by order of the county court into said town, and that the said town had been incorporated so that it would become a border town on the north line to Missouri and enable filling stations located therein to sell gasoline at Missouri prices and defeat the Arkansas tax, that certain described lands were incorporated into the town to consist of 320 acres, and that there are eight dwelling houses and twelve filling stations situate in the said incorporation; that the order of the court organizing said territory into an incorporated town was null and void, and was an arbitrary and unreasonable exercise of power; that the incorporation of said town is contrary to the provisions of art. 2, §§ 22 and 23 of the Constitution of the State of Arkansas, by the taking of private property for public use without any just compensation therefor, and that it will be the duty of Reed Adcock, county collector, to collect assessments made by the authorities of said town; the prayer was that the court decree the town of Gateway not legally incorporated; that the officers of said town be enjoined and restrained from levying or assessing any taxes in said incorporation; that Reed Adcock, as county collector, be

enjoined and restrained from collecting any such taxes levied or attempted to be levied.

To the complaint thus filed a general demurrer was interposed and sustained, and appellants refusing to plead further, the complaint was dismissed for want of equity, and this appeal seeks reversal.

The incorporated town of Gateway was incorporated by order of the county court of Benton County on August 22, 1934, as authorized by §§ 7664, 7665, and 7666, Crawford & Moses' Digest. Section 7668 provides one month subsequent to the forwarding and delivery of such order of incorporation (to the Secretary of State, etc.) for any interested or injured party to attack such order of incorporation and § 7669 provides the method and means for the hearing and determination of any such controversy.

In *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. (2d) 24, we held that an attack upon an incorporation order made subsequent to the thirty-day period provided for in § 7668, *supra,* to be a collateral attack upon said order of incorporation, and not maintainable. We there held, quoting from the 2nd headnote, "Under Crawford & Moses' Digest, § 7668, providing for an attack on the validity of the organization of an incorporated town at any time within one month after the transcripts of the county court's order authorizing its organization has been forwarded and delivered, an action instituted after that time to enjoin the subsequently elected officer from functioning held a collateral attack on the judgment of the county court, which is a court of superior jurisdiction."

But appellants assert that *Waldrop* v. *Kansas City Southern Ry. Co.,* 131 Ark. 453, 199 S. W. 369, sustains their position in this case. This is not so. In the Waldrop case we expressly held that the county court's order of incorporation appeared to be void upon its face, therefore, under repeated opinions of this court, was subject to collateral attack. Such is not the status of this record. The county court's order of incorporation of Gateway, Arkansas, of date, August 22, 1934, appears to be a valid

order upon its face, therefore not subject to collateral attack.

It follows from what we have said that appellants' complaint did not allege sufficient facts to constitute a cause of action in equity, and that the chancellor was correct in so deciding.

The decree must be affirmed.

HAYS CONSTRUCTION COMPANY *v.* PAGE.

4-4304

Opinion delivered March 9, 1936.

R. E. Wiley, for appellant.

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

SMITH, J. The Hays Construction Company, hereinafter referred to as petitioner, alleged in the suit which it filed in the Pulaski County Circuit Court that it entered into a valid contract with the State Highway Commission for the construction of certain concrete paving, designated as Job No. 6123, a portion of which was to be paid for by the Federal Government; the remainder by the State. Due to lack of funds, the Highway Commission was unable to pay for that portion of the job originally intended to be paid for with State funds, and petitioner was not permitted to complete that part of the contract. However, petitioner did construct and was paid for about 45 per cent. of the total work called for in the original contract, this being the portion to be paid for with Federal funds.

Thereafter, petitioner filed a claim growing out of this breach of the contract with the State Highway Audit Commission, which after investigation recommended to the State Refunding Board that it should be compromised and settled for the sum of $6,900. This recommendation was approved by the Refunding Board at a regular meeting, and this suit was brought to compel the disbursing agent of the Refunding Board to issue a voucher and the exchange thereof for a warrant issued by the State Auditor and its payment by the Treasurer of State. From the judgment of the Pulaski Circuit Court denying this relief is this appeal.

For the affirmance of this judgment it is insisted that the instant case is similar to and is controlled by the opinion in the recent case of *Smith* v. *Refunding Board of Arkansas,* 191 Ark. 1, 90 S. W. (2d) 494, and, as we concur in that view, the judgment must be affirmed.

Appellant here, petitioner below, concedes this is true if the instant case be construed to be a suit for the loss of anticipated profits. Petitioner denies that it is a suit of that character. It is also insisted that it is not a suit for damages for breach of contract. The argument is that petitioner spent $14,093.55 preparing to perform the contract to construct 53,188 square yards of concrete of which it was only allowed to construct 21,796 yards, and it is argued that this cost, or the proper proportion thereof, should be allowed and paid as a part of the contract actually performed.

We cannot agree with this conclusion. It is an undisputed fact that petitioner has been paid the full contract price for all concrete which was put down. Petitioner's cause of action must necessarily be and is to recover damages resulting from the State Highway Commission's breach of the contract in refusing to allow petitioner to lay the remainder of the concrete called for by the contract. It is not contended, and cannot be successfully asserted, that petitioner is entitled to recover the balance which would have been due had the contract been completed. The well-settled rules for measuring damages in such cases forbid. Petitioner could, in that case, have recovered only that amount, less the

cost of completion, which in the last analysis is the anticipated profits.

It was held in the case of *Smith* v. *Refunding Board, supra*, that the board was without authority to authorize the payment of claims of that character. The opinion in that case reviewed the legislation under which the Refunding Board had acted, and defined its authority. It would be a work of supererogation to again review the law of the subject. As that case controls here, it must be followed, and upon its authority the judgment here appealed from must be affirmed, and it is so ordered.

BOURNE *v.* STATE.

Crim. 3976

Opinion delivered March 9, 1936.

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

McHaney, J. Appellant was convicted of the crime of grand larceny and sentenced to one year in the State penitentiary. He has appealed to this court, but has not favored us with a brief in his behalf.

In his motion for a new trial he assigns eleven errors of the trial court. The first three are that the verdict is contrary to the law, the evidence, and both the law and the evidence. These raise the sufficiency of the evidence which we have carefully examined and find it both ample and substantial. We think it unnecessary to detail it. Another assignment is that the court erred in permitting the witness, Lindell Johnson, to testify that appellant's co-defendant admitted that he and appellant committed the larceny, and that the latter divided the spoils with him. But the record does not disclose that appellant made any objection to the question that elicited such testimony and no exception taken. Other assignments relate to the admission and exclusion of evidence which we have examined and find them without merit.

Assignment No. 10 challenges the correctness of instruction No. 2, given at the request of the State, relating to the defense of an alibi. A comparison of this instruction with the one approved by this court on the same subject in *Ware* v. *State,* 59 Ark. 379, 27 S. W. 485, will show that it is almost a verbatim copy of the latter. So, on this point, *Ware* v. *State, supra,* is decisive of this contrary to appellant's contentions.

The jury returned this verdict: "We, the jury, find the defendant guilty and fix the penalty at one year." It is assigned as a ground for new trial that this verdict is so vague and uncertain that the court could not determine whether the jury meant to convict of grand or petit larceny, and could not assess a just punishment. What we said in the recent case of *Caruthers and Clayton* v. *State,* 191 Ark. 1070, 89 S. W. (2d) 732, applies here. See also cases cited there.

A supplemental motion for a new trial, on the ground of newly-discovered evidence, was filed and overruled. Such a motion addresses itself to the sound legal discretion of the trial court, and this court will not reverse except where an abuse of such discretion is shown or an

apparent injustice has been done. *Ward* v. *State,* 85 Ark. 179, 107 S. W. 677; *Young* v. *State,* 99 Ark. 407, 138 S. W. 475; *Cole* v. *State,* 156 Ark. 9, 245 S. W. 303. No abuse of discretion is shown.

The judgment is affirmed.

CHASE *v.* ANDRUS.

4-4221

Opinion delivered March 16, 1936.

W. O. Young and *A. L. Smith,* for appellants.

Alvin Seamster and *Ben Ware,* for appellee.

MEHAFFY, J. In 1920 W. A. Stewart owned two adjoining tracts of land in Benton County, Arkansas. One tract was free from encumbrance and the other tract was encumbered by a mortgage held by Marion Wasson for the sum of $1,000. There had been a payment of $100 to Wasson. The value of this land was estimated to be $3,000 above the mortgage.

H. C. Andrus, who was 70 years old, owned some property in Muskogee, Oklahoma, valued at $2,000. This was the home of Andrus and wife. W. B. Chase owned two tracts of land near Muskogee, Oklahoma, one of them with a six-room dwelling house on it valued at $2,000, and the other tract was valued at $1,000. Mr. Andrus was the father of Mrs. Chase, wife of W. B. Chase, and Mrs. Andrus was her step-mother.

W. A. Stewart desired to trade his property in Benton County, Arkansas, for property in Oklahoma. An-

drus and wife and Chase and wife came to Arkansas and looked at Stewart's place, and Andrus agreed with Stewart to trade his Oklahoma property for Stewart's property in Arkansas, provided Mrs. Stewart would agree to it. Mrs. Stewart, after looking at the Andrus property, refused to make the trade. In the meantime, Andrus and wife had made a deed to Stewart, and the deed and $500 was put in escrow. After Mrs. Stewart declined to trade for the Andrus property, Mr. Chase made the proposition to trade his property in Oklahoma for the Stewart property, and this trade was accepted by the Stewarts. The Stewart property was valued at $4,000 and the Chase property at $3,000; that is, the Stewart property, less the encumbrance, was valued at $4,000. Stewart made a deed to Florence Chase, daughter of Andrus, and the amount due on the mortgage at the time it was paid was $985. This amount was paid by Andrus. Andrus and wife and Chase and wife agreed to live together on the place purchased from Stewart. Stewart's personal property was purchased for $1,000. H. C. Andrus died on February 3, 1935.

This suit was begun by appellee April 9, 1935. In her complaint she alleged that in 1921 she and her husband, together with Florence Chase and her husband, W. B. Chase, purchased the 42-acre farm in Benton County, Arkansas, describing it, the deed being made to Florence Chase, wife of W. B. Chase and daughter of H. C. Andrus. The purchase price of the land was $3,000, and the assumption of the mortgage due to Wasson. W. B. Chase purchased the personal property and equipment then on the farm, including livestock and tools, for the sum of $1,000. Appellee alleged that at the time of the purchase she and her husband paid $500 cash, and that the mortgage held by Wasson for $1,000 was paid by her and her husband in June, 1922. The balance of the purchase price of the land and all the purchase price of the personal property was paid by W. B. Chase. It was alleged that the object of the purchase was to provide a joint home for the two families who had never lived together before, and the deed to the land was taken in

the name of the daughter, Florence Chase, as a matter of convenience. W. B. Chase worked the farm, keeping exclusive control of the personal property. H. C. Andrus was a blacksmith and erected a shop near the dwelling house, and earned about $1 a day, which was expended in the general expenses of the two families. She also alleged that she and her husband rented the property in Oklahoma and in the six years this amounted to $1,800, and was used in paying the joint expenses of the families. Appellee owned property in Muskogee which she sold for $1,100, and this was expended for the benefit of all, a part of it being spent in the purchase of an automobile for the joint use of the families; that H. C. Andrus bought and paid for material necessary to build a large barn, a garage and blacksmith shop. They also financed the purchase and setting out of an orchard. They expended $600 in permanent buildings and improvements on the farm; that during their years of plenty, W. B. Chase had free access to their bank account, but in 1928, when their money was exhausted, and H. C. Andrus, being 78 years of age, could no longer earn so large an amount at his blacksmith shop, it became necessary for W. B. Chase to contribute to the family maintenance. Trouble arose at once, and in May, 1930, W. B. Chase and his wife moved to a nearby farm, leaving the old people the use of the house and garden; that W. B. Chase is still working the farm and retains the proceeds for himself; that in 1930, H. C. Andrus made and executed a will bequeathing to his daughter, Florence, $1, and to appellee all his undivided interest in the 42-acre farm above described. Appellee is now past 75 years of age. W. B. Chase has caused a deed to be executed by Florence Chase to himself; that the lands are not susceptible to be partitioned or divided in kind. She prayed for a decree partitioning the land, and that said lands be sold and the proceeds be divided among said parties according to their interest therein.

Appellants filed answer denying most of the allegations in the complaint, and alleging that the farm was to belong to Florence Chase, and that Chase and Andrus

purchased the personal property for $1,000, each of them paying $500. All the allegations with reference to appellee's right or interest in the lands are specifically denied by appellants. They admit the execution of the will, but deny that Andrus had any right or interest in the land. They also describe the purchase of the property in detail, which contradicts the statements in appellee's complaint. They allege in their answer a supplementary contract in which Andrus was to pay $500 on the personal property, his deposit in the bank in escrow to be used for that purpose; that they were to share in all the proceeds from the sale of any or all the personal property; that Andrus and his wife, the appellee, were to live with Chase and his wife as a part of the family as long as it was mutually agreeable.

The evidence is in conflict, and it would serve no useful purpose to set it out in full. The admitted facts are that Andrus put up $500 in escrow to pay on the land; that he paid the $1,000 mortgage, which at the time he paid it, in June following their trade in December, amounted to $985; that he built the blacksmith shop; that he paid for material amounting to something more than $50; that he made a will in which he bequeathed his interest in this particular property to appellee. The house on the farm burned and was rebuilt, and, except during the time that it was being rebuilt, appellee has lived on the farm from the time they purchased it until now, and is still living on it.

The evidence is conflicting as to the purpose for which Andrus paid the $985, but it is not disputed that he paid it. The court found that the title to the property is held in trust for the appellee to the extent of payments made by her and her husband of the purchase price of the lands, and ordered that the lands be sold and the proceeds divided among the parties according to their respective interests, and found that the interest of the appellee was one-fourth of the value of the farm. This appeal is prosecuted to reverse the decree of the chancellor.

It is the contention of the appellant that a trust was not created and that for that reason appellee is not en-

titled to any interest in the land. They call attention to *Hatcher* v. *Wasson, Bank Commissioner,* 191 Ark. 765, 87 S. W. (2d) 578. In that case there was a suit pending against Hatcher and it was discovered before the sale that Hatcher had conveyed the property, except his homestead, to his two sons, a separate portion to each. His sons did not pay anything, and the conveyance was manifestly for the purpose of defeating his creditors, and the court held that the conveyances were void. The court said in that case: "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." In that case there was no consideration except love and affection for his children.

The next case to which appellant calls attention and relies on is *Chaffin* v. *Crow,* 182 Ark. 621, 32 S. W. (2d) 155. In that case, Crow and his wife and children had been killed in an accident. At the time of his death he was the owner, by warranty deed, of certain lands in Boone and Newton counties. He died intestate. Chaffin, the father of Mrs. Crow, brought suit seeking to be declared the owner of one-half interest in the lands of which Claude Crow died seized and possessed, and asking for a partition, and asked that a trust be declared inuring to the benefit of Chaffin. The evidence simply showed that at one time Chaffin had given his daughter, Mrs. Crow, the sum of $750. The court held that no trust resulted in his favor.

Appellants then call attention to *Kerby* v. *Field,* 183 Ark. 714, 38 S. W. (2d) 308. In that case a deed given was construed as a mortgage, and we do not think that case has any application here. A number of cases are referred to by the appellants, but in none of them are the facts similar to the facts here. Appellants refer to 26 R. C. L. 1223. On 1224 it is stated: "But it is now a generally accepted rule that a resulting trust may arise in favor of one who furnishes a part of the purchase money for land, where the title is taken in another, though there is a diversity of opinion as to whether there

must be a distinct understanding that the payment is for a definite interest in land, or whether the fact of furnishing the money without more will raise a resulting trust. * * * So it is held that, where several persons contribute money to pay for land and the title is taken in the name of one of them, a resulting trust arises in favor of the others *pro tanto.*"

In the instant case, as we have already said, the undisputed proof shows that $500 in cash was put up as a payment on the land. To be sure, Chase testified that the $500 was used for purchasing the personal property, but he is contradicted in this by the appellee, and there is no evidence in the record that the purchase of the personal property was ever discussed or thought of when this $500 was put up. In addition to this, while H. C. Andrus is dead and we cannot have his testimony, his will indicates that he was the owner of an interest in this land. Then there is no satisfactory explanation by appellants as to why Andrus paid $985 to Wasson.

We do not deem it necessary to set out more of the facts. The evidence is in conflict, but we think the circumstances corroborate appellee's evidence, and we cannot say that the chancellor's finding was against the preponderance of the evidence.

The decree is affirmed.

REALTY INVESTMENT COMPANY *v.* HIGGINS.

4-4219

Opinion delivered March 16, 1936.

June P. Wooten, for appellant.

Dean, Moore & Brazil, for appellee.

SMITH, J. On November 7, 1925, W. M. Carter subscribed for $1,250 stock in the Travelers Building and Loan Association of Little Rock. He borrowed a like amount from the association for which he gave his note and attached his stock as collateral security. As further security he executed a mortgage to the association upon certain lots owned by him in the city of Morrilton. The dues and interest payments had become delinquent when on December 4, 1930, the secretary of the association wrote Messrs. Dean, Moore, and Brazil, attorneys located at Morrilton, instructing them to institute foreclosure proceedings. M. H. Dean, a member of the above-named law firm, answered this letter by stating that suit had been filed as directed. The complaint prayed judgment for $1,206.87 and for $87.04 delinquent taxes which the association had paid.

Clifton Moose was the local agent of the association at Morrilton and collected the monthly dues from the association's members, who resided there. The law firm of which Dean was a member attended to the association's legal business in Morrilton and brought all of its foreclosure suits. Dean had been told by the president of the association, who resided in Little Rock, that Moose had charge of the association's loans in Morrilton, and the attorney was directed to follow Moose's orders in regard to them.

It appears that after obtaining the loan, Carter sold two of the mortgaged lots to Lugenia and Rosie Williamson, colored women, who are sisters. A third lot, described as lot 3, block 10, of Griffen's Addition to the

town of Morrilton, had been sold by him to Lena Higgins, a colored woman. These women were made parties defendant to the foreclosure suit.

It is certain that negotiations were entered into regarding this foreclosure suit, and that as a result of these negotiations, the Williamson sisters and Lena Higgins executed a mortgage on December 19, 1930, which was prepared by Dean and acknowledged before him as a notary public. This mortgage described the three lots which Carter had sold the women and in addition described a lot owned by Lena Higgins, which she had not bought from Carter, but which adjoined the lot she had purchased from him. After the execution of this new mortgage the foreclosure suit was dismissed, and the new mortgage was sent to the association's home office in Little Rock without explanation of its provisions. Lena Higgins had bought lot 3 subject to the mortgage from Carter to the association, but she was under no obligation to pay Carter's loan until she joined in the execution of the new mortgage which included her home as well as lot 3.

The new mortgage was executed on a printed form, but the following recital of its purpose and consideration was written into it: "The sale is on the condition that whereas we are justly indebted unto the said Travelers Building and Loan Association in the sum of thirteen hundred five and 31/100 ($1,305.31) dollars evidenced by bond and mortgage executed by W. M. Carter and wife to said Travelers Building and Loan Association under date of November 7, 1925, which bond was given for, and said mortgage secures a loan of $1,250, and this mortgage is executed by us to further secure said indebtedness * * *. The said Lena Higgins agrees to pay $16.66 payable on the 10th day of January, 1931, to June 10, 1931, inclusive, and said Lugenia Williamson and Rosie Lee Williamson agree to pay $16.66 the 10th day of January, 1931, and like amount on the 10th day of each month thereafter including June, 1931. After June 10, 1931, the total amount to be paid will be $16.66 each month until said indebtedness is paid."

In the early part of 1932, the Pulaski Chancery Court appointed a receiver to take over the assets of the association. The Carter loan was among these; and, as the new mortgage had been executed subsequent to the institution of the original foreclosure suit, an amended complaint was prepared by the attorney for the receiver praying the foreclosure of the new mortgage, he signed the name of Dean, Moore and Brazil with his own as solicitors for the plaintiff. This complaint was filed November 1, 1932. Some time in 1933, a fire destroyed the building located on the lots sold the Williamson women, and when the insurance was adjusted, they were given credit for $900, and by order of the Pulaski Chancery Court, where the receivership was pending, the two lots were ordered released from the mortgage.

The second foreclosure suit was dismissed with prejudice on June 12, 1933, but was later reinstated on motion of the attorney for the receiver. On October 6, 1934, an additional amendment to the complaint was filed showing release of the Williamson lots because of the $900 credit and judgment was prayed for the balance of $379.78 then alleged to be due on the original loan to Carter. On November 24, 1934, the firm of Dean, Moore & Brazil filed an answer for Lena Higgins which raised the issues we are now called upon to decide. This answer alleged that the consideration for the mortgage which Lena Higgins had executed on her two lots was an agreement by her to make six payments of $16.66 each, and to pay an attorney's fee of $25. A number of pleadings were filed which do not elucidate the controlling issues and are therefore not discussed.

At the trial from which this appeal comes, Lena Higgins testified that when she was made a party to the original foreclosure suit she called on Mr. Moose and discussed the suit with him, and it was agreed that she should pay $100 on the mortgage indebtedness, and a fee of $25 for the attorney who had brought the foreclosure suit, and that these payments would discharge the lien of the mortgage against her property; but that she was required to give additional security for the payment

of this money, and that this was done by executing the new mortgage which this suit was brought to foreclose.

The testimony of Dean fully supports this contention. He testified that he was directed by Moose to prepare a mortgage to that effect, and that he did so. He further testified that the purpose, and, as he thought, the effect of the recital hereinbefore copied from the mortgage of Lena Higgins and the Williamson sisters was to require Lena Higgins to make monthly payments of $16.66 beginning January 10, 1931, and extending to June 10th of that year, and to require the Williamson sisters to make similar payments for the same period of time, and to thereafter require the Williamson sisters only to continue payments of $16.66 per month until the debt was paid. Dean testified that he was told by both Moose and Lena Higgins that this was the consideration for the new mortgage which he prepared. Lena Higgins paid him the $25 attorney fee as agreed, and she also made the six monthly payments. Dean testified that he was the only member of the law firm who was familiar with the transaction and knew the facts. He has retained his membership in this law firm although he removed to St. Louis in 1933, where he has since been employed as attorney for the Federal Land Bank of St. Louis. When he learned that his firm's name had been signed to the complaint filed to foreclose the new mortgage, he notified the officers of the association that he could not accept that employment, as he had already collected and paid over the debt which the mortgage secured, and he would be compelled to file an answer setting up the facts herein recited. The decree from which this appeal comes contains no special finding of fact, but did dismiss the foreclosure proceeding as being without equity.

The recital of the consideration for the mortgage here sought to be foreclosed copied above, is somewhat ambiguous, but it does not appear to express the purpose of releasing Lena Higgins upon payment of $125, and appellant insists that, as the reformation of the mortgage was not prayed, its foreclosure should be ordered, and that testimony should not be heard to contradict or explain it.

It is true the reformation of the mortgage is not prayed, but it is true, also, that its reformation would not be required, if we accepted Dean's construction of it. But it was prayed that upon a final hearing the said lands be declared free of any and all claims of plaintiff, and for any and all other legal and equitable relief to which Lena Higgins was entitled whether specifically prayed for or not. We think this prayer is sufficient to ask reformation, if relief cannot be otherwise given. But it is the statement of facts, and not the prayer for relief which constitutes the cause of action; and the court may grant any relief which the pleaded facts warrant under a prayer for general relief or without any prayer at all; but the courts will not suffer the plaintiff to take a decree that is not responsive to the issues nor justified by a full development of testimony. *Baldwin* v. *Brown,* 166 Ark. 1, 265 S. W. 976. If the court did not in fact interpret the mortgage as Dean testified it was intended to be, the decree in effect accords relief by reformation. Such is the effect of a refusal to decree its foreclosure.

Appellant insists that reformation of a written instrument, even when that relief is properly prayed, will not be granted except upon evidence that is clear, unequivocal and decisive. This is a correct statement of the law, but even so, we think the testimony measures up to that requirement. *Davidson* v. *Peyton,* 190 Ark. 573, 79 S. W. (2d) 734. The testimony does not disclose the value of any one of the three lots sold by Carter to these colored women. But we do know that the lot sold Lena Higgins was unimproved while there was a building on the lots sold to the Williamson women on which as much as $900 insurance was collected when it burned. Moose may have thought the $125 was a fair and proportionate part of the debt for Lena Higgins to pay. Moose is now dead, but the testimony of Dean, who at the time was the association's attorney, is unequivocally to the effect that Lena Higgins' lot should be released from the lien of the Carter mortgage when she had made the payments required of her by her own mortgage. She paid the $25 and assumed the payment and gave additional security for the $100 which she later paid. The court therefore

properly refused to decree the foreclosure of the mortgage against her lots, and it is, therefore, affirmed.

HICKINGBOTHAM *v.* INDUSTRIAL FINANCE CORPORATION.

4-4212

Opinion delivered March 16, 1936.

James Merritt, for appellant.

Coy M. Nixon and *Sam M. Levine,* for appellee.

JOHNSON, C. J. This action originated in a justice of the peace court in Desha County by Industrial Finance Corporation, appellee here, filing a note signed by appellant, R. C. Hickingbotham, upon which a balance of $40 was claimed as due. The defense of usury was interposed and sustained by the justice and an appeal was prosecuted to the circuit court of Desha County, and upon trial before the court on the issues joined in the justice court it found no usury in the contract and rendered judgment accordingly from which this appeal comes. The note, the foundation of the action, provides:

"$100 Pine Bluff, Ark., June 10, 1930.

"For value received I promise to pay to the order of The Industrial Finance Corporation one hundred and 00/100 dollars, with interest from maturity until paid, payable at the office of the corporation, in Pine Bluff, Arkansas, in equal installments of $10 each on the 15th

day of each month, following the date of this note, until the whole amount of this note shall have been fully paid, being for the purchase of a four per cent. (4%) installment investment certificate of The Industrial Finance Corporation. Failure to pay any installment of this note, time being made the essence of this contract, shall entitle the payee herein to declare all instruments due, and he may proceed to collect same.

"The makers, indorsers, guarantors, and sureties of this note hereby severally waive presentment for payment, demand, protest, and notice of protest, and nonpayment. This note may be extended without notice and without affecting the liabilities of any of the parties hereto. If the makers should fail in business or should become bankrupt, or should have filed against them, or any of them, proceedings in involuntary bankruptcy or for the appointment of a receiver, this note, each installment thereon, and all other debts and obligations of the maker or makers, direct or contingent, shall immediately become due and payable. At the maturity of this note, or when otherwise due, as above provided any and all moneys, stocks, bonds, or other securities or property of any nature whatsoever on deposit with, or held by, or in the possession of said The Industrial Finance Corporation, as collateral or otherwise, to the credit or for account of the makers, indorsers, or other parties hereto, or any of them, shall be and stand applied forthwith to the payment of this note, or any other indebtedness due said The Industrial Finance Corporation by said parties, or any of them. If this note be not paid when due and it should be placed in the hands of any attorney-at-law for collection there shall be due attorneys' fees hereby fixed at 10 per cent.

"Witness my hand and seal.

"R. C. Hickingbotham (L. S.)"

On the reverse side of said note appears the indorsement:

"The undersigned hereby jointly, severally, and *in solido* guarantee to The Industrial Finance Corporation, its successors, indorsers, or assigns, the punctual payment of the within note; and having taken cognizance of

all its terms and conditions hereby assent thereto, and consent that the time of payment of said note may be extended without notice to or further assent of the undersigned or any of them who shall remain bound, notwithstanding such extension.

"W. H. Wagner, Engineer, McGehee.

"M. T. Hickingbotham, Engineer, McGehee."

The investment certificate which is described in the face of the note is as follows:

"Investment Certificate of The Industrial Finance Corporation

"This is to certify, that R. C. Hickingbotham is the holder of this four per cent. (4%) investment certificate in the sum of one hundred and 00/100 dollars for which he agrees to pay the sum of $10 on the 15th day of each and every month hereafter until paid for in full. Time being the essence of said payments.

"The holder of this certificate shall be entitled to receive four per cent. (4%) interest per annum on each payment made on due dates.

"In order for the holder of this certificate to receive interest above specified, payments on said certificate must be made promptly on or before date due.

"When fully paid The Industrial Finance Corporation will pay to the holder hereof the face of this certificate with the said four per cent. (4%) interest in cash.

"Witness our hands and seal, this 10th day of June, 1930.

"The Industrial Finance Corporation.

"C. B. Smith, President.

"Attest: P. M. Kilroy, Secretary and Treasurer."

On the reverse side of this certificate appears the following indorsement:

"For value received, I hereby transfer and assign unto The Industrial Finance Corporation the within four per cent. (4%) investment certificate, as collateral security for my note of even date for $100, subject to the terms, conditions and provisions of said note.

"Witness my hand and seal, this 10th day of June, 1930.

"Signed: R. C. Hickingbotham."

A collateral obligation by which the investment certificate heretofore set out was pledged was executed as follows:

"$100 Pine Bluff, Ark., June 10, 1930.

"For value received one year after date I jointly and severally promise to pay to the order of The Industrial Finance Corporation one hundred and 00/100 dollars, at its office in the city of Pine Bluff, Arkansas, with interest at the rate of eight per cent. (8%) per annum from maturity until paid.

"There has been deposited and pledged as collateral security for the payment of this note, or of any other liability or liabilities of the undersigned to the owner thereof, whether the same be now existing or hereafter contracted, now due or hereafter to become due, the following property, to-wit:

.....

.....

"And in addition thereto a four per cent. (4%) installment investment certificate of The Industrial Finance Corporation, same being marked installment investment certificate No. 11,014 and duly assigned to the Industrial Finance Corporation, and full power and authority is hereby granted to sell, assign, and deliver the whole or any part thereof, or any substitute therefor, or any addition thereto, at public or private sale, with the right to apply the proceeds to the discharge or partial discharge and payment or partial payment thereof.

"Any and all installments, together with accrued interest thereon, that may have been paid on the aforesaid investment certificate or any note or notes given to secure same or for which same is given as collateral security, all without putting in default, at option of the owner or holder of this note, declaring the total amount (all installments thereof) due, may be applied in total or partial payment of this note upon the non-performance of this promise or the nonpayment of any of the liabilities above named, at any time or times, without advertising or notice, which is hereby expressly waived.

"The owner or holder of this note may buy any of the above and aforesaid collateral at private sale with

or without notice, at the market price, and if there be no market price, at a fair valuation, and the proceeds of any sale shall be applied first to the payment of the expenses of making such sale, together with a reasonable attorney's fee if any attorney is employed or consulted; second, the payment of the principal debt thereby secured and the interest therein; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, security, indorser or otherwise, and if any surplus then remains same shall be paid to the undersigned.

"The parties to this note, whether makers, indorsers, guarantors, or sureties, hereby severally waive presentment for payment; demand, protest, and notice of protest, and nonpayment.

"This note may be extended without notice and without affecting the liabilities of any of the parties hereto. If the maker or makers should fail in business or become bankrupt or should have filed against them involuntary proceedings in bankruptcy or proceedings for the appointment of a receiver, this note and all other debts, obligations of the maker or makers, direct or contingent, shall immediately become due and payable.

"The owner or holder of this note shall have the right to require at any time a greater number, or more satisfactory sureties, indorsers or guarantors. The failure of the maker to comply with a request for such further security, shall cause this note and all other debts and obligations of the maker or makers to immediately become due and payable.

"At the maturity of this note, or when otherwise due, as above provided, any and all moneys, stocks, bonds, or other securities of property of any nature whatsoever on deposit with or held by, or in the possession of said holder as collateral or otherwise, to the credit or for the account of the makers, indorsers, or other parties hereto, or any of them, shall be and stand applied forthwith to the payment of this note, or any other indebtedness due said holder by said parties or any of them. If this note be not paid when due and it should be placed in the hands of an attorney for collection, there shall be

due attorneys' fees hereby fixed at ten per cent. (10%) of principal and interest due.

"Time is expressly made the essence of this contract. Witness my hand and seal this day above stated.

"R. C. Hickingbotham (L. S.)
"W. H. Wagner (L. S.)
"M. T. Hickingbotham (L. S.)"

Testimony was adduced by appellant which tended to show that all the instruments heretofore set out constituted one obligation while that on behalf of appellee tended to show that the two notes were separate and distinct obligations.

Appellant's first contention for reversal is that the trial court erred in permitting appellee to introduce as a witness N. J. Gantt, president of appellee company, after both parties had announced the closing of testimony.

We have repeatedly held the admission of further testimony after closing is within the sound discretion of trial courts. *Moss* v. *Adams,* 32 Ark. 562; *Evans* v. *Rudy,* 34 Ark. 383; *Lowenstein* v. *Finney,* 54 Ark. 124, 15 S. W. 153; *Bynum* v. *Brady,* 82 Ark. 603, 100 S. W. 66, and we are unwilling to impair our previous opinions in this regard or to say that the trial court abused his discretion in admitting the testimony of Mr. Gantt.

Since the trial court has determined ambiguity in the transactions between appellant and appellee, and this at the express invitation of appellant by offering testimony in reference to the singleness of the obligations, and since it has found from conflicting testimony that the notes were separate and distinct obligations, it follows that we must dispose of the case with this finding of fact in mind.

The finding of fact last referred to brings this case squarely within the doctrine announced by us in *Simpson* v. *Smith Savings Society,* 178 Ark. 921, 12 S. W. (2d) 890, wherein we had under consideration a series of transactions not materially different from the transactions herein considered, and held first that the several instruments were separate and distinct obligations, and, secondly, when thus viewed and construed did not sepa-

rately disclose usury. Even so here. The obligation first set out was executed as the purchase price of the investment certificate, and, had appellant performed his part of the contract by paying all the monthly installments, he would have owned outright the certificate which in turn would have automatically paid off his collateral obligation.

Contractual obligations analogous to this one have been approved by us many times, and the doctrine is in line with the great weight of American authority. *Reeve* v. *Ladies' Bldg. Ass'n,* 56 Ark. 335, 19 S. W. 917; *Taylor* v. *Van Buren Bldg. Ass'n,* 56 Ark. 340, 19 S. W. 918; *Black* v. *Thompkins,* 63 Ark. 502, 39 S. W. 553; *Farmers' Saving & Bldg. & Loan Ass'n* v. *Ferguson,* 69 Ark. 352, 63 S. W. 797; *Bell* v. *Southern Home Bldg. & Loan Ass'n,* 140 Ala. 371, 37 So. 237; 27 R. C. L. 210; *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *Cockle* v. *Flac,* 93 U. S. 344, 23 L. ed. 949, and *Union Central Life Ins. Co.* v. *Hilliard,* 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462.

The collateral obligation executed by appellant is demonstrably not usurious. It matures one year after date and the obligee deducted 10 per cent. interest in advance. This is authorized by § 7355, Crawford & Moses' Digest, and we have many times approved its consequences. *Bank of Newport* v. *Cook,* 60 Ark. 288, 30 S. W. 35; *Vahlberg* v. *Keaton,* 51 Ark. 534, 11 S. W. 878; *Beard* v. *Millwood,* 51 Ark. 548, 11 S. W. 881.

No error appearing, the judgment is affirmed.

THORNSBERRY *v.* STATE.

Crim. 3978

Opinion delivered March 16, 1936.

K. T. Sutton, for appellant.

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

BUTLER, J. The appellant was indicted for the crime of rape, convicted for carnal abuse and sentenced to imprisonment in the State penitentiary for ten years.

No bill of exceptions was prepared and filed, and on appeal the sole question we are asked to review is the alleged error of the trial court in refusing to set aside the verdict of the jury and grant the appellant a new trial. The motion for a new trial was based upon the alleged fraud of a juror in failing to disclose his bias and prejudice when being questioned on his *voir dire* as to his acquaintanceship and relation to the father of the prosecuting witness.

As before stated, we have no bill of exceptions showing the examination of the juror on his *voir dire,* and this was attempted to be supplied by the testimony of the appellant, and one of his attorneys as to what occurred at the juror's examination and the testimony of other witnesses as to the relationship and acquaintance of the juror to the father of the prosecuting witness. This testimony tends to show that during the year 1927 the juror, a Mr. Pitts, lived about three-quarters of a mile from Mr. Compton, the father of prosecuting witness; that he occasionally attended a church in that neighborhood which was also attended by Mr. Compton and his family. It was also shown that a son of the juror had married the daughter of one Shirley, and that a daughter of Compton had married into the same family—perhaps marrying a son of Shirley.

The appellant, being called to testify as to what occurred during the examination of the juror, Mr. Pitts, was asked by counsel if this question was propounded to Mr. Pitts: "Are you connected with, related or associated in any manner with the Compton family, either in a social way, business way, or otherwise?" The answer was "yes," and he was then asked what Mr. Pitts answered, and he stated that it was "no." According to this witness Pitts was also asked: "Is your acquaintance, if any, with the Compton family, or your connection with any members of the Compton family, such as would, in any way, affect you in the proper and fair deliberation of this case?" and to this question Pitts answered "no." He also stated that Mr. Pitts was asked if he was in any manner related, by blood or marriage, to the Compton family, and that he answered that he was not. One of appellant's attorneys testified practically to the same effect as the appellant as to what occurred at the *voir dire* examination of Mr. Pitts.

Pitts was called and testified that as he remembered the examination he was asked if he was acquainted with the Comptons and the Thornsberrys, and he answered that he was. He was also asked if he was, in any way, related to them, and answered that he was not; and that he barely knew them when he saw them. He stated that the fact that one of the Comptons had married into the Shirley family, and one of his boys into the same family did not, in his opinion, create any relationship on his part to the Compton family; that he had no bias or prejudice and did not intentionally conceal any facts on his examination, but answered the questions propounded fairly and truthfully.

To us this appears to be the effect of Pitts' testimony on the hearing for a new trial. He was asked if, immediately after the verdict, he did not rush up to Mr. Compton and congratulate him upon the verdict the jury had returned. He answered that he did not, but that while looking for his son he met Mr. Compton and shook hands with him, but did nothing more.

It is clear, giving the testimony the effect most favorable to the appellant, that the juror Pitts was not dis-

qualified under § 3160 of Crawford & Moses' Digest. The fact of the intermarriage of members of the Compton family with the Shirley family, a son of Pitts having also married a member of the Shirley family, did not create the relation of affinity to the prosecuting witness or any member of her family. The proceeding was in the nature of a new trial for newly-discovered evidence. The trial court has wide discretion in passing on motions for a new trial in such matters, and we cannot say that such discretion was abused in the overruling of the motion in the instant case.

We note in the statement of the appellant that he moved the court to require the reporter to transcribe the testimony, and this motion was refused. Court stenographers are usually paid salaries which are supposed to compensate them for their duties in taking the testimony in criminal cases and preparing bills of exception. When they fail or refuse to do this the circuit court, on proper application, should compel the performance of this duty. This court has held that application must be made first to the trial court for an order to compel the performance of the stenographer's duty. *Sutton* v. *City of Little Rock,* 191 Ark. 603, 87 S. W. (2d) 20. In this case, from the statement of appellant, it appears that he made this application, but his remedy, on the refusal of the trial court to compel the stenographer to perform his duty, was by application to this court for review of the action to the court below. We make these observations simply for the purpose of indicating that defendants, regardless of how poor they may be, are entitled to a record of the proceedings in the court below to the end that those proceedings may be intelligently reviewed by this court, and the remedy is ample to compel the court stenographer to prepare a bill of exceptions for authentication by the trial court.

We have examined the record, and as no error appears on the face thereof, the judgment is affirmed.

STATE, USE JACKSON COUNTY, *v.* MURPHY.

4-4220

Opinion delivered March 16, 1936.

Roy Richardson, Howard Hasting and *S. L. Richardson,* for appellant.

John C. Ashley and *Buzbee, Harrison, Buzbee & Wright,* for appellees.

HUMPHREYS, J. Appellant brought two suits in the circuit court of Jackson County against appellees, one of them to recover $499.19 and one for $1.50, alleging as the basis of the suits that the treasurer of said county cashed warrants out of the general revenue fund of the county for the amounts, which warrants were void because issued in excess of the revenues for the years to which they were chargeable, in violation of Amendment No. 10 of the Constitution of 1874, to the injury of the county, and that the wrongful act of the treasurer in cashing the warrants was a breach of his bond. A demurrer was filed to each of the complaints on the ground that the circuit court was without jurisdiction to hear, try and determine the issues raised, and that if it had jurisdiction, the complaint did not state facts sufficient to constitute a cause of action. For the purposes of trial, the cases were consolidated. Upon a hearing, the court sustained the demurrer to each complaint, and appellants, electing to stand upon their complaints and refusing to plead further, the complaints were dismissed, from which judgment of dismissal, an appeal has been duly prosecuted to this court.

The condition contained in the treasurer's bond, made a part of the complaint, are for the true and faithful performance of his duties as county treasurer, and

for an accounting and payment over of all money coming into his hands as treasurer.

These demurrers were sustained by the trial court to the complaint, and the complaints were dismissed without assigning the reason for doing so.

It is argued that the court was correct because the complaints contained no allegation that, in the settlement with the treasurer, it was found and adjudged by the county court that he was indebted to the county in any sum which he had not paid. This was not necessary as a condition precedent to bring a suit against him and his bondsmen for paying void warrants. The payment of void warrants by the treasurer was clearly a violation of his official duties, and the bond provided he would faithfully perform his duties. The case of *Haley-Thompson Special Consolidated School District* v. *Splawn,* 172 Ark. 797, 290 S. W. 957, is authority for bringing suits in the circuit court for wrongful acts of a county treasurer for cashing and paying void warrants whether the officer's accounts have been passed upon by the county court or not. His wrongful acts in the performance of his duties have nothing to do with his accounts or settlements. It was said by this court in the case of *School District* v. *Splawn, supra,* that: "Certainly there can be no reason to have the county court pass on whether or not a treasurer had wrongfully paid a warrant. As to whether the treasurer did or did not wrongfully pay these warrants, or any of them, is a question of fact, and may be determined in a trial in the circuit court without any regard to what the officer may have done in the county court. We think there is no reason why the county court should act in a suit like this before suit is begun in the circuit court, and that such action by the county court is not necessary to give the circuit court jurisdiction."

It is also argued that Amendment No. 10 to the Constitution of 1874 has no application to the payment of warrants ordered and issued against the general revenue fund in excess of the revenues for the years to which they were chargeable. The demurrers admitted in these cases that the two warrants in question were void be-

cause allowed and issued contrary to the amendment, and it necessarily follows that the treasurer was without authority to pay such warrants. The amendment would mean nothing, and be of no force and effect if warrants allowed and issued in violation of it might be paid by the treasurer with impunity. It is true no penalty is imposed by the amendment upon the treasurer for paying them such as a fine or imprisonment, but it does not exempt him from liability for doing so. The complaints alleged a good cause of action.

The judgments are reversed, and the causes are remanded with directions to overrule the demurrers, and to proceed with the trial upon their merits.

BALDWIN ET AL., TRUSTEES MO. PAC. RD. CO. *v.* HUNNICUTT.

4-4222

Opinion delivered March 16, 1936.

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

John L. McClellan and *Tom W. Campbell,* for appellee.

McHaney, J. Appellee was, at the time of receiving the injuries hereinafter mentioned, an employee of the Missouri Pacific Railroad Company as a carpenter in the B. & B. gang. On February 24, 1934, while engaged in repairing the coal chute and tracks connected therewith, he received a severe and painful injury which resulted in the loss of his left eye. At the time of the injury he was working under the immediate direction of his foreman and was assisting in the removal of a 6x8 timber on the incline track, leading up to the coal chute, which is called a guard rail. These guard rails are notched down over the ends of the ties on both sides of the steel rails and about 11½ inches therefrom. They are also held in place by what are called lag screws ⅝x9 which are inserted through holes bored through the guard rail and a short distance into the tie, and are driven or screwed into the tie about three inches. The lag screws have square heads and are screwed down with a wrench or driven down to fit tight on a metal washer through which the screws pass. Every second tie is so fastened with a lag screw. In order to remove the guard rails it became necessary to detach the lag screws from the ties. Appellee says the proper and customary way to do this is to unscrew them with a wrench, but that they had no wrenches that would fit the screw head. He also says another proper way to remove them is to cut around the head with an adz, insert a claw bar, and prize them loose. On this occasion, however, they did neither, but the assistant foreman put a jack under the guard rail, elevated it sufficiently to put a strain on the ties to be detached, and his foreman handed him a twelve-pound maul and directed him to strike the ties and drive them free from the lag screws. After striking the tie next to the jack two or three blows, something flew up, struck him on the lip, cutting it and slightly injuring his nose and struck his left eye with such force as to destroy the eye-ball which necessitated its removal.

He brought this action to recover damages for his injuries under the Federal Employers' Liability Act, and

alleged negligence as follows: "When plaintiff struck said tie with said maul, as directed by his foreman, a large metal spike that had been negligently and carelessly left on said track by the agents, servants and employees of the defendants, and near said tie which plaintiff struck, was caused to be knocked upward and thrown violently against the plaintiff," etc. Trial resulted in a verdict and judgment against appellants in the sum of $10,000.

For a reversal of the judgment, appellants argue a number of assignments of error. In view of the disposition we make of the case, we think it unnecessary to discuss them all in detail. It is very earnestly insisted that the evidence is insufficient to establish negligence, or to take the question of negligence to the jury. While no witness testified that "a large metal spike had been negligently and carelessly left on said track—and near said tie which plaintiff struck," something did fly up and hit him causing the injuries complained of. No witness testified as to what it was that flew up and hit him, whether a loose spike lying on the tie or the guard rail or the track, whether the rail spike holding the steel rail on the tie being struck or whether the lag screw from which the tie was being driven broke loose therefrom, and flew up and hit him. As stated above, appellee testified there were two safe and customary ways to remove the lag screws, either with a wrench or with an adz and a crow bar, but that he had never pounded them loose with a maul. Witnesses for appellants testified that, in addition to these two ways to remove them, the method employed at the time of this injury was also used, and that all three methods were considered safe and proper. The majority are of the opinion that the evidence was sufficient to go to the jury on the question of negligence since appellee was acting under the immediate directions of his foreman in the manner of doing the work, and that the injury received or some injury might reasonably have been foreseen by the exercise of ordinary care as to the manner of doing the work by the foreman. Mr. Justice Butler, Mr. Justice Baker and the writer do not agree that any

negligence has been established, but on the contrary a directed verdict should have been given appellants.

Another assignment of error relates to the impaneling of the jury to try the case. Twelve of the regular panel were out on another case. The court directed the sheriff to call twelve bystanders whose names were placed in the box with the remaining members of the regular panel. The clerk by direction of the court drew eighteen names from the box. The court examined them on their *voir dire,* and all appeared qualified. Counsel for appellee was then asked if he desired to ask any further questions, and answered in the negative. Counsel for appellants was then asked the same question by the court, when the following occurred: "Mr. Ryan: I want to ask a question or two, but I would like to know the jurors, I don't know them by name; will you permit me to ask who No. 1 juror is? I don't know them. The Court: That is where you are unfortunate in not living in Saline County. Mr. Ryan: Note my exception to the ruling of the court. I certainly would like to live down here, if I could make a living down here."

In this we think the court fell into error calling for a reversal of the judgment. We think counsel had the right to interrogate the jurors to determine their names, residence, business, and such other information as would enable him to exercise his right of challenge for cause or peremptory challenge without cause. In *Clark* v. *State,* 154 Ark. 592, 243 S. W. 868, we held that a party is entitled to the same latitude in examining a juror to determine whether to exercise a peremptory challenge as when seeking information relative to challenge for cause, subject to the sound discretion of the court. The court not only denied counsel this right, but in doing so—facetiously, no doubt—hurtful, nevertheless—stated that counsel was unfortunate in not knowing the jurors by name, because he did not live in Saline County. The error, however, is the denial of a litigant the right to try to determine, in good faith, by examination on *voir dire,* who and what the jurors are who are to try his case.

The question is also argued as to whether appellee was engaged in interstate commerce within the meaning

of the Federal Employers' Liability Act. We think the evidence sufficient to take that question to the jury. Other questions are argued which may not arise on another trial, and we do not discuss them.

For the error indicated the judgment is reversed, and the cause remanded for a new trial.

McHaney, J. (Supplemental opinion on rehearing). On rehearing, counsel for appellee insist that they "do not know of any provision of law in this State that entitles either party to a civil suit to have each proposed juror stand and be separately interrogated by counsel." Section 6380 of Crawford & Moses' Digest provides that: "In order to determine a challenge for cause the particular juror or jurors challenged may be sworn, or, at the instance of either party, all of the jurors may be sworn to make true and perfect answers to such questions as may be demanded of them touching their qualifications as jurors. The court may allow other testimony in regard to the qualifications of any juror." The next section provides that each party shall have three peremptory challenges and § 6385 provides the procedure for challenges for cause. This court has recognized the right of litigants in civil cases to examine the jurors separately. In *St. L. I. M. & S. R. Co.* v. *Aiken,* 100 Ark. 437, 140 S. W. 698, this court said: "There is but one other assignment of error, and that relates to the ruling of the court in refusing to permit defendant's counsel to pursue the examination of a juror as to his bias. After a lengthy examination of the juror by counsel, the court stopped the examination, and said that it was sufficient. Counsel then challenged the juror peremptorily, and agreed to a trial of the case before eleven jurors. It does not appear from the record that defendant exhausted its peremptory challenges and was compelled to accept a juror which it otherwise would not have accepted; therefore, no prejudice resulted from the ruling, even if it was incorrect. The extent of the examination of the juror rested, however, within the sound discretion of the trial court, and there was no abuse of that discretion. Defendant was permitted to pursue the examination until every matter

bearing upon the juror's qualifications seems to have been fully drawn out."

The holding in this case was cited with approval in *Mo. Pac. Ry. Co.* v. *Riley,* 185 Ark. 699, 49 S. W. (2d) 397, where the court said: "Exception was saved to the qualifications of one of the jurors on the panel because it was shown upon his examination that he was a member of the board of aldermen of the city of Hot Springs. The exception to the competency of the juror was based on the theory that the negligence of the city was the proximate cause of the injuries, and, as the city was interested, the fact that the juror was an alderman disqualified him. It is not necessary to say whether or not this juror was disqualified, for there is no showing of prejudicial error, since it is not shown that the appellant had exhausted all of its peremptory challenges." Citing cases.

It will be seen from the Aiken case, *supra,* that the discretion which rests in the trial court does not relate to the right to examine jurors separately, but only to the extent of the examination of each separate juror. This same case is cited in 35 C. J., p. 389, § 439, in support of the following text: "The extent to which parties should be allowed to go in examining jurors as to their qualifications cannot well be governed by any fixed rules. The examination is conducted under the supervision and direction of the trial court, and the nature and extent of the examination and what questions may or may not be answered must necessarily be left largely to the sound discretion of the court, the exercise of which will not be interfered with unless clearly abused. In practice, considerable latitude is and generally ought to be indulged; the questions ought to be confined to matters directly affecting the legal qualifications of the juror, and all questions ought to be allowed which are pertinent to test the juror's competency. But such examination ought not to be permitted to take an indefinitely wide range concerning merely collateral or incidental matters having some connection with the case, and should be confined in some degree at least to the particular cause of challenge under investigation at the time. * * *"

We are, therefore, of the opinion that litigants in civil cases, as well as in criminal cases, have the right to examine the jurors separately in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject of course to the right of the court to control the extent of such examination, acting in its sound discretion. We think this right is recognized by our statutes and by the decisions above cited. The petition for rehearing is therefore, denied.

GILLENWATER *v.* BALDWIN ET AL., TRUSTEES MO. PAC. RD. CO.

4-4232

Opinion delivered March 23, 1936.

McKinley & Jaggers, Guy Durbin and *Ward & Ward*, for appellants.

Thomas B. Pryor and *Daggett & Daggett,* for appellees.

HUMPHREYS, J. Appellant, Wallace Gillenwater, brought suit against appellees in the circuit court of Lee County to recover damages to his automobile and himself, occasioned by a collision between his automobile and appellees' freight train while the train was standing across the main street of Marianna, a part of the train being on the north, and a part thereof on the south side of said street, connected by a flat car standing on the crossing.

Appellant's automobile was insured in the General Exchange Insurance Corporation, which paid for a part of the necessary repairs on the automobile after the collision, and it became a party plaintiff in the suit by virtue of a conventional subrogation agreement between said appellants.

It was alleged in the complaint that appellees were guilty of negligence in blockading the street without maintaining a signal, watchman or other lookout for the protection of approaching motorists or others, and that, on account of said negligence, he ran into the flat car as he approached from the east in his automobile in the exercise of ordinary care for his own safety, thereby injuring his car and himself to his damage in the sum of $2,725. The insurance company prayed for damages in the sum of $152.30.

Appellees filed an answer, denying each and every material allegation in the complaint, and by way of affirmative defense alleged that the collision, injuries and damages resulting therefrom were solely and proximately the result of the negligence of appellant, Gillenwater, in driving his automobile into the train of appellees without ordinary care and precaution for his own safety. The cause was submitted on the pleadings and testimony of appellant, Wallace Gillenwater, at the conclusion of which appellees requested an instructed verdict in its favor, which the court gave over the objection and exception of appellants. Judgment was rendered in accordance with the instructed verdict for appellees, from which is this appeal.

Wallace Gillenwater testified that about midnight on August 19, 1934, upon a dark night, he approached the crossing, with which he was familiar, from the east up an incline, traveling in his automobile at about twenty-five miles an hour, and did not see the flat car standing on the crossing until within a few feet of it, and too near thereto to materially slacken his speed; that he then attempted to check his car and turn to the right but crashed into the flat car; that his lights were on and his brakes in fairly good condition, and that he was looking to the front, but failed to see the flat car because his lights, owing to the

incline, projected their rays above instead of on or against the flat car; that no signal of any kind or watchman was there to warn him against the danger; that he did not stop, look or listen as he approached the crossing, taking it for granted that the street was open and not blocked.

In the recent case of *Lowden, et al., Trustees C. R. I. & P. Ry. Co.* v. *Quimby, ante* p. 307, 90 S. W. (2d) 984, the facts of which are quite similar to the facts in the instant case, this court said: "He (appellee) judged he had no cause to look and sought to justify his failure to observe the car on the crossing by the fact that the lights of the automobile, because of the declivity in the highway, did not light the highway ahead. This fact was an added reason why he should have looked, especially when the driver was approaching the crossing at thirty miles an hour with no precaution for their safety." And again, in further analysis of the facts, this court said: "If it be conceded that actionable negligence on the part of appellants has been shown, this does not relieve drivers of automobiles upon the highway of exercising some degree of care for their own safety. * * * We think it clear, judged by his own testimony, that appellee was guilty of negligence, and that his injuries were not occasioned by the operation of the train, but by the negligent operation of the automobile while the box car was standing on the crossing."

In the instant case, there is no substantial evidence, even by reasonable inference, tending to show negligence on the part of appellee. The record is silent as to the purpose for which the train stopped or how long it had been there when appellant, Gillenwater, ran into the flat car. For aught that appears, it may have just come to a standstill, and time sufficient may not have elapsed for the brakeman to hang out a lantern or other signal or to place a watchman to warn the public who might be approaching. The record does not reflect that the train had stopped and obstructed the street in violation of any ordinance or had been there for an unreasonable length of time without putting out a signal. Be that as it may,

the undisputed evidence is that appellant, Gillenwater, approached the crossing, with which he was familiar, at the rate of twenty-five miles an hour on a dark night without slowing down, stopping, looking or listening, oblivious to the fact that a train might be standing on the crossing, and just taking it for granted that the street was clear. In other words, he drove into the flat car with his eyes wide open without exercising any degree of care for his own safety. There is no escape from the conclusion that his own negligence was the sole and proximate cause of his injuries and damage.

No error appearing, the judgment is affirmed.

NEAL *v.* CITY OF MORRILTON.

4-4305

Opinion delivered March 23, 1936.

Harry B. Colay, for appellant.

E. A. Williams and *Strait & Strait*, for appellees.

BAKER, J. This suit filed by appellant Neal, as a citizen and taxpayer of the city of Morrilton, was brought to enjoin the city of Morrilton and its officers from making sale and delivery to the United States Government of bonds issued for the purpose of procuring a municipal hospital in said city. The appellant contends that ordi-

nance No. 400, passed by the council of the city of Morrilton, is void, and that the proceedings thereunder, in contemplation of the issuance and sale of said bonds, are also void. To the complaint filed in this case, a demurrer was sustained and the complaint was dismissed. The appeal therefore presents to us the question of sufficiency of the complaint. Only the pertinent portions of the complaint will be set out for discussion.

The city of Morrilton, as a city of the second class, entered into a loan and grant agreement with the U. S. A., acting by and through the Federal Emergency Administration of Public Works, under the terms of which agreement the United States agreed to purchase $55,000 in bonds of the city to be issued pursuant to amendment No. 13 to the Constitution of Arkansas, and to make a grant to the city of an amount not to exceed $20,000, the proceeds of said loan and grant to be used for the construction and equipment of a municipal hospital, the cost of equipment to be paid solely from said grant. The plaintiff alleged that various proceedings had been completed whereby the bonds of the city of Morrilton were tentatively sold to the U. S. A. Contracts had been let for the construction and equipment of a municipal hospital, subject to the approval of the U. S. A., acting through the P. W. A.; that an annual levy had been made by the city of Morrilton, duly certified to the quorum court of Conway County, and by it levied and ordered extended upon the tax books upon the real and personal property within the corporate limits of the city of Morrilton. Plaintiff also alleged that the enactment and passage of an ordinance providing for an election, and the proceedings had subsequent thereto, done and performed with reference to the issuance of bonds therefor, the election thereon, the construction and equipment contracts, the levying of an annual millage tax for the payment of the bonds and interest, and the acts of the city council of the city of Morrilton with reference thereto, were illegal, void and of no effect for the reasons set out in the complaint. Plaintiff pleads that subsequent to the passage of ordinance No. 400, the mayor of the city of Morrilton,

pursuant to authority expressed and set forth in said ordinance, called a special election for November 8, 1935, for the purpose of determining by vote of the qualified electors of said city, the question as to whether or not the city of Morrilton should issue and sell bonds to raise funds to obtain a site for, and construct and maintain a municipal hospital. It is alleged that said ordinance and notice in providing that bonds shall be issued for the "maintenance" of municipal hospital is not authorized by said amendment No. 13, and said ordinance and notice thereunder are void and of no effect on that account. Said notice conformed to the ordinance which provided for the construction and maintenance of such hospital. The ballot, however, prepared for the said election and used by the electors was not in conformity to the said ordinance or notice of the election, but provided for the purchase of a site, construction and equipment of the hospital.

There are other matters in the complaint suggested as being illegal. It is unnecessary, however, that we set these out or discuss them since we are agreed upon one of the material allegations, which we are impelled to hold is fatal to the further progress of the enterprise under ordinance No. 400.

Amendment No. 13, 184 Ark. XXXI, is the only authority upon which the city of Morrilton might proceed for the construction and equipment of a hospital. Without quoting the entire paragraph, that portion of it relative to the matter under consideration provides: "for the purchase of sites for construction of and equipment of * * * hospitals, etc." This is the sole authority upon which the city might proceed. Municipalities derive their powers from the Constitution and the statutes. They may act legally only within those delegated powers. It is true that we have sometimes said that certain power and authority may be implied, but a power necessarily implied is a delegated power, nevertheless. When municipalities exceed their delegated powers, the act is *ultra vires* and, of course, ineffective. They function within limits fixed by the Constitution and law. *Eagle* v. *Beard*, 33 Ark. 497.

This court in *Cumnock* v. *Little Rock,* 168 Ark. 777, 782, 271 S. W. 466, said: "It is well settled in this State that counties, cities and towns or municipal corporations are created by the Legislature and derive all their powers from it unless otherwise provided by the State Constitution. *Eagle* v. *Beard,* 33 Ark. 497; *Harrison* v. *Campbell,* 160 Ark. 88, 254 S. W. 438." See also *Kitchens* v. *Paragould,* 191 Ark. 940, 88 S. W. (2d) 843.

It is unnecessary to cite numerous authorities as every practitioner must recognize as practically elementary the announcements above made. Ordinance No. 400, under which the election was held, provided for the construction and "maintenance." These are words of common or ordinary meaning and acceptation, not used in any peculiar, restricted or technical sense. The word "maintenance" is not found in the provisions of amendment No. 13 in regard to hospitals. Upon publication of this ordinance or publication of the notice for the election thereunder, citizens of the city of Morrilton must have understood that the proposition submitted to them to be voted upon was one for the construction, building, erection of a hospital structure and that when built, to make provisions for its maintenance, a means whereby it would be kept as a live, going concern for the city, an instrumentality for the relief of the sick of the community. Maintenance is rather a broad term. It could comprehend the organization of a hospital staff of physicians and surgeons, nurses and other attendants, as well as a means to supply necessary food, medicines and medicinal and surgical necessities of all kinds and for a continuation of such support of the organization. By no kind of reasonable construction are we able to say that the pertinent part of amendment No. 13 above copied provides therefor.

It is argued that the ballot when prepared for the election did not conform to the ordinance, but provided for a vote for the construction and equipment instead of construction and maintenance of the hospital, and that therefore the error in the use of the word "maintenance" in the ordinance was corrected inasmuch as the people did not vote upon the question of maintenance of the hos-

pital, but that they did vote for the equipment of the hospital, and that it was unnecessary to vote for the equipment of the hospital, inasmuch as the equipment will be furnished by the national government as a grant and without bonds issued therefor. But we are unable to substitute the word "equipment" for the word "maintenance" in the ordinance. They are not synonymous, and the ballot provided so as to permit the vote upon equipment was to that extent unauthorized by ordinance No. 400.

It is unnecessary to discuss other matters set forth and argued with equal force challenging the legality of the ordinance and proceedings of the city officers thereunder.

The chancery court erred in sustaining the demurrer. The decree is therefore reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings.

ROMICH *v.* KEMPNER BROTHERS REALTY COMPANY.

4-4230

Opinion delivered March 23, 1936.

D. K. Hawthorne, for appellant.

House, Moses & Holmes, Wallace Townsend and *S. S. Jefferies,* for appellees.

SMITH, J. R. L. Saxon owned a factory site with buildings and machinery thereon which he mortgaged to the Bankers Trust Company of Little Rock on June

1, 1926, to secure a debt of $35,000. The trust company filed suit to foreclose the mortgage on May 22, 1928, and on the same date filed the statutory *lis pendens* lien. A decree of foreclosure was rendered June 19, 1929, pursuant to which the mortgaged property was sold by a commissioner named for the purpose, and whose deed to the purchaser was dated and approved October 16, 1930. On September 20, 1928, Saxon leased the factory site, buildings and equipment to Command-Aire, Inc., for two years with an option to renew and an option to purchase. This last-named company was engaged in the manufacture and sale of airplanes, and in the summer or autumn of 1930, on motion of its president and principal stockholder, a receiver took possession of its property. On December 2, 1930, the receiver sold all the property of the corporation to appellant Romich, who remained in charge of the factory site, equipment and machinery for at least fifteen or sixteen months, and, according to his own testimony, until March 2, 1933.

On June 24, 1931, Romich filed a petition in the chancery court, reciting that a dispute had arisen between himself and the owners of the real estate over a sprinkler system. He prayed the court to adjudge whether he had purchased this system at the receiver's sale. Appellees intervened in this proceeding and alleged their ownership of the sprinkler system under the commissioner's deed, executed pursuant to the foreclosure decree of the mortgage hereinbefore mentioned. Neither party pressed the question to a decision. On February 2, 1933, interveners prayed that Romich be required to pay rent and be restrained from removing any property, and praying that the sprinkler system be declared their property. No court order was made until June, 1935, when the decree was rendered, from which is this appeal, adjudging the title to the sprinkler system to be in the interveners. During all the above time the sprinkler system has remained in the building, and has been in use for more than two years past, if not continuously since December, 1930.

It will be noted that the lease was executed after the foreclosure suit had been filed.

The lease provided that: "The lessee, upon expiration of this lease, may remove all machinery and equipment which it has heretofore or may hereafter install upon the premises." The lease required the lessee to carry $20,000 fire insurance on the building. It was ascertained that the insurance premiums could be greatly reduced by the installation of a sprinkler system. Saxon, the lessor testified that it was installed with the understanding that the lessee might remove it; the trust company, his mortgagee, knew of the lease when it was made, but the testimony is in dispute as to whether its officers were advised of the agreement whereby the sprinkler system might be removed. The court made no finding upon this disputed question of fact, but we assume, in view of the decree rendered, that it was found that the trust company had no knowledge of the agreement between Saxon and his lessee, and had not given consent thereto. It is certain, however, that the trust company was aware of the lease, and that much of the rents paid by the lessee under its provisions was paid over to it as credits on the mortgage indebtedness. These payments appear to have induced the indulgence extended in the foreclosure proceedings.

The testimony shows that the sprinkler system consists of a large elevated tank imbedded in a concrete foundation with pipes running under ground and connecting with the building. The pipes in the building were made to fit it. The overhead pipes are attached to the rafters by screws. But it was shown also that this tank could be removed without injury to the freehold, and that, while the tank and the pipe system were adapted to use in the building in which they had been installed, they could be installed and used in other buildings.

It was decreed that the sprinkler system was a fixture and did not pass to Romich by his purchase from the receiver; and his petition that he be adjudged the owner thereof was dismissed, and it was decreed that the title thereto had passed to the purchasers of the real estate under the foreclosure decree. *Stone* v. *Suckle,* 145 Ark. 387, 224 S. W. 735, is a well-considered case which announces the principles which we think are controlling

here. It enumerates the classes of persons between whom questions regarding the right of possession to what are called fixtures arise, and states the different rules that are applied to the different classes. It is there said that the strict rule as to fixtures which applies between heir and executor applies between vendor and vendee and between mortgagor and mortgagee. Another class of persons between whom the question frequently arises is the executor of the tenant for life and the remainderman or reversioner and there the right to fixtures is considered more favorably for the executors. Where the strict rule applies, all property attached to and adapted to the use of the property sold or mortgaged passes by the deed or mortgage, although it could be removed without damage to the property. But it was there said that between landlord and tenant the claim to have articles considered as personal property is received with the greatest latitude and indulgence. It is there further said that there is an exception of broader extent in respect to fixtures erected for the purpose of trade.

Now it is not contended that the sprinkler system is a trade fixture. But the question as to whether it is a fixture at all arises between parties who have taken the places of persons who were lessor and lessee or landlord and tenant. Appellees, through the mortgage foreclosure, have acquired the title of Saxon, the lessor or landlord. Appellant, through the receiver's sale, has acquired title of the Command-Aire, Inc., the lessee or tenant. What is known as the liberal rule is the one therefore to be applied, as the present litigants have acquired the right and title of persons whose original relation was that of landlord and tenant.

We think the sprinkler system was not placed in the mortgaged building as a part of it, and did not therefore become a fixture. We are led to this conclusion from the following facts and circumstances: (a) The lease gave the lessee the right to remove all machinery and equipment which it had then or might thereafter install upon expiration of the lease. It has expired and appellant owns the lessee's interest, whatever that is. (b) If there is

any ambiguity as to what property was included under the description of "all machinery and equipment," that doubt is removed by the testimony of the lessor, Saxon, himself, to the effect that it was expressly agreed that the sprinkler system might be removed upon the termination of the lease. (c) The sprinkler system was installed at a cost of $8,016. The foreclosure suit was pending when the lease was executed, and it would have been highly improvident on the lessee's part to incur this large expense which would be a total loss as soon as this foreclosure was completed. (d) The sprinkler system may be removed without damage to the building in which it was installed although some expense will be incurred in adapting it to, and in installing it in, another building. As stated in *Stone* v. *Suckle, supra,* this circumstance is not of controlling importance, but it is one to be considered in determining the intention of the parties and the character of the improvement. (e) The removal of the sprinkler system does not deprive appellee of any security which the original mortgage gave, as the system was installed subsequent to its execution. The equity of the case, as well as the law applicable to improvements of this character, call for the reversal of the decree, and it will be so ordered.

The decree is therefore reversed, and the cause will be remanded with directions to accord appellant the right to remove the sprinkler system.

ELROD *v.* ELROD.

4-4238

Opinion delivered March 23, 1936.

C. W. Garner, G. W. Fike and *McDaniels & Crow,* for appellants.

House, Moses & Holmes and *Richard C. Butler,* for appellees.

BAKER, J. This suit was one to quiet title to a piece of real property situated in Saline County, which real property was at one time owned by George Elrod. George Elrod was the father of John J. Elrod and George Milton Elrod. The appellants, who were plaintiffs in the trial court, are the children of John J. Elrod, and appellees are children of George Milton Elrod. All of them claim title to the said property from their grandfather as a common source.

George Elrod died in 1889. It is alleged that after he had grown old he bought a piece of property near his son, John J. Elrod, in order that he might be taken care of by John J. Elrod, with whom he made an agreement that upon death of himself and his wife, father and mother of John J. Elrod, in consideration of caring and providing for them in their old age, that John J. Elrod should have his property. A short time before the death of George Elrod he went to live in the home of John J. Elrod, but, thereafter, a few months before his death, he moved from that place to the home of his daughter, Mrs. McAdams, and it was at that home that he and his wife died. At any rate, John J. Elrod was left in possession of the real property owned by George Elrod at the time of his death, and continued in possession thereof until he died in 1926, and some of his children have remained in possession since that day.

Although it is seriously asserted and urged here that John J. Elrod should be declared the owner by reason of the services rendered by him to his father, under an agreement that he should be compensated therefor, under the contract whereby he was to receive his father's prop-

erty for such services, John J. Elrod made no effort, after his father died, to perfect title to himself to this property until a short time before he died in 1926. A short time before his death he did make an effort to get quitclaim deeds from some of the kindred.

Appellees offered a letter which was said to have been written by John J. Elrod in 1909 to George Milton Elrod, his brother. The letter is as follows: "Dear Brother: I take pleasure in writing you a few lines. This leaves us well, hoping it will find you all the same. Well, Bud, I got a letter from Charlie Lewis the other day to come down and buy Laura's part of this place, or sell my part of it. I went down to see him Sunday and he says if I will sell him my part he will put it in court at once. And I want the place to cultivate as my land is getting so it will not make anything, but I cannot afford to pay them for my part of the place and pay the rest of the heirs too. And if I sell to them he says he is not going to say anything to the rest of the heirs about it, but just fight it out in the court. He has that account of $250 that he is going to put in against the place and the court will allow it to them, and if it will take the whole place to pay it, I will have to pay that account in order to get the place. Now, I want to know who you would rather give your part to, to me or Charlie Lewis. If you cannot come out, let me know at once because I haven't but about 10 days to decide. Come if you can get off and advise me what to do. From your brother, John J. Elrod, Bryant, Arkansas."

This letter was written about twenty years after the death of their father. The Charlie Lewis mentioned in the letter is said to be the son-in-law of Mrs. McAdams, the sister of John J. Elrod and George Milton Elrod.

There was some conflicting testimony relative to the alleged contract between father and son in regard to the property. A larger part of the testimony, however, dealt with the proposition of the possession of John J. Elrod and his children during the respective periods, from the date of the death of George Elrod in 1889 to the date of the death of John J. Elrod in 1926, and the possession of the children of John J. Elrod from 1926

and the date of the filing of the suit to quiet title to this property. The decree of the trial court was to the effect that said alleged contract was not satisfactorily proved; that all of the parties claimed title from a common source, were tenants in common, and that John J. Elrod and his heirs have not held adversely or under such conditions as to give notice of such adverse claim or holding as would set in motion the statute of limitations and thereby bar the claim of the appellees. It is to correct the alleged error in this decree that this appeal has been prosecuted.

We think the chancellor was correct in his findings of fact and declarations of the law.

No useful purpose will be served by an attempt to set forth and argue the facts in relation to the alleged contract for services rendered by the son to his parents. Conditions seem from the record presented here not materially different from those that occur in many families where the ordinary affections exist, as between parents and children. There is no presumption under such conditions that parents expect to pay or that children expect to receive compensation for such services. The presumption is to the contrary. *Graves* v. *Bowles,* 190 Ark. 579, 79 S. W. (2d) 995. It must therefore follow that one relying upon such contract must be able to establish it by a preponderance of the evidence, and, failing to do so, cannot recover.

It must be evident that when John J. Elrod wrote the letter above set forth, twenty years after his father died, he himself was not then relying upon any contract whereby his father was to transfer or convey the real property to him. This letter contradicts that theory.

It is true, as argued in appellant's brief, that his first concern at that time was about this twenty-year-old claim of $250 made by his sister's son-in-law, which was giving him considerable worry, and on account of which he thought he might have to yield possession of the property in order that this claim might be paid. One so conscientiously concerned about the payment of this twenty-year-old debt would most probably have been believed had he at a proper time asserted his claim of ownership to the property. It is true he was trying to get title to

the property just a short time before he died, but this was not by way of denial by him that others had an interest therein, but rather in recognition of their rights, which he sought to have conveyed to him. It must, perforce, appear that no substantial right existed under such alleged contract as appellants now set up.

The only other question remaining in this case is that of adverse possession. The propositions of law governing this situation are well settled and recognized. The possession of some of the joint tenants, or tenants in common, is the possession of all, and continues to be such until there is some act of ouster sufficient in itself to give notice that those in possession are claiming in hostility to, and not in conformity with, the rights of others having interests in the property. *Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284. One in possession is presumed to hold in recognition of the rights of his cotenants. *Patterson* v. *Miller,* 154 Ark. 124, 241 S. W. 875. A great number of citations support this proposition. It is unnecessary to extend this opinion by including them.

A thorough examination of this record is convincing that the trial court was correct in his findings of fact and declarations of law, and the decree is therefore affirmed.

[redacted]

STRICKLAND *v.* DYER.

4-4234

Opinion delivered March 23, 1936.

[redacted]

H. P. Smith and *James R. Campbell*, for appellant.

W. W. Sharp, for appellee.

McHaney, J. The facts in this case are not in dispute, most of them being stipulated. On March 2, 1929, E. T. Dyer, deceased husband of appellee, contracted with appellant to finance him to make a crop during said year to the extent of $2,000. On said date he executed and delivered his note to appellant for said sum, due November 1, 1929, and secured by a mortgage on certain chattels and all crops to be grown by him. At appellant's suggestion or by his requirement, Mr. Dyer applied for and was issued a policy of life insurance in the Reliance Life Insurance Company in the sum of $3,000, the first premium being paid by appellant and charged to Dyer's account. This policy was delivered April 10, 1929, and appellee was named beneficiary therein. On said last-mentioned date, Mr. and Mrs. Dyer executed and delivered to appellant the following assignment of said policy of insurance: "For value received, I hereby assign and transfer unto R. B. Strickland, Clarendon, Arkansas, so far as his interest shall appear, all my right, title and interest in policy No. 451074, issued by the Reliance Life Insurance Company of Pittsburgh upon the life of E. T. Dyer, of Clarendon, Arkansas, and dated the 23 day of March, 1929.

"Witness my hand and seal this 10 day of April, nineteen hundred and twenty-nine.

"(Signed) Insured: E. T. Dyer.

"Beneficiary: Julia S. Dyer."

This assignment was duly executed and acknowledged on forms furnished by the company and a copy retained by it and a copy delivered to appellant. The note, for which this assignment was given as additional security, was paid in full on October 30, 1929, one day before its due date, and the note and mortgage sur-

rendered and canceled. Thereafter, beginning on November 11, 1929, Mr. Dyer made other small purchases on credit, and on January 1, 1930, owed appellant $40.75. Dyer again arranged for advances in the sum of $2,000 for said year, for which he executed a new note and chattel mortgage. This year's indebtedness was not paid. On April 20, 1932, a settlement was had between them in which it was agreed that Dyer owed appellant $1,989.63, for which a new note and chattel mortgage were given at 8 per cent. Other credits were thereafter extended and two payments of $100 each were made by him. Dyer died in December, 1934.

Appellee brought this action against the insurance company to recover the $3,000. It admitted liability, paid the money into court, and interpleaded appellant on the ground that he claimed some interest in the proceeds of said policy by reason of said assignment. He thereupon filed an answer setting up said assignment, Dyer's indebtedness to him at the time of his death, and prayed that he be permitted to recover from the proceeds of said policy the amount of his debt in excess of $2,000 with interest. Trial resulted in a decree for appellee except one quarterly premium paid by appellant in 1930 in the sum of $9.37, which amount was awarded him.

The trial court held that said assignment was given appellant to secure said note for $2,000 dated March 2, 1929, and that when said note was paid on October 30, 1929, the note and mortgage, as well as said assignment, were extinguished and became null and void.

We think the trial court was correct in so holding. Payment of a negotiable instrument by the maker discharges the instrument and all persons secondarily liable. Section 7885 and 7886, Crawford & Moses' Digest. Necessarily, therefore, all collateral deposited with the payee as security for the debt is discharged when the instrument it secures is discharged. As stated in 5 C. J., page 958: "Where the debt for which the collateral is given is paid, the right to hold the collateral ceases, and after that time the assignee has no interest in the collateral that he can transfer to another." Therefore, when Mr.

Dyer paid his debt, appellant had no more right to hold the assignment than he did the note it was given to secure or the mortgage which was satisfied. Had he surrendered the assignment to appellee, as it was his duty to do, then, to secure any future indebtedness to appellant, a new assignment would have been necessary, or a new agreement regarding the former assignment. It is not contended in this record that this was done. Appellee testified, and it is not contradicted, that appellant did not discuss with her any matter relating to Mr. Dyer's business or the policy after the debt was paid for which the assignment was given. Nor can we agree that Mr. Dyer, conceding that he orally agreed with appellant that the policy should stand pledged for the debt now sued upon, could assign the policy without appellee's consent when the policy itself was at all times in appellee's possession. *Hoge* v. *Morgan, ante* p. 363, 91 S. W. (2d) 614. She had a qualified interest in said policy, subject to his right to change the beneficiary as provided therein. *Townes* v. *Krumpen,* 184 Ark. 910, 43 S. W. (2d) 1083; § 5579, Crawford & Moses' Digest, as amended by act 141 of 1931; act 102 of 1933.

The decree is correct, and must be affirmed. It is so ordered.

TISDALE *v.* MANESS.

4-4224

Opinion delivered March 23, 1936.

Cravens, Cravens & Friedman, for appellant.
Thomas C. Pitts, for appellee.
George W. Dodd, for intervener.

McHaney, J. Appellee Maness brought this action against appellant to cancel certain promissory notes and for the release of certain collateral executed and delivered by the former to the latter. He alleged that he became indebted to appellant in the sum of $100 for borrowed money on or about January 1, 1935, and that appellant required him to execute six notes of $20 each due one each month, and one note for $70 due six months after date; that $5 of each $20 payment was to apply on the principal and $15 for interest; that at the end of six months he would have paid $30 on the principal and the $70 note then coming due, if paid, would cancel the debt. In other words, he was to pay $15 interest per month for the use of the $100 borrowed. He also alleged that he deposited with appellant as collateral to said notes a certificate for 17 shares of preferred stock of the Tribune Publishing Company of the par value of $100 per share, which he assigned in blank. He prayed a cancellation of the notes as usurious and for a return of said stock certificate. Appellant denied all the allegations of the complaint or that any notes were executed by appellee and delivered to him. He alleged that on December 29, 1934, said appellee came to him to borrow money, he being a money lender, and that he refused to make a loan, but purchased said stock for a cash consideration of $375 paid to said appellee, and the stock was thereupon assigned to him. Appellee Annie Deuber, a judgment creditor of Maness, intervened in the action and claimed a paramount lien on said stock by virtue of her judgment on which execution had been issued and levy made. Trial resulted in a decree cancelling said notes as usurious, cancelling the assignment of said stock certificate and ordering a surrender thereof to the clerk of the court. Also a lien was fixed on said stock in favor of said intervener, and same was ordered sold by the commissioner if not paid in twenty days.

Principally, a question of fact is involved on this appeal, appellant contending that the preponderance of the evidence is contrary to the findings and decree of the court, at least when measured by the clear and convincing rule which, it is contended, is required to support a

finding of usury. The issue is: Did Maness borrow $100 from appellant and execute and deliver the notes above mentioned and assign said stock certificate as collateral security therefor, or did Maness sell appellant his stock? If the transaction was one of borrowing and lending money, as contended by Maness, then the transaction was grossly usurious, as it exacted the payment of $90 interest on a loan of $100 for six months. If, on the other hand, there was an actual *bona fide* sale of said stock, as contended by appellant, then no question of usury is involved, as the element of lending and borrowing is absent. As said by the late Chief Justice Hart in *Home Bldg. & Savings Ass'n* v. *Shotwell,* 183 Ark. 750, 38 S. W. (2d) 552: "This court has uniformly recognized that borrowing and lending of money is indispensable to constitute usury; but that, no matter what the form of the contract may be, no device or shift intended to evade the usury laws will be upheld. The court has also recognized that, while an exorbitant price will not of itself constitute usury, yet it is a circumstance to be considered in determining whether the transaction was a *bona fide* sale of property or was intended for a cover for usury. It has been frequently judicially stated that one of the most usual forms of usury is a pretended sale of goods or other property."

Appellee Maness testified very positively that he executed the notes above mentioned and assigned the stock for a loan of $100; that after deducting certain amounts he owed appellant he received a check for $57.50, drawn on the City National Bank, and deposited $40 of said amount to his credit in said bank on the same day, exhibiting a duplicate deposit slip for said amount. The bank records showed that appellant's account was charged with a check for $57.50 on the same day, although both he and his bookkeeper testified that no check for that amount was drawn by him on that date to Maness or any one else. They both further testified the transaction was a sale and purchase of the stock and that the amount was paid to Maness in cash, less his indebtedness.

We think the finding of the court is supported by the preponderance of the testimony. Other facts and cir-

cumstances tending to support same are in evidence, but we think it unnecessary to set them out. We are also of the opinion that a preponderance of the testimony is sufficient, because the vital question at issue is whether the transaction was one of borrowing and lending of money, or whether the sale of property, which is a question of fact to be established by the weight of the evidence.

There is no dispute between Maness and the intervener, Annie Deuber. The decree is accordingly affirmed.

GENERAL EXCHANGE INSURANCE CORPORATION *v.* COFFELT.

4-4227

Opinion delivered March 23, 1936.

Ernest Briner, Barber & Henry and *Troy W. Lewis,* for appellant.

Wm. J. Kirby, for appellee.

JOHNSON, C. J. This action was instituted by appellee, K. Coffelt, against appellant, General Exchange Insurance Corporation, in the Saline County Circuit Court, for damages to an automobile alleged to have been cov-

ered by an indemnity contract of insurance. The defense interposed to the complaint was that the contract of indemnity had been canceled prior to the accident and consequent damages to the automobile. A jury trial being waived by the parties, testimony was adduced to the following effect: On September 17, 1934, appellant issued to appellee its policy of insurance, by the terms of which appellee's Chevrolet automobile was insured against accident and consequent damages for one year, and the premium was paid in cash. The policy contained the following clause in reference to cancellation: "The policy shall be canceled at any time at the request of the assured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be canceled at any time by this company by giving to the assured five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the *pro rata* premium for the expired term, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the assured stated in this policy shall be a sufficient notice. Where a special provision for cancellation is required by statutory enactment in the State where this policy is issued, the conditions of this cancellation clause are amended to conform thereto."

On March 27, 1935, appellant notified appellee that as of April 2, 1935, said contract of insurance would be canceled and that the premium for the unexpired term of the policy would be refunded on demand. This cancellation notice was received by appellee at Benton, Arkansas, on March 28, 1935, and on this date appellee demanded the return of the premium for the unexpired term of the contract. This demand for the return of premium was received by appellant April 1, 1935, but the refund was not effected until April 8, 1935, at which time a check was mailed at Memphis, Tennessee, and was received by appellee at Benton on April 9, 1935. In the meantime, on April 5, 1935, appellee's automobile was

damaged in an accident to the extent of $252.25. Appellee refused to accept the refund of premium, and demanded payment for the damages to his automobile.

The trial court found under the recited facts that the policy of insurance was in force on April 5, 1935, the date of the accident, and rendered judgment accordingly, from which this appeal comes.

The general rule is that contracts of insurance may be canceled by the insurer only on compliance with the provisions of the policy relating thereto, and then only by refunding the unearned premium. 32 C. J., § 440, p. 1252; 6 Couch on Insurance, pp. 5104-5107. The rule thus stated has met the approval of this court in many cases. *Southern Ins. Co.* v. *Williams,* 62 Ark. 382, 35 S. W. 1101. It is also true that the refund of the unearned premium may be waived by the insured voluntarily surrendering the policy for cancellation. Cooley's Briefs on Ins., Vol. 5, pp. 4604-4615. Or the return of the premium as a condition precedent to cancellation may be waived by the insured. 14 R. C. L., p. 1012.

With these fundamental rules in view, we proceed to an analysis of the cancellation clause of the policy under consideration. The language employed by the parties is plain and unambiguous, and no resort to construction is necessary. It expressly states that cancellation of the policy may be effected with or without return of unearned premium, but it is expressly conditioned that the refund must be made upon demand.

If the five days' notice of cancellation includes a promise to refund on demand, and no demand for refund be made during this period, the cancellation becomes effective. But, if the insured demands a return of the unearned premium during the five days' period provided for cancellation, and such refund be refused by the insurer, then the cancellation of the policy is automatically deferred until the unearned premium is refunded; and if loss or injury occur during this period of delay, a recovery may be allowed. This is the effect of the opinion of the Supreme Court of Michigan in *Molyneaux, et al.,* v. *Royal Exchange,* 235 Mich. 678, 209 N. W. 803, wherein

a cancellation clause in a policy not materially different from the one under consideration was construed.

The undisputed testimony in the instant case is that appellee demanded the return of the unearned premium four days before the lapse of the five days' cancellation period, and that this demand was received by appellant on April 1, at least one day before the five-day period expired, but appellant delayed the refund until April 5, when it claims to have written a check for the refund, but this check was not mailed by it until April 8, long subsequent to the accident to the insured car. By delay in effecting the return of the unearned premium to appellee by appellant, the policy was not canceled on April 2, but continued in force until after April 5, the date of the accident.

Waiver and estoppel have no place in this lawsuit. Appellee made immediate demand for return of his unearned premium, and by no word or act intimated that he would forego strict compliance.

The circuit court's judgment conforming to the views here expressed must be affirmed.

PULASKI COUNTY *v.* SHOFNER.

4-4223

Opinion delivered March 23, 1936.

Fred A. Donham and *Milton McLees*, for appellant.

Price Shofner, for appellee.

SMITH, J. This appeal grows out of the opinion in the recent case of *Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. (2d) 374. Johnson, the appellant in that case, brought suit in the Pulaski Chancery Court as a citizen and taxpayer, to restrain the expenditures of the sum of $2,500, which the quorum court of Pulaski County had appropriated to purchase a law library for the office of the prosecuting attorney of the district of which Pulaski County is a part. It was held on the appeal to this court in that case that the county was without authority to expend county funds for this purpose. Johnson, the citizen and taxpayer, was represented in the litigation by Price Shofner, an attorney residing in Little Rock, who filed a claim with the county court of Pulaski County for $625 for the services which he had rendered in the prosecution of that litigation and for $68.60 costs which he had advanced. The claim was disallowed by the county court, from which judgment an appeal was duly prosecuted to the circuit court, where, after hearing testimony, the attorney was allowed a fee of $450 in addition to the costs he had advanced, making a total allowance of $518.60. From this judgment the county has appealed.

For the reversal of this judgment it is insisted, (a) that if there were a contract, it was not lawfully made, and (b) there was no contract.

In support of the contention that no lawful contract of employment was made between the county and the attorney, we are cited to § 8 of act 74 of the Acts of 1933, page 211. The relevant portion of that section reads as follows: "It shall be unlawful to employ, retain, or otherwise engage counsel to represent any county in such district except by and with the advice and consent of the prosecuting attorney of said districts. This section shall not be construed to prohibit suit by taxpayers when the county judge and prosecuting attorney refuse to act."

If this act is not void as being local legislation, and if the portion of § 8, above quoted, is not invalid as infringing upon the jurisdiction of the county court, as

appellee insists, (upon which question we reserve our opinion, as was done in *Johnson* v. *Donham, supra,* where the provisions of another section of this act were invoked) then it must be said that the act affords no authority for the contention of appellant that the county court was without authority to employ special counsel without the advice and consent of the prosecuting attorney. The act has no application under the facts of this case. The prosecuting attorney was an adverse litigant. He appeared as counsel of record for the other side of the question. His interests were adverse to those of the county in that litigation. This was in effect a refusal by the prosecuting attorney to act in opposition to the expenditure of the appropriation, as he could not represent both sides of the litigation; and, while the advice and consent of that officer was not obtained, it was not required.

We think the testimony is sufficient to support the finding of the trial court that there was a contract for the employment of the special counsel. It is certain no definite fee was agreed upon, but it is not essential that there should have been. *Davis* v. *Webber,* 66 Ark. 190, 49 S. W. 822; 45 L. R. A. 106, 74 Am. St. Rep. 81; *Oglesby* v. *Ft. Smith District of Sebastian County,* 119 Ark. 567, 179 S. W. 178, 1199.

According to the testimony of Shofner, he had a contract with the county judge acting for the county under which he was to be paid a fee contingent upon the successful termination of the litigation, which it was agreed he should institute. He was to be paid no fee unless he prevailed, but he was to be paid a reasonable fee if he defeated the appropriation.

It is undisputed that the county judge and the attorney conferred about the matter, but the judge was reluctant to antagonize the budget committee of the quorum court, which had recommended that the appropriation be made. The county judge had been advised that the appropriation could not be defeated, and he was unwilling to incur expense in unsuccessful litigation. The judge suggested to the attorney that the publicity would

be sufficient compensation; but the attorney told the judge he would expect a fee, if he won the case and saved the county the money, and would expect the county court to allow a reasonable fee if "the validity and the amount of it should be passed upon by a court of competent jurisdiction." The county judge replied "that is all right." But he also said that he would not fix the amount of the fee. He did not do so. By rejecting the claim, he passed the question to the circuit court, where it was disposed of on the appeal. The reasonableness of the fee is not questioned, and it does not appear to be unreasonable in as much as it was upon contingent basis. The testimony is sufficient to support the finding that there was a contract for a reasonable fee in the event of a successful termination of the litigation which was begun as a taxpayer's suit pursuant to the understanding with the county judge to that effect.

The judgment must therefore be affirmed, and it is so ordered.

[redacted]

AMERICAN NATIONAL INSURANCE COMPANY *v.* FREEMAN.

4-4239

Opinion delivered March 23, 1936.

[redacted]

Daily & Woods, for appellant.

James Seaborn Holt, for appellees.

HUMPHREYS, J. This is a suit by the beneficiaries to recover the face value of a disability and life insurance policy issued by appellant to Abba R. Freeman on March 19, 1929, upon which the insured paid the initial yearly premium of $68.78, but never paid any subsequent payment during his lifetime. He died in 1932 with tuber-

culosis, which developed in December, 1929, at which time he became totally disabled on account of said disease. After he became totally disabled in 1929, he never notified appellant of his disability or made proof thereof during the remaining two and one-half years of his life, and after his death his beneficiaries gave no notice or made proof of his disability, and made no demand for the payment of the face of the policy until they instituted this suit in 1934 in the circuit court of Sebastian County, Fort Smith District.

The complaint set out the application and policy in full as a part thereof in addition to pleading the facts above detailed.

Appellant filed a demurrer to the complaint, which was overruled by the court on October 24, 1935, over its objection and exception, and, refusing to plead further and standing upon its demurrer, the trial court rendered judgment in favor of appellees for the face amount of the policy and costs and an attorney's fee of $300, from which is this appeal.

The policy contained the following provisions:

"Total Permanent Disability.

"Subject to the provisions hereinafter while this policy is in full force and before default in payment of premium hereon, if insured, prior to attaining the age of 60 years, shall furnish due proof to company at home office that insured has become totally permanently disabled by irremediable bodily injury or incurable disease not existing at the date of issue hereof, so insured is, and presumably will be permanently, continuously and wholly prevented thereby for life from performing any work for compensation, gain or profit, or from following any gainful occupation, and that disability has then existed for not less than ninety days, company will grant following benefits:

"1. Waiver of Premium.—The company will during the continuance of such disability, waive payment of each premium as it thereafter becomes due to the extent of annual premium of $68.76 commencing with premium first due after receipt of due proof of disability."

The majority of the court interpret the above provisions of the policy to mean that no liability arises thereon until notice and proof of disability is made, and that the payment of premiums is not waived until such notice and proof is made. They base their interpretation upon the construction given the clauses of the policy in the case of *New York Life Insurance Company* v. *Moose,* 190 Ark. 161, 78 S. W. (2d) 64.

The Chief Justice and the writer interpret the provisions of the policy in the instant case to mean that liability arises thereon when the disability occurs and that notice and proof of disability is not a condition precedent to liability, and our reasons therefor may be found in the dissenting opinion in the Moose case, *supra.*

The judgment is reversed, and the cause is dismissed.

HOUSE *v.* STATE.

Crim. 3980

Opinion delivered March 23, 1936.

W. D. Swaim, for appellant.

Carl E. Bailey, Attorney General, *Guy E. Williams* and *J. F. Koone,* Assistants, for appellee.

BAKER, J. The grand jury in Garland County indicted Roy House and Ayliff Draper of the crime of murder in the first degree for the killing of Tom Menser. The homicide occurred in March of 1935. Separate trials were awarded the parties, and upon the trial of House he was convicted of murder in the first degree, and his punishment was fixed at death. This trial was had last October. He has appealed from that judgment of conviction. He alleges several grounds as a reason for the reversal.

The first is that he was convicted of a crime with which he is not charged in the indictment. The second is that the testimony conclusively shows that House and Draper had entered into a conspiracy to rob Tom Menser and that House had withdrawn from this agreement prior to the commission of the crime which was in fact committed by Draper. On that account, the defendant alleges that he was not guilty of the crime. He alleges further that one Richard Pittman, a juror trying the case, fraudulently imposed himself upon the court and upon the defendant by making false statements, deceiving the court and the defendant so that he was not excused by the court nor by the defendant. There were some objections urged to instructions given on the trial of this case, but said objections may be disposed of by the settlement of the matters above set out. It may be stated that substantially the only objections made were those above stated and to the argument of the prosecuting attorney.

Such objections as were made to instructions only tend to explain or accentuate further defendant's position.

Not a great deal of the testimony will be set forth herein. Only a small part of it will be argued. However, whatever is necessary to an explanation of the issues will be stated.

The first contention of the defendant is to the effect that he was indicted for murder in the first degree and that the indictment does not charge that the homicide occurred in the attempt to commit a felony, robbery, and the defendant urges and argues, from his own testimony, that, although he had agreed with Draper that they would rob Tom Menser, he withdrew from the agreement in good faith before any assault was made upon Tom Menser in the effort to rob him, and that the assault was made by Draper without his consent and after he had withdrawn from the agreement or conspiracy that the two of them had entered into for that purpose; that he was therefore not guilty, first, because he did not strike or beat Menser, who was killed by Draper, and, second, because of his withdrawal prior to Draper's assault.

In the presentation of this theory, let it be said that the two parties, Draper and House, went to the home of Menser in the night time to rob Menser. House was to gain admittance because he was known to Menser, and one of them was to hold him while the other procured his money or valuables which they sought. When they entered Menser's well-lighted house, he was very friendly in inviting them to sit with him, and House, according to his statement, sat down near Menser and Draper walked behind Menser. House's own evidence as to his withdrawal is to the effect that he looked at Draper and shook his head; that as Draper prepared to assault Menser he again looked Draper in the eye and the second time he shook his head, meaning, as he said, to tell Draper that their victim had been so kind that they must not assault him. Notwithstanding this telepathic communication which House interprets as indicating his innocence in this case, Draper made a violent assault upon the victim with an implement which he had taken from the tool box

of the car in which they had driven to the home of Menser. House was horror stricken, unable to move, unable to shout a protest at the shocking brutality of his companion and finally the victim was beaten into insensibility, and House then regained such control of his shocked nerves and overcame his abhorrence of the brutal assault of the helpless victim to the extent that he helped Draper search the bloody corpse of Draper's victim and the house in the completion of the planned robbery, from which he says he had withdrawn a few minutes before.

The foregoing is the effect of House's own statement, his own testimony, and his explanation of his conduct. He argues that since nobody disputed his testimony that it should be believed. All of it was most probably believed by the jury, except that at no time did House either hesitate or attempt to withdraw from the scheme or plan that the two had formed. His position is that since he was not indicted for the crime of murder in an attempt to commit another felony, malice, after premeditation and deliberation, was not shown, and he was therefore not guilty of murder.

We have already said in many cases that the juries may consider the manner of the killing in a determination of whether there was malice, whether there was deliberation or premeditation. The latest announcement perhaps upon this question is the case of *Dowell* v. *State,* 191 Ark. 311, 86 S. W. (2d) 23; *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968.

It was entirely proper that this case should go to the jury; that the homicide was committed in the commission of the robbery. This court said in the case of *Spear* v. *State,* 184 Ark. 1047, 44 S. W. (2d) 663: "The general rule is that all who join in a common design to commit an unlawful act, the natural and probable consequence of which involves the contingency of taking life, are responsible for a homicide committed by one of them while acting in pursuance or furtherance of the common design, although the homicide might not have been in contemplation of the parties when they conspired to commit the unlawful act, and although the actual perpetrator is not identified. This rule was recognized in *Carr* v. *State,*

43 Ark. 99. In that case reference is made with approval to the case of *Stephens* v. *State,* 42 Ohio St. 150, where the indictment appears to have been one which charged the offense of murder at common law."

Although the indictment did not allege that the killing was one in the perpetration of a robbery, it did allege the malicious, deliberate and premeditated killing, and, under well-settled rule of decisions in this State, it was entirely proper to submit to the jury the question of the deliberate and premeditated murder. *Powell* v. *State,* 74 Ark. 355, 85 S. W. 781; *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356; *McCabe* v. *State,* 149 Ark. 585, 233 S. W. 771; *Spear* v. *State,* 184 Ark. 1047, 44 S. W. (2d) 663. It must follow therefore that the court did not err in giving instruction No. 3 complained of by the defendant, which instruction is to the effect that, if the jury believe beyond a reasonable doubt that the defendant, Roy House, on the 8th day of March, 1935, in Garland County, Arkansas, did wilfully, unlawfully and feloniously, and with malice aforethought, and after premeditation and deliberation, or while in the perpetration of or in the attempt to perpetrate robbery, kill and murder one Tom Menser by striking and beating him, the said Tom Menser, on the head and about the body with a certain blunt instrument and that the said Tom Menser died from the effects of the striking and beating, as charged in the indictment, you should find the defendant guilty of murder in the first degree.

Appellant urges that he was indicted under the provision of the statute which defines murder as the "unlawful killing of a human being, in the peace of the State, with malice aforethought, either expressed or implied." He asserts that he was not indicted under that other provision of the statute which says: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree."

As far as we have been able to determine the appellant is insisting upon a refinement in the matter of instruction which this court has never made. The defendant was charged with having committed a crime of murder in first degree, by beating and striking his victim with a blunt instrument. This thoroughly apprised him of the charge and of the details or manner in which it was committed. It was not necessary that the State, in making that charge, should attempt to discover and set up the motivating factor controlling the defendant in the commission of the crime. The prosecution has never been expected to assume a burden so great in a case of this kind. It matters little whether defendant was convicted upon a charge of premeditated and deliberate murder, or a murder committed in perpetration of the act of robbery. A conviction supported by substantial evidence, as this one is, works no prejudice whatever to any right of the defendant.

Although the appellant was present, aiding and abetting, the scene was beyond his description. He summed it up in these words: "I was hurt, speechless, to see that he had hit the old man and was down on top of him beating him. I couldn't say how much he beat the old man, but I do know it was awful, the worst I had ever saw, and it was my first."

The same question raised by appellant here was argued in the case of *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356. In that case Rayburn shot and killed Carpenter in the perpetration of robbery, and the court gave substantially the same instruction in the case as No. 3 in this case, and this court approved the instruction in the following language: "The record shows affirmatively that the facts and circumstances tended 'to prove the murder as charged in the indictment.' In the absence of any proof tending to show that the homicide, although committed in the attempt to perpetrate robbery, was unintentional, it must be held that it was as stated to be shown in the record. The court's charge, so far as the record shows, was but based upon the proof."

This court also said in the case of *McCabe* v. *State,* 149 Ark. 585, 233 S. W. 771: "Malice might exist in the

commission of the homicide, even though the primary purpose of the offender was to commit another felony, and it is generally a question for the jury to determine whether or not the crime was committed with malice aforethought, even though it was done in the perpetration of or in the attempt to perpetrate another felony of the kind mentioned in the statute.'' See also *Spear* v. *State,* 184 Ark. 1047, 44 S. W. (2d) 663.

On account of the fact that we have stated the effect and in some instances quoted from appellant's testimony, it perhaps is unnecessary that we argue appellants theory that he had withdrawn from the conspiracy before Draper committed murder in his presence. There is no evidence of his withdrawal, except his own bare assertion, followed by his confession that he lingered after the completion of this murder to rob the body of the victim of the conspiracy which he says was entered into between him and Draper. Again we may refer to the case of *Spear* v. *State, supra,* for the authority that when criminals are associated together, and while engaged in a common design, one of them intentionally kills a person they are attempting to rob, all are equally guilty.

The only other question that has arisen and which deserves serious consideration is the charge that one Richard Pittman, a juror, upon his examination as to his qualifications, fraudulently imposed himself upon the court and the defendant by asserting that he had not formed or expressed any opinion as to the guilt or innocence of the defendant, when in fact appellant charges he had, shortly after the homicide was committed, expressed himself in rather strong or almost violent language in regard to the defendant. That question is presented to us by appellant in this statement in the motion for a new trial. ''(21) The misconduct of juror, Richard Pittman, in withholding information in regard to statement of opinion previous to his qualifying as a juror.''

There is found in the record this affidavit: ''Willard H. Sharp, being first duly sworn deposes and says: That upon the day of Ayliff Draper's arrest for the murder of one Tom Menser, he was at Richard Pittman's filling station on highway 170, and when it

was mentioned concerning the above-stated arrest, Richard Pittman said, after reading the newspaper account and learning that Roy House was being sought for the same murder, 'That I could go into the jury box and burn those boys for the murder of Tom Menser, and if I happened to be one of the jurors, I would have to give them death.' (Signed) Willard H. Sharp."

The implied charge made here is a serious one. The word "implied" is used advisedly for the reason that the charge becomes serious only by inference, and by the assumption of certain facts which do not appear in the entire record. We have just quoted from the motion for a new trial. This is the only statement with reference to this matter in the record presented on this appeal.

Appellant's counsel, however, argue in the brief that after the completion of the trial, while counsel was still in the court room, Sharp, whose affidavit is presented, offered this information to them which they had not, prior to that time, been able to learn. They argue that that was their first information in regard to the facts stated in Sharp's affidavit. This may be true. That statement, however, is only offered by way of argument.

We concede it to be our duty in every instance to protect the rights of the accused to the extent that he may have a fair and impartial trial. The presumption in the absence of an affirmative showing to the contrary is that there was no error. The burden is upon the appellant to present such facts as show that error was committed, and unless he is able to do this, the error will not be presumed.

He does not allege in his motion for a new trial, nor anywhere else in this record, the matter that he argues, that is, that he did not have this information at the time Pittman was accepted on the jury. If the matters set up in Sharp's statement were true, we believe, if we may judge from the frankness of Pittman himself upon *voir dire,* such facts would have been readily discovered with ordinary diligence before the trial or in the qualification of the jurors. Counsel will recognize the principle that the possibility of fraudulent or improper proof must necessarily require strict adherence to rules of practice

requiring those who feel themselves aggrieved by verdicts and judgments to present the whole matter by record to the trial court without relying upon any unwarranted presumptions. The trial judge was in position to examine into matters, had facts been alleged that the defendant had been imposed upon and was without information which he alleges was obtained immediately following the trial. He has shown no prejudicial error.

It is further argued that the prosecuting attorney was permitted to argue improperly to the jury that the jury should not give the defendant a life sentence for the reason that a life sentence at most would mean but about seven years in the penitentiary, when the defendant would return to his old life of robbery and murder. But this objection was not made during the trial, nor argument. It was not until the jury had retired to consider the verdict that appellant made this objection and requested the court to recall the jury and instruct the jury that the argument was improper and should not be considered. This objection not only came too late, but we do not decide that it was improper.

The case of *Hogan* v. *State,* 191 Ark. 437, 86 S. W. (2d) 931, can be of no aid to appellant here. In that case the error consisted in the statement of an alleged fact by the prosecuting attorney in the presence and hearing of the jury. This fact had a bearing upon the guilt or innocence of the defendant, or served to inform the jury in a determination of that question. Here the prosecuting attorney was arguing, as he explained, from statistics or matters of common knowledge, that defendants convicted or sentenced to life imprisonment ordinarily served not exceeding seven years. There was nothing in this bearing in any way upon the question of the guilt or innocence of the defendant. It related to but one proposition and that was relative to the severity of the punishment that should be administered. The prosecuting attorney may argue, in proper cases, the kind or severity of punishment that should be meted out to offenders.

We have examined this entire record, and, although we have not discussed in detail every matter argued, we find no error prejudicial to appellant's rights.

The judgment is affirmed.

WHITE RIVER BRIDGE CORPORATION *v.* STATE.

4-4022

Opinion delivered March 23, 1936.

Martin Fulk, Henry Donham, Guy Amsler and *Lee Miles,* for appellants.

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

JOHNSON, C. J. By way of intervention, appellants filed their joint and several motion to vacate a certain judgment of the Prairie Circuit Court made and entered September 18, 1930, in which action the State of Arkansas was plaintiff and the White River Bridge Corporation and the New York Trust Company were defendants. The judgment sought to be vacated is as follows: "Now on this day comes the plaintiff, the State of Arkansas, by its Attorney General, Hal L. Norwood, and by Pace & Davis and R. W. Robins, its attorneys, and comes the defendant, the White River Bridge Corpora-

tion, a corporation organized under the laws of the State of Delaware, by Robinson, House & Moses, its attorneys, and comes the defendant, The New York Trust Company, a corporation organized and existing under the laws of the State of New York, by Robinson, House & Moses, its attorneys, and, by consent of all parties made in open court, the following finding and judgment is made, rendered and entered by the court, to-wit: The court finds that the defendant, the White River Bridge Corporation, is the owner of the following real estate and property, to-wit: A right-of-way 100 feet wide on each side of the following line: Beginning at a point 277 feet east of the southeast corner of the northwest quarter of section 17, township 2 north, range 4 west; thence 76 degrees and 30 seconds east a distance of 594 feet; thence east 200 feet to the west bank of White River; and also beginning at a point 726 feet north of the quarter section corner between sections 16 and 17, township 2 north, range 4 west; running thence south 45 degrees and 20 minutes west a distance of 1,056 feet; thence west 300 feet to the east bank of the White River.

" 'And also the bridge across White River near De-Valls Bluff, Arkansas, at a point on White River where same is crossed by highway No. 70, including toll house, approaches, and all appurtenances thereunto belonging, said bridge, right-of-way and other property described above being all located in Prairie County, Arkansas.

"And also franchise and privilege of operating said bridge granted to Harry E. Bovay and his successors and assigns by an act of Congress of the United States, entitled 'An Act to Authorize the Construction of a Bridge Across White River in Prairie County,' approved November 23, 1921, which franchise has passed by assignment to the said defendant.

"And also the franchise granted to Harry E. Bovay by order of the county court of Prairie County for the construction and operation of the above-mentioned bridge, which order appears of record in Prairie County court record "T," pages 267 and 273, which franchise

as amended has passed by assignment to the said defendant.'

"And the court further finds that by deed of trust, dated May 1, 1928, appearing of record in mortgage record book 20, page 1, of the records of Prairie County, the defendant, the White River Bridge Corporation, has conveyed, mortgaged and pledged the above-described bridge, franchises, right-of-way and other properties to secure certain bonds therein described, of which bonds there now remains outstanding $463,000, and the court finds that there is no lien or mortgage upon the above-described property except for the above-mentioned bonds now outstanding and secured by the above-described deed of trust.

"And the court finds that the value of said bridge, franchises, right-of-way and all other properties above described, owned by the defendant, the White River Bridge Corporation, is $463,000; that the plaintiff, the State of Arkansas, is entitled under the law to condemn, take possession of, hold, own and operate the above-described bridge, franchise, right-of-way and other properties on and after November 1, 1930, upon the payment of the sum of one dollar to the defendant, the White River Bridge Corporation, and upon the payment when same shall mature of the balance due on the above-mentioned and described bonds secured by the above-described deed of trust, executed by the defendant, the White River Bridge Corporation, to the defendant, the New York Trust Company, on May 1, 1928.

"It is accordingly by the court considered, ordered and adjudged that the defendant, the White River Bridge Corporation, do have of and recover from the plaintiff, the State of Arkansas, the sum of one dollar damages, which, together with the assumption by the State of the above-mentioned and described bonded indebtedness, shall be in full payment and compensation for the taking of the above-described bridge, franchises, right-of-way and other properties as set forth above and owned by the defendant, the White River Bridge Corporation, and that the said bridge, franchises, right-of-way and other

properties be and the same are hereby condemned for public use and the title thereto divested out of said defendant, the White River Bridge Corporation, and invested in the State of Arkansas, for use and operation by its Highway Commission in such manner and under such terms as the said Highway Commission may determine, and that the State of Arkansas shall, in accordance with the terms of the above-described deed of trust assume and pay to the holders of the outstanding bonds, aggregating $463,000 and interest due November 1, 1930, and thereafter, provided, that the defendant, the White River Bridge Corporation, shall have the right at its own risk and expense to retain the possession of the above-described bridge and other properties until the first day of November, 1930, and during said period to collect the tolls therefrom, and during said period the said defendant shall maintain said bridge and other properties in a good state of repair at its own expense and shall promptly on the first day of November, 1930, deliver to the plaintiff the possession of said bridge and other property in as good state of repairs as same are now in."

The motion to vacate, in effect, alleged: that the interveners are holders and owners of certain bonds issued by the White River Bridge Corporation on May 1, 1928, which said bonds were secured by a first mortgage upon the bridge, lands and other properties owned and possessed by said bridge company, and that the New York Trust Company is the duly designated trustee therein; that the Prairie Circuit Court entertained jurisdiction of and entered a judgment in favor of the State and against the bridge company and all the property, both real and personal, owned by said bridge company and upon which appellants' mortgage lien existed, condemning said properties for public uses, although appellants were not parties to said litigation and had no notice thereof; that said judgment of the Prairie Circuit Court condemning appellants' property for public uses as aforesaid appears to be void upon its face because it does not expressly provide compensation to the owners in advance of the taking thereof, as required by amendments Nos.

5 and 14 to the Constitution of the United States, and by § 22 of article 2 of the Constitution of this State. Other matters were alleged in the motion to vacate, but they are not deemed of sufficient importance as to require being set out in detail.

A demurrer was interposed and sustained to the motion to vacate, and, from a consequent order dismissing same, this appeal comes.

Appellants first contention is that they were not parties to, and had no notice of, the condemnation proceedings in the Prairie Circuit Court, and for this reason they are not bound thereby. Admittedly, appellants were not in person before the court in the condemnation proceedings, but the New York Trust Company, the trustee in appellants' mortgage, was before the court *in personam* and by counsel. This is reflected upon the face of the judgment. Under facts and circumstances identical with those alleged by appellants, this contention was expressly decided by us adversely to appellants' contention in *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993. We there said: "Respondents expressly and irrevocably consented to the vesting of the title in the State of Arkansas. And, in lieu of cash, through their representatives, the trustee in the mortgage, irrevocably accepted the solemn pledge of the State to pay the bonds held by respondents as they matured." The respondents referred to in the case just cited were two bondholders and owners of the White River Bridge Corporation bonds, as appellants are, and we there expressly decided that they were parties to the condemnation proceedings, being represented therein by the trustee in the mortgage. See In Re *Engelhard & Sons Co.,* 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416.

Appellants next assert that the condemnation judgment appears to be void upon its face because it does not provide payment to the owners before the taking of the property. This contention was presented and likewise decided adversely to appellants' contention in the case last referred to. In referring to this contention it was there said: "In the condemnation proceedings the owners made no demand for cash paid down, but expressly con-

sented and agreed to accept the solemn pledge of the State to assume and pay the outstanding bonds as they matured. It is not to be doubted that the sovereign State will ultimately discharge the obligation. Conditions not at all peculiar to this State, and of which all persons have knowledge, render the discharge of the obligation impossible in the time and manner contemplated when the property was condemned. But, even so, the State acquired, and now has, title to the property, and the former owners have the obligation of the State to pay, and we must therefore hold, notwithstanding the equity of the case, that these former owners have no right to have a receiver appointed to take possession of property owned by the State."

The language just referred to and quoted is full authority for the position that the State of Arkansas acquired title to the bridge and all property connected therewith belonging to the White River Bridge Corporation, the New York Trust Company, and appellants, as bond owners, and we perceive no necessity to again consider and discuss the merits of the controversy. If the bond owners in *Watson* v. *Dodge, supra,* could not invoke the incidental relief of receivership as against the State's title to the bridge and properties, then certainly appellants, who stand in the identical position occupied by Mayo, *et al.,* may not recover the property from the State.

Appellants' contention that the condemnation judgment of the Prairie Circuit Court is violative of constitutional mandate is likewise without merit. Had such been its effect, we would have so decided in *Watson* v. *Dodge, supra,* because neither the State nor any one else can predicate rights upon or under a void judgment or order. Moreover, in condemnation proceedings under constitutional law it is essential only that the jurisdiction of some properly constituted tribunal be invoked in some appropriate way, and that inquiry shall be made as to the amount of compensation due; and when these things are done, due process of law, as required by the Federal Constitution, had been afforded. *Baccus* v. *Fourth Street Union Depot,* 169 U. S. 557, 18 S. Ct. 445,

48 L. Ed. 853; *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668, 43 S. Ct. 684, 67 L. Ed. 1167. Section 22 of article 2 of the Constitution of this State, cited *supra,* is not infringed by the condemnation judgment. In effect, we have so decided many, many times. *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78; *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334.

It follows from what we have said that the Prairie Circuit Court was correct in deciding that appellants' motion to vacate the condemnation judgment of September 18, 1930, was without merit and dismissing it.

No error appearing, the judgment is affirmed.

REED *v.* BALDWIN ET AL., TRUSTEES, MISSOURI PACIFIC RAILROAD COMPANY.

4-4245

Opinion delivered March 30, 1936.

[redacted]

Glover & Glover, for appellant.

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

BAKER, J. Charles H. Reed, appellant, sued the appellees to recover damages for personal injuries alleged to have been received by him on August 23, 1934, at Batesville, Arkansas. He alleges that while he was waiting for the arrival of a passenger train for which he had bought a ticket to Bowie, Texas, a freight train passed the passenger shed near to which he was standing, and that there was hanging or swinging on the side of one of the boxcars in the freight train a piece of timber, which swung out and struck him upon the head, knocking him down and severely injuring him. At the time of his injury he was looking at a man on top of the freight train, and this piece of timber struck him before he had knowledge of his danger. The defendants denied every allegation of the complaint and alleged negligence on the part of the plaintiff as the cause of his injuries. Reed in his testimony says that he bought his ticket about 2:00 o'clock in the afternoon; that the passenger shed of the railroad company was located about four blocks from the regular depot, and that this passenger shed was in use during the summer season; that he and some of his companions went from the depot, where the ticket was purchased, to the passenger shed, and that as they approached the passenger shed he was near or along the side of the railroad track when the freight train going north passed him, and he was struck by the swinging timber.

There is a considerable volume of testimony. That portion introduced on behalf of the appellant tending to show negligence and liability of the appellees is directly in conflict with that of a considerable number of other witnesses who say they were present and saw the occurrence causing injuries alleged to have been suffered by Reed. This proof taken most strongly in favor of the appellees is to the effect that appellant attempted to catch

or hold to the passing freight train, and was jerked or thrown on account of the speed of the train with some violence upon the ground alongside or near the tracks. There is also some testimony to the effect that he and his companions had been at a beer parlor situated near the railroad tracks, and that after his injury they returned to this same place where they were again engaged in drinking, and while there discussed and planned the contemplated suit for damages. The doctor who treated Reed immediately after his fall testified to the effect that Reed was very slightly injured, having a small scratch on top of his head and was not complaining otherwise. It is equally true that physicians who treated Reed within the next day or two found some rather bad bruises upon his back and hip, and a somewhat more severe cut upon his head than that described by the physician who saw him immediately after the fall.

We are bound, however, by the most favorable conclusion that may be arrived at in support of the verdict rendered by the jury, which decided all the material issues against Reed's contentions.

The appellant argues that the verdict of the jury was against the preponderance of the evidence. That may be true, but that is a matter we are not permitted to decide. The jury has already settled that controversy. We can only determine whether or not there was substantial evidence to support the verdict. We must hold that there was.

If Reed was injured according to testimony given by some of the witnesses to the effect that he was attempting to catch a passing train, and not by a swinging timber, he certainly had no right to recover, and is not entitled here to a reversal upon that account. The only question here is whether the court properly submitted the issues to the jury. It, therefore, becomes unimportant and unnecessary as to the great mass of conflicting testimony given upon trial of the case. Such portion of the same as a discussion may require as to alleged errors will be set forth as the matters are presented.

One of the chief objections urged by appellant was to instruction No. 4-A. This was an instruction given on behalf of the defendants, and at their request. That

instruction is as follows: "The court instructs you that the defendants are not liable for an injury that is not the direct cause or result of their negligence. In order for negligence, if any, to be the direct cause of an injury, it must be the proximate cause; and in order for negligence to be the proximate cause of the injury, it must appear from the evidence that the injury was the natural and probable consequence of the negligence or wrongful act complained of, and that it could have been foreseen in the light of the impending circumstances. You are therefore instructed that unless you find and believe from the preponderance or the greater weight of the testimony that the negligence of the defendants, or their agents, servants, or employees was the proximate cause of the injury, if any, to the plaintiff, then your verdict will be for the defendants."

The objection urged in appellant's brief is to the effect that the instruction was argumentative; that there was no evidence upon which it might be based, and that it ignored the law of comparative negligence; that it was in conflict with other instructions. The abstract furnished us does not show what, in fact, were the objections made. These matters, as above stated, are set forth in appellant's argument. However, we do not think that the instruction is open to the objections made to it. It clearly states a rule for the determination of negligence. It is not argumentative, nor can it be said to be abstract.

There was a great mass of testimony offered on behalf of the appellant tending to show negligence of the railroad company, its agents and employees, and it seems that the instruction had only one object in view, and that was to present to the jury for their determination the question of such alleged negligence. The matter of negligence of the appellant for purposes of comparison with that of the railroad company was not mentioned. In fact, so far as that instruction is concerned, whether the appellant was negligent or not, he had a right to recover if the appellees, or any of them were negligent, and such negligence directly caused the injuries. Comparative negligence affects the amount of the recovery ordinarily rather than the right of recovery. It may prevent a re-

covery only when the negligence of the injured party is equal to or exceeds that of a corporation causing the injury.

Appellant objected to instruction No. 7-A, which reads as follows: "You are instructed that if you find and believe from the evidence in this case that the plaintiff, Chas. H. Reed, saw the freight train coming then he had no right to go on or near the defendants' tracks or near the train, and if he did this, or if he failed to use such care as an ordinary prudent person would have used for his own safety at the time the train was passing, then he was guilty of negligence and you should so find."

Although we are unwilling to approve the instruction in its present form, it is not open to the objections made to it by the appellant. Of course, if there were an approaching freight train Reed did not have a right to go upon the railroad tracks in the face of danger and attempt to hold the railroad company liable for the consequences. In such a case the railroad owed him no duty except not to hurt or injure him wantonly or recklessly, but we cannot say that he did not have a right to go near the railroad tracks or the train. This is because the word "near" is somewhat indefinite, but it was no doubt used by the trial court in the sense that he must not go so close to the tracks or the train that he would be in danger of being struck or to come in contact with some part of the train. No special objection, however, seems to have been urged on account of this uncertainty or indefinite statement of the law. Appellant does urge that he had gone to the place or point where he was injured to take passage over the road on the passenger train to Bowie, Texas; that he had a right to go there. It is true, he testified, that he bought his ticket about 2:00 o'clock, and that the time of his injury was about 2:30, and that he was near the point or place where he would enter upon the passenger train which was not expected, however, until approximately three or four hours later. That question, however, is taken care of in another instruction, wherein the proposition is submitted to the jury as to whether or not he was a mere trespasser or a licensee. Appellant urges that this instruction was equal to a peremptory instruction for the de-

fendants. That is not correct. The question that was submitted to the jury for its determination under this instruction was whether the plaintiff was guilty of negligence. Being guilty of negligence, however, would not have necessarily prevented a recovery. Appellant also argues that the instruction should have told the jury that its findings upon this matter must be by a preponderance of the evidence.

The court in another and separate instruction told the jury about the burden of proof and explained what was meant by a preponderance of the evidence, and this instruction applied to the whole case. We cannot think the jury misunderstood a matter so well-known, and so frequently repeated that people generally are well acquainted with the principle; that one asserting or relying upon an affirmative statement, whether made by plaintiff or defendant, must ordinarily establish such alleged fact by a preponderance of the evidence. However, it is necessary that even commonplace matters, such as this, be stated in all cases, though there is no necessity for repetition in any particular case.

Defendants objected to instruction No. 8, which presented to the jury the question of whether Reed was making use of defendant's platform or pathway, near or at its tracks, at the time of the injury when he had no business with the company, and instructed the jury under what conditions he might be found to be a trespasser, and instructed if he were such the operators of the train owed him no duty, except, after discovering him in position of peril, not to injure him wantonly or recklessly. The objection made to this instruction was that at the place where he says he was injured he was upon a public street, and that there is no evidence that he was in a perilous position, and he argues that he was in no danger except for the fact that the operators of the railroad had left swinging the piece of timber which struck him, knocked him down and caused the injury. To make that argument, however, the appellant must assume that his injury was caused in the manner in which he alleged it occurred. His allegation as to the facts, however, was disputed, and under the evidence the jury could have well found that there was no swinging timber that struck

him, but that he had walked so closely to the railroad track as to be struck by some part of the moving train, even if the jury did not find, as some of the witnesses say the matter occurred, that the appellant was thrown or knocked down when he attempted to catch on the side of the moving train which was then going perhaps twenty-five or thirty miles an hour. This instruction merely submits to the jury for its determination the theory of the defendants as to the manner in which the injury occurred, and the instruction explained the duties or obligations of the railroad or its operators to one who is a trespasser, provided he should be found to be such. If the jury believed the testimony of the ticket agent, who sold Reed his transportation to Bowie, Texas, that is, that Reed did not buy his ticket until about 6:00 o'clock in the afternoon, then Reed has in fact been shown to have had no business at the time and place of his alleged injury. However, even under Reed's own contention that he had bought a ticket, and was approaching a place where he would embark upon the train, some two or three hours later, he was at most a mere licensee.

"In many cases before the lookout statute, which does not apply here, this court has held that a railroad company owes trespassers and bare licensees no affirmative duty of care, and only the duty not to wilfully or wantonly injure them, or the duty to exercise ordinary care not to injure them after discovering their peril and inability to escape. To bare licensees railroad companies owe no affirmative duty of care, for such licensees take their license with the concomitant perils." See cases cited. *Arkansas Short Line* v. *Bellars*, 176 Ark. 53, 62, 2 S. W. (2d) 683. A headnote reads: "A licensee or trespasser cannot recover for injuries caused by mere acts of negligence, but must show wilfulness and wantonness in the operation of the train." *St. Louis & San Francisco Ry. Co.* v. *Bley*, 168 Ark. 814, 271 S. W. 455.

The only other objection urged is that counsel for appellees made an improper argument relative to the fact that the suit was brought in Hot Spring county rather than in Batesville, Independence county, where the injury occurred. This was not prejudicial. There is

another proposition—that the court should have excluded testimony attempting to impeach the plaintiff, and also some of the witnesses. The record before us expressly shows that the court did not permit the impeachment of the plaintiff, appellant here, who was not a resident of Batesville, but did permit the impeachment of other witnesses. It may be that the appellant was not prepared to meet the issue upon impeachment, but at least there was no error in these matters as they are presented to us. These matters are not abstracted or presented as having been brought forward in the motion for a new trial.

These are not all the matters that are taken up and discussed in the voluminous brief filed here. The others, however, are of such minor importance that we do not feel warranted in an attempt to discuss or dispose of them.

It must suffice to say that we have examined every matter presented upon the appeal, and we find no error.

The judgment is affirmed.

GUNTHER *v.* COTNER.

4-4254

Opinion delivered March 30, 1936.

Thomas Harper, for appellant.

Geo. W. Johnson, for appellees.

BAKER, J. S. N. Gunther, plaintiff in the circuit court, appellant on appeal, sued L. N. Cotner, J. M. Cotner, and J. C. Cotner upon two notes. The first note, dated January 3, 1928, matured October 15, 1928, and was for the sum of $385 with interest from maturity at ten per cent. per annum until paid.

The second note dated December 12, 1929, matured six months after date with interest from date at ten per cent. per annum until paid.

The first note had two payments indorsed upon it as follows:

4-29-1929	$20.00	to 5-15-1929
5-28-1929	18.50	to 10-15-1929

The second note also bore certain credits as follows:

Dec. 1930	$100.00
10-27-32 pd.	11.00
1-31-33 pd.	5.50
3-21-33 pd.	55.00

Both notes were payable to the order of the First National Bank of Mansfield. Both bore an indorsement "Transferred to S. N. Gunther without recourse. First Natl. Bk., Mansfield, Ark. By W. L. Yowell, cashier." Above this indorsement was a guaranty of payment, waiver of demand, notice of nonpayment, etc. Parties have disregarded this guaranty very properly, and it will receive no consideration from us.

The complaint alleged the transfer of the notes to plaintiff as having been made on December 31, 1929, for the face amount thereof.

Defendants answering denied the transfer of said notes to plaintiff at any time for a valuable consideration; alleged that the transfer was by officers of the bank after its insolvency for the purpose of giving a preference to plaintiff who was a brother-in-law to the cashier Yowell. They also pleaded that at the time of the transfer said notes were overdue, and that at maturity and continuously thereafter J. C. Cotner had an account at the bank greatly in excess of the amount due on the notes

and that defendants were entitled to offset the deposit against the notes.

This plea was relied upon as to the second or larger note, while the bar of limitations was relied upon as to the first note. The court sustained the plea of limitations as to the first note, and a jury trial as to the matters in issue upon the second note resulted in favor of defendants. From the resulting judgment comes this appeal.

There is but one issue as to the first note, the one held to have been barred by the statute. The note as stated above had two payments indorsed thereon, the total amount thereof equaling one year's interest $38.50. The cashier of the bank had, when payments were made, credited the whole amount as interest showing payment of interest to October 15, 1929. There is no evidence that such credits were made by any agreement with defendants or any of them, but such credits were defended upon the well-recognized theory that unless the payor directed a particular application of the payment the creditor could apply same as he pleased. Appellant further contends that since the interest was paid in advance to October 15, 1929, there arises in law a presumption that the date of payment was extended to that date. That being true, the bar of the statute was not effective until five years thereafter. The suit was filed within five years after October 15, 1929.

It may be conceded that if appellant's premises are correct the conclusions follow. We do not agree with the first proposition stated by appellant that he could, without an express agreement, credit the payments upon unearned interest. We know of no authority, and none has been cited, empowering the creditor arbitrarily to apply payments made upon unmatured obligations when there are debts past due upon which same may be applied. The error of appellant's contention will be apparent if the case of *Jones* v. *Dowell,* 176 Ark. 986, 4 S. W. (2d) 949, be considered in relation to the facts stated. This case is in conformity with a much earlier case holding: "The remaining notes were not matured when the last payment was made, and without agreement with his debtor the creditor could not, and the law does

not, appropriate payments to debts not due." *Kline* v. *Rayland*, 47 Ark. 111, 14 S. W. 474. Besides the fact that without an agreement to appropriate the debtor's money to payment of unearned interest is to violate his right to pay before the newly-fixed maturity date without loss; it also runs counter to the provisions of § 7358, Crawford & Moses' Digest, which furnishes the rule applicable to partial payments. No presumption obtains, as argued, that there was an extension of the maturity date of the note, such presumption being in conflict with law.

The last payment on this note was May 28, 1929. Suit was filed June 11, 1934. The note was barred.

The second note and the facts in relation thereto present other questions and difficulties.

We cannot conceive that it would result in any particular benefit to anybody to state in detail evidence introduced upon trial. We content ourselves with a statement of such pertinent facts, and of our conclusions from the record as may be necessary to settlement of the issues. The date of the transfer of this note was a material matter about which appellant gave very little information. Yowell, the cashier of the bank, was the brother-in-law of appellant. While the bank was open he was the agent of appellant, making investments for his principal, checking on his account for money as needed therefor. This is the effect of Gunther's testimony.

Notes were left at the bank after purported purchase until about time the bank closed. The last payment thereon was by L. N. Cotner, March 21, 1933, at the bank to Yowell. This was the $55 credited on note of that date.

The receiver of the bank, Rex Ramsey, testified and introduced Gunther's bank account over objections of Gunther. Ramsey said he could not tell when money was withdrawn from the account to pay the bank for the notes. The account did not show any withdrawals on the date the notes were shown to have been paid according to bank's books. He could not tell whether the bank received a check or cash, or that it in fact received anything for the notes. He also testified that J. C. Cotner had $2,000 in the bank from 1929 until it closed about November 3, 1933. It had been insolvent since March 5, 1933.

This appeared from examiner's reports. He stated positively there was nothing to show how or when Gunther paid off these notes.

After the bank failure L. N. Cotner talked with Gunther about the notes. He said: "I understand you have some notes of mine." Gunther replied: "Hell, no, I have not got any of your notes." When Cotner advised him he had been so informed by Yowell he promised to see Yowell about it. This is not all of the testimony relative to the transfer or possession of the notes.

Appellant objected vigorously to the testimony of Ramsey the receiver in regard to Gunther's account. The positive statement that such testimony was incompetent does not make it so. Whatever force the objection may have had prior to Gunther's testimony was destroyed when he testified that Yowell made investments for him from his account when he thought the security good. If this transaction was in good faith and legal in all respects a thorough investigation of Gunther's account would have disclosed credits for the partial payments made upon the notes after the purchase. It is to us significant in this state of the record that Yowell was not called as a witness. He certainly was not unfriendly to appellant according to this record.

It became a question of fact as to the date of the transfer of the notes. We, like the receiver who had charge of the books and records, cannot say when the transfer was made or whether paid for. The testimony of the interested parties cannot be said to be undisputed, in determining the legal sufficiency. *Bridges* v. *Shapleigh Hardware Co.,* 186 Ark. 993, 57 S. W. (2d) 405; *McGraw* v. *Miller,* 184 Ark. 916, 44 S. W. (2d) 366.

These questions were for the jury to determine. The verdict was against appellant's contentions, and the transfer must be regarded as having been made after insolvency of the bank and after maturity of the notes, and subject to set-off by the deposit of one of the makers.

The objections to instructions are such only as to stress or accentuate the propositions discussed. The in-

structions correctly presented the issues, and are free from prejudicial errors.

The verdict is supported by substantial testimony.

Affirmed.

BALDWIN ET AL., TRUSTEES MISSOURI PACIFIC RAILROAD COMPANY *v.* COMPTON.

4-4248

Opinion delivered March 30, 1936.

Thomas B. Pryor and *W. L. Curtis*, for appellants.

Partain & Agee, for appellees.

MEHAFFY, J. Each of the appellees filed suit in the Crawford Circuit Court on June 6, 1934, against the appellants for damages alleged to have been caused by the negligence of appellants. The trial court consolidated the cases, and they were tried together before the same jury. Appellees alleged in their complaints that the appellants carelessly and negligently took up the tracks crossing the street and highway, which was a main traveled thoroughfare at the point where the Ft. Smith Suburban Railway line crosses same, and dug and created and left an excavation approximately three feet in depth, in and across said street and highways, and carelessly and negli-

gently left same in the night time without any barricade, warning or protection, or light, or signal or warning of any kind whatever of the dangerous condition and situation so carelessly and negligently created by appellants, their servants, agents and employees, and carelessly and negligently failed to make any provision whatever for protection or warning to the public traveling thereon of such dangerous situations so created and left by them; that at about 1:30 A. M., on April 18, 1934, one of the appellees, James W. Cleveland, was driving an automobile belonging to appellee, Wiles Compton, along Midland Boulevard and Highways 64 and 71, going in a southerly direction. All of the appellees were in the automobile, and when it reached the excavation across the street and highway, the automobile was, by the above acts of appellants, their servants, agents and employees, caused to fall into said excavation and wreck said automobile, and the occupants of the car, the appellees, were thrown with great violence in and about said car, and severely injured. Each appellee describes the injuries alleged to have been received, and each asked for damages in different amounts.

The appellants filed separate answers denying the allegations in the complaints. The jury returned its verdict against the appellants in favor of the appellees as follows: Wiles Compton, $500; Ralph Vest, $500; Doris Vest, $2,500; Libbie Sue Compton, $2,500; James W. Cleveland, $2,500. Judgments were entered accordingly. Motion for new trial was filed by appellants, overruled by the court, and the case is here on appeal.

The evidence introduced by the appellees tended to establish the following facts: that James W. Cleveland is 38 years old, has lived in Crawford county all his life except in recent years, he was away quite a while in the army, but his home has always been in Van Buren; that at the time of his injury in April, 1934, he was working at a service station in Ft. Smith; between 1:30 and 2:00 o'clock in the morning he was driving between Ft. Smith and Van Buren on the highway and was injured. The other parties in the automobile came by the filling

station where Cleveland worked about 10 o'clock and he went with them. They went to a dance and stayed until about twelve o'clock, and Mr. Compton went home. After the dance broke up the other appellees got in the car and decided to ride around awhile and went to a sandwich shop where Cleveland drank a glass of beer and the others had Coca-Colas. Cleveland testified that the highway between Ft. Smith and Van Buren was under repair, but at that time, when he went over on the bus, it was clear all the way through. He had gone through that morning. When they got near the excavation they saw an embankment, or bank of dirt, and Cleveland applied the brakes, and had ample time to stop the car before it reached the bank of dirt, but the bank was on the opposite side of the excavation, and, according to all of the evidence of appellees' witnesses, there was no barricade, no flags and no light, and they could not see the excavation, did not know it was there, and the car plunged into it and they were thereby injured. This evidence is contradicted by the witnesses of appellants who say that there was a barricade, and were some lights.

The evidence shows that the excavation was made some time during the day before the accident occurred that night. Appellees knew that work was being done on the street, but they did not know that any work was being done at the crossing where the accident occurred.

Appellants' first contention is that the evidence is insufficient to support the verdict. It is not contended that there is no substantial evidence to support the verdict, but it is contended that the testimony of appellants' witnesses showed that there had been a barricade placed across the street upon which there was a red flag and lantern, and that the barricade and lantern were there as late as 1 o'clock, some thirty minutes prior to the accident, and it is argued that the testimony of the witnesses for appellees is not worthy of belief.

It is the established rule of this court that, if there is any substantial evidence to support the verdict of the jury, the verdict of the jury as to its finding of facts is conclusive here. "This court has no power to vacate a

verdict of the jury or the judgment based thereon on the weight of the evidence, but we are obliged on appeal to view the evidence in the light most favorable to the appellee, giving to it every reasonable inference in support of the verdict, and however much we may think the evidence preponderates against the finding of the jury, we may not interfere. This court has repeatedly pointed out that this is a duty and power resting solely with the trial judge to be exercised whenever, in his opinion, the verdict is against the clear preponderance of the evidence, and on that question his judgment is conclusive if there is any substantial conflict therein." *American Co. of Arkansas* v. *Baker,* 187 Ark. 492, 60 S. W. (2d) 572; *General Talking Pictures Corp.* v. *Shea,* 187 Ark. 568, 61 S. W. (2d) 430; *Petty* v. *Ozark Grocer Co.,* 187 Ark. 595, 61 S. W. (2d) 60; *Hough* v. *Leech,* 187 Ark. 719, 62 S. W. (2d) 14.

Appellants' next contention is that the verdicts as to each of said cases are excessive and appear to have been the result of bias and prejudice. Appellees James W. Cleveland, Libbie Sue Compton and Doris Vest each obtained a judgment for $2,500. There is, we think, ample evidence of injuries to these three parties to sustain the verdict rendered in their favor. Wiles Compton and Ralph Vest received judgments of $500 each. We think the evidence is sufficient to justify these verdicts. Doris Vest, Libbie Sue Compton and James W. Cleveland all testified to serious and painful injuries, and there is nothing in the record tending to show either bias or prejudice.

It is next contended that the court erred in refusing to give instruction No. 1 requested by appellants. This instruction reads as follows: "You are instructed that under the law and the testimony the plaintiffs have failed to make out a case against the defendants, and you are therefore directed to return a verdict for the defendants."

We have already shown that the evidence of the witnesses for appellees, if believed by the jury, was sufficient to sustain the verdict.

Appellants then discuss the instruction given at their request, which instruction contained certain portions of the traffic rules of the city of Ft. Smith, and it is urged by the appellants that, because they complied with the traffic rules and because, as they contend, it was primarily the duty of the city of Ft. Smith to construct or reconstruct the street, that they are not liable. They call attention to *Collier* v. *Ft. Smith,* 73 Ark. 447, 84 S. W. 480. This case is cited and relied on as holding that the city is not liable. It would, however, make no difference whether the city was liable or not if the negligent act or wrongful conduct of appellants caused the injury to appellees while appellees were in the exercise of ordinary care for their own safety. The court in that case discussed the duties and functions of municipal corporations with reference to such duties and functions when representing and acting for the state or sovereign, and with reference to others as acting for themselves somewhat as a private corporation, and the court said: "When acting in the former capacity they are not answerable for the acts or omissions of their officers or agents, while when acting in the latter capacity their liability is ordinarily the same as that of a private person or corporation. The great difficulty and the great divergence of judicial opinion arise from the fact that no test has been formulated by which to decide with unerring accuracy whether a particular act or omission occurred in the discharge of governmental or *quasi* private duties."

At the time this opinion was handed down there were five members of this court. One of the justices concurred in the judgment only, and another justice dissented. Since that decision, this court has held contrary to appellants' contention, one of the most recent cases being *Missouri Pac. Rd. Co.* v. *Riley,* 185 Ark. 699, 49 S. W. (2d) 397. This court in that case said: "The appellant argues that, because its line of railroad and the excavation were lawfully made on due authority from the city of Hot Springs, therefore there was no obligation on its part to warn of the existence of the excavation, but that this was the duty of the city. This contention is unsound.

In *Strange* v. *Bodcaw Lbr. Co.,* 79 Ark. 490, 96 S. W. 152, a drain over a highway crossing was dammed by the permission of the county judge, so that a pond was formed on each side of the highway into which drain a horse fell and was drowned. The case was defended on the ground, among others, that the pond was made under rightful authority, and that to protect travelers on the highway the defendant would be obliged to enter on the same to erect protecting barriers, which it had no authority to do. In dismissing this contention the court said: 'The fact that the pond was put there by permission of the county judge does not alter the case, for the permission of the county judge cannot authorize acts dangerous to the public, or relieve the defendant from the consequences of its own negligence.' " The court in the case of *Railway* v. *Riley, supra,* further said: "This position taken by the appellant that it was the duty of the city authorities to safeguard the highway, and its failure to do so exonerates the appellant, is not tenable." Every contention made by appellants with reference to the city of Ft. Smith is decided in the last case cited, adversely to appellants' contention.

Appellants' next contention is that the court erred in giving instruction No. 3 requested by appellees. That instruction reads as follows: "You are instructed that it was the duty of the defendants after they had dug or caused to be dug an excavation or ditch across the public highway in leaving same for the night to do whatever was practicable and reasonable to avert danger or injury to travelers along the highway, and if barriers, signals, lights or other warnings were reasonably necessary for that purpose and practicable, then it was their duty to construct and maintain them in places needed, if any."

Appellants' objection to this instruction is that it fails to take into account the fact that certain barricades and lights were placed as shown by the testimony, as warning and barriers for the protection of the public travel on the night of the particular accident. It is argued that the language of the instruction is such as to indicate that there had been no protection. We do not think the instruction is subject to this criticism, but the appellants

did not make this objection to the trial court. The objection was general. No specific objection was made. The instruction is not inherently wrong, and no error was committed in giving it.

It is next contended that instruction No. 4, given at the request of appellees, is erroneous because it fails to take into account the rules of law fixing the primary responsibility of the city of Ft. Smith as a matter of law, and leaves it to the speculation of the jury to ignore the traffic rules. There was no specific objection made to this instruction, and the general objection would not be sufficient to raise the question here argued by the appellants. But this court has already decided in the case of *Missouri Pac. Rd. Co.* v. *Riley, supra,* and other cases, that the primary responsibility of the city of Ft. Smith did not relieve the appellants from negligence resulting in injury to other persons.

Appellants' objection to instructions Nos. 9, 10, 11, and 12 is that they authorized the jury to assess damages not only for physical pain and anguish, but for mental pain and anguish. It was not suggested to the trial court that these instructions were erroneous because they included mental pain and suffering, and there was no error in the court's giving these instructions.

We find no error, and the judgment is affirmed.

WISEMAN, COMMISSIONER REVENUES *v.* AFFOLTER.

4-4294

Opinion delivered March 30, 1936.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh,* Assistant, and *Millard Alford,* for appellant.

Donham & Fulk and *G. W. Hendricks,* for appellees.

JOHNSON, C. J. Appellee, J. A. Affolter, and a number of others engaged in the retail sale of whole milk in the vicinity of Little Rock instituted this action in the Pulaski Chancery Court against appellant, Earl R. Wiseman, Commissioner of Revenues for the State of Arkansas, the object of which was to permanently enjoin and restrain the collection of sales tax upon retail sales of whole milk. Upon trial, after issues joined by answer, testimony was adduced by the respective parties from which the court found that whole milk was exempt, and not subject to sales tax levies. Thereupon appellant was permanently enjoined and restrained from making such sales tax levies against the sale at retail of whole milk, from which this appeal comes.

The sole question presented for consideration on this appeal is—is the sale of whole milk at retail subject to a sales tax under the provisions of act 233 of 1935, commonly known as The Sales Tax Law. Act 233 of 1935 by general terms levies a sales tax of 2 per cent. upon all sales at retail of tangible personal property in this State, exempting from such levy, however, certain designated commodities and transactions. The constitutionality and validity of this act was sustained by us in *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. (2d) 91. The second paragraph of § 15 of said act—the provision with which we are concerned in this litigation—provides: "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."

Concededly and manifestly, whole milk as such is not expressly exempted by name from sales tax levies. Is it exempted by implication? The answer is to be found only by applying well-known and established rules of statutory construction and the application should be made in the light of attendant facts and circumstances.

Appellee's position is, and the chancellor so decided, that the words, "butter fats," as employed in the act exempted whole milk from sales tax levies. This conclusion was reached because: first, whole milk is absolutely necessary to sustain life; second, "butter fats" predominately appears in whole milk; third, the testimony reflected that "butter fats" is the criterion used by commercial sellers and buyers thereof to ascertain the commercial value of whole milk. On the other hand appellant contends that "butter fats" is only one of the elements contained in whole milk—and is not the sole criterion to its commercial value—and that whole milk not being expressly designated as exempt by the act, the tax applies—and that the rule of *ejusdem generis* precludes consideration of the general language employed, "All foods necessary to life."

We shall consider appellant's contentions under two subheads, but in inverse order to that heretofore stated.

The rule of *ejusdem generis* is resorted to by the courts only in aid of statutory construction, and is only applied by the courts in aid of ascertaining the legislative intent and does not control where the plain intent of the Legislature is apparent from the context, and would be hindered thereby. *Mason* v. *Inter-City Term. Ry. Co.,* 158 Ark. 542, 251 S. W. 10; *Crabtree* v. *State,* 123 Ark. 68, 184 S. W. 430; *Ft. Smith* v. *Gunter,* 106 Ark. 371, 154 S. W. 181; *State* v. *Gallagher,* 101 Ark. 593, 143 S. W. 98; 59 C. J. 982, 983.

Not only do courts refuse to resort to general rules of construction where the legislative intent clearly appears from the context by the language employed, but they must give effect to all language employed in the context if reasonable and consistent. *McNair* v. *Williams,* 28 Ark. 200; *Reynolds* v. *Holland,* 35 Ark. 56; *Bennett* v. *Worthington,* 24 Ark. 487; *Geary* v. *Parker,* 65 Ark. 521,

47 S. W. 238, 53 S. W. 567; *Phillips County* v. *Pillow*, 47 Ark. 404, 1 S. W. 686; *St. Louis, I. M. & S. Ry. Co.* v. *B'Shears*, 59 Ark. 237, 27 S. W. 2; *Towson* v. *Denson*, 74 Ark. 302, 86 S. W. 661. The language employed in the exemption clause as heretofore quoted seems to be clear and concise; therefore, the legislative intent must be ascertained from the language used.

Since it is found unnecessary to resort to the rule of *ejusdem generis* in aid of construction of the act under consideration to ascertain the legislative intent, it follows that we are without power to disregard any of the terms of said act, but on the contrary must give full effect to all words, provisions and terms employed.

The words, whole milk, are not employed in the exemption clause of said act, but the words "butter fats," are used. Webster's New International Dictionary defines "butter fats" as follows: "The natural fat of milk; the chief constituent of butter, consisting essentially of a mixture of nine or more glycerides, chiefly butyrin, olein, and palmitin and having a specific gravity of not less than 0.905." When we substitute the above definition for "butter fats" as the term appears in the exemption clause of said act, the same then reads: "All foods necessary to life * * * the natural fat of milk * * * shall be exempt."

The exemption clause when thus paraphrased demonstrates that the natural fat of milk is exempt from the sales tax levy. Moreover, the testimony reflects, if indeed it is necessary to resort thereto, that whole milk is the only produce now in existence which contains "butter fats" in commercial quantities, and that its presence in whole milk is the only criterion of commercial value. We judicially know that whole milk is one—if not the only—necessary food to sustain life. Babies during the first months of their lives subsist exclusively upon this product or its derivatives.

From these observations it follows that the "natural fat of milk is exempt, and, since its appearance in whole milk is the criterion of its commercial value, that the Legislature intended to exempt it from the sales tax, else the use of the words, "butter fats," is meaningless.

When "butter fats" are extracted from whole milk if indeed this is possible, it ceases to be the absolute necessity to sustain life it occupies in its natural state; therefore, if any force or effect be given to the exemption of "butter fats," it must be applied to whole milk.

It follows from what we have said that the trial court reached the correct conclusion, and his decree in this behalf must be affirmed.

ARKANSAS TRACTOR & EQUIPMENT COMPANY *v.* MELTON.

4-4202

Opinion delivered March 30, 1936.

Trieber & Lasley, for appellant.

W. P. Beard, for appellee.

SMITH, J. Special School District No. 91 of Lonoke County, through the president and secretary of its board of directors, issued a warrant for $300 payable to the order of W. B. Graham, the president of the school board, in payment of three acres of ground purchased for the use of the colored school in that district. The school district brought suit to cancel the school warrant, and it was held in that case that the warrant had been issued without lawful authority. This suit was brought against the county treasurer and against Graham and the Arkansas Tractor & Equipment Company, to which concern Graham had for value indorsed and assigned the school warrant.

J. P. Melton filed an intervention in which he alleged that he had purchased the warrant from the tractor company under its guaranty that the warrant would be cashed

and redeemed when prior outstanding and registered warrants issued by the district had first been paid. The court found that the warrant should be canceled and held for naught as having been issued without authority. The court also found that the intervener had purchased the warrant under the guaranty of the tractor company that it would be paid by the school district in its order, and this appeal by the tractor company questions only that finding.

This branch of the case was heard on testimony which cannot be reconciled. According to the intervener, there was a guaranty upon which he relied and which induced him to discount and purchase the warrant. The agent of the tractor company, who negotiated the sale of the warrant, testified there was no guaranty of any kind as the warrant had been sold at a discount of 20 per cent.

No useful purpose would be served by reciting in detail the conflicting testimony. It must suffice to say that, after carefully considering it, we are unable to say that the decree of the court below, based upon the finding that there was a guaranty, is contrary to the preponderance of the testimony.

The decree must therefore be affirmed, and it is so ordered.

SAILER *v.* STATE.

Crim. 3983

Opinion delivered March 30, 1936.

W. P. Smith and *O. C. Blackford,* for appellant.

Carl E. Bailey, Attorney General, *Guy E. Williams* and *J. F. Koone,* Assistants, for appellee.

JOHNSON, C. J. Appellant, Jesse Sailer, was convicted in the circuit court of Craighead County for the crime of permitting his stock to range at large in violation of a local stock law, and sentence was imposed as authorized by act 206 of 1925 from which this appeal comes.

For trial purposes in the circuit court it was stipulated by counsel that appellant was guilty of the crime charged, provided there existed a valid stock law in Texas and Little Texas townships in Craighead County.

The pertinent facts in reference to the establishment of the local stock law district under consideration are as follows: On October 10, 1934, upon petition of 25 per cent. of the electors in each of the townships affected, theretofore filed, the county court of Craighead County ordered an election to be held in Lester, Brookland, Herndon, Powell, Big Creek, Jonesboro, Nettleton, Greenfield, Gilkerson, Texas and Little Texas townships, and the following were submitted upon the ballot for consideration by said electors:

"For restraining horses, mules, asses, cattle, goats, sheep, and swine, both the male and female species from running at large."

"Against restraining horses, mules, asses, cattle, goats, sheep, and swine, both of the male and female species, from running at large."

Subsequent to the election held in obedience to the directions aforesaid the election officials canvassed the returns and certified the result thereof to the county clerk as follows:

Township	For Restraining	Against Restraining
Lester	72	15
Brookland	77	8
Herndon	27	1
Powell	29	6
Big Creek	82	19
Jonesboro	574	78
Nettleton	105	18
Greenfield	41	19
Gilkerson	66	19
Texas	76	156
Little Texas	46	49
TOTAL	1,195	388

The above proceedings were authorized by and conformed to §§ 321 and 322 of Crawford & Moses' Digest as amended by subsequent acts.

Appellant's most serious contention for reversal is that act 118 of 1933 by implication repealed § 321 *et sequitur* of Crawford & Moses' Digest, and acts amendatory thereof, the law under which the complained of stock law district was organized and for this reason the organization and establishment thereof were void.

Repeals by implication are not favored by the courts, *Ætna Casualty & Surety Co.* v. *City of North Little Rock,* 157 Ark. 291, 248 S. W. 294, and the courts are reluctant to construe statutes so repealed where subsequent legislation recognizes their existence. *Rural Special School District No. 30* v. *Pine Bluff,* 142 Ark. 279, 218 S. W. 661.

Moreover, act 118 of 1933 has no application to stock law districts created and organized under § 321 *et seq.* of Crawford & Moses' Digest and acts amendatory thereof because: Section 1 of this act provides: "In any county wherein the people had voted and provided for restraining horses, mules, asses, cattle, goats, swine or sheep from running at large, under the provisions of act No. 205 of the Acts of the General Assembly of 1927, which act was by the Supreme Court of Arkansas declared unconstitutional in the case of *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S. W. (2d) 233, it shall be lawful for the

county court, upon petition of a majority of the legal electors of any one or more townships, to make and enter an order restraining the running at large of any two or more of the animals named in accordance with such petition."

From the plain language of the act just quoted it is apparent that it applies only to such stock law districts as were created and organized under act 205 of 1927, which act we declared void in *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S. W. (2d) 233. Section 2 of said act is limited in application and effect to stock law districts likewise organized under act 205 of 1927, because dependent upon § 1 for meaning and effect. Section 3 of said act expressly recognizes the continued existence of § 321 *et seq.* of Crawford & Moses' Digest by providing, "the county court shall make and enter an order declaring the provisions of §§ 321 to 332, inclusive, of Crawford & Moses' Digest of the laws of Arkansas and acts amendatory thereof in force and effect, etc."

It appears therefore that act 118 of 1933 does not by implication repeal § 321 *et seq.* of Crawford & Moses' Digest, and acts amendatory thereof, but on the contrary expressly recognizes their continued existence and validity.

Appellant's next contention is that since a majority of the electors voting in Texas and Little Texas townships voted against the formation of the stock law districts, no district was voted by the electors, but, if so, these two townships should be exempted.

With the wisdom of legislation we have nothing to do, and when § 321 *et seq.* of Crawford & Moses' Digest, and acts amendatory thereof are read and considered it is obvious that it was the legislative intent to permit a majority of the electors voting in the proposed district—and not a subdivision thereof—to control the creation and organization of said proposed district. We expressly held in *Felser* v. *Eubanks,* 143 Ark. 465, 220 S. W. 457, in construing § 1 of act 156 of 1915 which is now § 321 of Crawford & Moses' Digest, but slightly amended that three or more townships was the unit for the organization of stock law districts, and that petitions making each separate township the unit were void.

Appellant's contention that certain necessary things were omitted by the county clerk in the formation of the districts is likewise without substantial merit. On this point it suffices to say that the necessary petition to invoke the jurisdiction of the county court of Craighead County was duly filed and the requisite court order was made calling the election which resulted as aforesaid. We have repeatedly held that a county court acting within the powers conferred by the Constitution and statutes of the State is a court of superior jurisdiction, and such powers judicially exercised are not subject to collateral attack. *Stumpff* v. *Louann Provision Co.*, 173 Ark. 192, 292 S. W. 106; *Bragg* v. *Thompson*, 177 Ark. 870, 9 S. W. (2d) 24.

It follows from what we have said that appellant was rightly convicted under existing laws, and the circuit court's judgment so finding is in all things affirmed.

SIMMONS *v.* SIMCO.

4-4241

Opinion delivered March 30, 1936.

Lonnie Batchelor, for appellants.

Partain & Agee, for appellees.

MEHAFFY, J. On February 18, 1924, Al Simco and his wife, Lena Simco, executed and delivered to their son, Tom Simco, a deed conveying the property therein described to said Tom Simco. The undisputed facts show that the deed was executed and delivered to Tom Simco and that he immediately went into possession of the land

conveyed. Some time thereafter he delivered the deed to his mother for safekeeping. It had not been recorded. The original deed conveyed the property to Tom Simco in fee simple, and after the deed was delivered to Mrs. Simco for safekeeping, Mrs. Simco testified that her husband suggested that he would like to have Mr. Stockard look over it, and some time later he brought it back. She did not look at the deed then, and did not know it was not just like it was when she signed it, until Tom had a chance to sell it; that during all that time Tom was in possession of the property. She testified that the original deed was a simple warranty deed, duly acknowledged, and that the words, "and the heirs of his body," was not in the deed when she signed it.

Al Simco, father of Tom Simco, testified that he and his wife executed the deed and acknowledged it before Alfred Creekmore, and that Tom went into possession of the property. He also testified that he obtained the deed from his wife, took it to Mr. Stockard, and that Stockard said something about the children might need it some day, and Mr. Stockard just put into the deed the words "and the heirs of his body." He testified that this was some time after the deed was executed and given to Tom, and after he had gone into possession of the property. His idea for putting this in the deed was that the Simco land should stay in the Simco name.

Tom Simco and his wife, Iva Simco, brought this suit in the Crawford Chancery Court against the appellants, asking that the deed be reformed so as to speak the truth, by striking therefrom the expression "and heirs of his body" wherever it appears in the deed, and that the deed be reformed and corrected so as to show that the lands were conveyed in fee simple as the deed showed originally. A guardian *ad litem* was appointed for the minors, and filed answer denying the material allegations in the complaint. The appellants, Al Simco and Lena Simco, and Alma Lee Simmons, filed no answer and made no defense.

The facts are practically undisputed, and the only question is whether the grantor, after executing, acknowl-

edging and delivering the deed, had the right to make the change by adding in the deed the words above quoted. The chancellor entered a decree correcting the record to make it speak the truth by striking out the words "the heirs of his body" wherever they appeared in the deed, and corrected the deed so as to make it read as it did when originally executed and delivered. The case is here on appeal.

After a deed is executed, acknowledged and delivered to the grantee and the grantee takes possession of the property, the grantor does not have the power thereafter to change such interests without the grantees' consent, and, in order to change the title to the property in any way, it is necessary for the grantee to convey to the grantor. In other words, after a deed has been executed, acknowledged and delivered, the title vests in the grantee, and there is nothing the grantor can do to divest the title out of the grantee. "After a deed has passed title to the grantee, it has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee, and the estate remains in him until it has passed to another by some mode of conveyance recognized by law. Therefore the destruction of a deed of conveyance by or at the instance of the grantee, does not reinvest the grantor with a legal title." 18 C. J. 406; 8 R. C. L. 1028; *Strawn* v. *Norris et al.,* 21 Ark. 80; *Campbell* v. *Jones,* 52 Ark. 493, 12 S. W. 1016; *Ames* v. *Ames,* 80 Ark. 8, 96 S. W. 144; *White* v. *Moffett,* 108 Ark. 490, 158 S. W. 505. If the grantor could change a deed after it had been delivered by inserting the words that were inserted in this deed, he could make any other change that he desired, but the law will not permit the grantor to make any change in the deed after it has been delivered. It is not contended in this case that the grantee consented to the change.

Appellant argues that it was the intention of the grantor to convey this property to Tom Simco during his life. There is, however, no evidence in the record tending to show any such intention. It is also argued

that the deed was a gift. It may have been, but the deed itself shows the consideration to be $1 and other valuable considerations; but a grantor would have no more right to change the deed after delivery if it were a gift than he would if its market value had been paid for it.

The chancery court was correct in ordering the changes in the deed so as to make it read as it originally did, and the decree is therefore affirmed.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT *v.* PERMENTER.

4-4214

Opinion delivered March 30, 1936.

J. G. Coston, J. T. Coston and *Mann & Mann,* for appellant.

Myron T. Nailling and *Bruce Ivy,* for appellee.

HUMPHREYS, J. This is a suit brought by appellant against appellee in the circuit court of Mississippi County, Osceola District, on June 28, 1934, for the purpose of condemning 14.45 acres of land contiguous to its right-of-way to enable it to strengthen and enlarge its levee, under authority of §§ 3933 to 3942, inclusive, of Crawford & Moses' Digest. There is no question raised as to the legality of the proceeding. A report of the ap-

praisers was filed ascertaining the damage to appellee's property in the sum of $1,306. Appellee filed exceptions to the report, and the issues joined were tried to a jury under correct instructions, resulting in a verdict and consequent judgment in the sum of $4,000, from which is this appeal.

We have carefully read the testimony pro and con upon the issue of damages, and have concluded that the verdict and judgment for $4,000 is sustained by ample substantial evidence. The argument made by appellant is that the witnesses testifying on behalf of appellee did not sufficiently qualify themselves to testify as to the value of the land taken and the damages resulting to appellee's adjoining lands. Practically all the witnesses testifying for appellee were familiar with the character of the lands and improvements thereon, the value of the lands actually taken, and the injury to improvements by destruction of shade trees and shrubs, and the removal of buildings to lower ground, as well as the injury to adjoining lands owned by appellee. They also disclosed a knowledge of market value of lands in the vicinity of the lands affected. We think they sufficiently qualified themselves to give opinions as to damages suffered by appellee. There is nothing in the record that would warrant this court in saying that the damages awarded are excessive.

Appellant makes the contention that the judgment should be reversed because the attorney for appellee, while examining one of the witnesses, made the following statement in the presence of the jury: "They are resting, they are claiming they are resting on an appraisement here; I want to show they paid as high as three times as much as the appraisement." The attorney for appellant objected to the statement. The court excluded the evidence and told the attorney, in the presence of the jury, it was not proper for him to make the statement. This was tantamount to telling the jury not to consider even the offer to make such proof. It occurs frequently in the trial of cases that the attorney offers testimony which he thinks is competent, but which the

court rules is incompetent; but the fact that it is incompetent, if offered in good faith, should not work a reversal of the judgment. If such were the rule, practically all judgments would be reversed, for a case is seldom tried without an attempt or offer to introduce incompetent testimony. The attorney did not make any statement of fact to the jury, but just offered to prove by the witness that the board of directors had paid other property owners three times as much as their appraisers had ascertained the damages to be and based the offer upon the fact that in this case appellant was resting upon the appraisement. Not being a statement of fact by the attorney, but merely an offer to prove the fact, when the court declined to allow him to make the proof and told the jury not to consider the offer to make it, certainly no prejudice resulted in the defense of appellant. The incident passed out of the case upon the ruling and admonition of the court.

No error appearing, the judgment is affirmed.

KOCHTITZKY & JOHNSON, INC. *v.* MALVERN GRAVEL COMPANY.

4-4246

Opinion delivered March 30, 1936.

John L. McClellan, Martin, Wootton & Martin and *Gordon E. Young*, for appellant.

Joe W. McCoy, for appellee.

SMITH, J. Kochtitzky & Johnson, Inc., a corporation, entered into a contract with the Federal Government for

the construction of a levee on the Mississippi River. The construction bond, required in such contracts, was executed by the New Amsterdam Casualty Company. The entire contract which was completed in June, 1933, was sublet by appellant to Ward-Hayes Construction Company, a partnership.

The Malvern Gravel Company, hereinafter referred to as appellee, filed an unverified complaint in the Hot Spring Circuit Court on which a summons was served September 11, 1933, against the construction company, to recover balance due under the lease of a locomotive in which judgment for $800 was prayed. A judgment for want of an answer was rendered against the construction company on December 5, 1933. A writ of garnishment was issued August 14, 1933, and was served upon appellant, which filed a verified answer, averring that appellant, garnishee, had not been indebted to the construction company in any sum since June 29, 1933, and was not at the time of the service of the garnishment indebted to the construction company in any amount.

A demurrer was filed to this answer on January 15, 1934, which was not passed upon until the ensuing term of the court, which convened July 16, 1934, on which date the demurrer was presented to and sustained by the court, whereupon, and at the same time, judgment was rendered against appellant for the amount sued for by appellee for want of an answer. The judgment thus rendered was not entered in the proceedings of that term of court, but was entered, without notice to the appellant garnishee, at the next ensuing term of court. Execution issued on this judgment, whereupon appellant filed this suit to vacate that judgment. A motion to dismiss this complaint was heard by a special judge, and from a judgment sustaining that motion is this appeal.

Testimony to the following effect was heard upon this motion. E. H. Wootton, an attorney of Hot Springs, represented the insurance company, which was named as a defendant in the original suit brought by appellee against the construction company, but which had not been served with process. The firm of which Wootton

was a member was employed to represent appellant, and filed an answer for it containing allegations to the following effect: The claim sued on arose out of a contract with the United States Government, and the Hot Spring Circuit Court was alleged to be without jurisdiction to hear it. Appellant had been notified by the insurance company not to settle with its subcontractor, the construction company, for the reason that the subcontractor had incurred numerous bills for which its bond was liable. The answer further alleged that on June 30, 1933, the First National Bank of Hamilton, Ohio, had brought suit in the St. Francis Chancery Court against the construction company, appellant, and the insurance company, in which it claimed to hold and own an assignment from the construction company dated November 21, 1932, of all money due and to become due under the contract between the construction company and appellant; and praying that all sums due under said contract be impounded until all lienable claims against the construction company had been determined, and that the balance be paid plaintiff bank. Appellant's answer alleged that it had deposited the balance due by it to the construction company with the Bank of Eastern Arkansas, in Forrest City, subject to the orders of the chancery court of St. Francis County, and that it had no interest in this fund and asked only to be protected in its disbursement. This answer further alleged that the insurance company filed an answer in the cause pending in the St. Francis Chancery Court in which it claimed to hold an assignment from the construction company prior to the assignment to the bank. The effect of this answer was to allege that in the suit then pending in the St. Francis Chancery Court, and which had been instituted prior to the suit pending in the Hot Spring Circuit Court, appellant had been required to deposit the very money which the garnishment out of the Hot Spring Circuit Court sought to impound, and it was alleged that the jurisdiction to determine all the lienable claims, for which appellant's surety would be liable, was in the federal court. This was the answer to which a demurrer was sustained on the first day of the July, 1934, term of the Hot Spring Circuit Court.

Wootton testified that he conferred with Judge Means, who represented the plaintiff gravel company, the appellee here, and told him that he represented all of the defendants. He and Judge Means agreed that the answer presented questions of law which would not require a jury, and it was further agreed that the cause would be submitted to the court without a jury at a time convenient to all parties. He employed J. L. McClellan, a local attorney, to assist him in the case. He understood from Judge Means and his associate counsel that the matter would be submitted for trial at a time convenient to all parties, of which all would have notice.

McClellan testified that he advised Judge Means of his employment and agreed with him that the demurrer might be heard at any time convenient to the court, and to opposing counsel, of which date, when agreed upon, he would notify Mr. Wootton and the demurrer could be heard and the issues settled. He further testified that the docket was sounded and the case called by the presiding judge at the term preceding the July, 1934, term, at which time he stated to the court in the presence of Judge Means, that there was a demurrer to be disposed of upon which Wootton, the principal counsel, wished to be heard, and he understood that it was then agreed that the court would hear the demurrer at some future time convenient to all parties. He further testified that at that time he was a candidate for Congress, and Judge Means was a candidate opposing the re-election of the presiding judge, and it was his understanding that no civil cases would be tried at this July, 1934, term, which was held just preceding the primary election in which witness was interested.

The presiding judge testified that on the opening day of the court Judge Means called up the demurrer. No other attorneys were present. He had forgotten that McClellan was connected with the case. Judge Means suggested that the judgment be entered against the garnishee after the demurrer had been sustained, and stated that if any one came in and raised an objection the judgment could be set aside. Only routine matters were attended

to at that term of court on account of the political campaign.

Kochtitzky, the chief officer of the appellant corporation, gave testimony supporting the allegations of the answer filed for his corporation to which the demurrer had been sustained. According to his testimony, the garnishee had in its hands no money belonging to the construction company at the time of the service of the writ of garnishment.

Judge Means testified in support of the motion to dismiss the complaint filed to vacate the judgment. He did not understand that Wootton represented any client except the insurance company, and he did not ask a judgment against it. He understood that McClellan was acting as local counsel for Wootton. He did not understand that he had any agreement with any one as to the time when the demurrer should be heard, and he had not agreed that the judgment might be vacated, if objection were made to it.

We accept the testimony of Judge Means without reservation. It exonerates him from any breach of agreement regarding the trial of the original suit. But even so, it has been made to appear very clearly that a gross injustice has been done appellant, according to the testimony of Kochtitzky. Its attorneys were guilty of no negligence or omission of any duty to their client. While they may have been mistaken as to the effect of the agreement with Judge Means, it is certain that they thought no judgment would be rendered until the demurrer had been heard, and that this hearing would not be had until they were notified and afforded an opportunity to be present. McClellan had the definite impression and, as he thought, an understanding that no civil cases in which he was interested would be disposed of at this July, 1934, term of court.

A case of unavoidable casualty has been established within the meaning of the seventh paragraph of § 6290 of Crawford & Moses' Digest, and the judgment against the garnishee should be set aside, and the answer of the garnishee heard on its merits. In the following cases

this relief was granted after the expiration of the term at which the judgment sought to be vacated had been rendered. In each of the cases cited there had been a misunderstanding between opposing counsel which resulted in a failure to make a defense which would otherwise have been interposed, as has here occurred. *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368; *Wrenn* v. *Manufacturers' Furniture Company,* 172 Ark. 599, 289 S. W. 769; *American Company of Arkansas* v. *Wilson,* 187 Ark. 625, 61 S. W. (2d) 453.

The judgment of the court sustaining the motion to dismiss the complaint of appellant will, therefore, be reversed, and the cause remanded with directions to overrule that motion, and to hear appellant's answer as garnishee upon its merits.

CONNOR *v.* COUGHLIN.

4-4242

Opinion delivered March 30, 1936.

J. R. Long, for appellant.

A. T. Davies, for appellee.

McHANEY, J. Appellant sued appellee for the damage done to his car as a result of a collision between his and appellee's cars, at the intersection of Quapaw and Violet streets, in Hot Springs, on August 31, 1935. At the conclusion of the evidence for appellant the court instructed a verdict for appellee. This appeal challenges the correctness of the court's action in this regard.

We agree with the trial court that the testimony for appellant was not sufficient to take the case to the jury. He testified that he was driving his car north on Quapaw approaching its intersection with Violet, at from 30 to 35 miles per hour down hill, and when he was at least 75 feet from the intersection he saw appellee's car approaching from the east going west up hill, traveling at a moderate rate of speed, and that appellee did not see his car. Mr. Ermy, a witness for appellant, testified that he was riding with appellee, and they were traveling about fifteen miles per hour. Without slowing his speed or making any attempt to stop his car, appellant drove into the intersection in front of the car on his right, and was struck on the right rear fender which upset his car. Under the law appellee had the right-of-way, and it was appellant's duty to stop his car or slow it down to yield the right-of-way to him. See § 18, act 223, Acts of 1927, page 721. While this accident happened in the city of Hot Springs, it is shown that there were no slow or stop signs at said intersection, and that the city had passed no ordinance regulating the traffic at said intersection. Therefore, the State law above cited applies. Even assuming that appellee was negligent, under the circumstances, still there could be no recovery, for appellant himself testified to a state of facts showing that he was guilty of negligence directly contributing to the injury to his car.

The judgment must be affirmed. It is so ordered.

NOWLIN *v.* MERCHANTS NATIONAL BANK.

4-4250

Opinion delivered March 30, 1936.

J. Allen Eades, for appellant.

Simmons & Lister, for appellee.

McHaney, J. Appellee obtained a judgment against appellant in the municipal court of Fort Smith on April 12, 1935. An affidavit for appeal was filed with the clerk of said court and the fee for making the transcript was paid April 20, 1935. The clerk of said court promised to file the transcript with the circuit clerk, but failed to do so within thirty days. The appeal was perfected May 31, more than thirty days from the date of the judgment. On motion of appellee the appeal was dismissed by order of the circuit court, and this action of the court is questioned by this appeal. In 1921 the Legislature passed an act (Acts 1921, p. 259) for the establishment and regulation of municipal courts in cities having a population exceeding 25,000, and under 50,000 according to the latest census, which classification includes Fort Smith. Section 6, of said act, reads as follows: "All appeals from the municipal courts must be taken and the transcript lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered, and not thereafter * * *."

It will be noticed that the appeal must be taken and the transcript lodged with the circuit clerk "within thirty days after judgment is rendered and not thereafter." This requirement is mandatory and is jurisdictional. Unless it is complied with, the circuit court is without jurisdiction. We so held in *Loveland* v. *State Pharmacy*, 123 Ark. 320, 185 S. W. 288. Persons desiring to appeal from the municipal courts affected by said act 203 of 1921 must see to it that their transcripts are lodged in the time limited, and they cannot have an extension of the time by reason of a broken promise of the clerk of the municipal court to attend to it within apt time.

The judgment is correct, and must be affirmed.

LYONS MACHINERY COMPANY *v.* PIKE COUNTY.

4-4247

Opinion delivered March 30, 1936.

Alfred Featherston, for appellant.

Tom Kidd, for appellee.

HUMPHREYS, J. This suit was commenced in the county court of Pike County by appellant filing a verified account or claim against said county in the sum of $2,110 for concrete culvert forms. The claim was filed on April 1, 1935, with the county clerk, and was disallowed by the county court on the same day. An appeal was taken to the circuit court of said county from the judgment of disallowance, where the cause was submitted to the court without the intervention of a jury, resulting in a judgment dismissing appellant's claim, from which is this appeal.

According to the undisputed evidence in the instant case, the contract for the sale and purchase of the concrete culvert forms was entered into in Little Rock, Arkansas, between W. J. Mauney, the county judge of Pike County and appellant corporation on the 26th day of October, 1934, and no order or judgment of the county court was entered approving the contract.

No authority or power is conferred upon county judges by the Constitution or by statute to make contracts on behalf of the county. With certain limitations, such authority or power is conferred by the Constitution and statutes upon county courts. Article VII, § 28, Con-

stitution of 1874; Amendment No. 10 to the Constitution of 1874; §§ 1976 and 2279 of Crawford & Moses' Digest. *Rebsamen, Brown & Co.* v. *Van Buren County,* 177 Ark. 268, 6 S. W. (2d) 288.

It is suggested by appellant that, even though the contract be held by the court to be invalid, it should be entitled to recover under the rule of *quantum meruit.* The argument is made that because Judge Mauney accepted the shipment and stored same on county property, the county is liable on a *quantum meruit* basis. This might be true if the county had made any use of the concrete forms in the construction of culverts, but it did not use them. The county has refused to use them, and makes no claim to them. In fact, it claims to have no use for them, and no money with which to buy concrete with which to build culverts.

The judgment is affirmed, disallowing appellant's account or claim.

MISSOURI PACIFIC RAILROAD COMPANY *v.* RANCE.

4-4259

Opinion delivered April 6, 1936.

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

McHaney, J. Appellee recovered a judgment against appellant in the sum of $1,000 for the loss of an eye, which, as he alleges, was caused by being struck in the eye by a hot cinder, thrown from a passing locomotive engine with a defective spark arrester. On or about October 10, 1932, appellee was in the employ of appellant as a laborer, and was living in a box car furnished by appellant at a rental of $2 per month, on a passing track at Gifford. At about 4:30 P. M., after his day's work was done, he left his box car home to get a bucket of coal from a tank car nearby, and, as he was returning with the coal, a freight train passed him going south which was throwing quantities of cinders on and about him, one of which struck him in his eye, causing such an injury as finally necessitated its removal.

For a reversal of the judgment against it, appellant first says the court erred in refusing its request for a directed verdict in its favor. This argument is based on the testimony of its dispatcher that he kept a record of the running of all trains between Little Rock and Texarkana, and that no train, freight or passenger, passed through Gifford going south between 1 P. M. and 7:30 P. M. on October 10, 1932, and therefore there was no train going south from 4 to 4:30 P. M. on said date. The fallacy of this argument is that appellee did not testify definitely he received his injury on October 10. He said it was about that time, but did not remember the exact date. A number of witnesses testified to his receiving an injury to his eye at about that time, some of whom attempted to get the cinder out of his eye. The doctor he consulted in Malvern at his foreman's suggestion testified that the eye was burned, and he suggested that he go to the company hospital in Little Rock. We think the evidence sufficient to take the question to the jury.

It is next argued that the court erred in permitting appellee to cross-examine appellant's witness Rowland regarding the throwing of cinders by trains. He testified over objections that he had seen cinders lying on the track and presumed trains put them there. He did not say he had seen trains throwing cinders. We fail to see

how appellant could be prejudiced by such testimony. It was perhaps irrelevant and immaterial, but not prejudicial.

Another assignment argued relates to the refusal of the court to permit appellant to introduce a purported release signed by appellee, showing a settlement. The court instructed the jury in this respect as follows: "There is some allegation in the complaint here and also in the answer about compromise settlement. Now the court holds and instructs you as a matter of law that there has not been sufficient evidence offered here before you to submit any question of settlement or compromise to you. You will try this case on the evidence and on the law, without regard to any compromise settlement being had." There was no objection or exception to this instruction, and appellant's failure in this regard must be held to be a waiver of error, if any, in refusing to permit the release agreement to be introduced.

Instruction No. 1 for appellee was objected to. It provided that, if the jury found that appellee was injured by the operation of a train, a presumption of negligence arose, etc. If he were struck by a cinder in the manner claimed, then he was injured by the operation of a train within the meaning of § 8562, Crawford & Moses' Digest. *Batte* v. *St. Louis Southwestern R. Co.,* 131 Ark. 568, 199 S. W. 907; *St. Louis-San Francisco R. Co.* v. *Young,* 175 Ark. 487, 299 S. W. 750. In the former case we said: "It was the duty of the defendant company to keep its engines in good repair and see that they were supplied with the best known appliances to prevent the escape of cinders. It was also its duty to see that its engines were properly operated and that such was the case at the time the injury occurred. *Missouri K. & T. Ry. Co.* v. *Orton,* 67 Kans. 848, 73 Pac. 63."

Appellee having been injured by the operation of a train, the burden was then on appellant to show that it was not negligent. This it wholly failed to do, except to show no southbound train passed through Gifford on October 10th, at about 4:30 P. M. See *Missouri Pac. R. R. Co.* v. *McDade,* 186 Ark. 317, 53 S. W. (2d) 595.

Other assignments argued relate to instructions given and refused. We have carefully considered them and find them unobjectionable. The final assignment is that the verdict is excessive, but we feel that counsel for appellant can hardly be serious in urging it.

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

BARTON-MANSFIELD COMPANY *v.* HIGGASON.

4-4237

Opinion delivered April 6, 1936.

C. T. Sims, for appellant.

W. F. Norrell, for appellee.

BUTLER, J. This action originated in the court of the justice of peace within and for Drew County, Arkansas. It was filed on January 22, 1935, and resulted in a judgment on March 1, 1935, in favor of plaintiff, Barton-Mansfield Company. During all that time the General Assembly was in session, Hon. W. F. Norrell being the senator from the ..... senatorial district composed of Drew and Desha counties. Upon the return day of the summons the defendant, Higgason,

secured a continuance until February 4th, and again until February 11th. These dates appear to have been fixed by the justice for the reason that Senator Norrell was in the habit of coming down to Monticello to spend the week-end at his home. On the 11th of February the justice was ill and the case was continued until March 1st. On that day the plaintiff appeared and announced ready for trial while the defendant (quoting from the justice's docket) "announces not ready and makes a motion for continuance until after the Arkansas Legislature adjourns and Senator W. F. Norrell, his attorney, returns to Monticello, Arkansas, which motion was by the court overruled, the court considering the same unreasonable and unfair to the plaintiff." The judgment then recites the taking of testimony on the part of the plaintiff, and that the defendant was given an opportunity to present his evidence but refused to do so. Thereupon the court proceeded to render judgment in favor of the plaintiff, and the defendant prayed and was granted an appeal.

On May 18, 1935, the defendant filed a petition for writ of certiorari in the circuit court of Drew County, alleging the facts hereinbefore recited and, as a defense, that the cause of action was identical with a suit which had been filed before in the court of G. T. Sikes, a justice of the peace in and for Drew County, and that in said cause before said justice judgment had been rendered in his favor which judgment he plead as *res judicata*. On motion of the Barton-Mansfield Company certain paragraphs of the petition for certiorari were stricken by the trial court, and a demurrer to the petition was overruled. At the hearing of the petition, both parties introduced testimony after which the court granted the prayer of the petition, quashed the judgment and ordered "that the justice of the peace * * * be directed to retain jurisdiction of said cause, and for further proceedings, * * *."

Barton-Mansfield Company, the appellant, as conclusive of the action of the justice, relies on the fact that Senator Norrell could not have been employed in the case before the convening of the Legislature because the

suit was not filed until after the Legislature had convened. In support of this contention the case of *Cox* v. *State,* 183 Ark. 1077, 40 S. W. (2d) 427, is cited. That case upheld the action of the circuit court in refusing to grant a continuance in a criminal prosecution where it was alleged, as a cause for same, that a member of the Arkansas Legislature, then in session, was employed by the defendant to represent him. This motion was based on act No. 4 of the Acts of 1931, § 430, Castle's 1931 Supp. to Crawford & Moses' Digest. This act provides that in suits pending in any of the courts of this State, in which an attorney for either party is a member of the General Assembly, proceedings shall be stayed for not less than fifteen days preceding the convening of the General Assembly, and for thirty days after its adjournment, unless otherwise requested by any interested member of the General Assembly.

In the case of *Cox* v. *State, supra,* the court held that the trial court did not err in refusing to grant the continuance where under the circumstances of that case the attorney was employed after the proceedings had been instituted although he was a member of the Legislature at the time of such employment. In commenting upon the facts, the court recognized the right of litigants in proper cases to have a continuance under the provisions of act No. 4, *supra,* but said that "where a person is indicted after the meeting of the Legislature charged with the commission of a crime at a time after the meeting of the Legislature, he cannot, by merely employing an attorney who is a member of the Legislature, have his case continued, without any showing as to when the employment was made or that the member of the Legislature is his regular retained attorney. If this was the meaning of the statute, all any person charged with crime in any of the courts would have to do to get a continuance would be to file a motion alleging that he had employed a member of the Legislature to try his suit." It was noticed by the court that the attorney, who was a member of the Legislature, and alleged to have been employed, made no request for a continuance, and did not communicate with the trial court in any way.

That court, and this one on appeal, as is clearly implied by the language used in the opinion, concluded that the allegation in the motion for continuance was a mere subterfuge adopted for the purpose of securing the continuance. In the case of *Bottoms* v. *Superior Court, etc.*, 82 Cal. App. 764, 256 Pac. 422, in considering a question similar to the one here presented, and under a statute of like import as our own, the court said: "If it be shown that the party to the action claiming the benefit of that provision of said section has other attorneys of record in the case capable of managing it in court, or that some attorney, a member of the Legislature, had been employed for no other purpose than to secure to a party the benefit of the provision in question from sinister or improper motives, then, in either such cases, particularly in the last suggested, a continuance should not be granted."

In the Cox case, *supra,* the court expressly recognized the right to a continuance, not only where an attorney had been employed prior to the meeting of the Legislature, but where "if one's regular attorney is a member of the Legislature and suit should arise, the party would have a right to a continuance on account of his attorney being in attendance upon the Legislature."

It is clear that Senator Norrell was the regular attorney of the appellee, Higgason, having represented him in all matters for as long as ten years prior to the filing of the instant suit, and that he was peculiarly acquainted with the facts involved. The justice, in overruling the motion for a continuance, did not base his action on the time or nature of the senator's employment, but on the fact that he considered the motion "unreasonable and unfair to the plaintiff."

It would then appear that the defendant in the justice court was entitled to a continuance under the provisions of the statute, and the question remaining for our consideration is what is the effect of the judgment rendered by the justice? The statute is quoted at length in the case of *Fox* v. *State, supra,* and from its provisions it would seem that all proceedings in any suit should be stayed when it is brought to the attention of the court that an attorney representing one of the litigants

is a member of, and in attendance on, the General Assembly. In construing the effect of the statute, in that case we said: "At common law applications for continuance were addressed to the sound discretion of the court, but, under the statute above quoted it is mandatory upon the court to grant a continuance when it is made to appear to the court by proper showing that the defendant had employed his attorney prior to the convening of the Legislature, and at the time set for trial his attorney was in attendance upon a session of the Legislature." To the same effect was the holding of the court in *Bottoms* v. *Superior Court, etc., supra,* and in that case a judgment of the lower court was quashed on certiorari where the defendant had invoked the provisions of the statute, and his motion for continuance had been overruled.

It is argued that certiorari cannot be invoked because the defendant had the right of appeal which was lost by his own negligence. If the judgment of the justice was void, certiorari is a proper remedy even though the judgment might have been vacated and set aside on appeal. *Fayetteville* v. *Baker,* 176 Ark. 1030, 5 S. W. (2d) 302. In *Gregg* v. *Hatcher,* 94 Ark. 54, 125 S. W. 1007, a judgment of the justice court was quashed on certiorari where the justice had proceeded in excess of his jurisdiction.

In *Green* v. *State,* 155 Ark. 45, 243 S. W. 950, a judgment of the municipal court was quashed on certiorari, this court holding that where a motion for change of venue had been filed in compliance with the statute, the court was deprived of jurisdiction to proceed further in the case except to make an order changing the venue. The reason for this holding was the peculiar language of the statute which was mandatory in its nature, the effect of which was to prevent any further action by the municipal court after the motion for change of venue had been made except to order the change of venue as prayed.

It is clear, from the imperative language of the statute now under consideration, that all proceedings should be stayed until thirty days after the adjournment

of the General Assembly, and that any other action by the lower court would be in excess of its jurisdiction. Therefore, when the court, in this case, ignored the motion for continuance in violation of the express provision of act No. 4, *supra,* and proceeded to render judgment, it exceeded its jurisdiction, and where this was made to appear to the circuit court it was within its sound discretion to grant the writ prayed for and to quash the unauthorized judgment of the justice court. *Reese* v. *Cannon,* 73 Ark. 604, 84 S. W. 793.

It is contended here that no formal writ was served upon the justice or response made by him. The record shows that the justice appeared in the circuit court bringing with him his docket and the original papers in the case when he was advised of the filing of the petition without requiring the issuance and service upon him of the writ. The purpose of the writ was served when the justice appeared in the circuit court with his docket and the original papers which constituted a waiver on his part of the formal proceeding, and we find no objection made to this which has been preserved in the record.

The judgment of the trial court works substantial justice and leaves the case where it may be tried and determined upon its merits. As we view the effect of the statute, we are also of the opinion that the action of the lower court in quashing the judgment of the justice court is correct, and it is therefore affirmed.

SMITH, MCHANEY and BAKER, JJ., dissent.

SMITH, J., (dissenting). It was held, as the majority say, in the case of *Cox* v. *State,* 183 Ark. 1077, 40 S. W. (2d) 427, that the provisions of the act of 1931, are mandatory and so they are. Being mandatory, they should be observed and not violated; which is only another way of saying that courts are not vested with a discretion to continue, or to refuse to continue, suits in which any attorney for either party to the suit is a member of the Senate, or of the House of Representatives, or is a clerk or sergeant-at-arms or a doorkeeper of either branch of the General Assembly. But it does not follow that the judgment is void because of the error of refusing the continuance. The jurisdiction abides. Its erroneous ex-

ercise is an error which may and should be cured in the manner provided by law, pursuant to a practice long-established and well-defined.

If a justice of the peace erroneously refuses to obey this practice act, and tries a case in which an attorney is a member of the General Assembly, or a clerk or a sergeant-at-arms or a doorkeeper of either branch of the General Assembly, he commits an error by violating this mandatory statute. But the error does not render the judgment void. There was no loss of jurisdiction. A very simple and amply sufficient redress is provided, which is the right of appeal, and when that right has been invoked, the case is tried *de novo*. It may be unfortunate if the obstinacy, or ignorance, of the justice of peace makes this expense and trouble necessary. But, if *nisi prius* courts made no mistakes, there would be no necessity for appellate courts. If, when the case reaches the circuit court, the error is repeated, or, if the error is made in a case originating in the circuit court, that error may be corrected upon an appeal to this court, by ordering a new trial; not because the circuit court did not have jurisdiction, but because it had committed an error in the exercise of that jurisdiction.

There are many statutes regulating the practice in both justices of the peace and in the circuit courts. For instance, a justice of peace might erroneously refuse to allow a party to exercise the number of challenges in selecting a jury, to which the statute entitled him. He might even be denied the right of a jury trial. This would be error, but it is one which could and must be corrected by appeal. The party aggrieved could not ignore this simple remedy and have the judgment quashed on certiorari.

In *Abbott* v. *State,* 178 Ark. 77, 10 S. W. (2d) 30, a defendant, who had erroneously been denied a change of venue, sought by certiorari to have the judgment of the justice of peace, who had imposed a fine after denying this right, quashed. We said this error did not vacate the jurisdiction of the justice of the peace (*Kinkead* v. *State,* 45 Ark. 536), and that the error of refusing the

change of venue, and of retaining jurisdiction, could not be corrected by certiorari nor did it entitle the defendant, upon conviction, to his release on *habeas corpus*. This was true because relief should have been obtained by appeal.

In Ex parte *Williams*, 99 Ark. 475, 138 S. W. 985, a chancellor, in a *habeas corpus* proceeding, ordered the discharge of a prisoner who had been fined and committed to jail, after having been denied a trial by jury in the police court. Assuming the right to a jury trial existed, the court said that: "The refusal of the police court to allow a jury was merely an error which could be corrected by appeal only and that question cannot be raised on *habeas corpus*. Ex parte *Brandon*, 49 Ark. 143, 4 S. W. 452."

The case of *Cox* v. *State, supra*, affords no authority for holding to be void the justice's judgment here questioned. There an accused was put to trial in the circuit court, while his attorney was serving as a member of the General Assembly. The judgment was not declared void. It was not even reversed, because the attorney had not been employed before the Legislature convened and was not the regular attorney for the defendant. We read that exception into the act because, as was there stated, it was not thought that the Legislature intended that a person indicted for a felony, even, as was the appellant in that case, might secure a continuance of his case by employing an attorney who was a member of, and already in attendance upon, a session of the General Assembly. It was there stated that the act of 1933 was mandatory; but the opinion contains no intimation that the error of not observing it could not and should not be cured by appeal.

The California case of *Bottoms* v. *Superior Court*, cited and relied upon by the majority, arose under a special statutory proceeding involving the right of condemnation of property. The court there said: "The remedy herein sought is proper. There is no appeal from an order granting or refusing to grant, or, as here, setting aside an order granting a continuance of the trial of a

case. Section 963, Code Civ. Proc. Such an order would be reviewable on an appeal from the judgment, but the circumstances of this case obviously require a more speedy remedy than would thus be afforded. The case of *Chicago Public Stock Exchange* v. *McClaughry,* 148 Ill. 372, 36 N. E. 88, does not hold otherwise."

The Illinois case there cited, and not disapproved, presented only the question of the effect of a refusal to grant a continuance to a litigant as required by a statute of that State whose attorney was "* * * in actual attendance upon a session of the General Assembly at the Capitol of the State and had been employed by complainant as its solicitor in said suit prior to the commencement of the said session of the General Assembly and that the presence and attendance of said solicitor in court were necessary to a fair and proper trial of said case." The Illinois court held that as there was an adequate remedy by appeal, no other relief would be granted.

The case of *Green* v. *State*, cited by the majority arose under an act requiring municipal courts to grant changes of venue in certain cases, and upon certain conditions, and declaring judgments rendered in violation thereof void. In other words, municipal courts could not render valid judgments in cases over which they had lost jurisdiction. The act of 1931, here involved, contains no such provision, and does not attempt to divest the jurisdiction by filing the motion for continuance. The Green case, having arisen under a statute of different purport, has no controlling effect here. The opinion in the Green case, *supra,* appearing in the 155 Ark. 45, 243 S. W. 950, was handed down October 2, 1922, and was delivered by Chief Justice McCulloch. The opinion in the case of *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501, delivered January 8, 1923, was written by the same learned Judge. It made no reference to the Green case which was evidently regarded as inapplicable to the facts of that case. In this case of *Sharum* v. *Meriwether, supra,* the probate court had refused a jury to Sharum, who was alleged to be insane and was adjudged so to be by the court. The validity of this judgment was challenged on

the ground that the record affirmatively showed that the court had refused to order a jury and had made the adjudication of insanity without the intervention of a jury. Certiorari to quash this judgment was denied although it was said that the court had abused its discretion and had committed an error in refusing to order a jury. It was so held because, as was there said, this was an error which could and should have been corrected by appeal. The reasoning leading to that conclusion was that the court had jurisdiction which was not defeated because there was an erroneous exercise of it in the proceedings. The error was one which could and should have been corrected by appeal and certiorari could not be employed as a substitute for this sufficient remedy.

I therefore dissent from so much of the majority opinion as holds the judgment of the justice of the peace to be void for the error of refusing to continue the cause on account of the absence of the attorney. I am authorized to say that Justices BAKER and MCHANEY concur in the views here expressed.

HENDRICKS *v.* HENSON.

4-4260

Opinion delivered April 6, 1936.

James Seaborn Holt, for appellant.

Robert D. Scott, for appellee.

BUTLER, J. In August, 1929, J. L. Henson, now deceased, executed his promissory note in favor of L. H

Saiewitz in the sum of $1,500 with interest at 8 per cent., due one year after date. To secure this note Henson and his wife executed a mortgage on certain real property in the city of Fort Smith.

In December, 1931, Saiewitz died and A. L. Hendricks was appointed administrator of his estate. At the time of the death of Saiewitz the mortgage and note were in the possession of Henson, but the mortgage had not been satisfied of record. On the first day of February, 1933, Henson filed a petition in the probate court of the Fort Smith District of Sebastian County reciting the execution of the note and mortgage, alleging that the indebtedness had been paid and praying that the court order the administrator to satisfy the mortgage of record and file a proper release deed. Hendricks, as administrator, filed a response, denying that payment had been made and praying that the petition of Henson be dismissed. A hearing was had on the issues joined, and the court found in favor of the respondent, and dismissed the petition of Henson.

On July 22, 1935, the appellant, as administrator, filed suit in the Sebastian Chancery Court for judgment on the note executed by Henson to his intestate, and for foreclosure of the mortgage. In the meantime, J. L. Henson died, and suit was brought against W. C. Henson, administrator of his estate, who defended on the ground that the note had been paid. To the defense offered, appellant interposed a plea of *res judicata* based on the proceedings and judgment in the probate court aforesaid. The plea of *res judicata* was overruled by the court, and the appellees were permitted to introduce testimony which tended to establish the defense of payment, and that the note and mortgage had been delivered by Saiewitz in his lifetime to Henson. The appellant rested on his plea of *res judicata,* and the court found in favor of appellee and dismissed appellant's complaint.

The sole question presented by this appeal relates to the correctness of the court's ruling on the plea of *res judicata.* The appellee contends that the proceedings and judgment of the probate court were void for the reason that such court had no jurisdiction of the subject-

matter. Appellant concedes the lack of jurisdiction of the probate court, but contends that appellee is estopped from now setting up the issue of payment, because his intestate invoked the jurisdiction of the probate court and acquiesced in all of the proceedings had therein. In support of this contention he cites the case of *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166, referred to in the case of *Huff* v. *Hot Springs Savings Trust & Guaranty Co.,* 185 Ark. 20, 45 S. W. (2d) 508. When the Fancher case is examined it will be seen that the only question involved on appeal was the judgment of the trial court apportioning the costs equally between the litigants which was approved by this court on the theory that the costs had been unnecessarily incurred by the party complaining in that he had acquiesced in an erroneous procedure in the probate court and in the circuit court on appeal. This court, however, noticed that the probate court, in the inception of the proceedings before it, had jurisdiction of the subject-matter, but that the method of procedure was erroneous. With reference to this, we said: "While this was an erroneous method of procedure in making the inquiry after it was disclosed that appellee was claiming the property in his own right, still the probate court, and the circuit court on appeal, had jurisdiction of the subject-matter of the inquiry, and an erroneous exercise of that jurisdiction did not defeat it. * * * The appellant had it in his power to prevent the erroneous method of procedure in the circuit court, had he made timely objection thereto, and much of the costs incident to the trial of the rights of property incurred by appellant, he could have prevented, and they were unnecessary, had he objected to the procedure."

It is unnecessary for us to consider the correctness of the ruling of the court in that case or the implications arising from it which might be thought would sustain the contention of the appellant in the instant case, for the reason that in this case, at no time did the probate court have jurisdiction of the subject-matter. It is well settled that where this jurisdiction is lacking consent cannot give it, and the judgment in all events is void. *Grimmett* v. *Askew,* 48 Ark. 151, 2 S. W. 707; *Axley* v.

Hammock, 185 Ark. 939, 50 S. W. (2d) 608. The trial court, therefore, correctly overruled the appellant's plea of former adjudication, and, as the evidence abundantly sustains the defense interposed, the decree will be affirmed. It is so ordered.

LAUCK *v.* BURNETT.

4-4244

Opinion delivered April 6, 1936.

Owens & Ehrman and *Herschell Bricker,* for appellants.

Troy W. Lewis, for appellee.

SMITH, J. James W. Allen died testate June ....., 1932, seized and possessed of lot 1, block 12, Worthen's Addition to the city of Little Rock. He was survived by his wife, Helen Allen, and four adult children of a former marriage, and an infant child of himself and his surviving widow. Under the terms of his will he appointed his wife, Helen, executrix, and directed that the expenses of his last illness and his debts be paid. The will then provided: "It is my desire that my wife, Helen Allen, remain in possession and enjoy my estate during her lifetime or until a future marriage, at which event, I devise and bequeath to all lawful heirs, share and share alike, all my property, moneys, chattels and effects wherever situated, belonging to my estate after all debts set out in paragraphs two and three have been paid. It is my express desire that our beloved children, Winifred, Arthur, Dora, Josie, and Jack, leave all property herein described in undisturbed possession of my wife during

her lifetime or until remarriage, and upon either her death or marriage all property belonging to my estate is to be equally and impartially divided among said children.''

The testator owned no other real estate and his personal property was of less value than $300. The widow and minor child, now eleven years old, were, therefore, entitled to have an order vesting the personal property in them under the provisions of § 80, Crawford & Moses' Digest. The lot was the testator's homestead.

The adult heirs caused the will to be probated July 22, 1932. Thereafter, on August 21, 1933, the testator's widow married Robert Burnett, but she and her husband and the testator's minor child continued to reside on the lot.

The adult heirs brought suit in ejectment against Mrs. Burnett and Robert Burnett, her husband, in which they prayed judgment awarding possession of the lot to them and to the infant child of their father. This is an amended and substituted complaint for an amended and substituted complaint and the answer filed thereto sets up several defenses; among others, the plea of *res adjudicata* based upon a judgment of the probate court. The cause was submitted upon the pleadings and the record of the proceedings in the probate court and was dismissed, from which judgment is this appeal.

For the reversal of this judgment it is insisted that the widow's failure to renounce the will operated as an election to take under it, and that the probate court did not adjudge otherwise, the proceedings in that court having been instituted for the purpose only of removing the widow as executrix. It is, therefore, insisted that the widow, having remarried and not having renounced the will in the manner provided by statute, has lost any interest in the lot she might have taken under the Constitution and laws of the State or under the will.

The testator's widow has not lost her homestead right. The proceedings instituted by the adult heirs in the probate court prayed the removal of the widow, as executrix, although she had never qualified or assumed to act as such. This motion alleged that the widow,

"has accepted the benefits accruing to her under the aforesaid will."

As has been said, the will was probated by the adult heirs, and this was done without consulting the widow. She filed in this probate court proceedings on September 30, 1933, a renunciation of the will and a declaration of her election to take under the laws of this State in such cases made and provided. The 18 months allowed by § 3542, Crawford & Moses' Digest, for the execution of a deed of renunciation had not then expired. She also filed a response alleging that the adult heirs had at all times been advised of her intention to take under the law rather than under the will. This response alleged the homestead right. The order of the probate court dismissed the petition of the adult heirs. That order was made November 17, 1933, and was not appealed from. A few days later, the widow filed what was designated as "First and Final Report of the Executrix." This report alleged that her husband left no estate, except his homestead, and personal property of a value less than $300. The widow claimed the lot as a homestead and alleged that it had been improved and made habitable by the expenditure of about $2,000 of her own money. This report was approved and the executrix discharged January 9, 1934, and no appeal was prosecuted from that order.

Appellants cite and rely upon the case of *Helm* v. *Leggett*, 66 Ark. 23, 48 S. W. 675, for the reversal of the judgment of the circuit court dismissing their substituted complaint as herein stated. It was held in the case cited that a devise of land by a testator to his wife for so much of her natural life as she shall remain unmarried and upon her death or subsequent marriage, to his children is valid. It was there also held, to quote a headnote, that, "Where a testator devised certain lands, including his homestead, together with the sole use and control thereof and all rents and issues arising therefrom, to his wife for and during her natural life or widowhood, provided that upon her subsequent death or marriage it should go to his child, the devise is repugnant to her right of homestead, and if she elects to take under the

devise, she cannot, after marrying, hold the homestead or any of the other lands devised to her.'' In other words, there is the same obligation to elect as to claim of homestead as there is to elect in regard to dower, and either or both may be lost, if repugnant to the devise, by accepting the devise.

The probate court had the jurisdiction to assign the homestead to the widow and minor or to the widow or minor. Section 5525, *et seq.*, Crawford & Moses' Digest. The proceedings in the probate court raised the question of the right of the widow and her infant child to have the lot set aside to them as their homestead, and we think the effect of the proceedings had in the probate court was to do so; from which order no appeal was prosecuted. After the probate court order having that effect had been made, the widow then filed what was designated as her first and final settlement showing not only that there were no unpaid debts, but that the personal property was of a less value than $300, and that there was no necessity for any administration. That report was also approved by the probate court. The effect of the judgment here appealed from is to leave the order of the probate court in full force and effect, awarding the widow and minor child their right of homestead in the lot.

This judgment is correct, and is therefore affirmed.

ASHBY *v.* SHOPTAW.

4-4255

Opinion delivered April 6, 1936.

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

Rowell, Rowell & Dickey, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in a magistrate's court in Jefferson County on a note of date April 16, 1931, payable October 1st of the same year, for $70 and interest, executed by appellee to R. H. Greene as surviving partner of the firm of R. H. Greene & John B. Meadows, and for the possession of certain personal property pledged for the payment of same by deed of trust of even date with the note. In December of that year, appellee paid $7.50 on the note and gave a new deed of trust with additional security to secure the payment thereof in the fall of 1932. When this second deed of trust became due, he gave another deed of trust in January, 1933, with additional security to secure the payment thereof in the fall of 1933. In the summer of that year, R. H. Greene, the surviving partner of the firm of Greene & Meadows, died, and appellant herein, R. S. Ashby, was appointed executor in succession to Greene. The note sued upon was assigned by the estate of Meadows to the estate of Greene. The pleadings, in addition to the note, filed before the magistrate consisted of an affidavit and a bond by the executor of the estate of R. H. Greene, deceased. The order for the delivery of the property described in the deed of trust and a summons was issued out of the magistrate's court on April 1, 1935, and made returnable on May 6, 1935. At that time, a judgment was rendered by the magistrate for the return of the property and for $75.21 in favor of appellee on his counterclaim, from which an appeal was prayed to the circuit court of said county. An affidavit for appeal was filed and sworn to, but the officer omitted to attach his jurat. The circuit court permitted appellant to amend the affidavit by attaching a jurat on the morning of the trial, over the objection and exception of appellee. After the note and

mortgage had been introduced by appellant, the appellee sought to introduce oral evidence, and was permitted to do so over the objection and exception of appellant, to show that at the time appellee executed the note and first mortgage, he did it with the understanding that it should not be binding upon him until there should be a settlement of accounts between him and the firm of Greene & Meadows, which accounts grew out of transactions between him and the firm since 1926, and that no settlement was ever made pursuant to the oral agreement, and that, according to an adjustment of the account, appellant was indebted to him in the sum of $2.77. At the conclusion of the testimony, appellant requested the court to instruct a verdict for him in the amount due upon the note, amounting to $93.29, which the court refused to do, over appellant's objection and exception. The court then overruled appellee's motion to dismiss the appeal from the magistrate's court because no jurat was attached to the affidavit for appellant, over his objection and exception, and submitted the issues to the jury of whether the note was to become binding upon appellee until there was a settlement of accounts between him and the firm of Greene & Meadows, and if such an agreement was made, whether appellee ratified the note by making a payment on it, and the execution of later chattel mortgages to secure same, and instructing them to find for appellee the sum that might be due him, if any, on a settlement of accounts in case they should find the note was not to be binding until such settlement was completed, if they should find that appellee had not waived the settlement by making a payment on the note and executing the subsequent chattel mortgages. The jury returned a verdict for appellee, and, from the verdict and consequent judgment rendered thereon, the cause is here on appeal and cross-appeal.

The sufficiency of the affidavit for appellant from the magistrate's to the circuit court is the first question arising for determination by this court. The affidavit was signed and sworn to, the only defect being the omission of the jurat by the notary public who administered the oath to the affiant. This court said in the

case of *Coleman* v. *Frauenthal & Co.,* 46 Ark. 302: "When the objection was made in the circuit court, the party prosecuting the appeal from the justice of the peace offered and was allowed to swear to the statements of the affidavit before another officer. There is no doubt of the power of the circuit court to permit an amendment of an informal affidavit for appeal. *Young* v. *King,* 33 Ark. 745. We have held that the omission from the jurat of the signature of the officer was a curable defect (*Guy, McClelland & Co.* v. *Walker,* 35 Ark. 212), and we think the court, in permitting the amendment now complained of, acted within the principle of that case, and in furtherance of the plain purpose of the liberal provision of the statute as to amendments."

This rule has been approved and followed in the following cases: *Railway Company* v. *Deane,* 60 Ark. 524, 31 S. W. 42; *Kull* v. *Dierks Lbr. & Coal Co.,* 173 Ark. 445, 292 S. W. 695; *Georgia State Savings Association* v. *Marrs,* 178 Ark. 18, 9 S. W. (2d) 785.

The instant case comes within the rule announced in the cases cited and is governed by them.

The next and controlling question arising on this appeal is whether appellee estopped himself from pleading at this late date a condition precedent to the binding effect of the note. We are of opinion that by making a payment on the note and executing new chattel mortgages in 1932 and 1933 to secure the note, appellee clearly estopped himself from denying the obligation in 1935 when collection was attempted. Recognition of the validity of the note by a payment thereon, and the execution of two renewal mortgages containing additional property to secure the note is diametrically opposed to the position assumed by him when pressed for collection. One cannot blow hot and cold. Appellee was bound by his continued conduct recognizing the validity of the note, and cannot be heard to say it had no binding effect.

The trial court should have instructed a verdict for appellant for the amount due on the note, and the judgment is reversed with instructions to render a judgment in favor of appellant thereon.

MAGNOLIA PETROLEUM COMPANY *v.* WASSON, BANK COMMISSIONER.

4-4261

Opinion delivered April 6, 1936.

[redacted]

Cockrill, Armistead & Rector, for appellant.
McDaniel, McCray & Crow, for appellee.

BAKER, J. Walter E. Taylor, as Bank Commissioner, procured a judgment against A. V. Martin *et al.,* for $39,550 and costs. On July 11, 1933, the Bank Commissioner filed a petition in the chancery court alleging the above indebtedness to be unsatisfied, that Magnolia Petroleum Company and others, naming them, were indebted for rents on buildings occupied by them, the exact amount of such rents not being known, and then propounded the following interrogatories:

"First: Were you on or after the date of the service of the writ of garnishment herein indebted to the defendant, A. V. Martin? If so, how were you indebted, and for what amount?

"Second: Had you in your hands and possession on or after the date of the service of the writ of garnishment herein any goods, chattels, moneys, credits or effects belonging to said defendant, A. V. Martin? If so, what was the nature and value thereof?"

Writ of garnishment against Magnolia Petroleum Company was issued on July 12, 1933, and served on that

day. Thereafter, on July 22, 1933, the Magnolia Petroleum Company filed its answer, duly verified by its assistant manager. In this answer it stated it had in its possession the sum of $75 to the credit of defendant, A. V. Martin; that it had no other moneys, rights, credits, or choses in action belonging to the defendant other than the $75, which it held subject to the orders of the court. Thereafter, on October 3, 1935, the court rendered a judgment against the Magnolia Petroleum Company in the sum of $1,425. In that judgment it was found that the Magnolia Petroleum Company had continued to rent property from A. V. Martin of the rental value of $50 per month. It is from that judgment the Magnolia Petroleum Company has appealed.

It is admitted by the appellee that no exceptions were made to the answer filed by the Magnolia Petroleum Company; that there was no traverse of its answer, but it is argued that it may be determined from the record, which is silent except the above statement in the judgment, that the court heard evidence justifying the rendition of this judgment. It is also contended by the appellee that on August 3, 1933, the court made an order reciting the fact of separate answers of H. H. Thompson, garnishee, J. Byrd Wright, garnishee, and Fred Newcomb, garnishee, and that upon this recital it was ordered that all garnishees upon whom writs of garnishment had been served, were directed to pay rents due or to become due, to the clerk of the court, and that by this order all rents were impounded.

The garnishment proceedings in this case are statutory and must be so regarded. When the answer was filed it furnished the basis for the rendition of a judgment for $75. The court may have heard evidence tending to show such an amount of indebtedness as was acknowledged, but there was no issue upon which evidence could be adduced. The answer was conclusive until an issue was made by some traverse thereof. *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646. Testimony without such answer or traverse to garnishee's response to the interrogatories filed was improper, as will appear from

a discussion in the case of *Southwestern Gas & Electric Co.* v. *W. O. Perkins & Son,* 185 Ark. 830, 49 S. W. (2d) 606.

It is unnecessary to quote from the two cases above cited. It must be sufficient to say that they very clearly and completely lay down the rules of procedure by which the courts are bound.

But it is argued that the garnishee was actually indebted in an amount of rents that accrued from and after the date of the filing of the answer by the garnishee. This argument is gratuitous. There is no such record here. We cannot, and do not, presume facts that could appear of record only according to fixed statutory methods, when those methods were not pursued. We have already shown that the case was not susceptible of oral testimony without some controversy or issue joined as to a matter pending before the court. Therefore, there is no proof of any accruing rents held by the garnishee or that should have been paid by it to the clerk of the court.

We are not saying that the court of equity could not have properly impounded a fund and directed a payment thereof into the registry of the court. There is no record here, however, showing that the Magnolia Petroleum Company was given any notice of such action of the court. It will be observed that it was not among those mentioned in the order upon which the appellee relies. There is no proof that it had any kind of notice to the effect the order was intended to apply to the Magnolia Petroleum Company as it did to others who were mentioned. However, if it did have actual notice of this order, we do not think it was at liberty to disregard the effect of the order without other or further directions or instructions from the court in so far as the same applied to appellant here.

We are unwilling to say and do not say that after the garnishee had filed its answer that it must follow the case and take notice, when in fact none was given, of all actions of the court.

Under the authorities above cited, until there was a traverse of its answer, it was not required or expected to

take notice of any act except the rendition of the judgment or order to pay over the $75. No other fund had been drawn into the court except that sum. See § 4906, Crawford & Moses' Digest.

In the matter of an equitable garnishment, which is not controlled by the statute, we have recently held that a recovery could be had only to the date of filing answer. It is not reasonable that a statutory proceeding should furnish any broader remedy than the more flexible equitable remedy. *Mabry* v. *Manney,* 190 Ark. 154, 160, 77 S. W. (2d) 975.

In that case the garnishee was making an effort to cover or conceal the amount of indebtedness, and, as shown by the complaint and proceedings, the plaintiff was pursuing the garnishee to uncover certain assets protected by the fraudulent conduct of the garnishee controlled by the defendant and his subordinates who filed all the answers.

It is not the view of this court that a reversal of this case will necessarily work a discharge of the garnishee after paying the $75. We are only holding that the procedure followed was erroneous, that this case should be reversed and remanded with directions to enter judgment for $75, and no more, unless the answer of garnishee be traversed, and it be shown that the garnishee had knowledge of the court's order impounding funds due from garnishees, and that it acted contrary to such order after such knowledge, which facts may be shown by proper pleadings and proof, if it be available, in which event the court may then proceed to determine the amount of money properly impounded, if any, and render judgment accordingly.

It is so ordered.

MISSOURI PACIFIC RD. CO., BALDWIN, ET AL., TRUSTEES, *v.* WESTERFIELD.

4-4257

Opinion delivered April 6, 1936.

Thomas B. Pryor and *Harvey G. Combs,* for appellants.

Clark & Clark and *R. W. Robins,* for appellee.

MEHAFFY, J. The appellee brought this action against the appellants in the Faulkner Circuit Court to recover damages for injuries alleged to have been caused by the negligence of the appellants. Among other things, he alleged in his complaint: "On January 13, 1934, the plaintiff was driving his automobile south along highway No. 65 at the southern corporate limits of the city of Conway, Arkansas, and while he was driving said automobile across an industrial track leading upon the main line of the track of the defendant, Missouri Pacific Railroad Company, into the property of the Conway Compress Company, the said defendant negligently, carelessly and without warning, ran a train of freight cars violently and suddenly against the automobile in which the plaintiff was traveling, turning said automobile partially over and dragging plaintiff's automobile for a distance of approximately 150 feet."

The complaint then alleges that the collision was caused solely by the negligence of appellants, and that appellee sustained painful, serious and permanent injuries, including a broken and stiffened arm, sprained back and shoulder, and other injuries, and that the injuries caused great pain and suffering, and caused him to expend certain sums for medical attention and hospital bills; that appellee's automobile was completely wrecked. It was also alleged that the appellants failed to keep a proper lookout for persons and property on said track, and failed to give any proper warning of the approach of said train, and failed to have said train of cars under any control whatever.

The appellants filed answer, denying all the material allegations in the complaint, and pleading contributory negligence. There was a jury trial, a verdict and judgment for $800. Motion for new trial was filed and overruled, and the case is here on appeal.

It is contended by appellants that the court erred by modifying one of the instructions requested by appellants, and that the court erred in giving this instruction as modified. The record shows that the court gave the instruction as asked by appellants without any modification, and the record does not show any objection or exception by the appellants.

The only other error alleged as to the instructions is that the court erred in its refusal to give an instruction directing the jury to return a verdict for the defendant. The appellants' theory is that the evidence is insufficient to sustain the verdict. This is the only question for our consideration.

The appellee testified that he was a physician, past 83 years of age, and had been practicing medicine in Faulkner County since 1894. The accident occurred south of town, where the side track crosses the highway going to Little Rock. He was traveling on highway 65, on which there is a great deal of traffic; was going south to Little Rock between 9 and 10 o'clock in the morning. The Missouri Pacific maintains an industrial spur track that crosses the highway from the main line over to the Con-

way Compress east of the highway; the highway runs north and south; the spur or industrial track is not used frequently; no warning sign is maintained by the railroad company, and he was keeping a lookout. This crossing is not treated as a regular crossing, in the way of putting up signs. He was traveling in a Plymouth coupe and going about 20 or 25 miles an hour. As he was traveling that morning, he saw a number of hitch-hikers every hundred feet or so on the right-hand or west side of the highway. He is not in the habit of picking up hitch-hikers, though a number of them tried to flag him that morning. There was nothing on the left side of the road to interfere with his view, but on the other side there were some bushes and things along down there, and a street crossing at the same place, just beyond the spur.. It was Saturday morning, and a number of people coming to town. He was watching out for cars. Does not know how close he was to the crossing when he saw the box car slip up there from behind the bushes, and a sign there that obstructed his view. As soon as he saw the box car he applied the brakes, but did not get his car stopped. He was just about on the track when he saw the box car, and he skidded about 30 feet before he hit the track. He applied the brakes with all his force, but could not keep the car from going on the track. The box car was coming toward him from the west. Saw three box cars together, but did not see any locomotive attached to the cars, and did not see any brakemen on the cars. The front box car struck his car and pushed it about 100 feet. The car was demolished and he was injured. He then describes his injury, but it is unnecessary to set out this testimony, because there is no question about the amount of the verdict.

Appellee testified on cross-examination that he did not see the cars until they turned in, and he could not stop. He was looking for cars passing that morning going and coming, and people coming to town, some on foot. There was nothing to prevent him from seeing the cars if he had been looking that way. The people that he saw appeared to be on the right-hand side of the track, and

he thought they were hitch-hikers. Appellee's testimony is corroborated by other witnesses, and it is undisputed that the appellants made what is known as a "flying switch," kicking the cars in from the main line onto this spur, and it is undisputed that appellants did this without having any person on any of the three cars. None of the train men or railroad men had any flag or lantern or anything to indicate that they were railroad men, and the appellee thought they were persons wanting a ride.

The witnesses for appellants testified in substance that they were protecting the crossing, a conductor on one side of the track, and the brakeman on the other. The conductor testified that he did his best to protect the crossing, but he did not claim to have any flag or anything that indicated that he was a railroad man, although the undisputed evidence shows there was a flag in the caboose, but he did not use it. He testified that the movement of the cars was the regular movement; that there was nothing to hinder appellee from seeing the cars that were kicked on the track. This testimony was corroborated by other evidence.

The undisputed facts are that the railroad company kicked or shunted these three cars from the main track onto the industrial track with no one on the cars to use the brakes if necessary, no possible way in which the cars could have been stopped or their speed checked, although they were kicked directly across a highway that was being traveled by the people constantly, and no explanation or reason is given for this. Railroad company contents itself by saying that it was the usual way. Everybody knows that it is dangerous to make a flying switch across a much traveled highway without any possibility of stopping the cars or checking their speed if they should discover some one on the track ahead of them. The evidence shows that the conductor was on one side of the track and the brakeman on the other side, but the evidence also shows that they had a flag in the caboose, but did not use it. It is a matter of common knowledge that on the public highways persons are constantly found on the side of the road flagging automobiles for the pur-

pose of trying to get rides. The evidence shows that at this particular place there were hitch-hikers, and Dr. Westerfield believed that these railroad men that were waving their hands were people wanting to stop him to get a ride. As to whether he was guilty of contributory negligence was a question of fact for the jury, and, while courts generally hold that making a flying switch across a public highway in the manner in which this was done is negligence, yet the question of the company's negligence was submitted to the jury.

As we have said, the only error complained of is that the court refused to direct a verdict for the appellants. "Under our judiciary system it is the province of the jury to determine the credibility of the witnesses and the weight of the evidence, under proper instructions as to the principles of law applicable thereto. And the court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deducted from their testimony, it is plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon." *St. Louis-San Francisco Railway Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910. There are many decisions of this court to the effect that, if there is any substantial evidence to support the verdict of a jury, we cannot set the verdict aside. "In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence, or where the evidence is not in dispute, but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict." *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. (2d) 1043. We have often held that in determining the sufficiency of the evidence to support the verdict, we must view the evidence with every reasonable inference arising therefrom, in the light most favorable to the appellee. *Roach* v. *Haynes,* 189 Ark. 399, 72 S. W. (2d) 532; *Healy & Roth*

v. *Balmat,* 189 Ark. 442, 74 S. W. (2d) 242; *Camden Fire Ins. Ass'n* v. *Reynolds,* 190 Ark. 390, 79 S. W. (2d) 54; *Arkadelphia Sand & Gravel Co.* v. *Knight,* 190 Ark. 386, 79 S. W. (2d) 71.

The appellant cites and relies on *St. L.-S. F. Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. (2d) 611, and *St. L.-S. F. Ry. Co.* v. *Harmon,* 179 Ark. 248, 15 S. W. (2d) 310, and *St. L.-S. F. Ry. Co.* v. *McClinton,* 178 Ark. 73, 9 S. W. (2d) 1060. Appellants quote from these cases, on the question of a necessary lookout. We do not think these cases are applicable. In the instant case it is conceded that there was no lookout on the train of cars, and they were shunted across the highway without any lookout. It is true there were two men on the ground, the conductor and a brakeman. No matter what lookout they may have kept, they could not have stopped the cars. In view of the fact that hitch-hikers are constantly flagging automobiles, and especially at this particular place, the jury probably concluded that the appellee was justified in thinking these men were hitch-hikers, because there was nothing about them to indicate that they were railroad men.

There was substantial evidence to sustain the verdict, and, under the settled rules of this court, we have no authority to set the verdict aside.

The judgment is affirmed.

[redacted]

ROCKAFELLOW *v.* ROCKAFELLOW.

4-4209

Opinion delivered April 6, 1936.

[redacted]

Witt & Witt, Owens & Ehrman and *E. L. McHaney, Jr.*, for appellants.

Murphy & Wood, for appellee.

JOHNSON, C. J. The purported last will and testament of Mrs. M. J. Rockafellow of Garland County, Arkansas, was on January 10, 1934, presented to and probated in common form before the probate court of Garland County. Mrs. Rose Scruggs and F. J. Carroll were the subscribing witnesses to the will, and they subscribed the necessary affidavit of due proof of execution. On January 13, 1934, William B. Rockafellow, appellee, here, instituted this contest of the will of Mrs. M. J. Rockafellow in the probate court of Garland County and joined as defendants thereto Charles A. Rockafellow, Nell M. Rockafellow, his wife, F. J. Carroll, and Helen Carroll, his wife, and Charles Francis Carroll, the son of F. J. and Helen Carroll.

Prior to the trial of the contest in the probate court, F. J. Carroll filed his renunciation of any interest under or by virtue of the terms of the will. The probate court upon a hearing of the contest determined that the instrument was the last will and testament of Mrs. M. J. Rockafellow. The will in substance provided, after directing that the testator's debts be paid: That no property should be sold or exchanged until three years after her death; it then made an outright gift to Charles A. Rockafellow of $20,000 providing that this was to reimburse him for the services he had rendered to her and for money he had paid out in her behalf, and for certain property which his father had directed that he should have after his mother's death. It further stated that he had worked for her for the past 25 years, looking after her property and business affairs, and had attended

to all the management of same, leasing her property, collecting her rents, and performing all such services for her, for which he had received only nominal remuneration. The will then recited that William B. Rockafellow and his wife had lived with Mrs. M. J. Rockafellow for many years, during all of which time she had furnished them food and clothing, and that she had made advancements to William B. Rockafellow in the amount of several thousand dollars, which debt she thereby canceled. The will then made bequests to Nell M. Rockafellow and Frances Rockafellow, the wives of Charles Rockafellow and William B. Rockafellow, respectively, in the sum of $1,000 each. The will then gave the residue of the estate, share and share alike to Charles A. Rockafellow and William B. Rockafellow. It also bequeathed a house and lot at 240 Whittington Avenue to Francis and Helen Carroll and provided that Charles A. Rockafellow should pay for the education of Charles Francis Carroll out of funds bequeathed to him.

Contestants appealed from the adverse judgment of the probate court to the circuit court of Garland County. Prior to the trial of the contest of the will in the circuit court, Helen Carroll, wife of the witness, F. J. Carroll, filed her renunciation of any interest under the terms of the will and thereupon her name was stricken from the record as a party defendant.

Upon trial of the contest proceedings in the circuit court, it was determined that F. J. Carroll was not a competent subscribing witness to the will of Mrs. M. J. Rockafellow, and there not being two other competent subscribing witnesses to the execution of said will, directed the jury to return a verdict in favor of contestants and from a consequent judgment this appeal comes.

Under the recited facts the legal query arises—was F. J. Carroll a competent subscribing witness to the will of Mrs. M. J. Rockafellow? This legal query will be considered from the following viewpoints: First, is a subscribing witness to a will rendered incompetent because designated therein as a beneficiary? Second, if not, is such subscribing witness rendered incompetent because his wife is designated in the will as a beneficiary?

As a preliminary to consideration of the questions propounded it may be said that every person of lawful age and of sound and disposing mind has the untrammeled right to dispose of his estate by will, subject only to well-defined limitations prescribed by law. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; 28 R. C. L., title, Wills, § 10. Moreover, each State has the independent right to prescribe the circumstances and conditions under which a will may be executed. See *U. S.* v. *Fox,* 94 U. S. 315, 24 L. Ed. 192.

By the statutes of this State two subscribing witnesses to the execution of a will are necessary to its validity. In reference to attestation, subdivision four of § 10,494 of Crawford & Moses' Digest provides: "There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

Where one of the necessary subscribing or attesting witnesses to a will is a beneficiary therein, such bequest may be voluntarily released and thereby such subscribing witness becomes competent. Section 10,533 of Crawford & Moses' Digest provides: "If any person shall attest the execution of any will to whom any legacy or bequest is thereby given, and such person before giving testimony concerning the execution of such will shall have been paid, or have accepted or released, or shall refuse to accept such legacy or bequest upon tender thereof, such person shall be admitted as a witness to the execution of such will, and the credit of such witness shall be subject to the consideration of the court and jury," and by § 10,529 of Crawford & Moses' Digest such necessary subscribing witness may be compelled to so testify. This section provides: "If any person shall be a subscribing witness to the execution of any will wherein any beneficial devise, legacy, interest or appointment of real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, such device, legacy, interest or appointment shall be void, so far only as concerns such witness, or any person claiming under him, and such person shall be a competent

witness, and may be compelled to testify respecting the execution of such will, in like manner as if no devise or bequest had been made to him."

From the statutes just quoted it definitely appears that the common-law incapacity of a necessary subscribing witness because of a bequest to him in the instrument has been removed, and that by virtue of said statutes such subscribing witness is now made competent unless an inconsequential bequest to the subscribing witness' wife incapacitates him. It follows from this that F. J. Carroll is a competent subscribing witness to the will of Mrs. M. J. Rockafellow unless the bequest to Helen Carroll, wife of the witness, F. J. Carroll, renders him incompetent.

Does the bequest to Helen Carroll render her husband, F. J. Carroll, incompetent as a subscribing witness?

Appellant contends that the bequest to Mrs. Helen Carroll is void by reason of §§ 10,529 and 10,533 of Crawford & Moses' Digest, cited *supra.* But if not, that the prohibition contained in § 4146 of Crawford & Moses' Digest inhibiting husband or wife testifying for or against each other has no application to the probation of a will and cite in support of these contentions: *Jackson, etc.* v. *Woods,* 1 Johns. Cas. (N. Y.) 163; *Jackson* v. *Durland,* 2 Johns. Cas. (N. Y.) 314; *Woodbury* v. *Executor of Collins,* 1 Desaus. (S. C.) 424; *Kaufman* v. *Murray,* 182 Ind. 372, 105 N. E. 466; *Lanning* v. *Gay,* 70 Kan. 353, 78 Pac. 810; and that when F. J. Carroll was tendered as a witness in the contest proceedings in the circuit court his wife was not a party thereto, nor interested in the subject-matter thereof. On the other hand appellee asserts the converse of appellants' contentions and cites *Sullivan* v. *Sullivan,* 106 Mass. 474, 8 Am. Rep. 356, and numerous other cases following its lead.

Under the Constitution and laws of this State, we believe neither line of cases cited by the respective parties have controlling effect. The New York cases cited and relied upon by appellants are grounded upon the common-law unity of husband and wife, and this rule has but little support under the Constitution and laws of this State. Section 7 of art. 9 of the Constitution of

1874 declares that the real and personal property of a *femme covert* in this State acquired either before or after marriage shall be and remain her separate estate so long as she may choose and may be devised or conveyed by her the same as if she were a *femme sole,* and that the same shall not be subject to her husband's debts. Following the lead of this constitutional mandate, legislation has been enacted from time to time by the Legislature of this State making further inroads into the common-law rule of unity of husband and wife. Section 5577 of Crawford & Moses' Digest being a fair example of the inroads thus accomplished. It provides: "Every married woman and every woman who may in the future become married shall have all the rights to contract and be contracted with, to sue and be sued, and in law and in equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a *femme sole;* provided, it is expressly declared to be the intention of this act to remove all statutory disabilities of married women as well as common-law disabilities, such as the disability to act as executrix or administratrix as provided by § 6 of Kirby's Digest, and other statutory disabilities."

It may now be safely said that there remains only the skeleton of the common-law rule of unity of husband and wife in this State, and it follows that the legal reasoning upon which the New York cases and those which follow their lead are grounded do not exist under the Constitution and laws of this State; therefore, these cases are without controlling effect.

Neither can we agree with appellee's contention that *Sullivan* v. *Sullivan, supra,* and other cases following its lead are decisive of the question here under consideration. The Sullivan case is grounded upon statutory enactments of the State of Massachusetts. It is expressly pointed out in the opinion that, "* * * And the statutes removing the objections to the competency of witnesses on the grounds of interest and of the relation of husband and wife are expressly declared not to apply to attesting witnesses to a will or codicil."

By § 2 of the schedule to the Constitution of 1874 it is provided that in civil actions no witness shall be

excluded because he is a party to a suit or interested in the issues to be tried, and there is no saving clause in favor of husbands or wives as there appears to have been in the State of Massachusetts at the time the Sullivan case was decided. The only statutory limitation existing in this State against husbands and wives testifying for or against each other will be found in § 4146 of Crawford & Moses' Digest as amended by act 230 of 1931, and it provides: "All persons except those enumerated herein shall be incompetent to testify; * * * Third. Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsist or afterwards, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent. * * *"

It definitely appears from the express terms of the statute quoted that in a civil action in this State all persons may testify except those expressly excluded, and husbands and wives being excluded rests upon the conditions therein expressed. In other words we construe this statute to mean that in civil actions husbands and wives are incompetent to testify for or against each other save on the conditions therein stated. Of course the conclusions here announced do not impair the rule of testimony in criminal cases between husbands and wives (see *Jenkins* v. *State,* 191 Ark. 625, 87 S. W. (2d) 78), as the rule in such cases rests upon other reasons. Is this rule applicable to the probate of last wills and testaments?

A civil action is defined by § 1028 of Crawford & Moses' Digest as follows: "A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture." By § 1029 every other remedy in a civil case is a special proceeding, and in application of these sections we have held that guardianship proceedings are special. See *Nelson* v. *Cowling,* 89 Ark. 334, 116 S. W. 890.

Under constitutional provisions and statutes not materially different from ours, the Supreme Court of Kansas in *Lanning* v. *Gay, supra,* held, quoting from the headnotes. "1. A husband who is one of the subscribing witnesses to a will is not disqualified from giving testimony to establish its due execution before the probate court because of the fact that his wife is a legatee."

"2. The provisions of § 4771, Gen. St. 1901, which render a husband or wife incompetent to testify for or against each other in an action, except in certain cases, do not disqualify a husband from testifying before a probate court in a proceeding to establish a will in which his wife is named as a legatee."

We have reached the identical conclusion entertained by the Supreme Court of Kansas: that the probation of a will under the laws of this State is a special proceeding, and not a civil action, and that the inhibition contained in § 4146 has no application to such proceeding. It follows from this conclusion that a husband of a beneficiary in a will may be a competent subscribing witness thereto.

The next question which arises for consideration is the competency of the husband of a beneficiary in a will to testify as a witness in a contest of its validity. It is axiomatic that the competency or incompetency of any witness in a civil action arises only when such witness is introduced as such. See 28 R. C. L., § 35, p. 448.

At the time F. J. Carroll was offered as a witness in the contest proceedings in the circuit court—and this is the point of time when his competency must be determined—his wife was not a party to the suit and had no interest in the subject-matter thereof because she had previously disclaimed the testamentary bequest, and her name had been stricken as a party to the proceedings. We conclude, therefore, that F. J. Carroll was a competent witness and that the trial court erred in holding otherwise.

For the reasons stated, the cause must be reversed and remanded with directions to proceed with the contest of the will in conformity to law, and not inconsistent with this opinion.

EVANS *v.* F. L. DUMAS STORE, INC.

4-4268

Opinion delivered April 13, 1936.

Claude E. Love, for appellant.

N. A. Cox, for appellee.

BUTLER, J. Appellee was the owner of the record title of SW¼ of SW¼, section 5, township 17 south, range 14 west, in Union County, Arkansas. This land was sold for the taxes delinquent in 1930 to the appel-

lant, and the two years for redemption having expired, a tax deed was issued to him. Appellee filed suit to cancel said deed and from a decree granting the prayer of his complaint comes this appeal.

The sole question involved relates to the validity of the sale for delinquent taxes for the year aforesaid. In the court below the appellee alleged eleven grounds as a basis for its contention, and there and now has abandoned all of these save six of the same which we will notice in the order presented.

1. The first ground for the alleged invalidity of the sale rests on the contention that there was no valid assessment of taxes against the land. This contention is based on the proposition that the testimony affirmatively shows that no assessment list was prepared and sworn to as provided by § 9901 of Crawford & Moses' Digest, and by § 9873 (a) of Castle's 1931 Supplement to Crawford & Moses' Digest. These sections, together with § 9916, Castle's Supp. (act 172, § 16 of the Acts of 1929) providing for the preservation of assessment lists made by the property-owner relate to assessments of personal property and have no application to the assessments of real estate. The assessment of real estate is governed by § 2, act 172 of the Acts of 1929 (Castle's Supplement 1931 to Crawford & Moses' Digest § 9917C). It is accomplished by the assessor without the intervention of the property-owner and the case of *American Trust Co.* v. *Nash,* 111 Ark. 97, 163 S. W. 178, cited by appellee, involved only the assessment of personal property and has no application to the assessment of real estate.

2. The next attack on the validity of the sale is on the ground that there was no valid levy for the taxes of 1930. There are five separate objections urged as follows: (a) The order levying school taxes does not levy for the year 1930. (b) It shows a levy for "teachers" which is unauthorized by the Constitution as amended. (c) There are no dollar marks or decimal points to show what money, or if any money was levied. (d) There are no ditto marks or other signs to indicate that the respective items are referred to the headings

above. (e) The order is not signed by the judge; there is no mark, certificate or other indication to identify either this order, or the whole minutes, as being what it purports to be.

(a) That part of the order of the levying court making the specific levy for district school taxes does not specify for what year the levy was made, but this was not necessary for the reason that in the opening recital of the minutes of the levying court it is declared, *inter alia,* that the purpose for which the levying court met was for levying "of the taxes for the year 1930." This sufficiently designates the year for which the levy was made and is not necessary to be repeated with respect to each item of the levy made.

(b) Under this head it is urged that the levy of 18 mills for "teachers" under the head, "Rate in mills," does not comply with the law which authorizes a levy for "maintenance of schools." The salary of teachers manifestly is for the maintenance of schools, and the levy is not invalid because a more general and broader term, "maintenance of schools" was not used, although the better practice would be to follow the language of the law, for otherwise the expenditure of the tax levied might be restricted to the salaries of teachers only, a point, however, on which we find it unnecessary to express an opinion.

(c) and (d). These objections relate to the failure to use dollar marks, ditto marks, etc. Without setting out that part of the order criticized, we think it sufficient to say that on its examination, no doubt could arise as to what rate, or for what purpose, the levy was made. No particular form is essential and one is sufficient, as in this case, where there can be no doubt as to the amount of the levy and the purpose for which it was intended.

(e) This point was not raised by any specific allegation in the complaint nor is there any indication in the record to the effect that it was pressed to the attention of the trial court. Moreover, the failure of the county judge to sign the record could not affect the validity of the levy, and if required, would serve no purpose except to authenticate said record. In support of the conten-

tion that the signature of the judge is a prerequisite to the validity of the levy, the case of *Board of Conference, etc.* v. *Phillips,* 187 Ark. 1113, 63 S. W. (2d) 988, is cited by the appellee. This case does not, however, support that contention. It is true, the record there was signed not only by the county judge, but by the justices composing the levying court; but the questions involved in that case bear no relation to those arising in the instant case, and it was not there held that the signatures were required.

In *Shultz* v. *Carroll,* 157 Ark. 208, 248 S. W. 261, cited by appellee, the record of the levying court, held to be ambiguous, is unlike the record in the case at bar. In that case the record failed to show that the figures under the head, "Amount taxes voted" 7, and under the heading, "For What Purpose" "5 gen. 2 bldg.," gave nothing to indicate what these figures were intended to represent. Whereas, in the instant case there appears over the heading, "Teachers" "Bldg.," the heading, "Rate in Mills." This removes any ambiguity and distinguishes this case from the cited case.

In *Carter* v. *Wasson,* 189 Ark. 942, 75 S. W. (2d) 819, cited and relied on by appellee, the comment by the court relative to no "dittos" appearing opposite any of the lands listed was made in connection with a duplication of assessment by reason of which the tract of land sold at the tax sale for a substantial amount in excess of the taxes, penalty and costs due, and it was for this reason that the court in that case held the tax sale invalid.

3 and 4. These objections to the validity of the sale are that the clerk did not properly list the lands or properly extend the taxes against them, and that, as delivered to the tax collector, the tax books did not correctly show a valid extension of the taxes. Section 10,009, Crawford & Moses' Digest, provides that the clerk of the county court shall make out, in books prepared for that purpose in such manner as the auditor of State shall prescribe, a complete list of all the taxable property in his county and the value thereof; and, with relation to real estate, provides that "each separate tract of real property in each congressional township in his county,

other than town or city property, shall be contained in a line, or lines, opposite the names of owner or owners, arranged in numerical order." "Each separate lot or tract of real property in each city or town shall be set down in a line, or lines, opposite the names of the owner or owners, arranged in numerical order."

Section 10,010 is as follows: "The clerk of the county court shall, after receiving statements of the rates and sums of money to be levied for the current year from the auditor of State, and from such other officers and authorities as shall be legally empowered to determine the rates or amount of taxes to be levied for the various purposes authorized by law, forthwith determine the sums to be levied upon each tract or lot of real property in his county adding the taxes of any previous year or years that may have been omitted, and upon the amount of personal property, moneys and credits listed in his county in the name of each person, company or corporation, which shall be assessed equally on all real and personal property subject to such taxes."

The objection to the listing of the lands and the extension of the taxes is that the land was described as SW SW and that there were no ditto marks, that the word "acres" was not placed after the figure "40," nor a dollar mark before the figure "140" under the column headed, "Valuation," etc. A photostatic copy of the record as prepared and transmitted to the clerk, shows that the record was divided into columns, the first being the name of the owner; then a column for parts of sections; then columns headed "Section," "Township" and "Range" followed by others for area and valuation. The first tract described opposite the name of the owner is E½ NE, section 5, township 17, range 14, 80 acres. Following this description, without dittoing the section, township and range, appear the descriptions of other subdivisions comprising a section. Following that, the first description appearing after the name of the owner is SE SE, section 6, township 17, range 14, and, as in section 5, there follows without ditto the remainder of the subdivisions of that section. Then follow descriptions commencing with W¼ SE, section 7, township 17, range

14, and continuing until the subdivisions of that section are described. Following the land descriptions appear columns for road district, school district, and rate district school tax. The next column is headed "State Tax." Immediately below is the rate in mills and then follows the column for county tax and the rate in mills. Then follows a column for district school tax and one for total State and county taxes. In each of these columns the proper extensions are made and we conclude that the record is such that any person of average information and understanding could not be mistaken as to the tract of land assessed, its valuation, and the amounts of tax assessed for the several purposes allowed by law. We are of the opinion that the record, as prepared by the clerk and delivered to the collector, is in substantial compliance with the sections of the Digest last cited above and that the case of *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. (2d) 33, cited by the appellee, is not authority to the contrary.

6. The validity of the sale is next questioned on the ground that the clerk failed to advertise the delinquent list in the manner and form required by law and that the clerk's certificate does not show that the list was published and the lands sold in conformity to law. Much of the argument under this heading is in line with that dealing with the alleged failure to list and extend the taxes, noted under headings numbered "3 and 4," and attention is called to the fact that the notice actually published is not an exact reproduction of the delinquent list on file in the clerk's office. The law does not require that this should be so.

Section 10,082, Crawford & Moses' Digest, provides: "The collector shall, by the second Monday in May in each year file with the clerk of the county court a list or lists of all such taxes levied on real estate as such collector has been unable to collect, therein describing the land or city or town lots on which said delinquent taxes are charged as the same (are) described on the tax books, and the collector shall attach thereto his affidavit to the correctness of such list. The clerk of the county court shall carefully scrutinize said list and

compare the same with the tax-book and record of tax receipts, and shall strike from said list any tract of land, city or town lot upon which the taxes shall have been paid, or which does not appear to have been entered upon the tax-book, or that shall appear from the tax-book to be exempt from taxation."

It will be observed that no particular form for the delinquent list is prescribed by this section and § 10,084, Crawford & Moses' Digest, providing for the publication of delinquent lists, is complied with where the description of land is given with the name of its purported owner and the total amount stated for which said land is to be sold. The records on file in the clerk's office show the separate amount of taxes, of penalty and of costs. These are open to the taxpayer in order that he may inform himself as to the correctness of the sum appearing in the notice of the intended sale for delinquent taxes, penalty and costs. The list involved in the case at bar, as published, showed the name of the supposed owner of each tract, its description and the total amount of tax, penalty and costs charged against it, and is a substantial compliance with the requirements of the law.

Objection is made to the heading of the publication notice in that it refers to "the taxes and penalties charged" without referring to costs, whereas the certificate shows that the lands were sold for "the taxes, penalty and costs." The notice and certificate are substantial copies of the form prescribed by § 10,085 of Crawford & Moses' Digest and of the recitals in the certificate made by the clerk of the sale prescribed by § 10,092, *ib.*

7. It is next contended that the tax deed is void on its face because several tracts of land were included in the deed for which a gross amount was paid. This objection would be well taken under the rule announced in *Cocks et al.* v. *Simmons*, 55 Ark. 104, 17 S. W. 594, and *Campbell* v. *Sanders,* 138 Ark. 94, 210 S. W. 934, but for the fact that this rule has been changed by statute now found as § 10,108, Castle's 1927 Supplement to Crawford & Moses' Digest, which permits one owning more than one certificate of purchase, or having a certificate

of purchase for more than one tract of land purchased at any one sale to have included in one deed any number of such tracts sold at the same sale.

Appellant contends that appellee's cause of action is barred by the provisions of § 10,119, Crawford & Moses' Digest. This question we need not decide for the reason that as we view the record, as presented and argued by counsel, we find the tax sale valid and that the deed to the appellant based thereon served to divest the title of the appellee. Accordingly the decree of the trial court is reversed, and the cause is remanded with direction to dismiss the complaint of appellee for want of equity, and confirm title in appellant.

GEYER *v.* WESTERN UNION TELEGRAPH COMPANY.

4-4278

Opinion delivered April 13, 1936.

Quillin & Quillin, for appellant.

Francis R. Stack and *W. C. Rodgers,* for appellee.

MEHAFFY, J. This is an action for damages brought by the appellant against the appellee. The appellant alleged that she was the sister of Walter Leslie Francis, who died on May 20, 1935, and that her sister, Cora Tumbleson, sent the following message to her: "Cincinnati, Ohio, May 20, 1935.

"Anna Geyer, Mena, Arkansas.

"Leslie died funeral Manchester Friday 2 P. M.

"Cora."

It is alleged that the appellee negligently and carelessly delivered said telegram to her in Mena, Polk County, Arkansas, in the following form: "Cincinnati, Ohio, May 20, 1935.

"Anna Geyer, Mena, Arkansas.

"Leslie died suddenly Manchester Friday 2 P. M.

"Cora."

Funeral services were held for Walter Leslie Francis and his body was buried at Manchester, Ohio, on Friday, May 24, 1935. Appellant then alleges the affection between herself and brother, and that solely by reason of the negligent act of appellee in altering and delivering said message to her in Mena, Arkansas, she was prevented from and denied the privilege of attending the funeral; that except for the negligence of appellee she would have attended. She alleges that as a result of the negligence of appellee she suffered great shock, illness, physical pain and nervousness to her damage in the sum of $2,900; that her nervousness and physical illness was produced solely by the negligence of appellee, and that she was compelled to employ physicians to treat her. She also alleges her physical condition prior to the message, and subsequent thereto, and that she was compelled to incur the expense of $75.

The appellee, without admitting liability, offered to confess judgment in the sum of $5, which offer was refused by appellant. The appellee thereupon filed the following demurrer: "Comes the defendant herein and

demurs to the complaint of the plaintiff in this action, and for reasons, says:

"1. The complaint does not state facts sufficient to constitute a cause of action as to the $2,900 claimed by plaintiff. 2. The complaint does not state facts sufficient to constitute a cause of action as to the item of $75 claimed. 3. The complaint does not state facts sufficient to constitute a cause of action, except for nominal damages not exceeding $5."

The trial court sustained the demurrer. The appellant declined to plead further, and the action was dismissed. The appellant prosecutes this appeal to reverse the judgment of the circuit court.

It is contended by the appellant that the pleading filed by the appellee, although called a demurrer, was not in fact such, and that we must look to the substance rather than to the name, and that a pleading is treated according to what its substance shows it to be, regardless of what it is called. This is true, but it is also true that pleadings under the code are liberally construed, and every reasonable intendment is indulged in behalf of the pleader. *Holcomb* v. *American Surety Co.,* 184 Ark. 449, 42 S. W. (2d) 765.

While the complaint was not paragraphed, yet there was one count for $2,900 and one for $75. It was manifestly the intention of the appellee to demur separately to each of these counts, and we think the court correctly treated the pleading filed as a demurrer.

Appellee correctly states that its offer of compromise, or offer to confess judgment, should not be deemed to be an admission of the cause of action, or the amount to which plaintiff is entitled, nor be given in evidence on the trial. *Bates* v. *Blocher,* 175 Ark. 891, 1 S. W. (2d) 11.

It is also contended by the appellee that the change in the message could not have misled appellant, and that the message, as delivered to appellant, substituting the word "suddenly" for the word "funeral," could not have meant anything but that his funeral would be at Manchester. The message as delivered to appellant was that he died suddenly, Manchester, 2 P. M. We think any rea-

sonable interpretation of this message would be that he died suddenly at Manchester on Friday at 2 P. M., and there was nothing to indicate that his funeral would be Friday, but the presumption would be that he died suddenly at Manchester, and that his funeral had already been held.

Appellee cites and relies on the case of *Peay* v. *Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965. The court said in that case: "It will be borne in mind that the damages claimed in this action are alleged to have been caused by breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance, and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone, can be measured by any practical or just rule." Appellee also cites and relies on *Spade* v. *Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88. In that case a recovery was sought for fright, and the court held that no recovery could be had for such physical injuries as may be caused solely by such mental disturbance.

It may be conceded that there are numerous authorities which hold that under the common law no recovery can be had for mental anguish or fright caused by mere negligence, and some authorities hold that if the physical pain and bodily injury follows as a sequel to the mental anguish, no recovery can be had. The general rule seems to be that no recovery can be had under the common-law for fright or mental anguish caused by mere negligence, but that for wilful conduct causing fright or mental anguish, a recovery may be had.

The important question in this case is whether there can be a recovery, or rather whether a recovery is prohibited, by reason of the fact that this was an interstate message. Numerous authorities are referred to by appellee, but we will not undertake to discuss them all. One of the cases argued is *Western Union Tel. Co.* v. *Brown*,

234 U. S. 542, 34 S. Ct. 955. In that case the message was delivered to the company in South Carolina, and addressed to the plaintiff in Washington, D. C. The court said: "It is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort, that accompanies the person of the defendant elsewhere, and that is not only the ground, but the measure of the maximum recovery."

The general rule is that one must recover in a tort action under the law of the place where the tort was committed, and in the instant case the complaint alleges that the change in the message substituting "suddenly" for "funeral" was at Mena, Arkansas. In other words, it is alleged that a tort was committed in Arkansas, and suit was brought in Arkansas. Therefore the tort action must be tried under the laws of Arkansas. In the Brown case, *supra,* the court, after deciding the case holding that one could not go beyond the jurisdiction of the State and recover under a statute creating liability in another State, or jurisdiction, said: "What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another, or to this district, by determining the consequences of not pursuing such conduct, and in that way encounters *Western Union Telegraph Co.* v. *Pendleton,* 122 U. S. 347, 7 S. Ct. 1126, a decision in no way qualified by *Western Union Tel. Co.* v. *Commercial Milling Co.,* 218 U. S. 406, 31 S. Ct. 59."

In the Pendleton case, *supra,* it was shown that there was an attempt by Indiana to regulate the mode in which messages sent by telegraphic companies doing business in her limits, shall be delivered in other States, and the court said this could not be upheld. In other words, in that case it was held that Indiana could not regulate the mode in which messages were delivered in Texas. The

court also said: "Undoubtedly under the reserve powers of the State which are designated under the somewhat ambiguous term of 'police powers,' regulations may be prescribed by the State for the good order, peace and protection of the community." In other cases cited in the Brown case, that is *Western Union Tel. Co.* v. *Commercial Milling Company,* the court said: "And there can be liability to the sender of the message as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility, to make the measure of its default, not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty, a duty, we may say, if performed or omitted, may have consequence beyond the damage in the particular case. This the statute of the State, expressing the policy of the State, declares shall not be. For the reasons stated we may think this may be done, and it is not an illegal interference of interstate commerce."

The case of *Southern Express Co.* v. *Byers,* 240 U. S. 612, 36 S. Ct. 410, was a suit for mental anguish occasioned by failure promptly to deliver a casket, etc. The court said: "The action is based upon a claim for mental suffering only, nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here the long-recognized common-law rule permitted no recovery; the decisions to this effect rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation."

Courts generally hold that there can be no recovery for mental anguish alone, caused by mere negligence. But so far as we know, no court has held that interstate transportation or transmission companies are relieved from liability for a tort committed in the State where suit is brought. Neither the interstate commerce act,

nor any other act, so far as we know, undertakes to relieve wrongdoers from the consequences of their wrongful conduct resulting in damages to others.

The complaint in this case does not ask damages for mental anguish or fright. It is expressly stated that the wrongful conduct took place in Mena, Arkansas, and that it resulted in physical pain and injury, and in the necessary expenditure of money. We have held that in determining whether a demurrer to a complaint should be sustained, every allegation made therein, together with every inference reasonably deducible therefrom, must be considered. *Texarkana Spec. Sch. Dist.* v. *Ritchie Grocer Co.,* 183 Ark. 881, 39 S. W. (2d) 289; *Harnwell* v. *Arkansas Rice Growers Co-op. Assn.,* 169 Ark. 622, 276 S. W. 371; *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. (2d) 408; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826.

Our conclusion is that the complaint states a cause of action. The judgment is reversed, and the cause is remanded with direction to overrule the demurrer, and proceed with the trial of the cause.

McHaney and Baker, JJ., dissent.

S. R. Thomas Auto Company *v.* Wiseman, Commissioner of Revenues.

4-4329

Opinion delivered April 13, 1936.

Owens & Ehrman and *E. L. McHaney, Jr.*, for appellants.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh*, Assistant, and *Millard Alford*, for appellee.

SMITH, J. The appellants in this case are corporations engaged in the retail automobile business in the city of Little Rock. Each of them had been in business for some time prior to July 1, 1935, the date on which act 233 of the Acts of 1935 (Acts of 1935, page 951), commonly referred to as Sales Tax Act, became effective. They had each acquired a number of second-hand automobiles received in part payment for new ones before that date. The only question presented on this appeal is whether used cars so acquired by appellants before July 1, 1935, and sold by them after that date, are subject to the sales tax. These dealers seek exemption from the payment of this tax under sub-division "i" of § 3, of act 233, which reads as follows: "The test of a sale at retail is whether the sale is to a consumer for use and not for resale. Sales of goods which, as ingredients or constituents, go into and form a part of the tangible personal property for resale by the buyer are not within the act; also sale of tangible personal property where other property is accepted as part of purchase price, such personal property so accepted to be resold, is not subject to tax."

The appellant dealers had sold a number of these cars after the act became effective, which they had on hand prior to that date, and they sought by this proceeding to restrain the commissioner of revenues from attempting to enforce payment of the tax on such sales. A demurrer to the complaint praying this relief was sustained, from which decree is this appeal.

It was alleged in the complaint that the commissioner of revenues had properly ruled that automobiles accepted in trade after July 1, 1935, were not subject to the sales tax when resold because such sales are specifically exempted from the tax by the paragraph of the act above quoted. It is argued that this exemption from the tax applies to all sales of cars taken in part payment of other cars, whether they were acquired before or subse-

quent to July 1, 1935, and that to construe the act otherwise leads to the anomalous result of a dealer having cars acquired in an identical manner, on some of which a sales tax must be paid; on others not.

But it is not the acquisition of the car by the dealer for sale which is taxed. It is the sale thereof by the dealer upon which he must collect and account for the tax imposed upon that transaction. The first sentence of the paragraph above quoted is that: "The test of a sale at retail is whether the sale is to a consumer for use and not for resale." The tax here sought to be collected is upon such a sale. The commissioner seeks to collect the tax upon cars that have been sold since July 1, 1935, and these sales are taxable unless an exemption is found in the paragraph of the act above quoted. It is not without significance that the car, the sale of which is exempted from the tax, is the car which "is accepted as part of the purchase price" and not cars which were or had been so accepted. The tax is due and collectible at the time the sale is made. All statutes have prospective operation only unless the terms thereof clearly show a legislative intention that they should operate retrospectively. *School District No. 41* v. *Pope County Board of Education,* 177 Ark. 982, 8 S. W. (2d) 501. The Sales Tax Act must be so construed.

In the recent case of *Wiseman, Commissioner* v. *Madison-Cadillac Company,* 191 Ark. 1021, 88 S. W. (2d) 1007, the contention was made that no tax was collectible upon the sale of automobiles, whether old or new, for the reason, there urged that, at the time of the passage of the sales tax law, there was already imposed a privilege or license upon automobiles. We held against that contention and in so holding, said that in all cases of doubt as to the inclusion of particular property within the terms of a revenue statute, the presumption was in favor of the taxing power and the burden was upon the claimant to establish clearly his right of exemption. This statement was reaffirmed in the still later case of *Wiseman* v. *Ark. Wholesale Grocers Association, ante* p. 313, 90 S. W. (2d) 987.

It is no doubt true, as counsel for appellants say in their brief, that the General Assembly was advised that sales of automobiles are commonly made by taking an old car in part payment of a new one, and that is true also of numerous other articles. It is argued therefore that when the tax is collected and reported on the total sales price on a new car, it would be double taxation to tax the subsequent sale of the old car which had been received in part payment of the new one.

The first answer to this argument, which suggests itself, is that no attempt is being made to collect the tax on the sale of the new cars made before July 1, 1935, in part payment of which the old cars were received, but sold subsequent to that date. The second answer is that we find no authority for the exemption in the act. The tax is imposed upon "all sales at retail of tangible personal property" (unless exempted therefrom). Paragraph "A," § 4, act 233 of 1935, p. 593. Automobiles, whether old or new, sold subsequent to the effective date of the act, are subject to the tax, unless received as part of the purchase price, since the act became effective. The appellant retailers should have collected the tax with which the revenue commissioner here charges them. Section 10 of the act (p. 597) requires the retailer who neglects, fails or refuses to collect the tax from his purchaser, to pay it himself.

The decree here appealed from so ordered, and, as it is correct, it must be affirmed.

KIRK *v.* ELLIS.

4-4267

Opinion delivered April 13, 1936.

[redacted]

T. A. French and *O. T. Ward,* for appellant.

Arthur Sneed, for appellee.

McHaney, J. This is an action in ejectment by appellant against appellees to try title to and obtain possession of the north half of the southwest quarter and the southwest quarter of the southeast quarter of section 1, township 20 north, range 7 east, in Clay County, Arkansas. Appellant claimed title as follows: (1) Forfeiture and sale to the State in 1929 for the delinquent taxes for 1928; (2) decree of confirmation of said sale and quieting title in the State on November 30, 1932, under the provisions of act 296 of 1929; (3) deed from the State to Leslie M. Renfro, dated January 4, 1934; and (4) deed from Renfro to appellant, dated March 30, 1934. Appellees defended the action on the ground that the forfeiture and sale to the State were void, and that therefore appellant acquired no title for these reasons: (1) that the county clerk did not deliver to the collector the tax books with his warrant attached thereto as provided by § 10,016, Crawford & Moses' Digest, before the first Monday in January, 1929, it being stipulated that said books were delivered on January 16, 1929; (2) that the collector did not file with the clerk, prior to the second Monday in May, 1929, the delinquent list as required by § 10,082, Crawford & Moses' Digest; and (3) that the delinquent list for 1928 taxes did not have attached an affidavit of the collector as to its correctness as required by said § 10,082. Appellant demurred to the answer on the ground that it did not state a defense. The court overruled the demurrer. Proof was made establishing the defense set up, or the facts were stipulated, and judgment was rendered for appellees in which it was held that the forfeiture and sale were void for the reasons above stated. The case is here on appeal.

We think the court erred in so holding. Section 9 of act 296, Acts of 1929, p. 1235, provides: "The decree of the court confirming the sale to the State shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of

any informality or illegality in the proceedings; and the title to land shall be considered as confirmed and complete in the State forever; saving, however, to infants, persons of unsound mind, imprisoned beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the State's title to said land within one year after the disabilities may be removed. The owner of any lands embraced in the decree may within one year from its rendition have the same set aside in so far as it relates to the land of the petitioner by filing a verified motion that such person had no knowledge of the pendency of the suit, and setting up a meritorious defense to the complaint upon which the decree was rendered." See, also, act 119 of 1935, p. 318, superseding and repealing said act 296.

This act has been applied and construed in *Little Red River Levee District* v. *State,* 185 Ark. 1170, 52 S. W. (2d) 46, and in *Stringer* v. *Conway County Bridge District,* 188 Ark. 481, 65 S. W. (2d) 1071. In the latter case, the court said: "When lands are forfeited to the State for nonpayment of taxes, and confirmation is had under act 296 of 1929, all irregularities and informalities connected with the forfeiture and sale for taxes are cured, and in all cases where the State had the power to sell, the title may be confirmed in the State. If the State did not have the power to sell for taxes, then, of course, the sale would be absolutely void, and a confirmation would be void. If taxes on a tract of land had already been paid, the sale would be void, or if the property was not subject to taxation; but in all cases where the State has power to sell, and a decree has been entered in accordance with the provisions of act 296 of 1929, although the sale may be void for irregularities and informalities, all persons are barred by the decree of confirmation, and cannot thereafter take advantage of any informality or irregularity."

These cases are decisive of this. The matters relied on to invalidate the sale to the State are nothing more than irregularities and informalities which are cured by confirmation, although fatal prior thereto.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[redacted]

ÆTNA LIFE INSURANCE COMPANY *v.* SANDERS.

4-4262

Opinion delivered April 13, 1936.

[redacted]

Owens & Ehrman, for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellee.

JOHNSON, C. J. The facts of this case are not in material dispute and are to the following effect: On April 23, 1925, the appellant, Ætna Life Insurance Company issued to appellee, Herman E. Sanders, its policy of insurance whereby the insured was indemnified against total and permanent disability in the sum of $50 per month during such period of total and permanent disability. On November 12, 1930, the insured filed a claim with the insurer asserting that on August 9, 1930, he became totally and permanently disabled within the purview of his contract of insurance because of fistula and other ailments. This claim was approved by appellant and payments were regularly made by the company according to the terms of the policy until March, 1933, when payments were discontinued. Subsequent to the last-mentioned date, suit was instituted by appellee against appellant to recover past-due disability payments. This suit was settled between the parties and thereupon appellant resumed disability payments as provided for in

the contract and as agreed upon by the parties. As we understand this record, it is not contended that this settlement between the parties in any way impaired the insurance contract.

In the fall of 1934, appellee's attending physician recommended that he undergo a surgical operation for fistula, that he have his teeth extracted and that he have his tonsils removed. These operations were refused by appellee, or at least he refused to immediately submit thereto, and thereupon appellant declined to make additional payments for total and permanent disability. The present suit was instituted by appellee who recovered judgment in the trial as prayed, and this appeal is prosecuted by appellant to avoid future payments under the insurance contract.

But one question is presented for determination, namely: Can the insurer in an insurance contract, indemnifying against total and permanent disability, compel the insured to undergo surgical operations to correct physical conditions thought to be responsible for, or contributing to, total and permanent disability and, upon the insured's refusal to comply, discontinue payments under the contract although such contract does not expressly provide therefor?

Upon trial to a jury appellant requested and the trial court gave to the jury in charge the following instruction: "The court instructs the jury that if you find from the evidence that plaintiff is totally disabled within the meaning of the insurance policy, but that his disability could have been corrected by submitting to such treatment that a reasonably prudent man would have submitted himself, under all the circumstances, to correct his condition, and you further find that plaintiff failed and refused to use ordinary care to effect a recovery from his disability, then the plaintiff cannot recover after such time, that he would have been cured by the exercise of reasonable care to correct his condition."

This instruction was as favorable to appellant's defense as it had a right to demand or expect under the law. The contract of insurance which indemnifies appellee

against total and permanent disability does not, by express terms, require that appellee submit himself to surgical operations to correct contributing causes to total and permanent disability. In the absence of such express requirement in the contract, appellee's only duty under the law was to act as a reasonably prudent person in the premises, and the jury has found from conflicting testimony that he has done so.

The rule of general application seems to be that a person is not required to undergo a major surgical operation against his will for the purpose of freeing another from consequent damages; on the other hand a simple minor surgical operation may be compelled only where a reasonably prudent person would submit thereto. 17 C. J. 779; *Texas & Pac. Ry. Co.* v. *Behymer,* 189 U. S. 468, 22 S. Ct. 622; *Williams* v. *Brooklyn,* 53 N. Y. S. 1007; *Leitzell* v. *Del. L. & W. Ry. Co.,* 232 Pa. 475, 81 Atl. 543, 48 L. R. A. (N. S.) 114; *Finkelstein* v. *Metropolitan Life Insurance Co.,* 273 N. Y. S. 629.

Cody v. *John Hancock Mutual Life Insurance Co.,* 111 W. Va. 518, 163 S. E. 4, 86 A. L. R. 354, and *Liberty Life Assurance Soc.* v. *Downs,* (Miss.) 112 So. 484, cited and relied upon by appellant are not in conflict with the views announced. In the Cody case, cited *supra,* the court said: "The courts are in accord in the rule that in determining what constitutes reasonable or unreasonable refusal to submit to treatment, including minor surgical operations, to alleviate pain and suffering and improve one's condition, the facts of the particular case must govern."

It appears from the authorities cited that in determining what constitutes reasonable or unreasonable refusal to submit to surgical operations to correct total and permanent disability each case must, of necessity rest upon its peculiar facts and circumstances, and when the jury has determined this issue on conflicting facts and circumstances its finding is conclusive on appeal.

Conceding that the necessary surgical operations upon appellee to restore his health are minor, as distinguished from major, in surgical parlance, it by no means follows that such minor operations are not dangerous to

life. Personal observation has many times demonstrated the converse, and we believe the sound rule which is supported by the great weight of American authority is that no surgical operations should be compelled as a matter of law and that the reasonableness or unreasonableness of such demand even in minor surgical operations should be ascertained and determined as a fact from all attendant facts and circumstances of each particular case as it arises.

The trial court's judgment conforming to the views here entertained must be affirmed.

ROBINSON *v.* MISSOURI PACIFIC TRANSPORTATION COMPANY.

4-4276

Opinion delivered April 20, 1936.

Kenneth Coffelt and *Wm. J. Kirby,* for appellants.

Carmichael & Hendricks, for appellee.

MEHAFFY, J. The appellant, Mrs. Fearney Robinson, brought suit in the Saline Circuit Court against the appellee for $3,000 damages, alleging that she was injured by the negligence of the appellee. The appellee filed answer and among other things, alleged in the answer "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 verdict and judgment for $2,500 in favor

of appellant, Mrs. Robinson, and appeal was prosecuted, and on October 14, 1935, the judgment of the Saline Circuit Court was affirmed by this court. *Robinson* v. *Missouri Pac. T. Co.*, 191 Ark. 428, 86 S. W. (2d) 913.

On December 9, 1935, the appellee filed suit in the Pulaski Chancery Court against Mrs. Fearney Robinson, Kenneth C. Coffelt, W. J. Kirby, Thomas C. Watson, Dr. M. M. Blakeley, Dr. William Feldman, Dr. A. J. McGill, Ethel Jacoway and R. J. Ashby. The petition in this case alleged that the Missouri Pacific Transportation Company had paid to Mrs. Fearney Robinson, the sum of $65, a day or two after the injury, in full settlement of her claim, and that that amount has never been refunded to it. It prayed that an order be made by the Pulaski Chancery Court that the amount of $65 be paid to it out of any funds in the court going to Mrs. Fearney Robinson.

Appellants filed answer denying the allegations in the petition, and alleging that the matter had already been passed upon by a court of competent jurisdiction, and that the Missouri Pacific Transportation Company has no right or claim to any portion of the money, and that Mrs. Robinson is not indebted to appellee in any sum for anything.

The case was tried in the chancery court on the following agreed statement of facts: "Comes on for hearing the petition of the plaintiff, Missouri Pacific Transportation Company, asking that the court allow it $65 out of the fund paid into the registry of this court in the above cause adjudged to be due Mrs. Fearney Robinson, and the answer of defendant, Mrs. Fearney Robinson, to said petition, and both parties agreeing that the cause may be submitted to the court for decision upon said petition of plaintiff, and the answer thereto of said defendant, and upon the following agreed statement of facts, to-wit:

"On the 3d day of November, 1934, Mrs. Fearney Robinson, defendant herein, filed suit in the circuit court of Saline County, Arkansas, against the plaintiff herein, Missouri Pacific Transportation Company, alleging that

she was negligently injured by it because of a defect in a certain metal stripping on the floor of its bus, when, in attempting to alight from its bus at Benton, on or about said date, she fell to the ground.

"She alleged that, within a few hours thereafter, the company fraudulently obtained a release from her for the consideration of $65, releasing it from any further liability to her for her said injury. Defendant company answered, denying all of plaintiff's allegations in her complaint, and charged her with contributory negligence. The cause was tried before a court and jury at the March term of said circuit court, 1935, and the jury rendered a verdict for her in the sum of $2,500, she having sued for $3,000, and in her complaint asked that said release be set aside. The cause was appealed by the Missouri Pacific Transportation Company to the Supreme Court of the State of Arkansas, and on the ..... day of ....., 1935, the cause was affirmed by the Supreme Court. On the ..... day of ....., 1935, said company filed in this, the chancery court of Pulaski County, Arkansas, its bill of interpleader, in which it paid into the registry of this court said judgment of $2,500 and accrued interest and cost which had been affirmed by the Supreme Court, alleging that certain parties, including said Mrs. Fearney Robinson, had different interests in said sum, and asking that said court decree as to whom and in what amounts said money should be paid.

"This court has decreed that out of said fund $700.73 shall go to said Mrs. Fearney Robinson.

"It is further agreed that Mrs. Fearney Robinson actually received the $65, and there was no issue made in the trial of the original suit as to its return, and no instruction was given in reference to its return."

Appellee states that this case presents two questions: First, Is the question *res judicata?* Second, Is appellee entitled to the return of the money paid for the release?

Appellee calls attention first to the case of *O. A. Pattison* v. *Seattle, Renton & Southern Railway Co.*, 64 Wash. 370, 116 Pac. 1089, 35 L. R. A. (N. S.) 660. It

quotes from said case the following: "According to the larger number of cases, it is unnecessary to return or tender the consideration for a release obtained by fraud, as a requisite to the maintenance of a suit for the damages resulting from the injury, it being sufficient that the amount be deducted from the verdict if one is obtained against defendant."

Among the larger number of cases are the cases decided by this court. It is the established rule of this court that it is unnecessary to return or tender the consideration for a release obtained by fraud, as a requisite to the maintenance of a suit for damages. This was recognized by appellee in the case in the Saline Circuit Court. It did not ask the return of the $65. It is, however, conceded by appellee that the rule established by this court is that it is unnecessary to tender or return the consideration.

Appellee next cites and quotes from 53 C. J. 1232. Immediately following the quotation from C. J., in the same paragraph, is the following: "But there is authority to the effect that such restoration or tender need not be made." The text cites several Arkansas cases. In fact, it has been many times held by this court that a tender or return is not necessary.

A recent case is *Missouri Pacific Railroad Company* v. *Elvins,* 176 Ark. 737, 4 S. W. (2d) 528.

Appellee cites and relies on the case of *Cowling* v. *Nelson,* 76 Ark. 146, 88 S. W. 913, in which it is stated: "This is true, and his action bound her in everything which the partition suit could validly accomplish—a partition of the lands and, where it is found incapable of partition without great prejudice, then a sale. These are the only issuable matters to be presented. On them she is bound. Beyond them she is not." Then follows the quotation relied on by appellee: "Litigants do not place themselves for all purposes under the control of the court, and it is only the interests involved in the particular suit that can be affected by the adjudication. Over other matters the court has no jurisdiction, and any decree or judgment relating to them is void."

The release in this case was pleaded by appellee, and the appellant, Mrs. Robinson, admitted that she had received the $65. We have many times held that all questions within the issue, whether formally litigated or not, are settled by the decision of the court.

"It is well-settled doctrine in this jurisdiction that a judgment of a court of competent jurisdiction is conclusive of all questions within the issue, whether formally litigated or not. It extends not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented." *Jamison* v. *Henderson,* 189 Ark. 204, 71 S. W. (2d) 696; *West 12th St. Road Imp. Dist. No. 30* v. *Kinstley,* 189 Ark. 126, 70 S. W. (2d) 555; *Ogden* v. *Pulaski County,* 189 Ark. 341, 71 S. W. (2d) 1062; *Coleman* v. *Mitchell,* 172 Ark. 619, 290 S. W. 64; *Connell Spec. Sch. Dist. No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. (2d) 610; *Morris & Co.* v. *Alexander & Co.,* 180 Ark. 735, 22 S. W. (2d) 558; *Shorten* v. *Brotherhood of Rd. Trainmen,* 182 Ark. 646, 32 S. W. (2d) 304; *Barney* v. *Texarkana,* 185 Ark. 1123, 51 S. W. (2d) 509; *Prewett* v. *Waterworks Imp. Dist. No. 1,* 176 Ark. 1166, 5 S. W. (2d) 735.

It is next contended by appellee that it is entitled to the return of the money, or was entitled to have it credited on the judgment. The suit was for $3,000. The appellee in this case alleged that it had paid $65. The jury returned a verdict for $2,500. It cannot be said that the jury did not take into consideration the $65 already paid. There was no request made that this question be submitted to the jury. There was no request of the court after judgment, that the $65 be credited on the judgment.

In the suit in the circuit court Mrs. Robinson admitted that she received the $65, a payment on the identical claim involved in her suit.

From the authorities above cited, it clearly appears that the rule is, in this court, that all matters within the issues are settled by the judgment whether litigated or

not. When one brings suit for $3,000 and admits that she has already been paid $65, and there is a verdict for only $2,500, it cannot be said that the jury did not consider the $65 payment.

In the case of *Capital Fire Ins. Co.* v. *Montgomery,* 81 Ark. 508, 99 S. W. 687, suit was brought against the insurance company for $575 upon a fire insurance policy issued to Montgomery on his dwelling house and furniture. The insurance company pleaded a written release of liability alleged to have been executed by the plaintiff in consideration of the sum of $25 paid to him as a compromise, and the further sum of $11.15 unearned premium paid to him. The jury returned a verdict for $575, the full amount sued for. It was said: "Appellant was entitled to credit on the amount of liability under the policy for the sum paid to him. We assume that the court instructed the jury to that effect. The jury returned a verdict for the amount of the loss without interest. The interest up to the date of the verdict was sufficient to cover the amount of payment, and we assume that the jury allowed the credits in that way."

In the instant case there was no request by either party for an instruction with reference to the release, or amount paid, but the undisputed proof was that the transportation company paid, and Mrs. Robinson received $65, and the presumption is that this was considered by the jury. If one should bring suit alleging that another owed him $1,000, and the defendant answered alleging that he paid him $100, and that that was all he owed him, and that he took his receipt in full, and the jury returned a verdict for $750, there could be no doubt that the jury took into consideration the payment which had been made. We think there can be no doubt in this case that the jury took this into consideration. The transportation company was entitled to a credit for the $65, but as we have already said it was settled by the verdict and judgment under the well-established rules of this court. Moreover, after the judgment was rendered no request was made by the appellee to the trial court to deduct the $65 from the $2,500 judgment. If

this request had been made at the time, there would have been no difficulty in finding out whether the jury did or did not take this into consideration.

Under the well-established rule of this court, this matter was settled by the judgment in the Saline Circuit Court because it was within the issues and could have been settled whether it was litigated or not.

The decree of the chancery court is reversed, and the cause is remanded with directions to dismiss the petition.

CITIZENS BANK & TRUST COMPANY *v.* GARROTT.

4-4309

Opinion delivered April 20, 1936.

Charles F. Cole, for appellant.

S. M. Casey, for appellee.

BAKER, J. The appellant in this case sued J. W. Scott and Mary Scott, his wife, in a foreclosure suit, and under a decree in said suit sold the mortgaged property. There was a deficiency judgment or, at least, an unpaid judgment for several hundred dollars. An execution issued on November 26, 1934, and was levied upon certain lands belonging to J. W. Scott. They were advertised for sale on December 29, 1934.

The appellant had only a judgment lien upon these lands. Its mortgage lien covered other property.

The lands seized under this execution had been mortgaged or conveyed by deed of trust to E. P. J. Garrett since December 8, 1922. The mortgagor had made par-

tial payments so that the debt was not barred by limitations. No marginal notations had been made upon the mortgage record showing these payments or any extension of time of payment, and according to the record the debt was apparently barred.

The appellee filed suit to foreclose his deed of trust pleading the note showing the partial payments thereon, and alleging his lien to be prior and paramount to the claim of appellant under the execution sale on December 29, 1934, wherein the execution creditor purchased the west half of the northwest quarter of section 17, township 12 north, range 5 west in Independence County, the same tract of land conveyed to appellee in the deed of trust.

Appellant's answer specifically invoked the protection of §§ 7382 and 7408, Crawford & Moses' Digest.

There is no controversy about the respective debts or payments. The only matter for settlement by us is to determine the correct answer to the query: Is the purchaser at the execution sale, under the conditions here shown, a "third party" within the purview of abovementioned statutes, and as such possessed of equities superior to those of the mortgagee?

In one of the earlier cases this court said: "The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes, as to such third parties, an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage. * * *

"But an unrecorded mortgage is still good and binding between the parties. It constitutes a valid lien on the property, except as to the legal rights of third parties. * * *." *Morgan* v. *Kendrick,* 91 Ark. 394, 398, 121 S. W. 278.

Another case upon which appellant relies is that of *McKinley* v. *Black,* 157 Ark. 280, 282, 247 S. W. 1046.

In that case the court defined third parties, saying: "Third parties, as used in the statutes under construction, necessarily mean strangers to the mortgage. This being true, we think an execution purchaser at his own sale, who was not a party to the mortgage, is a third party within the meaning of the statutes."

Later, however, in the case of *First National Bank* v. *Meriwether Sand & Gravel Co., Inc.,* 188 Ark. 642, 647, 67 S. W. (2d) 599, this court said: "The judgment creditors are not innocent purchasers, and by their judgments could only subject to the payment of their indebtedness the mortgagor's interest remaining in the property, their liens being subject to existing equities of third parties in the land, etc. *McGuigan* v. *Rix,* 140 Ark. 418, 215 S. W. 611; *Doswell* v. *Adler,* 28 Ark. 82; *Apperson Co.* v. *Burgett,* 33 Ark. 328; *Howes* v. *King,* 127 Ark. 511, 192 S. W. 883; *Robbins-Sanford Merc. Co.* v. *Johnson,* 166 Ark. 330, 266 S. W. 260; *Snow Bros. Hardware Co.* v. *Ellis,* 180 Ark. 238, 21 S. W. (2d) 162; *First National Bank of Amarillo* v. *Jones,* 107 Tex. 623, 183 S. W. 874."

This same problem was presented again in the case of *Carroll* v. *Evans,* 190 Ark. 511, 79 S. W. (2d) 425, and one of the supporting authorities therein is *First National Bank* v. *Meriwether Sand & Gravel Co., supra.* It is true that in the Carroll case there was a deed which was construed as an equitable mortgage and which, as we have heretofore said, is not governed by statutes to the same extent or effect as is the ordinary or statutory mortgage or deed of trust. This is not the point, however, that should be emphasized in this discussion.

In the case of *Carroll* v. *Evans, supra,* we again approved and quoted from *First National Bank* v. *Meriwether Sand & Gravel Co., supra,* the above repeated extract from that case. In addition thereto we said, quoting from *McGuigan* v. *Rix,* 140 Ark. 418, 215 S. W. 611: "The next and last point for determination is whether or not the lien created by the instrument in question is paramount to the lien of the judgments of appellants. Judgment creditors are not innocent purchasers. Their liens are subject to existing equities of third parties in

the land. The rule of *caveat emptor* applies to purchasers at execution sales."

We also cited and quoted with approval upon the same matter from *Howes* v. *King,* 127 Ark. 511, 192 S. W. 883, a pertinent statement of the late Chief Justice HART, and to the same effect.

It now seems patent from a reconsideration of these cases cited and argued by the respective parties in this suit there is conflict in our announcements. We believe it proper upon this re-examination to use whatever means may be necessary to clarify our views rather than to attempt to reconcile them.

When the Legislature passed §§ 7382 and 7408, Crawford & Moses' Digest, the purpose was not creative of new rights, but the intention was to protect third parties as prospective purchasers. Purchasers of real property, in the absence of actual knowledge, look to the records of titles. These are outgrowths of the laws of registration.

Proper marginal notations of extensions of time of payment or of partial payments furnish constructive notice to the world of the continued existence of the debt, and of the security held for its payment.

Since the giving of notice to these "third parties," prospective purchasers, was the prime motive, if not the only one, for the passage of these statutes, it would be inconsistent to hold that by reason of them those who were, prior to the passage of these acts, required to take notice of other's rights need not do so now.

Perhaps there is no better known principle than the application of the rule of *caveat emptor* and particularly to a creditor purchasing at his own execution sale. Unless we hold that the two sections of the statutes under discussion destroy the rule of *caveat emptor,* as applied to execution sales, we must say that the opinion in *McKinley* v. *Black,* 157 Ark. 280, 247 S. W. 1046, is erroneous. We have decided to adhere to the ancient landmark of *caveat emptor* as being in conformity with the spirit of the statutes involved, and we overrule *McKinley* v. *Black, supra,* as opposed thereto.

Ordinarily, notice whether constructive or actual, or purely legal, as under the rule of *caveat emptor,* will protect prospective purchasers, and the statutes may not be regarded as the exclusive method whereby notice may he had. *Wasson* v. *Beekman,* 188 Ark. 895, 68 S. W. (2d) 93.

In the last-cited case there were no marginal notations showing credits or extension of time of payment, although the lien of the mortgage was apparently barred. Notice of *lis pendens* filed with the foreclosure suit and possession by the plaintiff through a tenant was held to be sufficient.

So in the case under consideration the appellant as an execution creditor purchaser had notice, or at least bought under the rule of *caveat emptor,* and was not, therefore, a protected third party. Moreover, two days before the purchase the appellant had written notice, or actual notice, of appellee's rights, and no doubt in bidding for the property took full cognizance thereof.

The decree of the chancery court was correct.

Affirmed.

McDonald *v.* The Olla State Bank.

4-4251

Opinion delivered April 20, 1936.

W. F. Norrell and *James Merritt,* for appellants.

John Baxter, for appellee.

JOHNSON, C. J. This is a foreclosure action instituted by appellee, The Olla State Bank, domiciled in the State of Louisiana, against appellants, J. M. McDonald and his wife in the Desha Chancery Court.

Appellants by answer admitted the execution of the mortgage and accompanying note, but denied that appellee was the owner thereof, and affirmatively pleaded payment. The testimony adduced at the trial upon the issues joined was to the effect: That on February 27, 1930, J. M. McDonald and wife executed and delivered to Mrs. Caroline Willis a note for the sum of $2,500 secured by a real estate mortgage upon certain lands situated in Desha County. Mrs. Willis is the mother of J. M. McDonald. More particularly the testimony on behalf of appellee tended to show that on February 26, 1930, appellant J. M. McDonald and his mother, Mrs. Willis, came to the bank's place of business and endeavored to negotiate a loan in McDonald's behalf. The bank refused to make the loan to McDonald because he resided in the State of Arkansas and the lands offered as security were also located in Arkansas. The bank did agree, however, to make a loan of $2,500 to Mrs. Willis who resided in the State of

Louisiana. The bank thereupon issued a cashier's check in favor of McDonald for $2,500, the amount of the loan, and Mrs. Willis executed her note as evidence thereof, and subsequently delivered to the bank, as collateral security to her note, the McDonald note and mortgage. McDonald's note and mortgage to Mrs. Willis were accepted by the bank without the written indorsement of the obligee. On October 30, 1931, J. M. McDonald paid to the bank $100 which was applied by it upon the accrued interest on his note. Default having been made in the payment of both the Willis and McDonald notes in 1933, a suit was instituted by the bank in the Louisiana court against Mrs. Willis, but the fruits of this litigation proved to be entirely insufficient to pay the debt; therefore, the present pursuit of the Arkansas collateral.

On behalf of appellants the testimony tended to show that on April 29, 1932, J. M. McDonald paid to Mrs. Willis the full sum due her under the note and mortgage of February 27, 1930, and thereupon Mrs. Willis satisfied of record the mortgage instrument which had not theretofore been assigned of record. These facts of payment were established by the testimony of J. M. McDonald and Mrs. Willis.

The chancellor in vacation on November 29, 1934, upon the testimony theretofore adduced by the parties, rendered his written findings of fact and declarations of law in which the issues were determined in favor of defendants or appellants here. The following declarations appear in the chancellor's findings: "From the above it must, by this court, be held that plaintiff did not obtain the note in due course, for value without notice and before maturity. That the note executed by the McDonalds to Mrs. Willis, now McManus, has been fully discharged, and that plaintiff's bill dismissed for want of equity.

"Solicitors for defendants will prepare a precedent in conformity with this opinion, saving appeal to plaintiff, should same be desired, with a copy to plaintiff's solicitor and the original to this court for approval.

"Done in chambers, in the city of Dermott, Arkansas, this the 29th day of November, 1934.

"E. G. HAMMOCK,
"Judge 2nd Chancery Dist. Ark."

The foregoing findings of fact and declarations of law were not filed, however, with the clerk of the Desha Chancery Court until December 3, 1935. On April 15, 1935, a decree was entered conforming to the findings of the chancellor heretofore set out. On September 8, 1935, appellee filed its motion to vacate the decree of April 15, 1935, and for cause alleged that Mrs. Willis, a material witness for appellant in the trial had repudiated her testimony given at said trial, and her affidavit to this effect was filed as an exhibit to said motion. Testimony was heard on the motion to vacate, at the conclusion of which the motion was sustained, and the former decree was vacated as prayed, and one was entered in favor of appellee from which this appeal comes.

Primarily, appellants contend that the Desha Chancery Court was without power to vacate the decree of April 15, 1935, because the decree was in effect made on November 29, 1934, or during the October, 1934, term of said court, and that since appellee's motion to vacate was not filed until September, 1935, it was beyond the term; that it stated no statutory cause for vacating the former decree, and, therefore, should have been overruled or denied by the chancellor. This contention cannot be sustained. The written memorandum of the chancellor of date November 29, 1934, was executed in vacation, and the same was not filed with the clerk of the Desha Chancery Court until more than one year subsequent thereto; therefore, there was no substantial evidence that the cause was adjudicated prior to the decree of April 15, 1935. We, therefore, conclude that the cause of action was primarily adjudicated on April 15, 1935. *Red Bud Realty Co.* v. *South,* 145 Ark. 604, 224 S. W. 964; *Poe* v. *Walker,* 183 Ark. 659, 37 S. W. (2d) 866.

The statutes provide that the regular terms of the Desha Chancery Court shall be held on the third Monday in April and October each year. We judicially know

that April 15, 1935, was the first day of the regular April term of said court. It follows from this determination that appellee's motion to vacate, filed on September 9, 1935, fell within the April, 1935, term of said court.

The law is that motions to vacate judgments or decrees filed within the term at which such judgments or decrees are entered are addressed to the sound discretion of the trial courts, and need not conform to statutes relating to vacating of judgments and decrees after the expiration of the term of court at which they were rendered. *Ashley* v. *May,* 5 Ark. 408; *Campbell* v. *Garven,* 5 Ark. 485; *Wells Fargo & Company* v. *W. B. Baker Lbr. Co.,* 107 Ark. 415, 155 S. W. 122.

In other words the court to which the instant motion to vacate was addressed might have, at the instance of any interested party or of his own motion with or without affirmative cause, vacated its former decree and thereupon enter such decree as a preponderance of the testimony warranted, and to his conscience seemed proper and right. It follows from this conclusion that the decree in favor of appellee must be reviewed upon its merits, when measured by the testimony adduced.

Appellant's next contention is that the chancellor's finding of fact is against a preponderance of the testimony. On the trial, appellants admitted the execution of the note and mortgage held by appellee; therefore, the burden of establishing their affirmative defense of payment rested upon them. *Dodd* v. *Dodd;* 189 Ark. 1171, 70 S. W. (2d) 850; *Smith* v. *Ryan,* 175 Ark. 23, 298 S. W. 498; *Toland* v. *Forbes,* 178 Ark. 1200, 12 S. W. (2d) 402.

On this issue, appellant, J. M. McDonald, testified that he paid his mother, Mrs. Willis, in cash the full amount of the note. Mrs. Willis at the former trial testified to the same fact, but subsequently repudiated her testimony in detail. The chancellor evidently, as he had a right to do, disregarded the whole of the testimony of Mrs. Willis upon consideration of the motion to vacate. Substantially, this left only the testimony of J. M. McDonald establishing payment. In a long line of opinions we have consistently held that the testimony of interested

parties is never considered as uncontradicted. *Bridges* v. *Shapleigh Hdw. Co.,* 186 Ark. 993, 57 S. W. (2d) 405; *Davis* v. *Oakes,* 187 Ark. 501, 60 S. W. (2d) 922; *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. (2d) 14.

Moreover, J. M. McDonald admitted that in 1931 he sent to appellee bank $100 which was applied by the bank upon past-due interest. It appears, therefore, that the question of payment of the note and McDonald's good faith in this regard rested upon conflicting facts and circumstances, and the chancellor's determination thereof is not against the clear preponderance of the testimony. *Jackson* v. *Banks,* 182 Ark. 1185, 33 S. W. (2d) 40; *First National Bank* v. *Walker,* 183 Ark. 1153, 38 S. W. (2d) 306; *Greer* v. *Stilwell,* 184 Ark. 929, 44 S. W. (2d) 348.

Lastly appellants assert that appellee had no title to the note or mortgage because not indorsed and assigned by the payee. The indorsement of the note by the payee is not necessary to appellee's title and ownership thereof. It is so expressly provided by § 7815 of Crawford & Moses' Digest. True, it is, that appellee's ownership of this note and mortgage without indorsement or assignment is subject to all equities existing between J. M. McDonald and Mrs. Willis, but the chancellor has affirmatively found that no such equities exist.

No error appearing, the decree is affirmed.

SWILLING *v.* BIFFLE.

4-4307

BIFFLE *v.* PRIDDY, JUDGE.

4-4213

Opinion delivered April 20, 1936.

Reece A. Caudle and *J. M. Smallwood,* for appellant and respondent.

C. C. Wait, for appellee and petitioners.

HUMPHREYS, J. This suit was brought by appellant in the chancery court of Pope County to review the validity of an order or judgment of the county court providing for a local option election in said county on the prohibition of the sale, barter or exchange of spirituous, vinous, or malt liquors therein, and to enjoin the officers of the county and election commissioners from proceeding with the election, on the alleged ground that the petition upon which the county court based the order or judgment was insufficient in form and substance, particularizing the defects in the petition, and the failure of 35 per cent. of the qualified voters of the county to sign it. Pleadings were filed by appellees challenging the jurisdiction of the chancery court to try the cause, and also denying the material allegations of the complaint. On the trial of the cause, the complaint was dismissed for want of equity.

This is a collateral attack upon the judgment of the county court ordering a local option election upon petition of 35 per cent. of the qualified voters of the county upon the proposition of whether or not spirituous, vinous, or malt liquors shall be sold, bartered, or loaned therein, under article 7, § 1 of act 108 of the Acts of the Legislature of 1935. The act confers jurisdiction upon the county court to receive the petition, and to make the order directing the election. Exclusive original jurisdiction is conferred upon the county court by said act,

and not upon the chancery court, to determine the sufficiency of the order, not only as to form, but also as to whether the petition is signed by 35 per cent. of the qualified voters of the county. No provision is made in the act for a review of the county court's findings or judgment by the chancery court. In this particular case, the record reflects that appellant appeared in the county court and contested the sufficiency of the petition in form and substance, and appealed from the decision against him to the circuit court where the matter is now pending for a trial *de novo*. It goes without saying that he had a right to appeal to the circuit court. Article 7, §§ 14 and 33 of the Constitution of 1874. He has a complete remedy at law by appeal and none in equity to enjoin the officers from proceeding with an election to test the sense of the qualified electors of the county as to whether spirituous, vinous, or malt liquors shall be sold, bartered, or loaned in the county.

The chancery court was without jurisdiction to pass upon the sufficiency of the petition, and its decree dismissing appellant's complaint for review must be and is affirmed.

It follows that the application in this court for a writ of prohibition to prevent A. B. Priddy, circuit judge, from trying the case on appeal must be, and is, also dismissed.

G. H. HARDIN & COMPANY *v.* NETTLES.

4-4285

Opinion delivered April 20, 1936.

O. T. Ward, for appellant.

Jeff Bratton, for appellee.

BAKER, J. Eugene Nettles filed a suit in the chancery court of Greene County against G. W. Sweaney, who was a tenant upon Nettles' farm, and also against G. H. Hardin & Company, which company was a partnership composed of G. H. Hardin, Clayton Hardin and Ollie Bearden, but this fact was not alleged and upon motion Hardin & Company was discharged. Upon the same day on which the action against Hardin & Company was dismissed, an amendment was filed and the partners composing the company were sued. These parties defended the suit upon the ground that more than six months had expired after maturity of the rent accounts, and that the lien was no longer enforceable. Proof was taken and several witnesses testified, though there was no substantial controversy among the parties. It was admitted, or at least not disputed, that Nettles had notified Hardin & Company, who sometimes bought cotton, that Sweaney was his tenant, and that his lien on the crops would have to be protected. As Hardin & Company bought cotton from time to time from Sweaney, they remitted a fourth of the proceeds of the cotton to Nettles. This, however, did not pay all the rents because Nettles had rented certain lands to Sweaney upon which he planted and grew his crops of corn and hay, and for this land Sweaney was to pay a certain price per acre. It was to recover this part of the rents that Nettles was pursuing Hardin & Company as purchasers of Sweaney's crop. In taking testimony by deposition, the attorney representing Hardin & Company had Nettles and his wife, who was Nettles' bookkeeper and agent, upon cross-examination, pressing his contention rather vigorously in an effort to show maturity dates of the debts for rent.

It was developed that Nettles and his wife had gone to Sweaney's home, where they found Sweaney sick in

bed, and there bought from Sweaney five bales of cotton, allowing him as credit therefor 8c a pound, which was perhaps something over and above the market price. It was also developed by proof, which was in accordance with the proof developed on this cross-examination, that Sweaney had told the ginners that he had saved the five bales of cotton to pay the rent on his corn and hay crops and expected to use it for that purpose. Nettles had arranged for Ray to haul the cotton to put it away in compress or storage, but on account of bad roads he did not go for the cotton for two or three weeks after directed to do so. In the meantime Sweaney had gone and gotten the cotton, sold it to Hardin & Company who had no knowledge of the fact that Sweaney had previously sold the cotton to Nettles. It is, perhaps, correct to say that Nettles did not know what had become of the cotton until he received check from Hardin & Company for one-fourth of the value of the cotton he had just purchased from Sweaney. This last statement may not be correct, but it is not, at least, prejudicial to the interests of the parties. We think it is conceded that Hardin & Company did not know that Nettles had purchased the cotton.

Upon trial of the case the court considered the pleadings amended to conform to this proof to the effect that Hardin & Company had purchased this cotton from Sweaney which had prior to that time been sold to Nettles who was the real owner, and that Sweaney had no interest therein, and upon that theory the court permitted a recovery. The appellant urges that the lien of the landlord had expired at the time of the filing of this amended complaint, naming all of the parties composing Hardin & Company as defendants; that, therefore, the decree of the court was erroneous. Whether the appellant may be correct in his theory, is not the question that was decided in the chancery court. The question there settled was that Hardin and his associates had converted cotton that belonged to Nettles to their own use, had paid the fourth part of the value thereof. It may be there were some other items that entered into the amount of this judgment or decree. If so, these have not been pointed out.

Appellant cites certain cases to the effect that this was a new or different cause of action, and that the decree or judgment is not in response to the pleadings, and, therefore, must be treated as error. This contention would be sound, except for the well known proposition that courts in the exercise of discretion permit amendments to be made when necessary to subserve the ends of justice. The appellee could not have introduced this proof upon the pleadings he had filed. The appellants did introduce it, and, if there were any error in its presentation, the appellants erred.

Of course, there was no objection to this testimony. Therefore, under a long line of cases, pleadings were necessarily treated as amended to conform to the proof. *Street* v. *Shull,* 187 Ark. 180, 58 S. W. (2d) 932; *Fidelity & Deposit Co. of Maryland* v. *Cowan,* 184 Ark. 75, 41 S. W. (2d) 748; *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

Appellee could not have offered this testimony over objection of the appellants without error, but appellee did not offer it at all.

The court was correct in treating the pleadings as amended to conform to this proof.

There is no estoppel in this case as Nettles has done nothing to induce them to buy or pay Sweaney for this property. He has only attempted to protect himself. In the conversion of property there is no such thing as an innocent purchaser who will be protected against the real owner who is not, in any manner, in default. *Newburger Cotton Co.* v. *Stevens,* 167 Ark. 257, 267 S. W. 777; *Shelton* v. *Landers,* 167 Ark. 638, 270 S. W. 522.

From the foregoing it must be seen that those who take the property of others, whatever may be their good faith, intention or purpose, must account to the true owner therefor.

There was no error. The decree is affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* BUTLER.

4-4263

Opinion delivered April 20, 1936.

Owens & Ehrman and *John M. Lofton, Jr.*, for appellant.

Ernest Briner and *Melbourne M. Martin*, for appellee.

SMITH, J. The appellant insurance company issued to appellee two policies of life insurance. One dated July 18, 1919, was for $2,000 with monthly benefits in case of total disability, of $20. The other policy dated September 9, 1920, was for $3,000 with monthly benefits of $30, in case of total disability.

On March 22, 1933, appellee notified appellant that he was then totally and permanently disabled and had been since December 8, 1931. In this notice he demanded past-due and future benefits, and when the demand was refused, suit was brought to enforce it, and, from a judgment in his favor, an appeal was duly prosecuted to this court. It was held upon this appeal that liability under the policy sued on was conditioned on the happening of

disability and proof thereof within 120 days thereafter, and that the provisions of the policy made the requirement as to notice a condition precedent to the granting of benefits. As this notice had not been given, the judgment was reversed, and the cause dismissed. *Pacific Mutual Life Ins. Co.* v. *Butler,* 190 Ark. 282, 78 S. W. (2d) 813.

Shortly before the rendition of this opinion, suit was brought upon the larger policy with identical allegations as to the time when the disability occurred. This cause was removed to the Federal court where, upon a trial had while the appeal from the first judgment was pending in this court, testimony was offered similar to that offered in the trial of the suit on the smaller policy.

A voluntary nonsuit was taken in the Federal court upon the completion of the testimony, and a third suit was brought in the Saline Circuit Court. The complaint in this case alleged that the plaintiff became disabled December 8, 1931, but it was amended after the opinion of this court was delivered February 4, 1935. This amendment, made by interlineation, alleged that while appellee became totally and permanently disabled on December 8, 1931, he did not realize that he was disabled until March 22, 1933. This interlineation was later amended by striking out the date December 8, 1931, and inserting the date of March 22, 1933.

Appellant filed a motion to dismiss the amended complaint upon the ground that the decision in the first case between the parties was *res adjudicata* of the controlling question involved in the case, and that appellee was estopped by the allegations of his former complaints from alleging that he became disabled on March 22, 1933. This motion was overruled and testimony was offered at the trial from which this appeal comes fixing March 22, 1933, as the date upon which appellee became aware that his disability was total and permanent, and that proof thereof was made within 120 days of that date. Testimony was also offered to the effect that proof of an earlier date was a mistake. Appellee was asked this question by his counsel: "You state to the jury that

the first time you ever knew of your disability was on March 22, 1933?" And his answer was: "It was."

The parties entered into a stipulation reading as follows: "It is stipulated that proof of the original record in the case of 5714, *Butler* v. *Pacific Mutual Life Insurance Company of California,* the original transcript may be offered in evidence in this case, subject, of course, to the objections that the court may sustain as to any incompetencies. It is further stipulated that the testimony of Gus Butler in the case of *Gus Butler* v. *Pacific Mutual Life Insurance Co.,* in the United States District Court in Little Rock may be offered in evidence without the necessity of calling the reporter who took the testimony down and transcribed same, subject, of course, to the objections that the court may sustain as to any incompetencies."

Pursuant to this stipulation, the testimony of Dr. McGill, taken at the trial of the suit on the smaller policy was read in evidence by appellee. Appellant offered to introduce from the original transcript in the case appealed to this court, a copy of the complaint filed in that case. This was excluded. Appellant also offered in evidence a copy of the testimony of appellee upon the trial in the Federal court. This was also excluded, exceptions being saved to both rulings.

In support of the contention that the plea of *res adjudicata* should be sustained appellant says: "The question involved in this case was the same as that decided by the court on the former appeal namely, whether Gus Butler, appellee, could recover disability benefits under a policy of insurance when the giving of notice within 120 days from the inception of this disability was a condition precedent to such recovery. Appellant also invokes the rule of *stare decisis,* and insists that for both reasons the judgment here appealed from should be reversed, and the cause dismissed.

In answer to these contentions it may be said that an insurance contract identical with the one here sued on has been construed as requiring notice of the disability to be given within 120 days of its inception. That

proposition has been definitely decided in litigation between the parties here appearing and arising out of a contract identical with the one here sued on. We reaffirm what was said in the opinion in the first appeal. But the notice is given not of the disease or ailment from which the disability finally results; but of the fact of disability itself, when it occurred, and is known to exist and to be total within the meaning of the insurance contract. *Home Indemnity Co.* v. *Banfield Bros. Packing Co., Inc.,* 188 Ark. 683, 67 S. W. (2d) 203; *Missouri State Life Ins. Co.* v. *Barron,* 186 Ark. 46, 52 S. W. (2d) 733; *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520; *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. (2d) 640.

But appellee insists that in the suit on this second policy, he has brought himself within the law as declared on the former appeal, and we are not asked by him to overrule or to qualify that opinion. It is here alleged that appellee has given the notice which the former opinion held to be essential to recovery. While the rule of *stare decisis* requires us to hold that this notice must be given as a condition precedent to a recovery upon the policy here sued on, it was alleged, and testimony was offered, tending to show that the notice was given within the required time. Nor can the plea of *res adjudicata* be sustained. The question of liability on this second policy has not been previously adjudged. It was only decided that giving a certain notice had been made a condition precedent by the terms of a similar policy, and it is now alleged that this notice was given.

In the excellent brief of appellant, numerous authorities are cited on the question as to when the plea of *res adjudicata* should be sustained. Among others, our own case of *Nat'l Surety Co.* v. *Coates,* 83 Ark. 545, 104 S. W. 219. That was a suit against the surety upon a contractor's bond who, it was alleged, had failed to perform a mail service contract with the United States.

The answer alleged a former trial to a jury upon the issue that the contract had been terminated prior to the alleged breach. A demurrer to this pleading was sus-

tained, and in reversing that judgment it was there said: "The paragraph just quoted contains a complete defense to the action, and the demurrer should not have been sustained. It is urged on behalf of the appellee that the former adjudication was not a bar to the present action for the reason that the latter is instituted to recover damages accruing since the former adjudication. This does not prevent the former judgment from barring the present action. According to the allegations of this amendment, the question of the defendant's liability on the contract of suretyship sued on was determined in the former action adversely to the plaintiff's contention in this case, and therefore barred a recovery."

A number of decisions of the Supreme Court of the United States are there cited and quoted from. Among others the case of *Southern Pac. Ry.* v. *U. S.*, 168 U. S. 1, 18 S. Ct. 18, to the following effect: "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." (Citing cases.)

This statement of the law was again quoted and approved by this court in the case of *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278. There are many cases to the same effect.

This rule has application in cases similar to our Coates case, *supra,* where it was quoted. There the fact put in issue and decided by the jury at the first trial was that the contract was not in effect at the time of its alleged breach. This was as complete defense to the claim for damages subsequent to the first trial as it was to those prior thereto, and it having been adjudged that the contract had terminated, the parties to the contract were concluded by that adjudication.

The rule quoted does not apply here. The point at issue which was decided in *Pac. Mutual Life Ins. Co.* v. *Butler, supra,* was not whether Butler had been disabled for more than 120 days before giving notice, but was rather the effect of the failure to give notice. The plaintiff alleged a disability for more than 120 days, and there was no adjudication of that fact as it was not controverted, and was not an issue in the case. That judgment is not decisive of the question of liability on the separate and distinct contract here sued on although of an identical nature because appellee does not ask an adjudication here of the question upon which he lost the former case, that is, whether the notice is a condition precedent. He now concedes that it is, as was held in the former opinion; but he says he was in error upon the question of fact, not controverted and not adjudicated, in the former appeal as to the date from which the existence of the disability should be computed.

The trial court was correct, therefore, in the view that the pleadings in one case and the transcription of appellee's testimony in the other which appellant attempted to introduce in evidence did not sustain the plea of *res adjudicata,* but this evidence was competent by way of impeachment as bearing upon the good faith of the allegation that appellee was mistaken as to the date upon which he became disabled, and the sufficiency of the testimony to support it. *Wrape Company* v. *Barrentine,* 129 Ark. 111, 195 S. W. 27. It was stipulated that these records might be offered in evidence subject to objection as to competency. It is always competent to impeach the essential testimony of a litigant by proving contradictory statements, and also to prove declarations against interest, and the excluded testimony should have been admitted for this purpose. For the error in excluding it, the judgment must be reversed, and the cause will be remanded for a new trial.

McHaney and Baker, JJ., concur in reversal of judgment.

UNITED FRIENDS OF AMERICA *v.* AVERY.

4-4281

Opinion delivered April 20, 1936.

[redacted]

Ingram & Moher, for appellant.

Wm. C. Gibson and *M. F. Elms,* for appellee.

BUTLER, J. Appellant, defendant in the court below, is a fraternal beneficiary society and has local branches which are styled councils. One of these known as Pride of Stuttgart Council No. 37, is located in the town of Stuttgart. On October 21, 1928, appellee, plaintiff below, became a member of said local council, and was issued the certificate providing for certain death benefits, and for medical and hospitalization in case of sickness. Appellee paid her dues according to the undisputed evidence down to and including the month of July, 1935. These premiums were due on the first day of each month with a grace period of twenty days which continued until November, 1932, when by an amendment to the bylaws the grace period was thirty-one days beyond the due date. In August, appellee applied for admission into appellant's hospital located at Little Rock. Her application was granted and she remained in the hospital for a period of about ten days. Her ailment was diagnosed as a tumor. She was advised that an operation was necessary, but because of the heat of the

summer she was told to return to the hospital about the middle of October for the operation. On October 1, she sent $2.70 for two months dues to the home office of appellant in Little Rock by a colored man, who, when the money was tendered, was asked if he brought a certificate showing the appellee to be in good health, and when appellant's officials were told that he had not, he was told that the member was "nonfinancial," and that her dues would not be accepted unless accompanied by a certificate of her physician showing that she was in good health. About the time she was notified to return to the hospital she appeared there bringing with her the $2.70, and again tendered it to the appellant. The money was refused, and she was denied admission to the hospital, whereupon she instituted this suit. The suit, as instituted, was based upon the theory that appellant had paid her dues down to and including the month of August, 1935, and that as she had tendered the premium for September within thirty-one days from the first of the month, she was not in arrears, but in good standing, with her benefit certificate in full force, and that appellant's refusal to carry out the terms of the contract entitled her to a return of the premiums she had paid. The defense tendered alleged the failure and neglect of the appellee to pay the dues for August 1, September 1, and October 1, 1935, and to furnish appellant with a health certificate or application for reinstatement as required by the bylaws, and that by reason thereof appellee was suspended from membership in the society, and has continued so to be, and, because of the default and neglect stated, the society had the right and did declare a forfeiture of said policy. Defendants pleaded as a part of its bylaws applicable sections 1, 2, 4, 5, 10 and 12 thereof, and an amendment thereto adopted in October, 1930. The bylaws provided in short for an annual premium of $15 divided in monthly payments of $1.25 each due on the first of the month with a grace period of twenty days. That if a member take sick or die before the 20th with his dues unpaid he shall be deemed "financial," provided all previous monthly payments had been made, and be entitled

to and receive all benefits under the terms of his certificate as though he had paid and was "financial." But, if the grace period had expired in which payment might be made, the member defaulting would be delinquent, and if while delinquent a member should become sick he should not be allowed to pay his delinquent dues until he was restored to health, and during his illness would not be entitled to or receive any benefits; that all members must be "financial" when they take sick, and remain so while sick, in order to be entitled to the benefits provided. A member allowing his dues to get delinquent for three months was required to furnish the general office with a health certificate certifying his good health as a prerequisite to their acceptance, signed by a reputable physician.

The amendment of October 30, pleaded in the answer was introduced in evidence by the grand secretary of the society, which is to the effect that a member from one to two months behind "could pay up by filling out a past-due endowment, provided his local commander and secretary would sign same indicating that said member was in good health. But if a member owed three months a doctor's certificate, by a regularly licensed practicing physician, in addition to the past-due endowment, had to be furnished by a member."

In addition to the by-laws pleaded, appellant introduced in evidence without objection the amendment to the bylaws of November, 1932. This amendment provided for a grace period of thirty-one days after the due date of any premium, and further provided that after the expiration of this period policies, on which premiums have not been paid, shall automatically lapse, but may be reinstated "if a member can furnish satisfactory evidence of good health, but in no case shall a lapsed policy be reinstated without such evidence."

By the terms of the certificate the bylaws are made a part thereof, and it is application of those referred to above as construed in *Sovereign Camp Woodmen of the World* v. *Anderson,* 133 Ark. 411, 202 S. W. 698; *Woodmen of the World* v. *Jackson,* 80 Ark. 419, 97 S. W. 673;

and *Modern Woodmen of America* v. *Seargeant,* 188 Ark. 1098, 69 S. W. (2d) 397, which appellant contends defeats recovery.

The trial resulted in verdict and judgment for the appellee in the amount sued for from which comes this appeal. The contention for reversal is that the court should at appellant's request have directed a verdict in its favor, and next that the case was submitted to the jury on an erroneous theory and declarations of law.

As to the payment made in August for the premium coming due on the first of that month the evidence conflicts. That offered on behalf of appellee tended to support her contention and warranted the submission of the case to the jury, but inasmuch as that question was not submitted to the jury it passes out of the case.

The first instruction given by the court on behalf of appellee was to the effect that under the bylaws the dues of a member maturing while he was sick is waived during the period of illness, and the jury was told that if appellant was sick during the months of August, September and October, 1935, and before her recovery she tendered all premiums due or delinquent, the appellant had no right to lapse or forfeit the policy during such period. This instruction was given over the objection and exception of the appellant, and it is now urged that same was in conflict with the bylaws and not a proper declaration. This instruction is doubtless based upon the court's construction of that part of section 1 of the bylaws providing that where a member is sick before the expiration of the grace period, and he has paid all previous monthly premiums "the organization shall hold him financial the same as though he had paid for that month. * * * In this case he shall be entitled to and shall receive all benefits * * * as though he had paid and were financial."

It is unnecessary for us to determine whether or not the trial court correctly interpreted these provisions, because from the views we entertain of this case it was not prejudicial, neither can the other objections made of the court's declarations, made on behalf of the plain-

tiff, or its refusal to direct a verdict for the appellant, be sustained. Our conclusion based on undisputed evidence is that the trial court should have directed a verdict in favor of the plaintiff, and, therefore, the verdict of the jury to that effect, although based on erroneous instructions, is correct and will not be disturbed.

It is the contention of the appellant that appellee was three months in arrears with her dues, and in attempting to make the payment on October 1, 1935, was doing so without complying with appellant's bylaws, and, therefore, the refusal to accept the payment and declare the policy delinquent and appellee entitled to none of its benefits was justified. In the first place it may be said that appellant's assumption that appellee was three months in arrears is erroneous. If it be granted, as contended by it, that appellee had not paid her premiums for August she had all of September and until October 1st, until the thirty-one day grace period expired to pay her September premium, and until October 31, to pay that months premium, and, therefore, when the $2.70 was tendered appellee was only delinquent for one month, and appellant's demand for a doctor's certificate was not warranted by any of the bylaws pleaded in its answer or offered in evidence except the amendment of November, 1932. But this provision of the bylaws as well as the others providing for payment of premiums was violated by the appellant on numerous occasions, as we will presently show, and at a time not exceeding three or four months before the date of its refusal to accept the tender. Before this, for a long period of time, appellant had ignored its own bylaws, and on many occasions had accepted past-due and delinquent premiums without requiring appellee to comply with the provision of the bylaw relative to the payment and acceptance of delinquent premiums.

"The principle of estoppel in equity stands upon the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect and meaning to their actions which common sense and justice dictate.

A fraternal insurance association, such as appellant, is as much subject to the operation of its principles as any other association of persons or as an individual. * * *

" 'Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured and others known to the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief'." *Sovereign Camp W. O. W.* v. *Newsom*, 142 Ark. 132, 219 S. W. 759.

Until amended by an amendment adopted in 1932, the bylaws provided for the payment of premiums upon the first of each month, with a twenty-day grace period. By the amendment above noted, the grace period was changed from twenty to thirty-one days. The appellant voluntarily introduced a record of the payment of premiums beginning with that for the November period in 1928 and continuing down for each monthly payment thereafter to and including the July payment made in 1935. This record conclusively shows that from the inception of the contract the provisions of the bylaws with respect to the payment and acceptance of premiums were consistently ignored and disregarded. The premiums for November and December, 1928, and for January, 1929, were paid on the 21st day of each of those months. The premium due February 1, 1929, was not paid until the 5th day of March following, and on the date of its acceptance had been delinquent thirteen days. Throughout the remainder of the year, 1929, the payment for each month was beyond the grace period except December, which was paid within that period. The May and June premiums were not paid until July 7, making the May payment forty-six days late, and the June payment seventeen days late. The record is that for the months of 1930 all, save for the month of February, were paid beyond the grace period. The payments due respectively

May, June, July and August 1st were not paid until September 8, thus making the payment and acceptance of the May premium 111 days beyond the grace period, that of June, 81 days late; July, 50 days and August, 19 days late. The payments for September, October, November and December were made and accepted December 24, making a default of 94 days for September and more than two months for October. In 1931, the same process is repeated in the main. The premium payment for October was twenty-nine days delinquent when payment was made and accepted. Also, in 1932, the premium for each and every month was delinquent when payments were made and accepted, except November, which was paid within the grace period of thirty-one days. The premiums for February, March and April were not paid until May 11. Those of June were not paid until August 8, those for August and September not until October 13, and those for January not until March 2, 1933. In 1933, the premiums for all the months up to August were delinquent when payment was made. In 1934, the premiums for February were not paid until March 31, and for November were not paid until December 31. For these months payments were made and accepted under delinquencies practically identical with that of August, 1935, when the premium was refused when tendered on October 1, 1935. The premium for May, 1935, was 29 days delinquent when its payment was made and accepted on June 29. While the foregoing analysis may not be entirely accurate it is substantially so, and serves to demonstrate appellant's course of conduct systematically pursued. It is no where shown or contended that appellant at any time advised the appellee that it intended to discontinue this method of procedure and to insist on a compliance with the provisions of its bylaws. If it intended in the future to insist upon a compliance with its bylaws, fair dealing required of it that it so notify its policyholder, and in order to change its custom and lapse the policy for a noncompliance of the bylaws which had been acquiesced in on numerous occasions, such notification must have been given. *Sovereign Camp, W. O.*

W. v. *Condry,* 186 Ark. 129, 52 S. W. (2d) 638; *Columbian Mutual Life Ins. Co.* v. *High,* 188 Ark. 798, 67 S. W. (2d) 1005.

The course of conduct on the part of the appellant was such as to estop it from insisting on the forfeiture of the policy because of a noncompliance with the bylaws as to reinstatement, for it is plain that by it appellee might reasonably expect the same indulgence would be shown her as to the August premium as had been shown her in the past, and it is reasonable to infer this doubtless would have been done if the appellant had not discovered appellee was sick and would be unable to procure a certificate of good health. It was then, and not before, that it demanded a strict enforcement of its bylaws. The case presented, calls for an application of the principles announced in the cited cases, *supra.* In *Sovereign Camp, W. O. W.* v. *Pearson,* 155 Ark. 328, 244 S. W. 344, we said: "If the practice of the company and its course of dealing with the insured, and others known to the insured, have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief." * * *

"Thus was established a course of conduct on the part of the local clerk which was acquiesced in and approved by the sovereign camp, which was calculated to mislead Pearson and cause him to believe that the sovereign camp was not insisting on the certificate of good health; and to cause him to make his payments believing that he was in good standing with the society. This conduct was such as to estop the appellant from insisting, under the doctrine of the Newsom case, *supra,* on the forfeiture of the policy because of the noncompliance with the bylaws as to reinstatement."

The principles announced in the foregoing cases were noticed and reaffirmed in the recent case of *Order of Railway Conductors of America* v. *Skinner,* 190 Ark. 116, 77 S. W. (2d) 793.

Our attention is called to the fact that the issue upon which this case was disposed was not such as was presented by plaintiff's complaint. This, however, was brought about by the facts established on cross-examination of appellant's secretary and treasurer to which no objection was made and warranted the court under settled rules of procedure to treat the complaint as amended, and under the proved facts to have directed a verdict for the plaintiff.

The judgment will, therefore, be affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* MEANS, JUDGE.

4-4277

Opinion delivered April 20, 1936.

Carl E. Bailey, Attorney General, *Thomas Fitzhugh,* Assistant, and *Neill Bohlinger,* for petitioner.

Farmer Tackett and *Glover & Glover,* for respondent.

MCHANEY, J. Upon the application of the Arkansas State Highway Commission, petitioner herein, to the county court of Hot Spring County, an order was entered in 1931, changing the location of U. S. and State highway No. 67 at Donaldson, in said county, so as to route same over an over-pass across the railroad tracks, which petitioner proposed to construct at said point. The route of said highway as changed by said order passed across the lands of Mr. J. D. Nix. There-

after, just when not being shown, but perhaps in 1934, petitioner undertook to take possession of the land for the new route and over-pass, but Mr. Nix refused to permit same, and petitioner instituted an injunction proceeding in the chancery court and enjoined him from further interference with its right of possession and with the construction of the changed highway and over-pass. In the injunction order the court attempted to impound $3,000 of the turn-back funds due from the State to Hot Spring County to protect Mr. Nix in whatever damage he might sustain by reason of the taking of his property. There was no appeal from this decree. In August, 1935, Mr. Nix filed a claim with the county court for damages for the taking of his land in the sum of $3,000, which claim was disallowed by the county court on October 7, 1935, for the reason that: "Damage not incurred by county or any agent thereof." An appeal from the order of disallowance was, in due time, prosecuted to the circuit court, and, on October 11, 1935, Mr. Nix filed a complaint in the circuit court against Hot Spring County, Kochtitzky and Johnson, contractors, the State Highway Commission and the trustees of the Missouri Pacific Railroad Company in which he prayed damages in the sum of $3,000 for the taking of his land. The State Highway Commission entered its special appearance, objected to the jurisdiction of the court in the action, and moved to have the cause dismissed as to it. The trial court overruled this motion and ordered petitioner to prepare for trial, whereupon this original proceeding was instituted in this court. A temporary writ was awarded by one of the judges and was continued by the whole court, pending a final hearing. The question now is: Shall the writ of prohibition be granted?

Mr. Nix alleged in his complaint filed in the circuit court that the order of the county court condemning his land for the changed route of said highway 67 is void, and that the petitioner here was a trespasser. The order of the county court was made under authority of § 5249, Crawford & Moses' Digest. This section was amended by act 611 of the Acts of 1923, page 490, but Hot Spring

County was exempted from the amendatory act. Said section has been many times construed and sustained. See *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, and cases following it which are collected in Shepard's Arkansas Citations, volume 2, page 128. Under this section, Mr. Nix had one year in which to file his claim for damages for the taking of his land. Whether this period of limitations runs from the date of the order or from the date of the actual taking, we do not now determine. Suffice it to say that Mr. Nix had a complete and adequate remedy by appeal from the order of the county court denying his claim for damages. Perhaps he still has that right as he did present his claim within one year from the actual taking, though not within one year from the date of the order. Moreover, when he was sued in the chancery court and enjoined from interfering with the petitioner in the construction of said improvements on his land, he had the remedy of appeal from that decree, if he were dissatisfied therewith. He did not do so, but permitted same to become final. This decree is not in the record now before us. A letter from the State Treasurer, dated April 6, 1936, and addressed to the State Highway Commission, advises that, pursuant to the resolution of the Commission, that office had impounded $3,000 in turnback funds of Hot Spring County for the satisfaction of right-of-way damages to Mr. Nix, which amount was then on hand for that purpose. It, therefore, appears that when some court of competent jurisdiction has lawfully determined the amount of damages Mr. Nix is entitled to receive, if any, same will be paid regardless of the solvency or insolvency of said county.

This is a suit against the State and cannot be maintained. *Arkansas State Highway Commission* v. *Nelson Brothers,* 191 Ark. 629, 87 S. W. (2d) 394. The proceeding in the county court in 1931 wherein the highway was relocated was not an adversary one. Nix was not a party to that proceeding, was given no notice thereof so far as this record discloses, and none was necessary. All he did was to file his claim against the county for damages in 1935, and, when same was disallowed, he

appealed from that order. The Highway Commission was not a party to this appeal. The claim filed was not a claim against it, but one against Hot Spring County. It reads: "County of Hot Spring to J. D. Nix, Dr., for land condemned for right-of-way for Highway No. 67, at point known as Donaldson over-pass in Hot Spring County, belonging to J. D. Nix and damages to property $3,000." There was no appeal from the order of condemnation, but only from the order disallowing the claim. So, of necessity, the suit now pending in said circuit court is a new and independent one against the Highway Commission, just the same as it is against the contractors and the railroad company, and being such, cannot be maintained, because a suit against the State, under the authority of the Nelson Brothers case, *supra*.

The question before the circuit court is whether he has been damaged, and, if so, how much, (assuming his claim was filed in time)? He raised no question in the county court as to the validity of its order. On the contrary he asserted its validity by filing his claim. He now asserts the invalidity of the order, and sues the petitioner with others for damages as a trespasser.

Let the writ issue. It is so ordered.

SMITH and MEHAFFY, JJ., dissent.

SYKES *v.* JAMESON.

4-4274

Opinion delivered April 27, 1936.

Henry B. Whitley, for appellant.

McKay & McKay, for appellee.

HUMPHREYS, J. A motion has been filed in this case to dismiss the appeal for failure to comply with Rule IX of this court, which requires appellant to file an abstract or abridgment of the transcript necessary for a full understanding of all questions presented for decision. A careful reading of the abstract reflects that the issues involved in the case to be determined in this court are whether J. M. Mason received $300 on June 12, 1921, as administrator of the estate of Arthur Sykes, deceased, and failed to account to Lillie Sykes and Oleen Sykes, Arthur Sykes' sole and only heirs, for their share of said amount, and whether they are barred under the statute of limitations from recovering same.

The facts material to a decision of the issues involved reflected by the record are that on June 22, 1919, Arthur Sykes, father of Lillie and Oleen Sykes, was run over and killed by a train of the Louisiana & Arkansas Railroad Company at a road crossing; that J. M. Mason, upon whose farm the deceased was residing as a tenant when he was killed, was duly appointed administrator of the estate of deceased, and in that capacity brought suit against said railroad and recovered judgment as such administrator against it for $600, which was paid to him and for which he gave a receipt; that he paid the attorneys representing him $300 of the amount as a fee and retained the balance; that he filed no inventory or claim himself against the estate of Arthur Sykes, and died on the 23rd day of July, 1925, intestate, without having even filed any account current and without making a final settlement; that there was no administration on the estate of J. M. Mason; that after his death his personal property was exhausted, and his real estate of 320 acres

is still owned by his heirs, who are the appellees herein. The relief sought in this suit is a lien upon the 320 acres for the share of appellants in the estate of their father, which J. M. Mason recovered from said railroad as administrator aforesaid.

In refusing to grant this relief to appellants, the chancery court proceeded upon the theory that the judgment recovered by the administrator was for the benefit of the widow and next of kin of Arthur Sykes. There is nothing in the judgment to so indicate. Had that been the case, the claim against the railroad was barred when the judgment against it was obtained. Arthur Sykes was killed on June 22, 1919, and the suit was filed and judgment obtained on July 12, 1921, more than two years after the death of Arthur Sykes, and at that time an action for the benefit of the widow and next of kin was barred under § 1075 of Crawford & Moses' Digest, whereas an action at that time for the benefit of the estate of Arthur Sykes was not barred by limitations. The action for the benefit of the estate could have been brought within three years from the death of Arthur Sykes. Section 1070 of Crawford & Moses' Digest. It must be presumed therefore that the suit brought by J. M. Mason as administrator against said railroad was for the benefit of the estate, and not for the benefit of the widow and next of kin.

It follows that the money received by the administrator in satisfaction of the judgment became and is a trust fund, and the statute of limitations will not prevent appellants from collecting their share of it out of the lands belonging to J. M. Mason at the time of his death, which his heirs inherited from him and which they now have in their possession. *Hall* v. *Brewer,* 40 Ark. 433. It goes without saying that the widow of Arthur Sykes, who is a party to this suit, was entitled to a dower interest in the amount collected by J. M. Mason, administrator, which could have been extinguished by advances or payments by the administrator to her. There is some evidence in the record tending to show that J. M. Mason made payments to her after her husband's death. What-

ever he paid to her should be deducted from her dower interest in the fund.

The decree is therefore reversed, and the cause is remanded with directions to declare a lien on said real estate for the share to which the heirs are entitled and any balance due the widow, with interest thereon in favor of each at the rate of six per cent. per annum from July 18, 1921.

MEHAFFY, J., dissents.

BAKER, J., disqualified and not participating.

STATE, EX REL. ATTORNEY GENERAL *v.* BROADAWAY.

4-4295

Opinion delivered April 27, 1936.

Carl E. Bailey, Attorney General, *Leffel Gentry* and *Walter L. Pope,* for appellant.

Rose, Hemingway, Cantrell & Loughborough, J. A. Tellier, Owens & Ehrman and *E. L. McHaney, Jr.,* for appellees.

MOORE, Special C. J. The State sues A. C. Broadaway, Urey Haden, Dwight H. Blackwood and J. L. Williams to recover moneys claimed to have been unlawfully paid out of its treasury in consequence of their alleged fraudulent conspiracy. Fidelity & Deposit Company of Maryland is sued as surety on the bonds of Blackwood and Williams as members of the State Highway Commission, and as surety on the bond of Blackwood as its disbursing agent. Wils Davis, a Tennessee attorney, was named in the complaint as a defendant, but was never served with process and brought into the case.

The facts furnishing the foundation of suit may be summarized as follows: During the term of office of Blackwood as Chairman, and of Williams as a member of the State Highway Commission, and on December 9, 1930, Davis addressed a letter to J. S. Parks, another member of the Commission, in which he said: "Some

time ago, on behalf of Road Improvement Districts Nos. 1, 2 and 3 of Dallas County, and Marshall-Witt Springs Road Improvement District of Newton County, we filed claims with the Highway Department for refund of interest paid by these districts after January 1, 1927, and we desire now to submit to you evidence of these payments." Attached to the letter were certain checks and drafts issued and paid out of funds they then had on hand by the four districts in January, 1927. The payments aggregated $24,799.34, and were made upon bond and interest obligations maturing February 1, 1927, a few days before the approval of act No. 11 of the General Assembly of 1927, commonly known as the Martineau Road Law.

The claims were referred to V. A. Kleiber, the Commission's Auditor, and on February 20, 1931, he wrote Davis returning the checks and drafts, and advising that the claims had been disallowed at the Commission's meeting of February 18, 1929. On May 1, 1931, a letter was addressed, over the signature of Blackwood as Chairman of the Commission, to Claude Duty, at that time Assistant Attorney General assigned to the Highway Department, enclosing the checks and drafts, and inquiring whether the Commission under the law should pay them. Mr. Duty's answer, bearing date of May 2, 1931, was: "* * * We have carefully studied these claims, and while they were paid during February, 1927, into the respective banks, by the several districts, yet it is our opinion that if these districts were equally without and within, or if a majority of them were without the State Highway System, you should recognize these claims as valid charges against any funds that you might have remaining in your appropriation on account of act No. 153 of the Acts of 1929. It is our opinion, in short, that these payments made as they were, in error, by the several districts, that is to say, the whole transaction, would amount to debts against the several districts, and would therefore be payable under the above act."

On May 23, 1931, Davis presented to the Auditor of State, voucher No. 410, of the Highway Commission, for the sum of $21,714.13. The voucher bore date of April

30, 1931, was signed with the name of D. H. Blackwood as Chairman of the Commission, was countersigned by C. S. Christian as State Highway Engineer, and bore the certificate of M. H. Thomas as Secretary of the Commission to the effect that the approval of the claim appears of record in the Commission's minutes of March 1, 1929. In the body of the voucher appeared an itemized statement showing the amount in which the claim of each of the four districts had been allowed, and under this statement appeared the notation "Items above listed being paid under opinion of Attorney General, dated May 2, 1931."

On May 23, 1931, the Auditor issued against voucher No. 410 State warrant No. 181,505 for $21,714.13, payable to Davis as attorney. The warrant was presented by Davis to the State Treasurer who issued to him two checks payable at the Bankers Trust Company of Little Rock, both dated May 23, 1931, and respectively for $2,000 and $19,000. The Treasurer paid Davis in cash $714.13. The minutes of the Highway Commission show that at a meeting held June 25, 1931, at which all of the Commissioners were present, voucher No. 410 in the sum of $21,714.13, was, on the motion of J. S. Parks, seconded by S. J. Wilson, approved for payment along with a large number of other vouchers, some of which appear to have been for bond and interest payments. This is the only record evidence showing consideration of the claim by the Commission as a whole.

The facts so far recited relate only to the presentation, allowance and payment of the claims. Turning to the distribution of the proceeds, the record shows that on May 23, 1931, the $2,000 check, bearing the indorsement of Davis as attorney and of Claude Duty, was paid by the Bankers Trust Company, and that the check for $19,000, bearing the indorsement of Davis, was deposited on May 25, 1931, to his credit in the Bank of Osceola, of which Williams was president. At the top of the ledger sheet showing the deposit account appears in pen and ink the name J. L. Williams. Out of the account was cashed on May 27, 1931, a check in favor of A. C. Broadaway for $9,642.03, leaving, after other withdrawals, a

balance of $6,000. On July 2, 1931, $4,000 was charged against the account upon a debit slip of that date, bearing the notation "Wils Davis—D. H. B." The balance of the account was paid out for the use and at the direction of Williams.

The record shows that of the money collected by Davis, Broadaway and Haden, who had procured from all of the road districts except one contracts upon a fifty per cent. basis to collect their claims against the Highway Department, and who had employed Davis to represent the districts before the Commission, received $714.13 in cash, plus $9,642.03, the proceeds of the check above mentioned. They paid to Marshall-Witt Springs Road District, whose claim had been allowed in the sum of $6,045.07, $1,500; to Road District No. 2 of Dallas County, whose claim had been allowed in the sum of $3,085.21, $200; and to Road District No. 3 of Dallas County, whose claim had been allowed in the sum of $5,568.89, $200. Road District No. 1 of Dallas County, whose claim had been allowed in the sum of $7,014.99, received nothing. Less than $2,000 of the $21,714.13 reached the districts on whose behalf claims had been filed.

The State in its complaint predicates its case upon allegations of conspiracy. It is alleged that on or about December 1, 1930, all of the defendants conspired together to wrongfully and corruptly take from the treasury the sum of $21,714.13, and that from that date they jointly pursued their corrupt design until its consummation. It is alleged that Blackwood's issuance of the voucher was without lawful authority and a breach of official duty, and with the unlawful and corrupt design of wrongfully taking money from the treasury, a part of which he was to and did receive individually; and that Williams participated in the collection of the warrant by depositing its proceeds to his credit in the Bank of Osceola, thereby unlawfully appropriating the proceeds to his own use in violation of his trust as a member of the Highway Commission. The final allegation is in effect that Broadaway and Haden, and Davis whom they had employed, caused Blackwood and Williams to do

the acts with which the latter are charged, and thus actively participated in the withdrawal of funds from the treasury to pay claims that did not constitute legal obligations of the Highway Department, and which it had no right or duty to pay. Judgment is asked against all of the defendants in the full sum of the voucher with interest and against the bonding company as surety on the bonds of Blackwood and Williams. Blackwood and Williams answered, denying all of the allegations of the complaint, and the bonding company answered with similar denials and pleaded other defenses which, in view of the conclusion we have reached, it is unnecessary to consider.

The evidence directly touching the issue of conspiracy is contained in the testimony of Blackwood and Williams, both of whom took the stand. Blackwood admits obtaining $4,000 from Williams, his brother-in-law, on or about July 2, 1931. He testified that in the fall of 1930 Williams and his associates were forced to increase the capital stock of their bank and that at Williams' request he took and paid for $4,000 of the new stock. He stated that he did not want the stock as he had other uses for his money, but purchased it upon Williams' promise to lend it back to him the following summer should he need it. That in June, 1931, desiring to purchase some property in Indiana, he advised Williams that he needed the money and requested a loan of it. Williams acquiesced, and Blackwood at his direction went to Osceola, signed a note for $4,000 payable to Williams without interest, and obtained the money. His testimony is that he never knew that Davis owed Williams any money and was ignorant of the fact that the money loaned him by Williams came out of any payment made by Davis to Williams, or that it was a part of or had any connection with the proceeds of the claims allowed Davis by the Highway Department. He recalled that Davis had claims before the Department and remembered his being before the Commission at its meetings, but denied ever having talked to Davis personally about the claims, and stated that he never had any talk,

conversation or agreement with any one with reference to approving the claims. The record shows that by November 4, 1935, Blackwood had repaid Williams $3,925.

Williams substantially corroborated the statements of Blackwood, and in addition testified that during the pendency of the claims before the Department he had no conversation with Blackwood concerning them. Regarding his relations with Davis, Williams testified that for a number of years they had been friends, during which time he had occasionally lent Davis money, and that at the time of the presentation of the claims to the Highway Department by Davis the latter still owed him about $7,000, which he had promised to pay as soon as possible. He assumed that Davis would be able to pay him something out of whatever fee he made on his claims, but had no agreement as to how much he would pay. He voted to approve the claims, but not for the purpose of getting Davis in any position to pay him. The claims, when submitted to the Commission, probably came up on a long list of fifty others, and they were approved all at once. He denied any conspiracy and stated that the claims would not have been paid had they not been approved by the Attorney General. He recalled Davis having spoken to him a time or two about the claims, but stated that it was not unusual for a lawyer to speak to the Commissioners about such matters. He testified further that after Davis made the collection he deposited the money in the Bank of Osceola, of which he, Williams, was president, and paid $6,000 upon his indebtedness. Supplementing this testimony is that of Miss Cox, at that time cashier of the Bank of Osceola, who exhibited an account book showing loans made by Williams to Davis during the years beginning 1922 and running through 1930, and who stated that at the time of the deposit of the Treasurer's check for $19,000 Davis told her that he was paying $6,000 of it to Williams, and that Williams' name was placed in pen and ink on the ledger opposite Davis' name at the direction of the former after the bank was closed in December, 1931, so that he could be identified with the balance. Williams admitted receiving and using $6,000 of the account.

Both Williams and Blackwood denied ever having had any conversation or dealings with Broadaway and stated that they had never seen or known him until after the Comptroller began his investigation in 1934.

In connection with the testimony just outlined, certain other testimony must be considered. It was shown that the Commission opposed the passage of act 153 of 1929—the act under which the claims in question were approved for payment—and originally rejected all claims presented under it; but that after the decision in the case of *Arkansas Highway Commission* v. *Otis & Co.*, 182 Ark. 242, 31 S. W. (2d) 427, the Commission decided to pay all of them that there was no suspicion attached to. Justin Matthews, at that time a member of the Commission, testified that the lists of claims were so voluminous that it became necessary for the Commissioners to rely upon the Department's employees for information regarding them. Claims did not come up singly for approval, but had to be passed upon in such numbers that it was necessary for the Commission to approve long lists of them at one time. Other road districts, he testified, had paid out money on interest maturing about January 1st, and they filed claims which were paid; the Commission being of the impression that under the decisions of the Supreme Court they had to pay them under act 153.

From the testimony of M. H. Thomas, Secretary of the Commission from 1928 to 1932, and in charge of its minutes, it appears that many other vouchers approved by the Commission June 25, 1931, had been paid prior to that meeting, and that the list of vouchers approved at the meeting contained fifty to seventy-five pages on each of which were listed about sixty-five vouchers. It was the usual procedure of the Department to issue the vouchers, and if there was no doubt concerning their validity to release them to the claimants, and to have them approved at the next meeting of the Commission. If there was doubt, the Attorney General would be asked for an opinion before the release of the voucher. If his opinion was favorable, the voucher was released; otherwise it was held. When the Attorney General ap-

proved the claim, the Department usually paid it and later submitted it to the Commission for approval. The Commission's procedure was also described by I. B. Graydon, in charge of its disbursements from 1921 until 1931, whose duty it was to prepare the vouchers on such claims as were approved; and by C. S. Christian, Engineer for the Department from 1927 to 1932. Their testimony is substantially the same as that just set forth, it being stated that the signatures of Blackwood, as Chairman, and Christian, as Engineer, were usually placed upon vouchers by the Auditor for the Department; they, on account of the volume of vouchers to be issued, having undertaken to delegate that authority to the Auditor. Claims were customarily audited by Graydon, who prepared the vouchers for signature by Kleiber, the Auditor. If there was no question about the claim it was at once mailed or delivered to the claimant; if subject to any question, it was held for further inspection.

Seven instructions were requested on behalf of the State. All were refused by the Court, which then offered to submit the case to the jury on the question of the good faith of Blackwood and Williams as Highway Commissioners in approving the claims for payment. The State objected to submission upon that issue and the Court then instructed a verdict for the defendants. The first, fifth, sixth and seventh requests were peremptory and were properly refused in any view of the case. The second and third would have advised the jury that if Blackwood and Williams aided in the issuance or collection of the voucher with the expectation of sharing in the money to be collected by the payee, and did share therein, they were liable for its face amount with interest. The fourth request was to the effect that, although neither Blackwood nor Williams aided in the issuance or collection of the voucher with the expectation of sharing in its proceeds, yet if either received any of the money collected thereon by the payee they would be liable for such amount as they received, unless they received it in good faith and without knowledge that it was part of the proceeds of the warrant involved.

We have concluded that all three requests were properly refused. The second and third would have allowed an improper measure of recovery. *United States* v. *Carter,* 217 U. S. 286, 30 S. Ct. 515. And moreover, since all three necessarily present the issue of the good faith of the defendants, it was necessary, before the trial court would have been justified in granting them, that proof be adduced sufficient to carry that issue to the jury. That is to say, before the court could properly have so instructed the evidence must have justified the submission of the issue of conspiracy to the jury. It is our opinion that in that respect the record was not sufficient. It is, of course, elementary that a public officer occupies a fiduciary position, and that in disbursing public funds he must be as free from selfish interest, direct or indirect, as any other trustee. On the other hand, the law presumes that every public officer does his duty and performs faithfully those matters with which he is charged, and where the contrary is alleged the burden of proof is upon the State. 22 R. C. L., Public Officers, § 143, and cases cited.

The allegation of the complaint is that Blackwood and Williams conspired with Davis, Broadaway and Haden to corruptly take from the treasury $21,714.13, and that in consequence of this conspiracy they aided in and furthered the issuance of voucher No. 410. Upon this allegation, what is the proof? In the case of Blackwood, aside from the fact that the $4,000 borrowed by him from Williams in July, 1931, which turned out to be a part of the proceeds of the voucher issued to Davis, the substance of the testimony is that while prior to the issuance of the voucher he knew Davis had these claims before the Department, he had no conversation with any one about them, and had no part in their allowance save as a member of the Commission voting therefor. His explanation of the loan from Davis to him is not unreasonable, and he denies knowing that the $4,000 loaned him was a part of the proceeds of the voucher, which had been issued and collected some five or six weeks before the loan. This testimony comes from Blackwood alone, but there is nothing in the record inconsistent with it.

Williams, it is true, admits that Davis was in debt to him at the time the claims were presented to the Department, and that he intended, if they were allowed, to collect from Davis out of his fee part of what the latter owed him. While $19,000 of the proceeds of the voucher was subsequently deposited in Williams' bank, out of which he collected $6,000 from Davis, there is no evidence tending to show that Williams' conduct as a Commissioner prior to the issuance of the voucher was influenced by his relation with Davis, or that he in turn talked with or made any attempt to influence the action of Blackwood or any other Commissioner. To the contrary, the testimony was that Blackwood and Williams never discussed the matter. It appears from the testimony of Matthews and the employees of the Highway Department that after the passage of act 153 the number of claims presented to the Department was so great that they were customarily approved by the Commissioners *en masse* after having been first investigated by the Department's employees. For aught that appears the claims in question, if actually approved prior to the issuance of the voucher, were approved in that manner. When the issuance of the voucher was finally approved or ratified on June 25, 1931, it was approved as one of a list of other vouchers covering some fifty or seventy-five sheets. There is no evidence that these claims were handled any differently from the other claims presented to the Department under act 153.

Williams was not a party to or interested in the claims. He desired, of course, to collect from Davis what the latter owed him, but it is not to be presumed, especially in the complete absence of evidence that he sought to aid in the allowance of the claims or to influence the action of other Commissioners with reference thereto, that his own action was influenced by selfish interest, and that he permitted himself to act in a manner inconsistent with his trust as a public officer. Suspicion cannot take the place of proof, and while, as has been remarked, public officers are regarded as trustees and held to a high degree of accountability, we are

not willing to hold that the payment by Davis of his indebtedness to Williams can raise an inference of official misconduct on Williams' part in the face of the testimony just referred to. We conclude, therefore, that the evidence was insufficient to carry to the jury the issue of conspiracy, and that the court correctly refused the State's requests for instructions numbered two, three and four.

It has been suggested that had there been sufficient evidence of conspiracy to submit to the jury, the issue was withdrawn by the State's action in objecting to its submission when the court offered to submit it generally after having denied the State's request for its other instructions; and there may be some question as to whether the issue was, under the circumstances, not waived by the State. *Toplitz* v. *Hedden,* 146 U. S. 252, 13 S. Ct. 70, 36 L. Ed. 961. We prefer, however, to place our conclusion upon the broader ground.

It remains to determine whether the trial court was correct in instructing a verdict for the defendants. It is argued on behalf of the State that the claims for which voucher No. 410 was issued were not legal obligations of the department, were unlawfully paid, and that Blackwood and Williams, regardless of motive and in the absence of fraud or conspiracy, are liable to the State for the amount of the voucher. In considering this branch of the case, Blackwood and Williams must be assumed to have acted innocently, and the State's argument overlooks the question whether, having acted only as two members of the board of five, they can be held responsible for the board's action in approving the voucher. (*Tyrell* v. *Burke,* 110 N. J. L. 225, 164 Atl. 586; *Pidgeon Thomas Iron Co.* v. *LaFlore County,* 135 Miss. 155, 99 So. 677; 22 R. C. L., Public Officers, § 165). But we do not stop to decide that question since our decision is based upon another ground.

It is contended by counsel that the claims for which the voucher was issued were within act 153 of 1929, and, if not, were payable under the Martineau Road Law. We agree with the State that these claims were payable under

neither statute and were not legal obligations of the Highway Department. The claims were made on behalf of the districts for bond and interest payments made by them in January and on February 1, 1927. Without stopping to analyze act 153 in detail, it is sufficient to say that in our opinion on its face it excludes such items, and that in the case of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, it was construed as authorizing the payment of district indebtedness *other* than bonds. It is unnecessary to examine § 3 of act 11 of 1927, because act 112 of 1927 expressly provides in § 1 that any balance of money in the hands of road improvement districts after January 1, 1927, shall be used to pay bonds and interest maturing thereafter, and in § 4 empowers the Highway Commission to require the districts to remit any such funds on hand for application to the payment of such bonds and interest.

The case narrows to the question whether Blackwood and Williams, as members of the Highway Commission, are legally liable to the State for approving in good faith the issuance of a voucher to pay claims that did not constitute lawful obligations of the department and which it had no legal power to pay. The State here contends that the voucher was issued after the appropriation made in act 153 had expired, and that the commission in issuing it acted without the scope of its authority and without jurisdiction. The appropriation in connection with act 153 was made available by reference to § 7 of act 18 of 1929, and expired February 28, 1931. But act 781 of the General Assembly of 1923, § 8, provides: "any disbursing agent may draw a voucher against an appropriation made for an agency, if there is sufficient unvouchered balance, at any time during the period for which the appropriation is made and during the two months immediately following." A later provision of the act is that the auditor may "issue" a warrant on the voucher at any time not later than three months after the expiration of the period for which the appropriation is made, and the word "draw" as it appears in that part of the act just quoted is therefore used in the sense of preparing or drawing

a voucher, as distinguished from issuing and delivering it. Voucher No. 410 bears date of April 30th, and must be presumed to have been drawn on that date in the absence of evidence to the contrary. The fact that there appears upon it an indorsement to the effect that the items therein are being paid under an opinion of the Attorney General of May 2, 1931, was fully explained, and is not inconsistent with the presumption. We, therefore, hold that the appropriation had not expired when the voucher was drawn.

The claims were presented to the Commission as items payable under act 153. Under that act, it was the duty of the Commission to determine the validity and the amount of all items so presented. *Arkansas State Highway Commission* v. *Otis & Co.,* 182 Ark. 242, 31 S. W. (2d) 427. In so doing it acted as a *quasi* judicial body, and the rule is that officers acting in that capacity are immune from liability for errors of judgment when acting without wilfullness, malice or corruption. *Tyler* v. *Cass County,* 142 U. S. 288, 12 S. Ct. 225, 22 R. C. L., Public Officers, § 163. Here may be mentioned counsel's argument that there is no evidence of the claims having been approved before the issuance of the voucher. The contention, if material, is answered by the principle that the action of judicial officers is presumed, in the absence of evidence to the contrary, to be regular, and that acts done by such officers which presuppose the existence of other acts to make them legally operative, are presumptive proof of the existence of the latter. *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 13 S. Ct. 267; *Nofire* v. *United States,* 164 U. S. 657, 17 S. Ct. 212. But since the issuance of voucher No. 410 was approved, June 25, 1931, by the full Commission, it becomes immaterial whether the claims were or were not approved before the issuance of the voucher, since the Commission had the power to ratify, and thus validate, any act that it had jurisdiction to perform in the first instance.

Having reached the conclusion that the Commission had jurisdiction to consider the claims, it follows that it acted within the scope of its authority in seeking the At-

torney General's opinion as to whether they were legally payable. The reply of the Attorney General was in effect that the claims were legal obligations under act 153 of 1929, and as such payable out of any funds remaining in the appropriation. In delivering the voucher and in approving it the Commission acted upon the advice of the Attorney General, and its members are therefore protected against liability to the State under the rule laid down in *State* v. *Fidelity & Deposit Company of Maryland,* 187 Ark. 4, 58 S. W. (2d) 696. There being no liability on the part of Blackwood and Williams, it follows that none attaches to the surety upon their official bonds.

The views above expressed compel the conclusion that the trial court was correct in instructing a verdict for the appellees, Broadaway and Haden, there being no evidence of any conspiracy or collusion, direct or indirect, between them and any member of the Highway Commission. It follows that the court correctly instructed a verdict for all of the appellees, and the judgment is affirmed.

HUMPHREYS and MEHAFFY, JJ., and MCMILLEN, Spl. J., dissent.

MCMILLEN, Sp. J. (dissenting). It is conceded in the opinion of the majority of the court that the claims were not legal obligations of the highway department under act 153 of 1929, or the Martineau road law. Therefore $21,714.13 was illegally taken from the state of Arkansas.

The only evidence relied on by the majority in holding that the trial court was correct in directing a verdict for the defendants is the testimony of Blackwood and Williams who were vitally interested in the result of the trial. This court has consistently held it is error to direct a jury to find according to the testimony of a witness, if he is interested in the result of the trial, or if his testimony contains such inconsistencies or inaccuracies as would have warranted the jury in declining to accept as established the existence of facts which depend entirely upon his testimony. *Merchants' Fire Ins. Co.* v. *McAdams,* 88 Ark. 550, 115 S. W. 175.

This court has also consistently held that "where there is any substantial evidence to support the verdict

the question must be submitted to the jury. In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence or where the evidence is not in dispute, but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict." *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. (2d) 1043.

Measured by these rules, I am of the opinion the evidence is amply sufficient to warrant a submission of this case to the jury on the issue of conspiracy on the part of the defendants.

Even though the evidence were not sufficient to warrant the submission of that question to the jury, since it is conceded that the money was paid out illegally and without authority of law, the state has the undoubted right to recover the money that each of the defendants received. The allegations in the complaint state a cause of action for money had and received, and that form of action is "maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to another." 2 R. C. L., page 778; *Emery* v. *United States,* 13 Fed. (2d) 658; *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399. It is only necessary to read the statement of facts set out in the opinion of the majority to determine that the appellees received money that in equity and good conscience they ought not to retain.

Mr. Justice HUMPHREYS and Mr. Justice MEHAFFY concur in the views here expressed.

WOHLFELD *v.* HENLEY.

4-4289

Opinion delivered April 27, 1936.

[redacted]

McDaniel, McCray & Crow, for appellant.

Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

BUTLER, J. In a suit brought by appellee against his employer, the appellant, he recovered $300 as damages for personal injury, and from the judgment awarding the same, the present appeal is prosecuted.

The theory upon which the suit was instituted is that appellee was injured by a fall which was occasioned by the failure of appellant, his employer, to furnish him a safe place to work.

There are two grounds of error assigned in the motion for a new trial which are argued in appellant's brief for reversal of the judgment. The first, and the one most strongly insisted upon, is that the evidence is insufficient to establish the negligence of appellant, and the other is that the court should have, at appellant's request, instructed the jury that, if the injury was due solely to an accident, its verdict should be for the defendant.

The evidence tending to establish negligence in respect to furnishing a safe place in which to work is not altogether satisfactory, but when viewed in the light most favorable to appellee and the inferences reasonably deducible therefrom are considered, we think there is some substantial evidence warranting the submission of that question to the jury. Briefly stated, the evidence most strongly tending to support appellee's contention is to the effect that the injury occurred to appellee while he was engaged in rolling a wheelbarrow up an inclined plane or runway. He had been at work on this runway but a short time before his injury occurred; he had made no inspection of the runway or the nature of its construction, but supposed that it had been constructed so as to render it safe to those who had occasion to use it. This runway began at the ground and extended gradually upward, ending in a platform about six feet above the surface of the ground. It was made of pine boards, two by ten, or twelve inches and twelve or fourteen feet long. The proper method of constructing this runway was to have supports upon which the planks rested about seven feet apart so that a support would be at each end of the plank and one in the middle. As appellee wheeled the barrow upward and was approaching the platform, the plank on which the barrow was being rolled bent downward, or "sagged" under the weight of the barrow, and when this happened appellee's foot slipped and he fell, striking his side near the groin with sufficient violence to produce an inguinal hernia. There was no support under the middle of the plank, and this lack of support was the occasion of the bending or "sagging" of the plank and of the injury resulting. It is true that there is evidence strongly contradicting the foregoing statement, and also as tending to show that there was no injury caused to the appellant from the cause assigned by him, but these questions were for the jury, and, since there is some substantial evidence to support its finding, we are bound by it.

In a number of instructions given, both at the request of the appellee and of the appellant, the court made

it plain to the jury that there could be no recovery unless the injury could be shown to have been occasioned by the negligent failure of the appellant in the construction and maintenance of the runway. The jury was fully and fairly instructed on the question of assumption of risk and contributory negligence. These instructions necessarily excluded liability if the injury was the result of a casualty which could not have been reasonably anticipated or avoided by the exercise of ordinary foresight and prudence. The court therefore did not commit prejudicial error in refusing to tell the jury that there could be no recovery if the injury "was due solely to an accident," for this was necessarily inferred from the instructions given, although the court might well have given, with accident properly defined, an instruction to the effect that appellant was not liable if the injury was occasioned solely by an accident.

It follows that the judgment of the court below will be affirmed, and it is so ordered.

BRICKELL *v.* GUARANTY LOAN & TRUST COMPANY.

4-4287

Opinion delivered April 27, 1936.

W. P. Brickell, Jr., and *W. E. Douglas,* for appellant.

Moore & Burke and *G. D. Walker,* for appellees.

MEHAFFY, J. The appellant, W. P. Brickell, Jr., is justice of the peace of Hickory Ridge township, Phillips County, Arkansas. The appellees were defendants in an attachment suit brought by C. F. Fisher in appellant's court.

The appellees filed a motion to transfer the cases to the municipal court in Helena. The motion was denied on the ground that act 18 of the Acts of 1917 was unconstitutional. This act established a corporation court in the city of Helena to be styled the Municipal Court of Helena. Section 20 of said act is as follows: "In any civil case brought before a justice of the peace in Phillips County, the defendant may, on motion without any affidavit or supporting witnesses, take a change of venue to said municipal court, without the prepayment or tender of any fees, a justice of the peace, upon the filing of such motion, to have no further jurisdiction in the case, except for the purpose of preparing transcript for said municipal court."

When the justice of the peace refused to transfer the case or to grant the change of venue to the municipal court, the appellees filed a petition in the Phillips Circuit Court for a writ of mandamus, commanding and compelling W. P. Brickell, Jr., as justice of the peace, to transfer said cause to the municipal court at Helena, Arkansas. The petition was properly verified.

The appellant, W. P. Brickell, Jr., on the same day that the petition for a writ of mandamus was filed, filed the following entry of appearance, and waiver of service of summons: "Comes the defendant, W. P. Brickell, Jr., justice of the peace of Hickory Ridge township, and waives issuance of and service of summons in this cause and enters his appearance herein for all purposes, and

further consents that this cause may be heard by the court upon the adjourned day to be held November 19, 1935."

After the appellant had filed the written entry of appearance, he filed the following demurrer: "The defendant, W. P. Brickell, Jr., demurs generally to the complaint filed herein for the reason that the plaintiffs had other adequate remedies at law.

"That the complaint does not contain allegations or statements which, if true, are such as would constitute a cause of action against the defendant, that §§ 6418, 6419, 6420, 6421 of Crawford & Moses' Digest govern the actions of the justice of the peace in matters of changes of venue. That defendant, as justice of the peace, was governed by the general law and not by any special act, and only used his discretion, that he felt was right and proper, in refusing to grant said motion, as defendants had adequate remedies cited herein for all relief they were entitled, and that the plaintiffs hereto did not avail themselves of the adequate remedies set out under such sections, although the same were extended them by the defendant."

The appellant also filed the following special demurrer: "Comes the defendant and demurs to the jurisdiction of the court to hear and determine this cause, and for special reason states: That petitioners herein failed to give the statutory notice of ten days as is required by law at or before filing of the petition herein as said notice is mandatory and without the same having been given this court is without jurisdiction to hear and determine the same. Although defendant herein signed a waiver of said notice as under our law made and provided, jurisdictional question cannot be waived.

"That the defendant further demurs to the jurisdiction of the court for the reason that he believes § 20 of the special act of the Legislature of 1917 is unconstitutional."

The court overruled the demurrers. The appellant excepted, declined to plead further, and the court entered judgment in favor of appellee, and directed that a writ

of mandamus be issued. Motion for new trial was filed and overruled, and appeal prosecuted to this court.

It is first contended that § 20 of act 18 of the Acts of the General Assembly of 1917 is unconstitutional and void. Section 20 of act 18 of 1917 is substantially the same as § 23 of act 87 of 1915.

Section 1 of article 7 of the Constitution reads in part as follows: "The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and when deemed expedient, may establish separate courts of chancery."

Section 43 of article 7 of the Constitution provides for the creation of corporation courts in towns and cities, and authorizes the Legislature to vest such courts with certain jurisdiction.

This court has said in passing upon act 87 of the Acts of 1915, which, as we have already said, had substantially the same provision that the act creating the municipal court of Helena has: "No limitation is found in the Constitution upon the power of the Legislature to vest jurisdiction in municipal courts when established beyond the geographical limits of the municipality. Nor can it be said that there exists any policy or sound reason for restricting the jurisdiction to such geographical limits." *State ex rel. Wm. L. Moose* v. *Woodruff*, 120 Ark. 406, 179 S. W. 813.

The above case settles the constitutionality of the law, and if the Legislature had authority to pass the law establishing the court, it had authority to prescribe the manner in which a change of venue could be taken from justices of the peace.

Act 2 of the General Assembly of 1917, under the provisions of which the municipal court of the city of Hot Springs was established, had substantially the same provision with reference to change of venue that the other acts above mentioned had, and this court, in passing on that case, said: "The act of the General Assembly creating the municipal court gave it jurisdiction exclusive of the justices of the peace in townships subject to this act,

and concurrent with the circuit court over all misdemeanors committed in violation of the laws of the State within the limits of the county. A similar statute was upheld in the case of the *State ex rel. Moose* v. *Woodruff,* 120 Ark. 406, 179 S. W. 813." *Covill* v. *Gerschmay,* 145 Ark. 269, 224 S. W. 609.

The Constitution expressly authorizes the Legislature to establish municipal courts, and to vest such jurisdiction in said courts as may be deemed necessary. There is no provision of the Constitution limiting the jurisdiction to the municipality, and there is no provision in the Constitution prescribing the manner in which changes of venue in civil cases may be taken.

The Legislature, therefore, had the right to provide for a change of venue as it did in the three acts above mentioned. The fact that there are other acts or general laws prescribing the manner in which changes of venue may be taken from justice of the peace court did not prohibit the Legislature from passing a law prescribing a different method. If not limited by the Constitution, the Legislature may pass any law with reference to procedure in courts.

It is contended by the appellant that the circuit court did not have jurisdiction because no notice was given as required by § 6251 of Crawford & Moses' Digest. That section reads as follows: "Notice of such motion shall be served upon the party against whom the judgment or order is sought, at least ten days before the motion is made." The notice merely performs the functions of a summons, and, like the issue and service of summons, may be waived. The notice is required solely for the benefit of the party against whom the judgment or order is sought, and being for his benefit, he may, of course, waive the notice.

"A person for whose benefit or protection a notice should be given may waive the same." 46 C. J. 552; *Kirk* v. *Bonner,* 186 Ark. 1063, 57 S. W. (2d) 802; *St. Louis-San Francisco Ry. Co.* v. *State,* 179 Ark. 1128, 20 S. W. (2d) 878; 38 C. J. 913; *State ex rel. Murphy* v. *Second Judicial Dist. Court,* 99 Mont. 209, 41 Pac. (2d) 1113.

It is also contended by the appellant that appellees had other adequate remedies. But little need be said as to this contention. The duty to transfer the case was imposed by statute, and the statute provides that when the motion is filed that the justice of the peace shall have no further jurisdiction in the case except for the purpose of preparing a transcript for said municipal court. This suit was brought to compel the justice of the peace to perform a duty required of him by the law, and mandamus was the proper remedy.

We find no error, and the judgment of the circuit court is affirmed.

DAVISON *v.* MCCALL.

4-4298

Opinion delivered April 27, 1936.

John C. Sheffield, for appellant.

Trimble, Trimble & McCrary and *W. P. Beard,* for appellee.

BAKER, J. This suit was filed by A. O. McCall, as the executor in succession of the estate of George Sibly, deceased, against Alice Davison, administratrix of the estate of Sarah S. Sibly, deceased. George Sibly and Sarah S. Sibly were husband and wife. George Sibly died long prior to the death of Sarah S. Sibly. When George Sibly died he left a will whereby he disposed of his property, giving and bequeathing to his wife all of it for her lifetime, but with the full power of disposition, sale or other alienation of the property as she might wish,

with the remainder, after the termination of her life estate, however, to his heirs.

There is no controversy between the parties as to the will or its construction, and for that reason time or space will not be taken to set it forth herein. Let it be sufficient to say that the will was not essentially different from that of Mr. Coffman, the testator, in the case of *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. (2d) 287.

The only question for determination here is a question of fact. It was asserted by the plaintiff and denied by the defendant that the property in controversy, notes and mortgage for the sum of $2,500, in the custody of the appellant and claimed by her as belonging to the estate of Sarah S. Sibly, belong to the estate of George Sibly, deceased.

The abstract shows, among other things, that the notes in question were payable to Sarah S. Sibly, and the mortgage securing the same is a conveyance to her; that she was the owner of certain real property in her own right, acquired prior to the death of her husband. There were several different tracts of land that she owned as well as others that she acquired under the will.

We are inclined to think that appellant's theory in the presentation of the case is to the effect that the evidence offered herein is not sufficiently strong to overturn the presumption that the notes and mortgage securing the same belonged to Mrs. Sibly, as they were made to her as payee, and for the further reason that the original evidences of this same debt were transferred or assigned to Mrs. Sibley for an account in an insolvent bank, which account shows that she had on deposit in that bank, at the time it failed, about $2,700. The presumption would be sufficient were it not for the fact that it is rebutted by testimony which is not disputed. This testimony is to the effect that when Mr. George Sibly died the officers of the Bank of Central Arkansas, being acquainted with the conditions, transferred George Sibly's bank account to Mrs. Sibly.

Later, when the Bank of Central Arkansas failed, Mrs. Sibly's account, so acquired, amounted to something

more than $19,000. The Bank of Central Arkansas paid a dividend of 53 per cent., and from that account Mrs. Sibly received checks or dividends amounting to nearly or about $10,000. These she deposited in a Lonoke County bank. Her account was continued in that bank until it became insolvent. It had been reduced at that time to about $2,700. The liquidating agent in charge of the bank transferred to her the notes and mortgage of W. J. Waggoner for $2,500 in settlement of her account in the Lonoke County Bank.

There was another item of $2,500 in government bonds, which Mrs. Sibly had given to one of her neighbors for services and attentions bestowed upon her by the neighbor throughout the years. The question of title and ownership of the government bonds, however, was settled by a decree in the chancery court, and from that decree, as to that item, there has been no appeal.

It is argued that since Mrs. Sibly had other property that she must have added her own individual moneys to the bank accounts from time to time, and that it was error to treat the entire amount as belonging to the estate of George Sibly.

Records of the banks are not available. Some have been lost, some were stored in an outhouse, which burned some time ago, and the record is wholly lacking in proof of any additions to the Sibly account throughout the years, and we do not see that there could be a legal presumption that any additions were made thereto.

It is true that Mrs. Sibly sold several pieces of property. She may have received cash upon these sales, or may have collected payments from time to time. The record, however, is wholly silent as to any additions to the Sibly account. Further, when Mrs. Sibly sold some of the Sibly estate, in the execution of her deed, she recited the fact that title was acquired by her from the estate of her husband. If there were any deposits made by her they were evidently made as restorations to the estate left by the husband. If this were not true, she should have made or left such record or evidence where-

by her personal or individual property could have been identified. 1 Restatement of Law of Trusts, § 180.

This, in effect, was all of the proof. The decree is in conformity with it.

The evidence, we think, by preponderance supports the decree of the chancellor. It is affirmed.

RAY *v.* RAY.

4-4162

Opinion delivered April 27, 1936.

H. J. Denton, for appellant.

Nat T. Dyer, for appellee.

JOHNSON, C. J. Appellant and appellee were formerly husband and wife. On September 28, 1934, appellant instituted this proceeding against appellee in the Baxter Chancery Court, the object of which was to procure a decree of divorce, division of property, alimony and the custody of two minor children, together with their maintenance. By way of answer, appellee denied the material allegations of the complaint, and by cross-complaint sought a decree of divorce from appellant. The common alleged causes of action were that each spouse had suffered such indignities at the hands of the other as to render her or his condition in life intolerable.

Appellant and two of her children, issue of the marriage, Mrs. Pearl Wolf and Josephine Ray, testified in

detail as to the indignities suffered by appellant at the hands of appellee, extending over a period of years immediately prior to the separation. While on the other hand, appellee and one of the children, issue of the marriage, Mrs. Webber, not only denied the testimony adduced by appellant and her witnesses, but narrated in detail indignities offered by appellant toward appellee over a period of several years prior to the separation.

Particularly in respect to the general trend of the testimony offered by appellant as establishing her cause for divorce a letter was introduced which purports to have been written by appellee several years prior to their separation to a woman who resided in the State of Oklahoma. This letter is couched in the most endearing terms. Appellee emphatically denied authorship of this letter, and also adduced testimony which tended most strongly to show that it was written by appellant, or at least under her direction.

At the conclusion of all the testimony adduced by the parties, the chancellor entered a decree dismissing appellant's complaint for want of equity, granted a decree of divorce to appellee upon his cross-complaint, directing that each party retain the real and personal property theretofore had and possessed by each respectively—as to which more will be said hereinafter—awarded custody of one of the minor children to appellant and thereupon the other by choice accepted her as custodian and also awarded appellant $30 per month as permanent alimony, from which decree both parties appeal to this court.

Appellant first contends that a decree of divorce should have been awarded her on the testimony adduced, but if not, manifest error appears in the decree of divorce in favor of appellee. This contention rests upon the weight which should be accorded the testimony adduced. If the testimony adduced by appellant be given full credence and weight, it preponderates in her favor, but we are disinclined, as the chancellor was, to do this. It is apparent to us that appellant was the author of the defamatory letter which she introduced in testimony purporting

to have been written by appellee, and, holding this opinion as we do, the residue of her testimony must stand materially discredited. Likewise, the discredit just discussed has its preponderating influence in behalf of the decree of divorce in favor of appellee. A spouse who so forgets honesty and integrity as to manufacture testimony of the defamatory nature of the letter introduced by appellant manifests such hatred and malevolence as to warrant a court in finding that cohabitation in the future is impossible, and, when the allegations for divorce of the offended spouse are supplemented by testimony showing a course of conduct amounting to indignities, persistently pursued, which render life intolerable, will be sufficient to support a decree of divorce. *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. (2d) 98; *Griffin* v. *Griffin,* 166 Ark. 85, 265 S. W. 352.

Such is the state of this record, and the chancellor's finding of fact on the divorce branch of the case does not appear to be clearly against the preponderance of the testimony. *Greer* v. *Stillwell,* 184 Ark. 1102, 44 S. W. (2d) 1082; *Smith* v. *Thomas,* 185 Ark. 613, 48 S. W. (2d) 561; *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. (2d) 1055.

Lastly, it is contended that the property division effected by the chancellor and the alimony award are erroneous. The testimony on this branch of the case reflects that appellee owns the following property: 120 acres of land situated in New Mexico, of the approximate value of $1,500; the home place, where appellant resides, of the approximate value of $2,000; 2 filling stations of the approximate value of $2,000; personal property of the estimated value of $4,000, but encumbered for approximately its intrinsic value. Appellee's income is admitted to be approximately $70 per month. The chancellor awarded to appellant the home place and to appellee the New Mexico property and the two filling stations, and further directed appellee to pay to appellant as alimony $30 per month until otherwise directed. Since appellant has been determined at fault in the wrecking of the matrimonial venture, she is entitled to no part of appellee's property as a matter of law, 9 R. C. L., p. 497, § 319;

§ 3511, Crawford & Moses' Digest, and her further assistance from appellee rests entirely within the discretion of the chancery court. *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700; *Clyburn* v. *Clyburn,* 175 Ark. 330, 299 S. W. 38.

The title to the home place rested in appellant, and was not disturbed by the chancellor's decree; and, as we believe, this satisfied appellant's equities in respect to the properties owned by appellee.

The award of alimony to appellant was excessive under the facts and circumstances of this record. The court also erred in refusing to make an award for the maintenance of the two minor children who are in the custody of appellant. However, substantial justice has been done between parties in this respect. The chancellor should have directed $15 per month as alimony to appellant and $7.50 each to the minor children for maintenance.

The decree will be so modified and affirmed. It is so ordered.

KELLEY *v.* BALLARD.

4-4297

Opinion delivered April 27, 1936.

E. G. Ward, O. T. Ward and *Carl L. Hunter,* for appellants.

Arthur Sneed, for appellees.

McHaney, J. Appellant Kelley was the manager, collector, bookkeeper and disbursing officer of Light and Power Improvement District No. 1 and Water Works Improvement District No. 1 of Piggott, Arkansas, from November 1, 1930, to September 1, 1933, and appellant, American Surety Company, was surety on his official bond in the sum of $3,000. In March, 1934, after having an audit made of the separate books kept by Kelley in each of said districts, which audit showed a shortage in his accounts with both districts, appellees instituted this action against appellants to recover the shortage, and to reform the bond so as to show the obligees to be the two appellees above named instead of "Board of Commissioners, Public Improvement Districts, Piggott, Arkansas," as written in the bond. In response to a motion to make the complaint more definite and certain, appellees attached as an exhibit to the complaint an itemized statement of cash collected by Kelley, and not accounted for from December 1, 1931, to September 1, 1933, in the Light and Power District, in a total sum of $2,328.22, and a like statement for the same period in the Water Works District in a total sum of $1,016.08. A further sum was claimed amounting to $63.10 which was represented by customers' receipts for which no credits were given in the Customers Ledger accounts. The items above mentioned other than the $63.10 represented the result of an audit of the books kept by Kelley, made subsequent to his discharge, and were arrived at by totaling the credits in Customers Accounts and deducting therefrom adjustments and merchandise returned for credit, and comparing it with his cash, both on hand and in bank, after taking into consideration cash paid out for expenses, and he was found short in said amounts. Appellants answered and admitted that the bond was made for the benefit of the appellee districts, but denied any shortage in the accounts. They also moved to transfer the case to the circuit court and objected to the

appointment of a master to state the account, all of which was overruled by the court. A master was appointed who took all the testimony, restated the account and found appellant short in the Power and Light District in the sum of $1,670.08, and in the Water Works District the sum of $1,012.06, which, including the $63.10 item above mentioned made a total shortage, as found by the master of $2,745.24. This amount was reported to the court to be due appellees by appellants, and a decree was entered in accordance with the master's findings.

For a reversal of the judgment against them, appellants make a number of contentions. We will not discuss them all, as to do so would unduly extend this opinion. One of the arguments is that the chancery court should have transferred the case to the circuit court on their motion because the former was without jurisdiction. It is said that under §§ 5718 and 5719, Crawford & Moses' Digest, municipal improvement districts are required to make annual settlements and file same with the clerk of the city or town and that the council shall examine same and disallow all unjust charges and credits, subject to reexamination in a court of chancery. These sections have no application in matters such as are now under consideration. This is an action by improvement districts to recover from an employee and his bondsman a sum of money embezzled by the employee in the course of his employment. The chancery court had jurisdiction of this action for two reasons: 1st, a reformation of the bond was sought and obtained to more definitely identify the obligees as appellees; 2nd, a long and complicated account was involved, there being about 700 accounts to be examined in both districts, and extending over a period of 21 months. Generally the items are small, consisting of charges and credits for light and water service. It is well settled that for either reason equity has jurisdiction. *Smith* v. *Kaufman*, 145 Ark. 548, 224 S. W. 978; *Terry* v. *Little*, 179 Ark. 954, 18 S. W. (2d) 916.

Appellants also say the court erred in appointing a master, in not discharging him on their motion, and in

not sustaining their exceptions to his report. Should this all be true, it would be no ground for reversing a decree otherwise correct. It might justify a retaxing of costs. Otherwise appellants could not be prejudiced. We think the master was properly appointed and that the fee allowed him, $200, is not excessive.

When Kelley was checked out September 1, 1933, a check was made from the balance sheets of appellee districts, and it was found that he owed them $50.30 and they owed him $194.82. They paid him the difference, believing it to be correct and without any detailed audit. It is now insisted this constitutes an account stated, behind which appellees cannot go—that they are estopped. But not so. Appellees acted without knowledge of the facts that an audit later made developed. They also acted promptly in making the detailed audit, and immediately made demand for restitution. The account rendered appellees by Kelley was not a true account as developed by the audit, and as soon as its falsity was discovered, and the amount of the shortage determined, demand was made for restitution on appellants.

The real question in the lawsuit was: Did appellant Kelley collect, wrongfully abstract, and misappropriate the funds of appellee districts? The auditor, whose qualifications are not questioned, testified to the shortage. The master who restated the account and heard all the testimony reported that Kelley was short in the amounts heretofore stated. He found that since the audit was made a number of sheets from the day-book or scratch book had been removed, and that he could not check the auditors' report with the books in their mutilated condition. It was shown that Kelley was given access to the books to prepare his answer to the auditors' report. It was shown that Kelley's system of bookkeeping was to charge the customers in the ledger with their service charges and merchandise purchased, and when customers paid their bills same was entered in the day or scratch book and transcribed from that book to the credit side of the customers' ledger, or if an adjustment was made in a customer's account or merchandise returned, credit was

given in the proper account in a column for that purpose. In practically all instances, customers were given proper credit for their payments, but the cash did not find its way into the cash journal or in the bank account. The court heard the report of the master and all exceptions thereto, and judgment was entered against appellants in the amount stated.

Appellant Kelley very earnestly insists that he did not get the money, that he was not short in his accounts, but, on the contrary, that he accounted faithfully for all the money coming into his hands. But it appears to us, as it did to the master and the trial court, that the total of the credits in his customers' ledger, after deducting adjustments and returns, should balance with his cash and cash items.

The decree is not only not against the preponderance of the testimony, but appears to be amply supported by it, and must be affirmed.

BAKER, J., disqualified and not participating.

MID-CONTINENT LIFE INSURANCE COMPANY *v.* HILL.

4-4299

Opinion delivered May 4, 1936.

Rittenhouse, Webster & Rittenhouse and *Hays & Smallwood,* for appellant.

Neal King, for appellee.

MEHAFFY, J. On May 14, 1925, the Mid-Continent Life Insurance Company issued and delivered to James Franklin Hill its life insurance policy, insuring his life in the sum of $2,500 with double indemnity in case of accidental death. The policy was placed in the Bank of Atkins, Atkins, Arkansas, by Hill and remained there until his death. None of his family ever saw the policy, and knew nothing of its provisions. All premiums were paid, including the double indemnity premium, and the policy was in full force and effect at the time of Hill's death.

On March 12, 1935, the body of Hill was discovered in the back waters of an overflow near his home. The feet were lying on the edge of the levee and only the toes showing. The body was flat on its back down in the water two or three feet deep. His gun was found leaning against a bush on the levee. The body was lying between two bushes in the water, and his left hand was grasping one of the bushes.

On the same day that Hill's body was found, March 12, 1935, the Bank of Atkins, which had the policy in its possession, notified the insurance company at Oklahoma City of the finding of the body. The following is the letter written by the bank: "Gentlemen: The body of James F. Hill, insured under your policy No. 48,198, was found drowned this morning in a canal or bayou about seven to eight miles east of here. Some people think it was an accident, others that he died of some heart disease. We hold this policy in question for safekeeping, and it has been with us ever since it was issued, so please forward us proper blanks for the claimant, his wife, to execute * * *."

This notice was received by the insurance company in Oklahoma City on March 13, 1935, the day after Hill's body was found. The company, on March 14, 1935, issued its check dated at Oklahoma City for the sum of $2,175.07. This was the face of the policy less Hill's indebtedness to the company for borrowed money. Mr.

R. H. Amrein came to Atkins with the check on March 15. The policy was secured from the bank and the check delivered to Mrs. Hill, the beneficiary, on March 15, and Mrs. Hill signed the following receipt: "Received of the Mid-Continent Life Insurance Company of Oklahoma City, Oklahoma, the sum of two thousand one hundred seventy-five and 07/100 dollars, in full payment and satisfaction of all claims whatsoever under the above policy.

"In consideration of which payment we hereby forever release the said company from all liability to us, our heirs or assigns under said policy.

"Witness our hands and seals at Atkins, Arkansas, this 15th day of March, 1935.

"Willie F. Hill.

"Signed in the presence of:

"D. L. Barker,

"R. H. Amrein, Witness."

On July 13, 1935, appellee filed suit in the circuit court of Pope county, Arkansas, under the double indemnity clause of the policy for $2,500, attorney's fees, and 12 per cent. damages.

The appellant filed answer denying the material allegations of the complaint, and specifically denied that Hill died from external, violent and accidental means, and alleged that he died a natural death, and that appellant had, on March 15, 1935, paid the beneficiary the full amount of the policy less indebtedness, and that as a part and parcel of the same transaction, the appellee executed and delivered to the appellant the receipt above set out. It also alleged that no proof of death, as required by the policy, was made by the appellee.

There was a trial, and at the close of the evidence each party asked for an instructed verdict. The court rendered a verdict in favor of the appellee for $2,500 with 12 per cent. penalty and $250 as attorney's fees. This appeal is prosecuted to reverse the judgment.

The evidence on the part of the appellee shows that J. F. Hill, on the morning of March 12, 1935, after he had eaten his breakfast, took his gun and told his wife he was going to see about the back water. His body was

found the same day and his gun was found resting against the small tree near by. The body was found in the canal, and when taken out, water ran out of Hill's mouth, about a half gallon of muddy water ran out of his mouth and nose. The body was found among some bushes in the water, and Hill had hold of one of the bushes with one hand. After the witness who discovered him ran his hand over Hill's bosom, more water ran out of his mouth and nose. When the body was found the head was about three or four inches under water. On the same day the appellant was notified in Oklahoma City, Oklahoma, that the body was found drowned. The letter also stated that some people thought it was an accident, and others thought that he died of some heart disease. All the witnesses who saw the body at the time it was taken out of the water testified that a large quantity of water ran out of his mouth and nose.

Mrs. Hill and her daughter, Mrs. Alexander, and others who knew Hill intimately testified that he did not have heart trouble, and that he had never complained of heart trouble.

Immediately on receiving information that Hill was drowned and that some people thought it was an accident, the insurance company, with this information, made a check for the $2,500 less indebtedness, the check being dated on March 14, the day after the company received the letter. The company sent its adjuster with the check to Atkins, Arkansas. The policy was secured from the bank, the check delivered to Mrs. Hill, and she signed the release above set out and indorsed the check. Neither Mrs. Hill nor any other member of the family had ever had possession of the policy, and none of them knew that the policy contained the double indemnity clause. According to the witnesses of appellee, appellee was not advised that the policy contained the double indemnity clause.

The appellant contends for a reversal first, because it says it settled with the appellee, and that she signed a release containing the following statement: "In consideration of which payment we hereby release the said company from all liability to us, our heirs or assigns

under said policy." It is contended that this is a settlement, and in the absence of fraud is as incapable of rescission as any other contract. It is argued that the appellee does not allege in her complaint that the appellant company was guilty of any artifice, misrepresentation or fraud inducing the settlement and execution of the release, and that none is shown in the evidence. The evidence, however, does show that the appellant sent its agent with a check immediately on receiving information that Hill had been drowned, and it, of course, knew all about the indemnity clause, but it made a check for the amount due, or that would have been due, if his death had not been accidental. It knew all the facts; knew that Hill had been drowned; knew about the double indemnity clause. The appellee had never had possession of the policy, knew nothing about the double indemnity clause, and according to her testimony, she was not advised of this.

"Fraud consists of some deceitful practice or willful device resorted to with intent to deprive another of his right or in some manner do him an injury." Black's Law Dictionary, 521.

"The settlement was obtained by taking the beneficiary by surprise and requiring her to act at once without having the policy in her possession, or learning its provisions and without an opportunity to take legal advice or ascertain the facts." *National Life and Accident Ins. Co.* v. *Threlkeld,* 189 Ark. 165, 70 S. W. (2d) 851; *Order of United Commercial Travelers of America* v. *McAdam,* 125 Fed. 358, 61 C. C. A. 22.

In the instant case the representative of appellant came with the check only three days after Hill's death, knowing that the policy was not in the possession of appellee, and according to appellee's witnesses, was in a hurry to settle the matter, so that appellee had no opportunity to learn the facts, and her physical and mental condition at the time was such that she was unfit to make any investigation.

If the testimony of the witnesses for appellee is to be believed, the appellant, with the knowledge of the double indemnity clause and with the knowledge that

Hill was drowned, went to Atkins, saw Mrs. Hill, concealed from her the fact that the policy contained the double indemnity clause, gave her the check, and secured the release.

Appellant cites a great many authorities to the effect that an agreement fully performed has all the properties of a contract, and in the absence of fraud, is binding on the parties. One of the cases cited and quoted from at length states: "It is unimportant that there was a mutual mistake as to the extent of the injuries, unless the plaintiff relied and had the right to rely upon the superior knowledge of the other contracting party as to the extent of the injury. There is no such element in this case." *Kansas City Southern Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123.

The contract which is the basis of the present suit was not only not considered when the release was given, but the appellee had no knowledge of its existence, and according to her testimony, this act was concealed by the appellant. A contract entered into by parties capable of making contracts is binding on the parties. But here there was no contract or agreement settling the claim under the double indemnity clause, and no reference was made to that clause. Knowing that this contract existed, and that the appellee did not know it, it was the duty of the appellant to advise the appellee of its existence, and simply inserting in the release that it was a release from all liability under the policy would not protect it from a claim that was not settled. If the evidence on the part of the appellee is believed, and the court had a right to believe it, there was no settlement of the claim now in suit.

It is next contended by the appellant that the evidence is wholly insufficient to establish that the death of the insured, J. F. Hill, was caused directly, independently and exclusively of any and all other causes from bodily injuries, effected solely through external, violent and purely accidental means. The evidence, we think, clearly established that Hill was drowned. Unquestionably, from the facts in this case his death was neither murder nor suicide. Herzog on Medical Jurisprudence,

page 227, states: "One of the most constant signs in drowning is frothing at the mouth.

"Another sign which proves drowning is the grasping in the hands of weeds or some of the ground from the bottom of the sea, lake or river."

There were no wounds on the body; nothing to indicate either murder or suicide; but the appellant contends that he had a heart attack. There is no evidence that he had a heart attack, and in fact, no evidence that he had heart trouble, except that a physician stated that Hill had told him some time before the accident that he had heart trouble. This is contradicted, however, by practically all the witnesses that knew him intimately, and there is not a scintilla of evidence indicating that he had a heart attack causing him to fall into the canal.

In Wharton & Stilles Medical Jurisprudence, volume 3, page 349 *et seq.*, it is stated: "The post mortem appearances of the exterior of the body of a drowned person are usually very characteristic. The skin is usually pale, cold and damp. The paleness at times is marked, and often in the early stages is associated with reddened areas of cadaveric discoloration. * * * The appearance of foam at the nostrils has been considered of marked value in the diagnosis of drowning * * *. The condition of the lungs is very significant. Immediately after removal from the water, water may be poured out of the lungs by lowering the head of the victim and compressing the chest. * * * A small quantity of water may enter the lungs when the body is submerged post mortem, but the alveoli will not be so completely filled as in the cases of drowning. The presence of water in the stomach is of even more significance than the presence of water in the lungs."

In the instant case a large quantity of water came from the mouth and nostrils, which could not have happened if he had not been drowned. The water was muddy, and Hill's hand was grasping a bush. In fact, all indications are that he was drowned, and we think the evidence is ample to justify the court in finding that the drowning was accidental.

In jury trials, the jury is the judge of the credibility of the witnesses and the weight to be given to their testimony. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. (2) 689.

In this case each party requested a peremptory instruction, and no other instruction. They, therefore, submitted to the judge the questions of fact, and his finding is as binding on this court on questions of fact, as the verdict of a jury. *Inter-Ocean Casualty Co.* v. *Copeland,* 184 Ark. 648, 43 S. W. (2d) 65; *Coral Gables* v. *Marks,* 191 Ark. 467, 86 S. W. (2d) 911; *Rawls* v. *Free,* 184 Ark. 737, 43 S. W. (2d) 540; *Stone* v. *Bowling,* 191 Ark. 671, 87 S. W. (2d) 49.

We think there was ample evidence to sustain the court's finding, not only that Hill was drowned, but that his death was caused directly, independently and exclusively of other causes from bodily injuries, effected solely through external, violent and purely accidental means.

It is contended also that there was no proof that deceased came to his death through accidental means. Appellant received information immediately that Hill was drowned, and that some persons thought it was accidental. It did not require any additional proof, but proceeded to Atkins, settling the death claim without ever discussing the proof of loss or the fact that there was a double indemnity clause.

It is also contended that the court erred in granting appellee judgment for penalty and attorney's fee, and argues that no demand was made, but when the proof of loss was made and signed by appellee, this was a demand for payment of the amount due under the policy, and this proof was accepted by appellant without objection, and payment was made as above indicated.

We think there was substantial evidence to sustain the finding and judgment of the court, and the judgment is, therefore, affirmed.

DRAPER *v.* STATE.

Crim. 3982.

Opinion delivered May 4, 1936.

H. A. Tucker and *Calvin Sellers,* for appellant.

Carl E. Bailey, Attorney General, and *Guy E. Williams* and *J. F. Koone,* Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Garland County of murder in the first degree for killing Tom Menser in March, 1935, and the death penalty was imposed by the jury, from which judgment of conviction an appeal has been duly prosecuted to this court.

The chief witness for the State was Roy House, the accomplice of appellant, who testified, in substance, that he and appellant entered into an agreement on Friday night to rob Tom Menser, who resided on highway 70, some nineteen or twenty miles west of Hot Springs; that

they stopped about a mile and a quarter before reaching Menser's home and built a fire, where they remained for some time; that they planned for appellant to grab and hold Menser when they entered the house while he, witness, would search and rob him; that pursuant to the agreement, they drove the car beyond Menser's house about a quarter of a mile and parked it; that they walked back on the highway and entered the yard, and walked around the house to the back door, and when they made themselves known, Menser invited them in and asked both of them to take seats by the fire; that witness and Menser sat down, but that appellant walked around behind Menser and struck him with a wrench he had brought from the car and beat him to death; that before entering the house, appellant put on some old gloves; that after beating Menser to death, appellant ordered witness to search the dead man, which he did; that appellant then searched a trunk in the room and witness a table, where he found $8; that appellant found a watch and gun in or near a bed; that they counted the money and left the house and went around through the field and out to the car; that they drove on toward the Duncan's where appellant was residing with his aunt; that when near there, he, witness, got out and remained in the woods near the house until about three o'clock Saturday afternoon; that appellant met him Sunday and took the watch and gun and let witness keep the money; that he advised witness to leave the country, which he did, going to Columbus, Georgia, where he had planned to go before; that after about two months, his brother, Carl House, came to him in Georgia and that they traveled through a number of States together until they reached Texas, where witness was arrested and brought back to Garland county; that about a week later his brother returned.

Carl House testified, in substance, that on Sunday after the killing, being worried about his brother and knowing that appellant and his brother were out together on Friday night, and suspecting that maybe they had killed and robbed Menser, of whose death he had heard, he went to appellant's house and made inquiry

about his brother and whether they were implicated in the murder, and appellant admitted they were connected with it, and that they had divided the loot, he keeping the gun and watch, and Roy the money; that he showed him the watch and gun; that he recognized the watch as Menser's; that he, witness, afterwards told appellant that the officers had taken finger prints in the home where Menser was killed, and also told appellant they would get them and appellant replied they would not get him as he had on gloves at the time.

Many witnesses testified in the case. Two testified that they observed tracks of two persons going out into the field around Menser's house.

In order to decide the assignments of error argued and insisted upon for a reversal of the judgment, we do not deem it necessary to make a detailed statement of the testimony of the two witnesses named or any of the others. Suffice it to say the evidence of Roy House is ample to sustain the verdict of murder in the first degree if sufficiently corroborated. There is no question made that the testimony of Carl House fails to support that of Roy House, but appellant makes the contention that Carl House is, himself, an accomplice, and that the law is that one accomplice cannot corroborate the testimony of another accomplice under the rule that one charged with crime cannot be convicted on the uncorroborated testimony of an accomplice. Carl House was not an accomplice in the instant case although he concealed from the officers the information he received from appellant concerning the participation of appellant and his brother in the crime. He could not have disclosed the information he received from appellant without disclosing the guilt of his brother, Roy House. Section 2313 of Crawford & Moses' Digest is, in part, as follows: "* * *, provided, that persons standing to the accused in the relation of * * * brother * * * shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders." *Edmondson* v. *State,* 51 Ark. 115, 10 S. W. 21.

Not, therefore, being an accomplice, in view of his relationship to Roy House, in the instant case, his testi-

mony sufficiently corroborated that of Roy House to sustain the conviction.

The appellant also assigns as reversible error the giving of instruction No. 13, which is as follows: "If the jury believe that any witness has testified falsely in any respect, you may wholly disregard all the testimony of said witness or you may believe that part of his testimony which you believe to be true, and disregard that part of his testimony which you believe to be false."

The wording of the instruction was not an accurate statement of the law, but the omitted words complained of would likely have been inserted had the court's attention been called to it by a specific objection. Only a general objection was interposed to the instruction. In the case of *Flake* v. *State,* 161 Ark. 214, 255 S. W. 885, in summing up the ruling on similar instructions to the one objected to in the instant case, the court said: "Therefore, the effect of all these holdings of our court is that an instruction couched in language like that here under review, or of the same purport, does not strictly and accurately state the law, but the refusing of such an instruction is not reversible error, because it is not error for the trial court to refuse an instruction that does not correctly declare the law. And the giving of such an instruction is not error in the absence of an objection calling attention to the specific language to which the objection is made and which is claimed to be erroneous and misleading."

Appellant also assigns as reversible error the refusal of the court to give his requested instruction No. 1, which is as follows: "You are instructed that where the State depends in part upon circumstantial evidence for corroboration of the testimony of an accomplice the chain of circumstances must be wholly inconsistent with defendant's innocence, and must be so convincing of defendant's guilt as to exclude every other reasonable hypothesis, and it must establish in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge."

The rule contended for in this instruction is not correct and does not square with the rule announced in the

cases of *Osburne* v. *State,* 181 Ark. 661, 27 S. W. (2d) 783, and *Daniels* v. *State,* 186 Ark. 255, 53 S. W. (2d) 231.

Appellant also assigns as reversible error the admission of the testimony of Roy House, his co-conspirator, before requiring the State to introduce evidence tending to show a conspiracy between them. No prejudice resulted to appellant on this account because the evidence in the whole case is sufficient to show a conspiracy. *Hearne* v. *State,* 121 Ark. 460, 181 S. W. 291.

Appellant also assigns as reversible error the action of the court in permitting the deputy prosecuting attorney to say in his argument that "efforts were made to take finger prints in the room where the deceased, Tom Menser, was killed." There was testimony in the case to the effect that appellant put on gloves before going into the room, and when informed by Carl House that they were taking finger prints and would get "you fellows," appellant answered, "No they won't," and pulled from his front pocket an old pair of dress gloves, worn badly, greasy and dirty. We think the deputy had a right to comment on this testimony in an effort to show why the finger prints of appellant were not found in the room.

No error appearing, the judgment is affirmed.

RAGAN *v.* HENSON.

4-4302

Opinion delivered May 4, 1936.

Shaver, Shaver & Williams, for appellant.

Will Steel, for appellees.

McHaney, J. This is an action to recover the value of improvements made by appellant under a Donation Certificate. The complaint alleged that the southeast quarter of section 32, in township 16 south, range 27 west, was forfeited and sold to the State in 1927 for the taxes of 1926; that no redemption having been made within the time allowed by law, said lands were certified to the State; that on the 19th day of July, 1932, appellant applied for and received from the State Land Commissioner a donation certificate; that he immediately entered into the possession of said lands, began to improve and cultivate same and has since remained in possession of said lands, and has placed valuable improvements thereon of the cash value of $1,165, an itemized statement of which being attached to the complaint. He further alleged that under the provisions of act 2 of the Special Session of the Legislature, approved January 8, 1934, the owners of the land theretofore sold for taxes were granted the right to redeem until April 10, 1934; that on the 9th day of April, 1934, appellee, Henson, the then owner of the record title to said lands, redeemed the same from the State; that said act so extending the right of redemption further provides that if a donee in possession under a certificate of donation has any rights to property by way of betterments made, he should be remitted to his rights in the courts; and that although appellee, Henson, redeemed said lands under the provisions of said act, he has failed, refused and neglected to pay appellant for the improvements made as aforesaid, which constituted a just and legal claim and charge against said lands. He, therefore, prayed judgment for the value of his improvements, and that same be declared a lien on said lands, and, if not paid, said lands be sold in satisfaction thereof.

To this complaint a demurrer was interposed on two grounds: that it does not state facts sufficient to state a cause of action cognizable in equity under the laws of this State; and that it shows that plaintiff is still in possession of said lands, and that under the law he cannot maintain said action until he has surrendered possession. The court sustained said demurrer and, upon appellant's

declining to plead further, dismissed the complaint for want of equity.

Appellant's action is based primarily upon § 10120 of Crawford & Moses' Digest, the applicable portion of which, being the last clause therein, which reads as follows: "* * * for improvements made after two years from the date of sale the purchaser shall be allowed the full cash value of such improvements, and the same shall be a charge upon said land."

A portion of § 3 of said act No. 2 of the Second Special Session, held in January, 1934, page 3 of said acts, provides: "If, for any reason whatsoever, the sale to the State has not been certified to the State Land Commissioner, redemption may be made at any time before April 10, 1934, from the county clerk as now provided by law except that no penalty or interest shall be included, and except that no amount in addition to the taxes due at the time of delinquency and the fee hereinafter exacted for the issuance of the certificate of redemption, shall be included in the amount to be paid by the person redeeming; providing the words tax at the time the same became delinquent shall mean the tax due for one year only at the time of such delinquency. In the event donation of the land, or any part thereof, sought to be redeemed has not been completed and a deed issued and delivered to the donee, upon payment to the Commissioner of State Lands by the one seeking to redeem of the donation certificate fee in addition to the amount necessary to redeem such land from forfeiture, as provided herein, the Commissioner of State Lands shall permit said land to be redeemed and shall issue a certificate of redemption, as provided by law, and shall pay the donation certificate fee to the party entitled thereto. No pending donation or entry shall bar redemption, and it shall be mandatory upon the Commissioner of State Lands to issue a certificate of redemption to the one applying therefor, and if the donee or entryman has any rights as to property by way of betterments made by the donee he shall be remitted to his rights in the courts."

Assuming the validity of that portion of said act No. 2 which authorizes the redemption of land held under a donation certificate from the State, no question regarding its validity being raised by either party, it will be seen that the provision of the act is that "if the donee or entryman has any rights as to property by way of betterments made by the donee, he shall be remitted to his rights in the courts." The question is: When may the donee assert his action for betterments? Is he required to wait until dispossessed, or has surrendered the possession voluntarily, or may he bring his action at any time when still in possession after his right to acquire title from the State has been taken away from him, without fault on his part, by the action of the owner in redeeming the land? We think the cases relied upon by appellees are not in point as they were actions to try title or right to possession. Such is the situation in *Beloate* v. *State ex rel. Attorney General,* 187 Ark. 17, 58 S. W. (2d) 423, and in *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. (2d) 1003. Here, neither title nor right to possession is involved. Appellant concedes that appellee not only has the title but the right of possession. It does not appear that we have ever had a case exactly in point with this.

Appellee contends that the action was prematurely brought for the reason that under our former decisions, the value of the improvements made is determined at the time of recovery of possession or surrender of possession. We so held in the case of *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88, where we said: "The value of improvements are (is) determined at the time of the recovery, for that is the time they are turned over to, and go into the usable possession of, the holder of the title." In the same case, the court quoted from *Summers* v. *Howard,* 33 Ark. 490, the following: "Such allowances (for improvements) are made upon the ground that the improvements do in fact pass into the hands of the plaintiff as a new acquisition; and they can only be a new acquisition to him to the extent of their value at the time he recovers or obtains possession of them; and, therefore, their value at that time is to be al-

lowed, and nothing more." But this was a case in which the right of possession was involved, and is not in point here.

We are of the opinion that § 3 of said act No. 2 above quoted, confers the right upon the donee or entryman to bring an action for the value of his improvements while still in possession of the land, and we cannot see any useful purpose to be served by requiring him to surrender possession, and then bring an action therefor. The action of the owner in redeeming the land, again assuming the validity of the act, rendered it impossible for the appellant to acquire title from the State under the donation statutes. It might well be that appellant had not sufficiently improved said land, or to the extent he desired, in order to make it his home at the time the redemption was effected. Any improvements made thereafter would be at his peril, for which no recovery could be had, and if he were required to wait until appellee should bring an action to dispossess him, it is not difficult to see that an injustice might be done him. It is not disputed that appellant is entitled to his betterments, whatever they may be, and we are of the opinion that the act above referred to confers an immediate right of action on appellant to recover the value of his improvements.

The decree will be reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings according to law, the principles of equity, and not inconsistent with this opinion.

MEHAFFY, J., dissents.

FOSTER *v.* RICHEY.

4-4243

Opinion delivered May 4, 1936.

Waddell & Waddell, for appellants.

Donham & Fulk, for appellee.

JOHNSON, C. J. Prior to 1931, appellant, J. C. Foster, was indebted to appellee Mrs. William Richey, for borrowed money which indebtedness was secured by a mortgage on a certain hotel property situated in the village of Haskell, Arkansas. This hotel property lies south of the highway which runs east and west through Haskell. When this indebtedness was first created Haskell was a more or less thriving village, but by 1931 the local sawmill industry which was its principal industrial interest had vanished.

At the time last referred to appellant's mortgage debt to appellee was far past due, and the hotel property being in a dilapidated condition, insistent demand was made by appellee that the indebtedness be immediately paid. Appellant was unable at the time to pay the mortgage debt, and, to induce or secure an extension thereof, additional real estate security was agreed upon by the parties. It is around this transaction that the present controversy arises. By the renewal contract appellant's debt was extended until 1932. Said indebtedness not being paid a foreclosure action was instituted in 1933 which resulted in a commissioner's sale to appellee for the amount of the mortgage debt, accrued interest and costs. Subsequently appellant refused to deliver possession of all the property claimed by appellee under her purchase at the commissioner's sale, and a survey of the property disclosed that a triangular tract containing 1¼ acres upon which a dwelling house was located was not in fact within the description contained in the mortgage, the foreclosure decree and the commissioner's deed. The present suit was instituted to reform the mortgage, the decree and the commissioner's deed so as to include this 1¼-acre tract. On a trial of the issues joined the chancellor reformed the mortgage, the former

decree of foreclosure and the commissioner's deed from which this appeal comes.

Appellant's first insistence for reversal is that the testimony in behalf of appellee is insufficient to support the chancellor's finding and decree.

The rule in reference to the reformation of written instruments is that the testimony to warrant such reformation must be clear, concise and convincing, *Emerson* v. *Speak,* 177 Ark. 1193, 9 S. W. (2d) 780; but such testimony need not be undisputed to establish this issue of fact. *Meekins* v. *Meekins,* 168 Ark. 654, 271 S. W. 18; *Sewell* v. *Umstead,* 169 Ark. 1102, 278 S. W. 36; *American Alliance Insurance Co.* v. *Paul,* 173 Ark. 960, 294 S. W. 58.

The testimony adduced by appellee and accepted by the trial court as warranting the decree of reformation was to the effect that in 1931, when insistent demands were being made upon appellant for payment of the mortgage indebtedness, appellant induced his mother to supply the necessary additional property to extend the time of payment of said indebtedness; that at that time the additional property was pointed out to appellee's husband and agent in the transaction; that the 1¼-acre tract which is the subject-matter of this controversy was specifically pointed out and designated as part of the additional security. Judge EVANS of Benton was induced by the parties to prepare the renewal mortgage and accompanying notes, and he testified that he was directed by the parties to include in the mortgage all the lands owned by appellant's mother lying between the railroad tracks. This description necessarily covered the 1¼-acre tract in controversy. In behalf of appellant, the testimony reflected a bare denial that the small tract was to be included in the mortgage. The testimony above referred to in behalf of appellee was amply sufficient to authorize a decree of reformation, and its bare denial by appellant does not militate against its clear, concise and convincing effect.

Appellant next urges that the trial court was without power to reform its previous decree of foreclosure because as it is said such modification or reformation impairs the rule that judgments or decrees become final

at the expiration of the term at which rendered. The reformation of the mortgage in the first instance is predicated upon the equitable maxim, "Equity treats that as done which ought to be done." *Stiewell* v. *Webb Press Co.,* 79 Ark. 45, 94 S. W. 915; *Petty* v. *Gacking,* 97 Ark. 217, 133 S. W. 832; see, also, 23 R. C. L., § 4, p. 311.

The decree of reformation acts upon the person of the parties thereto, and no actual impairment of the foreclosure decree is effected. The commissioner's deed stands upon no higher ground. If parties to a contract intend a certain definite result, and by either fraud or mistake such result is not manifested, equity treats that as done which should have been done and decrees accordingly. See authorities cited, *supra.* The result just stated was accomplished by this court in the early case of *Allen* v. *McGaughey et al.,* 31 Ark. 252, and, notwithstanding the passing of time, it stands today unimpaired. *Blackburn* v. *Randolph,* 33 Ark. 119; *Ft. Smith Milling Co.* v. *Mikles,* 61 Ark. 123, 32 S. W. 493, and *Modica* v. *Combs,* 158 Ark. 149, 249 S. W. 567, although not directly in point on the principle stated, each reach an analogous result.

Neither can we agree that error appears in the decree of reformation in directing that title pass from appellant to appellee to the small 1¼-acre tract without a resale. It is not contended on this appeal that the mortgaged property if resold would probably bring a sum in excess of the mortgage debt and costs. A resale, therefore, is not necessary to preserve any equities existing between the parties and their privies. Indeed the principle of vesting title in reformation, in the absence of prevailing equities, and under facts and circumstances not substantially different from these here considered, has been definitely approved and applied. *Modica* v. *Combs, supra.*

No error appearing, the decree is affirmed.

KURN, ET AL., TRUSTEES ST. L., S. F. R. CO., *v.* TEAGUE.

4-4249

Opinion delivered May 4, 1936.

J. W. Jamison and *Warner & Warner,* for appellants.
Partain & Agee, for appellee.

BAKER, J. This is an appeal from a judgment of the circuit court in the sum of $3,500 for injuries alleged to have been received by the appellee on July 13, 1934, while employed as a laborer with a bridge crew.

The view we have of this case is such that we think it unnecessary to set forth with any great detail the evidence in the case. For that reason only a sufficient statement will be made to present and settle the controverted propositions.

The foreman, Bradley, had his crew of bridge carpenters at work removing bridge timbers from a trestle on the main line of the St. Louis San Francisco Railroad Company, about two and a half miles north of Schaberg, a short distance south of the Winslow tunnel. These bridge timbers were rather large, being 8 x 16 inches and 28 feet long. They were to be shipped after the removal of the bridge and for that reason were loaded on a push-car to be hauled to the station or shipping point. This shipping point was perhaps about two or

three miles from the bridge, from which the timbers were taken, down a steep grade. The plan or system used to move these timbers was to load them upon a push-car which consisted of the frame-work and trucks, and this car was placed behind a motor-car, though not connected to it by ropes or other coupling. The motor-car had mechanical brakes, by which its speed could be controlled down a grade. Also, the push-car, which when loaded weighed about five tons, was to a certain extent controlled by the motor-car. The push-car had no brakes. The push-car consisted of two stringers resting upon the trucks and these stringers were joined by cross-pieces or timbers near the wheels or trucks, which were placed at each end. The cross-pieces or timbers joining the side-timbers or stringers extended out beyond the side-timbers so that the ends of them were about even or flush with the outside of the wheels. The distance from the rim of the wheel to the cross-piece on each side of the wheel was about six or seven inches. As a device for auxiliary braking, a piece of timber or scantling 2 x 4 inches and 7 feet long was used. It was prepared for use under the direction of the foreman Bradley. Preparation, however, consisted of driving a large nail—sixty-penny—or spike, near the end of the scantling, perhaps six or seven inches away from the end. In the use of this appliance or piece of timber with the nail in it, it was inserted or placed under the end of one of the cross-pieces in front of one of the wheels, the nail resting against the cross-piece so as to prevent the scantling or timber from going forward, then by lowering the other end the scantling was brought in contact with the wheel. The appellee, Nolen Teague, used this auxiliary brake on the evening of the 12th of July, the day before he was injured. He sat or rode on the frame-work on the push-car, or on the timbers loaded thereon, placed the piece of timber under the cross-piece of the frame-work of the push-car, lowered the timber until it came in contact with the rim of the wheel, and by the amount of pressure or weight applied thereon he governed the speed of the push-car down the grade. He was an experienced section hand, of such age and intelli-

gence, at least, to do his work as well as the average and ordinary man. He knew, as every railroad man must know, that the diameter of the wheels of the truck of this push-car, was greater at the flange or inside edge than at the outside edge and that as he held his auxiliary brake upon top of this wheel the probable tendency, on account of this difference in diameter, would be to move or gradually work the auxiliary brake toward the outside edge when it would have to be moved back to the flange or inside edge of the wheel.

The evidence is beyond dispute that push-cars of this type are not supplied with brakes; that the men who operate these cars devise or supply brakes when the occasion or necessity calls for them. The one in use on this occasion was of the type ordinarily used, such brake generally consisting of a piece of timber of this kind used, or a pole whereby the pressure could be applied so as to control the action or movement of the push-car.

In this case the nail or spike that was driven into the 2 x 4 piece of timber was driven nearly, but not quite through the scantling, and in the use of the timber as a brake the point of the nail came practically or almost directly over the top of the wheel upon which it was used as a brake. In the use thereof, the friction of the wheel grinding or rubbing against the bottom side of the timber gradually wore the timber down until the nail was exposed and the point of it came in contact with the wheel. An examination of the braking device, after the accident, disclosed this fact. The appellee testified that he heard the scratching or grating noise of the contact of the nail upon the rim of the wheel.

The evidence shows that at the time of the injury the push-car had been loaded with timbers weighing eight or nine thousand pounds; that it was going down grade behind, but not fastened to the motor-car. Two men were riding upon the push-car, some others upon the motor-car, having it under control. Sometimes the motor-car ran slightly ahead of the push-car. Whether this was occasioned by the speed of the motor-car or by reason of the retarding effect of the scantling brake upon the push-car, does not appear from the evi-

dence, nor does it make any difference, as there is no evidence that it ever was sufficiently far away as to cause any danger, or that this condition in any wise brought about the accident.

Teague testified that he could see the end of the scantling where it rested upon the wheel. He could, therefore, tell if the scantling were properly placed over the wheel or was working off to the side. His explanation as to how the accident occurred is that they were moving along about ten or twelve miles an hour. He was using this brake stick; that he could hear the grating sound of the nail upon the wheel and that suddenly the brake stick "was jerked" so that it came off on the edge of the wheel and the end struck the ground or chat making up the road-bed. The effect of the end of the brake stick striking the ground was such that the other end struck him in the side, knocked him off the push-car and caused the injury for which he sued.

The use of this brake stick required no skill or art. Its operation was a matter of attention on the part of the laborer, the amount of braking force depending entirely upon the pressure or weight exerted to control the speed. It operated exactly on the same principle that section hands apply every day with a clawbar in the removal of spikes, or of a pry-pole used to raise any heavy object.

One of the theories upon which this case has been presented is that the instrumentality was a simple tool and that in the use of such simple tool the master owes no duty to inspect, or would not be guilty of negligence by reason of any defects, the existence of which a laborer presumptively would know about as well as the master.

We pretermit a discussion of the simple tool theory. We think it has no application here. In negligence cases, the duty rests upon the plaintiff to establish some default on the part of the master, some omission to do what he should have done, or proof of some act done that should not have been done, whereby the master becomes liable. A failure to prove actionable negligence should always result in a verdict for the defendant.

We think the plaintiff has wholly failed in this case to establish any degree of negligence on the part of the defendant. Plaintiff relies on the proposition that the nail was driven nearly or almost through the 2 x 4 piece of timber and that the timber wore away so that the point of the nail was so exposed as to rub upon the rim of the wheel. That fact is undisputed, but it is no explanation of the further fact that the brake timber slipped or came off the wheel and struck the ground. Of course, he knew that in the operation of this brake timber he could lighten the pressure upon it, slip it back to the flange of the wheel, did that perhaps many times. His explanation is that as he heard the grating noise of the contact of the nail with the metal part of the wheel that the brake timber "was jerked off the wheel." If he knew what jerked it off he does not explain. Nobody else does. Only by guess work, surmise or conjecture may there be any explanation of the so-called "jerk." This would not justify a recovery. From the facts proved there is no inference of any other matter or fact tending to show negligence of the master.

We might assume, in trying to explain the "jerk," that there was a roughened place upon the wheel with which the nail came in contact, or that it was caused by a jolt at a high joint, or some slight obstruction upon the rail, but such matters are the purest speculation about which there is neither allegation nor proof. We have said frequently that such speculation cannot become the basis of a verdict. *Lewis* v. *Jackson,* 191 Ark. 102, 106, 83 S. W. (2d) 69; *Turner* v. *Hot Springs St. Ry. Co.,* 189 Ark. 894, 75 S. W. (2d) 675. In the realm of speculation we think it much more highly probable that at a moment of inattention the appellee permitted the brake stick to slip off the wheel and that this was the "jerk" he felt, so at an instant later, by contact with the ground, it caused his injuries.

The defendants asked the court, at the close of the testimony to direct a verdict in their behalf. The court erred in not doing so. It is true that, after the court had refused to direct a verdict on behalf of the defendants, they asked other instructions, thirty-five or more,

and if there were other error in any matter in the presentation of this case, the voluminous lot of instructions probably covered such alleged errer and cured the same. However, that was not a waiver upon the part of the defendants, after having asked a directed verdict. They may have convinced the jury, by the numerous instructions, that their case was much more dangerous than it really was. However, counsel had a right to protect, as far as they were able, the rights of the defendants upon the theory adopted by the court in the submission of the case. *Arkansas Power & Light Co.* v. *Hubbard,* 181 Ark. 886, 891, 28 S. W. (2d) 710.

This case has been thoroughly and fully presented. Since there is no showing of negligence, it is unnecessary to remand for a new trial on account of the error abovementioned.

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

PURYEAR *v.* PURYEAR.

4-4240

Opinion delivered May 4, 1936.

George D. Hester and *Williamson & Williamson,* for appellants.

R. W. Wilson, for appellee.

BUTLER, J. The will of W. F. Puryear, deceased, was admitted to probate in common form and subsequently a contest was filed in the circuit court of Desha county by John Puryear, the appellee, resulting in a verdict against the validity of the will.

The attack on the will was based on the grounds that there was a lack of testamentary capacity on the part of the testator and that the will was the result of undue influence. On these propositions the contestant introduced ten witnesses and the contestee forty-six. When the testimony of the witnesses on the questions at issue is carefully examined and analyzed there appears to be no material conflict except in the opinions, based on observed facts, entertained by these witnesses.

There are a number of grounds for error assigned in the motion for a new trial and argued in briefs of counsel. Some relate to the declarations of law given to the jury by the court and others to the competency of evidence permitted to go to the jury, and one to the form of the question propounded to the witnesses for the contestant (appellee) which sought to elicit from these witnesses an opinion regarding the sufficient mental capacity of the testator to make a will. We find it unnecessary to consider any of the assignments of er-

ror except those relating to the sufficiency of the evidence on the questions of testamentary capacity and undue influence.

It is elementary that, subject to statutory restrictions, every person of sound mind and disposing memory has the untrammeled right to dispose of his property by will as he pleases, however capricious and unjust such disposition may appear to be. Sound mind and disposing memory constitutes testamentary capacity which is said to be the ability of the testator to retain in memory without prompting the extent and condition of the property to be disposed of, to comprehend to whom he is giving it, and to realize the deserts and relations to him of those whom he excludes from the will. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405. This definition presupposes a mental capacity sufficient to execute a will free from undue influence. *Tobin* v. *Jenkins*, 29 Ark. 151. With respect to the ability to know the extent and condition of the property to be disposed of and to whom it is being given, and to appreciate the deserts and relations to the testator of others against whom he discriminates or excludes from participation in his estate, it is unnecessary that he actually has this knowledge. It is sufficient if he has the mental capacity to understand the effect of his will as executed. "Capacity to understand the effect of making one's will, and not actual understanding, is the test of mental capacity required of the testator." *Huffaker* v. *Beers,* 95 Ark. 158, 128 S. W. 1040; *Emerich* v. *Arendt,* 179 Ark. 186, 14 S. W. (2d) 547. In determining the question of the testator's testamentary capacity, great latitude is allowed in the introduction of testimony. This includes, "The contents of the will, the manner in which it was written and executed, the nature and extent of the testator's estate, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claims of particular individuals, the situation of the testator himself and the circumstances under which the will was made, * * *." *Tobin* v. *Jenkins, supra.*

Following the rule in *Tobin* v. *Jenkins,* last quoted, the court below permitted inquiry into all of the facts,

both remote and recent, which might be informative of the question involved. It would be impracticable to state the testimony in detail or to quote the material facts as related by the witnesses as to do so would unduly extend this opinion. We, however, attempt to give the substance of the material evidence, stating only such as is undisputed or most favorable to the appellee.

W. F. Puryear began a mercantile business in a small way gradually increasing it until he was possessed of a fortune, which, in the locality where he lived, might be termed considerable. He was generally regarded by all who knew him as a man of steadfast character having those qualities which made him successful in a business way and liked by those with whom he came in contact. At the beginning of his career he was a strong and vigorous man, but afflicted with an impediment in his speech so that when he became nervous or excited he would stutter. Between 1925 and 1927 or 1928, a heart disease developed which confined him to his bed for days or weeks, then he would recover somewhat and be able to get about with the exercise of care. Because of this disease, approximately ten years before his death on August 4, 1934, he turned the management of his mercantile business over to his two sons, Oscar, one of the appellants, and John, the appellee. The mother of his two sons, his first wife, died when they were small children, Oscar being two years old and John twelve months. These boys were reared by certain of their relatives and Mr. Puryear remained unmarried until August, 1927, when he married the appellant, Mrs. Emma T. Puryear. At that time, or shortly thereafter, Mr. Puryear's heart disease had developed and he would sit around the store, but did not transact any business. If a customer appeared, he would usually tell him to wait until one of the boys came. Oscar, the elder of his two sons, managed the business, while John was the outside man engaged in soliciting business. In 1930, there was a crop failure in southeast Arkansas because of a protracted and extraordinary drouth. Mr. Puryear had been unable to collect his accounts and, because of this and his poor health, he decided to sell his mercantile business and told his

son, Oscar, to find a purchaser. Shortly after this Oscar proposed to purchase the business himself and on March 11, 1931, Mr. Puryear sold it to him, the contract of sale being drawn by Mr. Adrian Williamson at his office in Monticello. The terms of the trade had been agreed upon and after the writing evidencing the same had been prepared and signed, Mr. Puryear executed the will which is the subject-matter of the present litigation. Some of the witnesses for the appellee stated that about this time Mr. Puryear's physical condition was bad and that "there was right smart change" in his mental condition. One witness testified that Mr. Puryear stated that he was no longer able to attend to business and that his mind "was bothering him." Several witnesses stated that Mr. Puryear told them he didn't feel able to attend to business. John Puryear testified as to Mr. Puryear's mental condition that his father had told him that he was very forgetful. When asked, "What was the mental condition of W. F. Puryear along in the fall of 1930 and 1931," he answered, "Well, his mental condition was, so far as his health would let it go, I think it was all right." With regard to the extent of W. F. Puryear's estate, the evidence was to the effect that, aside from the mercantile business, he owned a quantity of town property in Dumas and ..... Some of this was rental property. He also owned the brick store in which the mercantile business was conducted and the home in which he and Mrs. Puryear lived. The aggregate value of his holdings, aside from the mercantile business which he had sold to Oscar Puryear, was inventoried at $..... which seems to be conceded as being approximately correct.

Based upon these facts, each of the witnesses for the appellee was propounded the following question (being the same as that propounded to John Puryear): "Q. Now, from your observation of him, your associations with him during the latter part of 1930 and the first part of 1931, his expressions and so on, knowing as you do the nature and extent of his property, and keeping in mind that the law says that in order to make a will a person must have sufficient mental capacity to keep in mind

without prompting from any one the nature and extent of his property, the relations of his family and their just deserts as the natural objects of his bounty, with those matters, tell the jury whether or not, in your opinion, your father, W. F. Puryear, had sufficient mental capacity on the 11th day of March to make a will?" Some of these witnesses, and also John Puryear, answered in the negative—that is to say, it was their opinion that the testator did not have sufficient mental capacity on the above date to make a will. After answering the above question, John Puryear stated that his opinion was based on the health of his father and the fact that the sale of the merchandise was improvident in that $36,000 worth of merchandise, as he estimated it, was sold for $5,000, payable at $500 a year.

Dr. H. A. Dishongh was present during the recital by the witnesses of the facts above stated and also heard the statement of one witness to the effect that a physician, then dead, had told him (the witness) that W. F. Puryear had arterio sclerosis and high blood pressure. This testimony was objected to as hearsay, but was admitted over the objection of the appellant. Dr. Dishongh was asked if he had heard all the above facts narrated and, if so, did W. F. Puryear, in his opinion, have "sufficient mental capacity to make a will without prompting," basing his opinion upon the facts narrated and his experience with arterio sclerotic patients. The doctor answered, "I don't think he had."

It is clear that with the opinions of the lay witnesses and of the learned doctor excluded, there is a total lack of testimony tending to establish any mental defects or abnormalities, much less a weakened mental condition of sufficient degree to render the testator incapable of executing a will under the rule heretofore announced. The most that can be said is that the testator was between 68 and 69 years old at the time he executed the will and that he gave to his widow and eldest son a greater part of his estate than he willed to his younger son, John Puryear, the appellee. To be exact, by the terms of the will there was conveyed to Mrs. Puryear the home in which she resided, the $5,000 worth of notes

of Oscar Puryear's and two-fifths of the remainder of the estate. Oscar Puryear was given two-fifths of such remainder and one-fifth was devised to John Puryear. Further, it may be said, that for some years previous to the execution of the will the testator had been a sick man and at that time he realized that he was incapable of successfully managing his mercantile business, and according to his own statements, he was forgetful and his mind bothered him.

The evidence relating to the execution of the will is undisputed and is to the following effect: On the morning of March 11, 1931, W. F. Puryear and his son, Oscar, prepared to go to Monticello to consummate the sale of the mercantile business. They invited Mrs. Emma T. Puryear to accompany them. At that time she did not know the purpose of the contemplated journey and went with them to Monticello. When the terms of the sale were stated to Mr. Adrian Williamson and after the business in that connection had been finished, W. F. Puryear announced that he had concluded to make his will, and Mrs. Puryear and Oscar left the room where he was, either at his request or on their own volition. At any rate, they were not present when the will was drafted or during the conversation had between Mr. Puryear and his attorney preliminary thereto. Mr. Puryear informed the attorney how he wished the will written and told him about his property, real and personal, giving the legal description of his homestead and some of his real property in Dumas. He told the attorney his reason for making the will and was present when the attorney dictated the will to the stenographer. It was not until the will was completed that Oscar and Mrs. Puryear returned to the room. The will was carried by Mr. Puryear to the bank at Dumas and it remained there until his death, when it was opened. Neither Oscar Puryear nor Mrs. Emma T. Puryear knew its contents until that time.

Counsel for appellee reaches the conclusion that the testator and his wife and son discussed the will on their return journey from Monticello to Dumas. He bases this upon part of the testimony of Oscar Puryear relat-

ing to what occurred on this journey who stated that his father said: "You know I am bothered with heart trouble. I don't want to unload the job on you, but it's going to be up to you to do it. You know I can't do it. I can't go down and tell John. It's going to be up to you and I want you to get witnesses in there when you go to tell him." When this statement is considered in connection with the other evidence, it is clear that it relates to the purchase by Oscar of the mercantile business. John Puryear had been working in the business, drawing an equal salary with his brother, and was so at the time the sale was consummated. The father had reasons to believe that Oscar was dissatisfied with John's conduct with regard to the business and that the sale to Oscar would terminate John's connection with it. This was the reason Mr. Puryear desired that Oscar would be the one to tell John about the change of ownership.

If there was other evidence tending to establish an impairment of the mind of the testator, the manner of the disposition of his property would be admissible to be considered with such other evidence. But there is none such. Even if there was some testimony tending to show feebleness of intellect, it would not of itself be sufficient to establish lack of testamentary capacity unless it was so great as to render the testator incapable of appreciating the nature and consequences of his act. *Phillips* v. *Jones,* 179 Ark. 877, 18 S. W. (2d) 852. Neither would physical suffering on the part of the testator be sufficient to render the will void unless it was so great as to make him incapable of properly disposing of his estate. *Griffin* v. *Union Trust Co.,* 166 Ark. 347, 266 S. W. 289.

There remains to be considered the opinions of the expert and nonexpert witnesses as to the testator's testamentary capacity. For the purpose of this discussion, we overlook the objections to the questions as propounded and treat them as properly phrased. These opinions can rise no higher than the facts upon which they are based. The facts testified to by the witnesses bear no just relation to the opinion expressed by them, and the court should have sustained appellants' objections to

their expression. That of the expert was based on the identical facts upon which the other witnesses grounded their's, and is, therefore, of no higher dignity or any more competent than the opinion of any other witness. "If the witnesses testify that testator is insane, but give as a basis for such opinion facts which do not justify it, their evidence on this point is worthless, and cannot support a verdict in favor of contestants." Page on Wills, vol. 1, 2d ed., § 698, p. 1173. "Witness will not be permitted to state an opinion inconsistent with, or finding no support in, the facts stated by him." 22 C. J., chapter on Evidence, § 652. "* * * the opinion of such a witness is not admissible in evidence until it be first shown by his own testimony that he has information upon which it can reasonably be based. Whether the information is sufficient for that purpose is a question for the court to decide before it can be admitted." *Schaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679.

There remains to be considered the question of undue influence. In *Lavenue* v. *Lewis,* 185 Ark. 159, 42 S. W. (2d) 649, the testator was about ninety years of age. On the contest of the will, the undue influence of the wife was charged as the procuring cause of its execution. In that case we stated the rule relating to the sufficiency of undue influence to avoid a will as follows: "As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause deprives the testator of his free agency in the disposition of his property. And the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relation with them at the time of its execution. (Quoting from 3 Elliott on Evidence, § 2696): 'The influence of the husband over the wife, that of the wife over the husband, of the parents over

the children, and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator.' "

We are of the opinion that the evidence fails to satisfy the rule stated. As to the influence Oscar Puryear exerted over his father, the evidence is wholly silent except that Oscar Puryear was a man of firm character, wanting to take the lead and be the head of all the undertakings in which he engaged and that his judgment dominated with respect to the conduct of the mercantile establishment. There is no evidence that he ever suggested to his father that he make his will, or that he knew what disposition had been made of the property until after his father had died. It is argued that the terms of the purchase and sale of the mercantile business were sufficient to show an exercise of undue influence by Oscar Puryear over the mind of his father. To this we cannot agree. It is true that John Puryear and a man who had clerked in the store testified that the invoice value of the mercantile establishment was from thirty-five to forty thousand dollars, including accounts and bills payable. This was not sufficient, however, to show the real value of the assets. The value, as shown by the invoices, might have been far greater than the then market value of the goods and we are not advised of the total face value of the accounts and bills receivable. These might have been far less in real worth than face value and many might have had no value at all, and at the time Oscar Puryear purchased the business, in addition to the $5,000 to be paid W. F. Puryear, he assumed debts due by the business amounting to five or six thousand dollars.

Witnesses testified, and no doubt this testimony is true, that W. F. Puryear held his two sons in equal affection. During the continuance of the ownership of the mercantile business by W. F. Puryear, Oscar and John were paid equal salaries. Just before Mr. Puryear married the second time, he conveyed to each of his sons a residence in the town of Dumas. For a time before his marriage he resided at the home of John. After this, for a brief time, he lived with Oscar while building a

home of his own. We think he loved them with the same degree of affection, but it by no means follows that he had equal confidence in their business ability or their respective necessities. Oscar had begun to work for his father in the store when he was 15 years old and continued in his employment until he was called to the army in 1917. Then it was that John came and Oscar taught him enough about the business to enable him to carry on until Oscar's return about eighteen months later. While some of the witnesses testified in effect that of the two John was the more valuable to the business, there is no indication that the father so believed, and while to one not acquainted with all the facts the difference made between the two sons by W. F. Puryear in his will may appear unjust and capricious, there is a want of evidence to show that this discrimination was brought about by the undue influence of Oscar Puryear, especially when it is considered that Oscar's stepmother was favored beyond him in a substantial degree.

Able counsel strongly insist that the maligning influence of Mrs. Puryear resulted in the execution of the will. We think this contention unjustified by the undisputed evidence. At the time of the marriage or shortly thereafter, W. F. Puryear was afflicted with a disease which rendered his life tenure doubtful which could be prolonged only by the exercise of the greatest care. From the first Mrs. Puryear undertook the care of her sick husband and the fact that she drove him in an automobile everywhere he went and was reluctant to have him go any distance without her seems to us to comport with the duty and affection that a faithful wife would be expected to show. There is not the slightest indication that she influenced, or attempted to influence, him with respect to the management of his property or the disposition of his estate. He had various properties other than the mercantile business which he continued to manage, both before and after the sale of the mercantile business. Mrs. Puryear accompanied him in his visits to these properties. When John Puryear, on the day following the sale, learned that the business had been acquired by his brother he went to his father to talk to

him about it. On this first visit Mrs. Puryear did not interfere with the conversation. The father was distressed and told John of the reasons for the sale and finally said he had made a fool of himself. On John's second visit to his father, Mrs. Puryear interfered and told John that he must not talk to his father any more about the business because it worried him so. It was further in testimony that after Mr. Puryear married he did not associate with his old friends with his former frequency and would seldom come to town without Mrs. Puryear. All of this fails to satisfy our minds of any ill influence exerted, and forces the conclusion that Mrs. Puryear's conduct throughout her married life was both innocent and proper.

In discussing the facts in evidence, we have failed to relate the fact that after the sale of the business to Oscar Puryear, W. F. Puryear was greatly disturbed and was sick for two or three weeks. There may be other facts which we have failed to notice here, but we have carefully examined the record and have reached the conclusion that, while it may appear that John Puryear was unjustly treated by his father in the execution of the will, it was the free act of the testator at a time when he had the mental capacity to fully understand the nature and consequences of his act, and that the trial judge should have directed a verdict for the proponents (appellants here) on both issues.

Considering the duration of the trial, which appears to have continued for the better part of a week, and from the record before us, it is our opinion that the case has been fully developed. The judgment will therefore be reversed, and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

SMITH *v.* MOODY.

4-4271

Opinion delivered May 4, 1936.

[redacted]

Marsh & Marsh, for appellants.

Harry C. Steinberg and *C. E. Wright,* for appellee.

SMITH, J. This suit was brought to cancel an oil and gas lease upon the ground that the present owners of the lease, and their predecessors in title have failed properly to explore and develop it. An understanding of the issues upon which the decision turns requires a somewhat extended statement of the facts.

J. C. Moody, the landowner and the lessor, executed an oil and gas lease on March 28, 1922, to H. M. Johnson, trustee, covering 360 acres of land. Johnson assigned the lease to Detroit-Summerfield Oil and Gas Company, which company assigned 20 acres of the lease to Imperial Oil and Gas Company. This last-named company completed three wells on this 20-acre tract—the last in May, 1923. This 20-acre lease was formally released and relinquished to the original lessor, and is not involved in this litigation.

On May 7, 1923, the Detroit-Summerfield Company assigned to H. E. Clark, an undivided one-half interest in the remaining 340 acres and on May 22, 1923, assigned the other undivided one-half interest to Terry-Summerfield Oil Company, a corporation.

In 1922, before making the two assignments last mentioned, the Detroit-Summerfield Company completed

two wells referred to as well No. 1 and well No. 2. From May, 1923, to March, 1925, Clark operated the property for the joint account of himself and the Terry-Summerfield Company and between June, 1923, and February, 1924, drilled six other wells referred to as wells Nos. 3, 4, 5, 6, 7 and 8. All of these wells except No. 8 were on the west property line of the lease. Well No. 8 was on the north line. No other wells have since been drilled. Clark operated all of these wells until March, 1925, except well No. 1, which was abandoned in 1924. In March, 1925, the remaining seven wells were turned over to the Terry-Summerfield Company and J. W. Wade was placed in charge of operations. He operated them for the joint account of the owners until February, 1934, with the exception of wells Nos. 2 and 4, which were abandoned in 1931. Well No. 8 was later abandoned in the same year. The derrick and equipment on well No. 5 burned in June of the same year, and was not operated until it was later reconditioned. From June, 1931, until February, 1934, the Terry-Summerfield Company continued to operate the three remaining wells, Nos. 3, 6 and 7, but not efficiently.

The Terry-Summerfield Company owned a lease on other lands referred to as the Smith Farm which had not been developed and operated to the satisfaction of the lessor, of which fact complaint had been made and Moody was invited to join in litigation to cancel both leases. On February 6, 1934, the Terry-Summerfield Company assigned its undivided one-half interest in the Moody lease, and the lease covering the Smith Farm to Patterson and Smith. The assignee Smith was one of the owners of the Smith Farm and appears to have been prompted in the purchase of these leases by the desire to have the Smith Farm lease properly developed. After acquiring the lease on the Smith Farm, and an undivided one-half interest in the other lease, Patterson and Smith junked and pulled the casings from the abandoned wells referred to above as wells 2, 4 and 8 and in May, 1934, rebuilt the derrick on well No. 5. They reconditioned wells 3, 6 and 7, and have operated these three wells and well No. 5 since doing so.

This suit was filed by the lessor, Moody, on January 28, 1935, for the purpose of cancelling the lease, and after hearing much testimony that relief was granted, except that the lease was not cancelled as to the forty acres on which the four wells last-above referred to are located. The storage tanks, tool house, boilers, pumps, pipe lines and other equipment are all located on the forty acres as to which the lease was not cancelled. This relief was granted upon the finding of fact contained in the decree "that the defendants and their predecessors in title have failed to properly perform the implied covenants of the oil and gas lease herein involved for the exploration, development and operation of said oil and gas lease" except as to the forty acres above mentioned which the assignees of the lease were allowed to retain.

It is not questioned that a breach of the implied covenant to explore and develop affords ground for the cancellation of an oil and gas lease. *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; *Mansfield Gas Co.* v. *Parkhill,* 114 Ark. 419, 169 S. W. 957; *Miller* v. *Mauney,* 150 Ark. 161, 234 S. W. 498; *Ezzell* v. *Oil Associates Inc.,* 180 Ark. 802, 22 S. W. (2d) 1015. Nor is it questioned that these covenants or conditions require the exploration and development of the entire lease, and are continuing obligations resting upon the lessee and his assignees which are not satisfied by the development of a portion only of the leased property. The duties of the lessee and his assignee are defined in the cases just cited. See, also, *Drummond* v. *Alphin,* 176 Ark. 1052, 4 S. W. (2d) 942; *Standard Oil Company* v. *Giller,* 183 Ark. 776, 38 S. W. (2d) 766.

It appears from the facts stated that the last well drilled on the property was in February, 1924, which was nearly eleven years prior to the institution of this suit, and it does not appear to be seriously questioned that this delay would ordinarily support the finding that there had been a breach of the implied covenant to develop, if there were no facts to excuse the delay or which operated to estop the lessor from asserting there were grounds for forfeiture. It is very earnestly insisted that there is a valid excuse for the failure to fur-

ther develop, and that the lessor has estopped himself from claiming a forfeiture.

Much testimony was offered as to the necessity of drilling other wells, the contention being that the wells now producing were at the edge of the producing fields, and that new wells could not be drilled and operated except at great loss. This contention may be disposed of by saying that, if true, the lessees have not been damaged by the cancellation of so much of the contract of lease as cannot be profitably performed.

The serious question in the case is the one of fact, whether the lessor had estopped himself from claiming a forfeiture. The basis of this contention in substance is that the right to cancel the lease, if it exists at all, was known to the lessor before Patterson and Smith purchased their interest in it, and they were induced to purchase this interest through conduct on Moody's part leading them to believe that the validity of the lease was not and would not be questioned. Moody gave the Terry-Summerfield Company a lease on forty acres of land not here involved which it is said was a part of the consideration for the assignment by the Terry-Summerfield Company of the undivided one-half interest to Patterson and Smith, and it is argued also that after Patterson and Smith had purchased this one-half interest, Moody stood by and saw them expend large sums of money in reconditioning the wells that are now being operated. It is alleged also that Patterson and Smith were ready to begin drilling on the Smith Farm lease, and had made arrangements to drill a deeper well on the Moody lease which was not done because the institution of this suit prevented that action. It is argued also that the cancellation of the lease was inequitable because no demand had been made upon the lessees or their assigns to proceed with the development.

It appears reasonably certain, however, that the assignee, Smith, was fully apprized of the nondevelopment, and of the complaint on that account. Indeed, he was quite active in demanding the proper development of his family property, known as the Smith Farm and suggested to Moody that they bring suit to cancel both

leases in which Terry-Summerfield Company was interested. Complaint appears also to have been made to McFann, the agent of Clark, who owned the other undivided one-half interest, and this agent excused the delay by saying they would drill when and if they could get the Terry-Summerfield Company interest out of the way. McFann admitted that in 1930 or in 1931, Moody's son had taken up the question of drilling with him, and he stated that "we were ready to drill the east field, and if we could get the Terry-Summerfield out, we would go ahead."

It is true that Patterson and Smith spent a large sum of money on the wells now operating which greatly increased their production. But this appears to have been no more than their duty required as assignees of the lease. Besides they are the chief beneficiaries of this expenditure. The decree leaves these wells in their possession with the right to continue their operation.

Smith paid the Terry-Summerfield Company $2,000 in cash for the assignment to Smith and Patterson of the Moody lease and the Smith Farm lease, and in addition gave the Terry-Summerfield Company a lease on two forty-acre tracts not covered by any previous lease. Smith allocated $1,250 of this money to the Moody lease and $750 to the Smith Farm lease. Moody testified that he did not know that Patterson and Smith were buying the Terry-Summerfield lease until after they had bought it, and that he gave the Terry-Summerfield Company the lease on the additional forty acres to enable Clark to get Terry-Summerfield out of the way. There is considerable testimony more or less conflicting upon these questions of fact, but we are unable to say that the chancellor's finding thereon is contrary to the preponderance of the evidence. The wells now in operation were reconditioned not later than July, 1924, and nothing appears to have been said or done about further drilling and development until about January, 1935, when Smith and Patterson offered to assign their interest in 120 acres of the Moody lease to procure the drilling of other and deeper wells. But this litigation was then in the offing, and the offer of Patterson and Smith to procure some one

else to drill a well was but a belated offer to perform the duty of developing the lease under which the lessees and their assigns had at all times rested.

The finding of the court that there was a failure to discharge this duty does not appear to be clearly contrary to the preponderance of the evidence, and the decree must be affirmed.

WINTER *v.* RAGAN.

4-4283

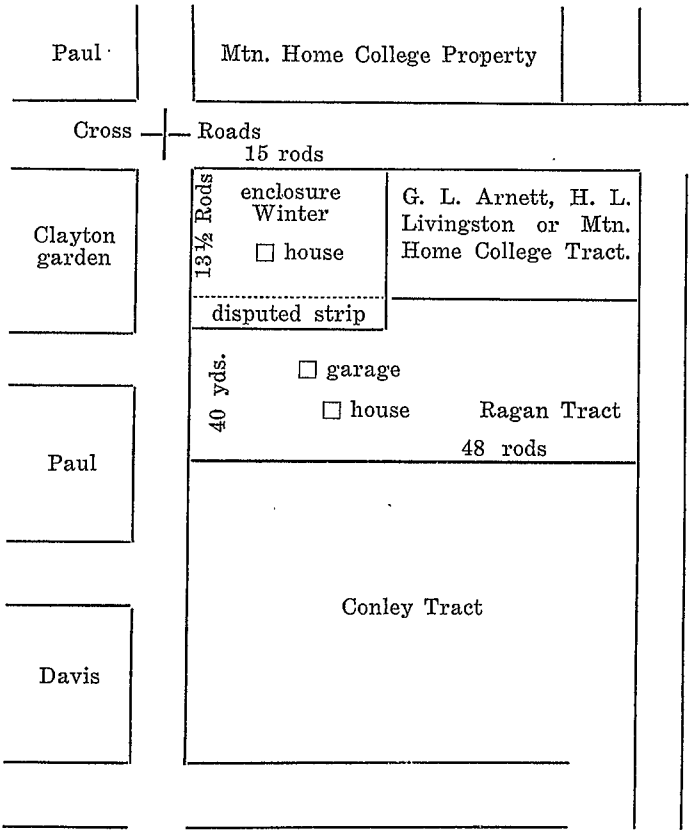
Opinion delivered May 11, 1936.

Nat T. Dyer, for appellant.

Northcutt & Northcutt, for appellee.

JOHNSON, C. J. This ejectment action was instituted by appellee, Mollie E. Ragan, against appellant, Kate Winters, in the Baxter Circuit Court to recover the following tract of land located in Mountain Home, Baxter County, Arkansas, namely: Beginning at the NW corner of the SW¼ of NE¼, section 9, township 19, north range 13 west run south 13½ rods for a beginning point, run thence south 15 feet, thence east 16 rods, thence north 15 feet, thence west 16 rods, to place of beginning.

The following map clarifies the issues and identifies the small tract of land in controversy, same being identified on the map as "disputed strip."



Appellant answered appellee's complaint by denying the material allegations thereof and affirmatively pleaded actual adverse possession of the disputed tract of land for the past forty years.

Upon trial to a jury a verdict and consequent judgment was entered in favor of appellee and against appellant from which this appeal comes.

The view entertained by the court renders it unnecessary to discuss or decide but one issue presented in briefs, namely: adverse possession.

The undisputed testimony adduced upon the trial reflects that more than forty years ago one George W. Foster purchased the tract of land identified upon the map as "Winter Tract" from one Finley and imme-

diately thereafter inclosed, with a fence, this disputed strip of land. Foster remained in the actual possession of the disputed tract until 1918 when he sold and conveyed the whole tract to Mrs. Winter, the appellant here. Mrs. Winter has, since her purchase, kept the disputed tract inclosed and in actual cultivation up to the bringing of this suit in 1933.

In 1917, one Aylor, purchased the tract of land lying immediately south of the Winter tract and subsequently conveyed the same to Mrs. Ragan, the appellee here. This tract is identified on the map as the "Ragan tract."

Mrs. Ragan's grantor, Aylor, was a witness in the case and testified that in 1902 or 1903 the disputed tract was within Foster's inclosure and so remained until his purchase of the south adjoining land in 1917. Mrs. Ragan admitted at the trial that the disputed tract was within the Foster-Winter inclosure when she purchased from Aylor in 1929, and has remained so inclosed since her purchase.

Under the above-narrated undisputed facts the tract of land in controversy became a part and parcel of the "Winter Tract" by actual adverse possession long prior to Aylor's purchase in 1917. *Miller* v. *Fitzgerald,* 169 Ark. 376, 275 S. W. 698, and cases there cited.

Appellee insists, however, that appellant's continuity of possession was broken in 1924 by the incidents hereinafter referred to, or else that appellant's possession of the disputed tract was permissive. To establish these contentions appellee adduced testimony to the effect that in 1924 a survey of the coterminous owners was made which established the dividing line between appellant's and appellee's tracts of land as the north line of the disputed tract and that appellant's husband was apprised thereof and acquiesced therein. The testimony adduced in this behalf falls far short of showing permissive user by appellant of the disputed tract or that her continuity of actual adverse possession was broken thereby. At the time this survey was effected in 1924; appellant and her immediate grantors had been in the actual adverse possession of the disputed tract for more than

thirty years, therefore title had vested by limitation long prior to the survey. *Mustain* v. *Smith,* 187 Ark. 1163, 63 S. W. (2d) 537; *Smith* v. *Leech,* 184 Ark. 421, 42 S. W. (2d) 545; *Stroud* v. *Snow,* 186 Ark. 550, 54 S. W. (2d) 693. Moreover the title to the Winter's tract was in Mrs. Winter and not her husband, and no effort was made to show that Mr. Winter was acting as agent of his wife in the premises.

If the law of adverse possession is to have any stability in this State it should be applied to the facts and circumstances of this case. Mrs. Winter and her predecessor in title have had this disputed strip of land inclosed and in actual adverse use for more than 40 years prior to the filing of this suit and we know of no rule of law or in equity which admits appellee's position of divesting title once acquired. *McDonald* v. *Roberts,* 177 Ark. 781, 9 S. W. (2d) 80.

It follows from what we have said that the trial court erred in refusing to direct the jury to return a verdict in favor of appellant as requested by her. The cause of action seems to have been fully developed; therefore, it will be reversed with directions to dismiss the complaint. It is so ordered.

JACKSON *v.* FOSTER.

4-4328

Opinion delivered May 11, 1936.

Jeff R. Rice and *J. T. McGill,* for appellants.

Bernal Seamster, for appellee.

MEHAFFY, J. This action was begun by appellees, who are residents and owners of real property in Paving District No. 1 in the city of Bentonville, Arkansas, against the appellants for a restraining order, restraining appellants from wrongfully using State Aid Funds, and from discriminating between real property-owners in said improvement district.

The appellees' property is not located on the State highway. The improvement district owes approximately $54,000 bonded indebtedness. This indebtedness is a lien on all the real property in the improvement district. The State of Arkansas delivered to the commissioners of said district $30,385.33 State Aid Bonds to be used as provided by law. The commissioners have applied $4,000 of said bonds to the reduction of the bonded indebtedness.

On August 15, 1935, the commissioners of said district adopted the following resolution:

"Whereas, the State of Arkansas has provided for the payment of the cost of paving State highways, improved by improvement districts in the State of Arkansas; and,

"Whereas, in Paving Improvement District Number One of the city of Bentonville, Arkansas, all of Central Avenue lying in the limits of said Paving Improvement District No. One is a State highway, and by reason of the improvement of said State highway on said West Central Avenue and East Central Avenue, the State Refunding Board has issued and delivered to the commissioners of said paving improvement district the sum of $30,385.33, in State Aid Certificates; and,

"Whereas, the Board of Improvement of said Paving Improvement District No. One is of the opinion that the said State Aid Bonds were intended to be used and applied by the commissioners of said district for the purpose of relieving the property-owners in said district fronting upon State Highways Nos. 71 and 72, located in said paving district, and that the real property-owners located on said West Central Avenue and East

Central Avenue and lying within said Paving Improvement District No. One, should be the beneficiaries of said payment in bonds by the State of Arkansas.

"Now, therefore, be it resolved by the Board of Commissioners of Paving Improvement District No. One of the city of Bentonville, Arkansas, that said State Certificates be used and expended for the purpose of paying off the assessment of benefits of the real property-owners fronting upon said Highway 71 and No. 72 and lying within the limits of said improvement district, and that the real property located in said paving improvement district and not located on either of said State Highways 71 and 72 are not entitled to share in the benefits derived or to be derived from said State Bonds or State Certificates received and held by the commissioners of this district.

"Passed, approved and adopted, this 15th day of August, 1935.

"Approved: (Signed) John B. Applegate,
"Chairman of Board of Commissioners.

"Attest: (Signed) W. E. Jackson, Secretary."

The appellants filed answer, and the case was tried on the following agreed statement of facts:

"It is agreed that plaintiffs are resident property-owners and own the real property set forth in the petition. That same is within the confines of Paving Improvement District No. 1, and it is further agreed that no part of said real estate is located on a State highway or continuation thereof. That assessment benefits against the real estate of plaintiffs have been made and are now in force by reason of the creation of said district. That W. E. Jackson, John B. Applegate and J. W. Blocher are the commissioners of said district, and at the present time said district is indebted in the sum of $54,000 for borrowed money, and that said commissioners received the sum of $30,385.33 par value State aid bonds, bearing three per cent. interest from January 1, 1934, and which bonds were issued in accordance with the statutes enacted by the General Assembly of the State of Arkansas providing for State aid to municipal improvement districts improving State highways, and

that the commissioners have sold and applied $4,000 of said State aid bonds toward the reduction of its indebtedness.

"It is agreed that the resolution set forth prior hereto was adopted by the Board of Commissioners, and that the properties of the plaintiffs are not located on a continuation of State highways in said district.

"It is agreed that the commissioners are carrying out the purpose and intention of said resolution to give the equitable benefits received from State aid bonds to the real property located on the State highways in said district, and are thereby lowering annual collection benefits levied against the real property located on said State highways in said district, and that said commissioners are not making any reduction of the benefit assessments levied against the real property of plaintiffs. That it is the intention of said commissioners to sell or exchange said State aid bonds, as provided by act No. 166 of the legislative acts of the State of Arkansas, and apply same to the reduction of the bonded indebtedness of said district and are extending to the real property-owners fronting upon the State highways in said district the equitable benefits of such reduction to the exclusion of real property not on said State highways and which latter property is in said district.

"It is agreed that the total benefits assessed in said district amount to $175,000; the benefits assessed against Central Avenue property, which is the property fronting upon said State highways in said district, amounts to $97,500; that the total cost of the paving in the district was $72,696; that the total cost of the paving of Central Avenue aforesaid, as determined by the State highway engineers, was 39.84 per cent. of the total cost, or $29,966.08; that the total bond issue of said district was $77,500; that the Central Avenue real property fronting upon State highways was obligated to pay approximately 55 per cent. of the total cost of the bond issue; the balance of the district not on State highways was obligated to pay approximately 45 per cent. of the bond issue. That there was paid for improving said

Central Avenue 39.84 per cent. of the total cost of the entire improvement in said district.

"It is agreed by the parties hereto that no attack is made or can be made upon the original assessment of benefits on all of the property in said district.

"It is agreed that the plat of the district showing the location of improvements upon the streets of said district and boundaries of the district is made a part of this agreed statement of facts."

There is only one question for our consideration and that is whether the fund received by the commissioners of the district from the State is for the benefit of those property-owners whose property joins the State highway, or whether it is for the benefit of the property-owners of the entire district, whose property was assessed to pay for the improvements including the State highway.

Our attention is called to the several acts of the Legislature beginning with the Harrelson act, which is act No. 5 of the Acts of Spec. Sess. of 1923. These acts of the Legislature have been reviewed by this court several times, and it would serve no useful purpose to review them again. See *Board of St. Imp. Dist. No. 315* v. *Arkansas Highway Comm.*, 190 Ark. 1045, 83 S. W. (2d) 81; *Smith* v. *Refunding Board of Ark.*, 191 Ark. 1, 83 S. W. (2d) 76; *Ledbetter* v. *Hall*, 191 Ark. 791, 87 S. W. (2d) 996.

Appellants' contention is that the benefits arising from the sale of State aid bonds should extend only to the owners of real property which is adjacent to or fronting upon the State highway. Appellants quote from act 85 of the Acts of 1931 to sustain their contention. That act provides, among other things, that where a district has improved a thoroughfare that is a continuation of State highways into or through some incorporated town or city, and has also improved another thoroughfare that was not a continuation of a State highway into or through such town or city, then it shall be the duty of the State Highway Commission to have engineers of the State Highway Department estimate the per cent. of the value of the improvement made by the

district on highways that are continuations of State highways, and the per cent. of the value of the improvements expended on thoroughfares that are not continuations of State highways. The act provides that when the engineers have furnished the information to the highway commission, it shall agree to pay a proportionate part of the maturing bonds and interest of such improvement district.

That provision in the statute is manifestly for the purpose only of determining the amount to be donated to the district; but when that amount is determined in the manner provided by law, the sum paid is to the entire district and not to the property-owners whose property fronts upon the State highway. In all the acts it is provided that the State aid shall be paid to the district and not to any particular property-owners. The property-owners who have property that is not adjacent to or near the State highway pay for the construction of the State highway the same as those property-owners pay whose property is adjacent to or fronts upon the State highway.

The agreed statement of facts shows that the assessment benefits against the real estate of the appellees, have been made and are now in force by reason of the creation of said district. Every property-owner within the district is assessed according to the benefits to his land, whether his land is on the State highway or not. In other words, all the property in the district is assessed to pay for the construction of the State highway, and under the law must be assessed according to the benefits accruing to the land. The statute itself not only provides that the money shall go to the district, but it would be inequitable and unjust to pay the owners of a portion of the land in the district, and not pay other persons whose property is assessed to pay for the improvements.

It was manifestly the intention of the Legislature to protect and assist the property-owners of the improvement district, and the intention that each property-owner should benefit in proportion to the assessment on his property.

The indebtedness of the district is an obligation and lien against all the property in the district, and not simply against the property adjacent to the State highway.

The chancery court enjoined the commissioners from using the funds of the district for the benefit only of property-owners of said district owning property on the continuation of State highways, and restrained the commissioners from lowering benefit assessments on property-owners located on State highways in said district.

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

WISEMAN, COMMISSIONER OF REVENUES *v.* TOWN OF OMAHA.

4-4339

Opinion delivered May 11, 1936.

Carl E. Bailey, Attorney General, and *Thomas Fitzhugh,* Assistant, for appellant.

Clyde T. Ellis, for appellee.

MCHANEY, J. The village of Omaha is situated on U. S. Highway No. 65 in the northern part of Boone county, Arkansas, about 3¼ miles south of the Missouri-Arkansas State line. Subsequent to January 1, 1935, it has been incorporated, the exact date not being shown, under the corporate name of Omaha, and its corporate

limits so fixed as to include the former unincorporated village and all the land on either side of said highway to the Missouri-Arkansas State line. The principal, if not the sole, object of so incorporating it as a town was to enable filling station operators in said town to compete with Missouri operators in the sale of gasoline under the provisions of § 1 of act No. 147 of the Acts of 1935. Appellant refused to recognize the right of gasoline dealers in said town to settle with the State on the basis of the Missouri rate of tax, 2½ cents per gallon, but collected from them the full Arkansas rate of tax, 6½ cents per gallon. The appellee, Incorporated Town of Omaha, brought this action to enjoin appellant from so doing. A demurrer was interposed to the complaint which was overruled, and, upon appellant's declining to plead further, the court permanently enjoined him from collecting the Arkansas rate of tax, and held that gasoline should be sold in said town at the Missouri rate.

Section 1 of said act 147 of 1935, p. 419, reads as follows: "Where any city or incorporated town shall border on a State line, the tax on motor vehicle fuel sold by any dealer in such city or incorporated town on the Arkansas side of the State line to the owner or owners of a motor vehicle and delivered directly into the regular fuel tank on the motor vehicle for immediate use therein, shall be the rate provided by law in such adjoining State, such rate not to exceed the rate in this State; provided, however, that where the State line is the center or the main channel of the Mississippi River this section shall not apply; and provided, that such fuel shall be sold to retail fuel or gasoline dealers located within the corporate limits of such cities and towns and delivered directly into the underground storage tanks of such dealers; and provided further that no existing city or incorporated town shall take advantage of this act whose corporate limits did not, on January 1, 1935, extend to within two miles of said State line."

It will be seen that the exemption from the Arkansas rate of tax applies only to cities and incorporated towns that border on a State line; "and provided further that no existing city or incorporated town shall take

advantage of this act whose corporate limits did not on January 1, 1935, extend to within two miles of said State line." The exemption does not apply to unincorporated villages and towns bordering on a State line or within two miles thereof, and we think it applies to "existing" cities and incorporated towns only, that is such as were in existence on January 1, 1935, and then not to them, if their corporate limits were not within two miles of a State line on said date. In other words, cities and incorporated towns more than two miles distant from a State line on January 1, 1935, could not extend their corporate limits and come under the exemption of the act. There is no provision to be found in the act that authorizes an unincorporated community to organize itself into a municipal corporation after January 1, 1935, bordering a State line, and thereafter come under the exemption provisions of said act. To so hold, we would have to read something into the act which is not there.

In the recent case of *Wiseman, Commissioner of Revenues* v. *Arkansas Wholesale Grocers' Ass'n, ante* p. 313, 90 S. W. (2d) 987, we said: "In construing statutes it is the duty of the courts to give them a reasonable, sensible interpretation, and where the language is clear and unambiguous, it is only for the courts to obey and enforce the statutes. *Boyer-Campbell* v. *Fry,* 271 Mich. 282, 260 N. W. 165, 98 A. L. R. 827." We there also quoted with approval from *Wiseman, Commr. of Revenues* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. (2d) 1007, the following: "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."

These decisions had reference to exemption from the sales tax, but the same rule applies. Appellee seeks to exempt its gasoline dealers from the Arkansas rate of tax which is 4 cents per gallon higher than the Missouri rate, under the provisions of said act 147. Since,

as we have shown, said act does not authorize the exemption, the courts cannot do so by construction.

The decree will be reversed, and the cause dismissed.

HOWARD *v.* RAYNER.

4-4272

Opinion delivered May 11, 1936.

A. B. Shafer and *E. C. Gathings,* for appellant.

R. V. Wheeler, Charles D. Frierson and *Charles Frierson, Jr.,* for appellee.

BUTLER, J. On April 10, 1935, the appellant, as half-brother and heir of Ella Wofford, brought this action against the appellee alleging in effect that appellee had procured a deed to certain lands in Crittenden county by reason of undue influence exerted upon the grantor, an aged negro woman, who at the time did not understand the legal effect of her act, but intended only to authorize appellee, her attorney, to more effectively handle her affairs. There was the further allegation that notwithstanding such fact and in repudiation of the trust reposed in appellee, he claimed to be the absolute owner of the property. The prayer was that appellee be declared trustee for appellant. An answer was filed and upon the issue joined and evidence adduced, the court found in favor of the appellee entering a decree dismissing appellant's complaint for want of equity. From that decree is this appeal.

The land involved consists of a half section in section 9, township 5 north , range 7 east, and a ten-acre tract and eighty acres in section 36 of the same township and range. There were some lots in the town of Edmondson contained in the deed, but these appear to have passed out of the case and no further mention of them will be made.

The 410 acres of land were acquired by William Wofford, a negro man, and upon the land in section 9, he and his wife, Ella Wofford, made their home. He was industrious and frugal, improved the property and was in good circumstances until the latter years of his life. When he became old and no longer able to look after his affairs as in former times, some years before his death, his property became heavily involved. He had given several mortgages which he was unable to pay. Foreclosure suits threatened and he was unable to refinance his obligations or raise the funds for the proper operation of his farm. In this state of his affairs, he employed Mr. Kenneth Rayner, the appellee, who was endeavoring to obtain indulgence from the mortgagees when William Wofford died in the spring of 1933. No one seems to have known the exact age of William Wofford or of his wife, but William was apparently between 75 and 80 years of age at his death. He left a will by which he devised his real property to his wife and bequeathed to her the major portion of his personal property. Rayner became Ella Wofford's attorney, represented her in the matter of probating the will and successfully resisted an attack upon it. He experienced great difficulty in the financing of the farm for the purpose of making a crop in 1933, but finally accomplished this through the means of an administrator who was able to raise the funds necessary for that purpose. Efforts were renewed to refinance the property, but without success, and it was apparent in the latter part of 1933 that foreclosure proceedings would soon be instituted. Ella Wofford and her husband had been married many years and she seems to have been devoted to him and mourned his death to a great degree. He always managed and looked after all their affairs and when he

died she was helpless. It was her desire to be freed of the load of debt and to secure for herself a home for the remainder of her life. This became generally known and there were several who contemplated making some trade with her by which they would take over the farms and assume the debts, giving to her a home and support for the remainder of her life. Nothing came of these, however, largely because of the state of the title and the opinion entertained that it was necessary that Ella proceed through the courts in order to convey title. It seems that William Wofford realized he could never pay off his indebtedness, and a trade was talked of between him and a neighboring white planter by which the latter was to take the farms and give Wofford a certain tract of land or some other consideration. But this trade fell through because of the interference of some of the old negro's advisers. The fact further appears that William Wofford was unable to finance his farming operations for 1933 and no arrangement for that purpose had been effected prior to his death. In the course of events relating to Ella Wofford's affairs, however, nothing had been done to relieve her financial situation or her distress of mind until the latter part of October, 1933, when Rayner proposed that if she would deed him the property he would give her a home, manage the farms, and try to pay off the obligations. Ella agreed to this and the deed which is the subject-matter of this litigation was the result.

The law governing the relation and dealings between attorneys and clients is well settled, about which learned counsel for the litigants in this case are agreed. The principles applicable have been well stated in cases cited by appellant and appellee. We quote first from 3 A. & E. Enc. of Law, p. 33, and *Thomas* v. *Turner's Admr.*, 87 Va. 1, 12 S. E. 149, cited with approval in *Thweatt* v. *Freeman,* 73 Ark. 575, 84 S. W. 720. "Equity regards the relation of attorney and client much in the same light as that of guardian and ward, and will relieve a client from hard bargains, or from an undue advantage secured over him by his attorney. And the client, in order to secure such relief, is not

bound to show that there has been any imposition or fraud, nor is the transaction necessarily void; but if it is a transaction in which the relation between the parties exerted or might reasonably have exerted any influence in the attorney's favor, then the burden of establishing its perfect fairness is thrown upon the attorney."

"It is the duty of an attorney to give his client the benefit of his best judgment, advice and exertion and it would be a just reproach to the law if he were permitted to bring his own personal interest into conflict with that duty by securing a benefit to himself through the influence which the relation implies. All transactions between the parties, to be upheld in a court of equity, must be *uberrima fides,* and the *onus* is on the attorney to show not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair, (2) that it was entered into by the client freely, and (3) that it was entered into with such a full understanding of the nature and extent of his rights as to enable the client to thoroughly comprehend the scope and effect of it."

Quoting from 6 C. J., § 211, p. 687, cited with approval in *Goode* v. *King,* 189 Ark. 1093, 76 S. W. (2d) 300, "There is no necessary incapacity for dealing between clients and attorney, and, although transactions between them will be closely scrutinized, yet those which are obviously fair and just will be upheld. To entitle the client to relief from a contract or agreement entered into with his attorney, it must be shown that the client has suffered some injury through an abuse of confidence on the part of his attorney."

The evidence, with respect to the execution of the deed and the circumstances immediately preceding, to which these principles are applicable, is not in dispute. It is in effect as follows: Ella Wofford was in Memphis on a visit when the agreement between her and Mr. Rayner was made. In company with Mr. Rayner and two of her colored friends, a man and a woman, she went to

the office of one of the leading attorneys of the city of Memphis with whom Mr. Rayner had, perhaps, previously conversed with relation to the consummation of the agreement between himself and Ella Wofford. When the purpose of their visit was made known, the attorney suggested that Mr. Rayner be absent during the conversation he (the attorney) was to have with Ella. Accordingly, Mr. Rayner left and the attorney proceeded to interrogate Ella with respect to the disposition of her property, and her reasons for the proposed conveyance of it to Mr. Rayner. She indicated to the attorney what her desires were and he advised her as to the method to be employed to carry those desires into effect. On that occasion she appeared to thoroughly understand the plan and left the attorney's office with the purpose of returning when the necessary instruments were prepared to execute the same. Later, with her two colored friends, she did return to the office of the attorney and the papers prepared were read over and thoroughly explained to her. The first was the deed reciting a nominal consideration, and the other was a contract in which that consideration was explained and set out in detail, to the effect that Mr. Rayner would take charge of the properties, endeavor to pay off the indebtedness, and provide a home for Ella consisting of a dwelling house and a few acres adjoining. The meaning and effect of the deed and collateral contract was again explained to Ella, and pains were taken to see that she understood thoroughly what the effect would be. She declared that she did understand, and that the deed and contract accomplished the thing she wanted done. The friends of Ella, who had accompanied her, corroborated the testimony of the attorney and testified that she expressed to them that she had accomplished the purpose she had in mind. Others who testified in the case, stated that she appeared to be greatly relieved and thoroughly satisfied with what she had done. It was in evidence that in addition to the stipulations in the written contract prepared by the attorney, Mr. Rayner had made Ella other promises to the effect that he would look after her and give her half-brother a home and the use of ten acres of

land in section 36. It appears that Rayner carried out these verbal promises. He permitted the half-brother to remain in possession of the ten acres of land and to use it until he died some time during the year, 1935. Also, after the execution of the deed, Ella, at the direction of Rayner, went to a mercantile establishment in Memphis and bought articles for her personal use which were charged to Rayner's account. A few days after the execution of the deed she became ill. Rayner learned of this and left his home in Memphis and went to Ella's home in Crittenden county where he found a doctor in attendance. He wanted to remove the old woman to a hospital in Memphis, but the doctor advised against this. Rayner then told the doctor to visit Ella as often as required, and told others in attendance to procure for her everything necessary and, in event they could not get it there, to telephone him in Memphis. It developed that Ella was afflicted with a mortal illness and she died the night after Rayner's visit. When apprised of her death, Rayner again went to her home and procured for her body decent interment and paid the necessary expenses.

As tending to support the contention that Rayner had unduly influenced Ella and procured property the value of which was greatly in excess of the obligation he had assumed and the indebtedness for which the property was burdened, some eleven or twelve witnesses were introduced by the appellant to establish the value of the property conveyed by Ella to Rayner. About an equal number of witnesses testified on behalf of the appellee.

From this testimony it appears certain that the 320 acres of land in section 9 was naturally very fertile and well drained, while the 80 acres in section 36 was not well adapted to the growth of staple crops, and its chief value lay in its location with respect to highways on which it fronted on two sides. The fact was further established that at the time of the conveyance attacked in this action both the 320-acre and 80-acre tracts were in a bad state of repair, a part of the 320-acre tract having noxious grasses upon it, and the tenant houses in a dilapidated condition.

The witnesses for the appellant testified that in their opinion the 320-acre tract in the fall of 1933 could have been sold for from $60 to $65 an acre, and the value at that time placed on the 80-acre tract was from $30 to $40 per acre. Some witnesses testified, without naming the date, that the larger tract had a market value of from $70 to $75 an acre. The witnesses called by the appellee appear to have been equally as well qualified to judge the market value of the lands involved as those who testified on behalf of the appellant. Several of these placed the value of the larger tract in the fall of 1933 at $30 an acre. Two witnesses placed it at from $40 to $50, another at $40, two at from $25 to $30, and two at $25 an acre. The values, as placed upon the property by appellant's witnesses, when averaged, approximate $55 an acre, and as placed by witnesses for the appellee at $35 an acre. The witnesses for appellee place the value of the 80-acre tract at about $20 an acre. In giving a basis for the values fixed by them, some of the witnesses for the appellee took into consideration the fact that the farms were in a bad state of repair and the general economic situation prevailing in the fall of 1933. It was in evidence that at that time the market value of farm lands had greatly depreciated, in fact, there was practically no market or transfers except under foreclosure proceedings. As tending to show the value of the equity of William Wofford, it is a significant fact that it was not deemed sufficient by parties approached for the purpose of obtaining additional advances to justify same.

There is little, if any, dispute as to the amount of the debts secured by mortgages, and the amount of taxes which stood as a charge on the lands which, at the time of the conveyance to Rayner, approximated $13,000. Considering the values as placed by witnesses for the appellee, the advantage to Rayner, as viewed under conditions prevailing at the time the deed was executed, was very problematical, and it must be also taken into consideration that in order to operate the farms Rayner must have necessarily financed them, which, in the light of experience, is a hazardous undertaking.

It was the conclusion of the chancellor that the appellee had affirmatively shown that the transaction was fair, entered into by his client freely, and with a full understanding of its nature and effect, and we cannot say that his conclusion was against the preponderance of the evidence. Therefore, under well settled principles, the decree is affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

WASSON, BANK COMMISSIONER *v.* DODGE, CHANCELLOR.

4-4340

Opinion delivered May 11, 1936.

J. H. Carmichael and *Miles & Amsler,* for petitioner.
J. A. Tellier, for respondent.

HUMPHREYS, J. This is an application for a writ of prohibition to prevent the chancellor of Pulaski county from restraining the petitioner from prosecuting a foreclosure suit on lands he filed in the chancery court of Jefferson county on February 28, 1933, against Walter R. Richards and Donald L. B. Richards and their respective wives, who executed a mortgage on certain lands in Jefferson and Lincoln counties to the American Exchange Trust Company on the 15th day of November, 1930, to secure an indebtedness of $19,588.28.

Subsequent to filing the foreclosure proceeding in Jefferson county, and while same was pending, a suit was filed in the chancery court of Pulaski county, over which respondent presides, by E. A. Henry, trustee in succession of the estate of Annie Greigg Ranken, deceased, against the petitioner, Marion Wasson, Bank Commissioner in charge of the American Exchange Trust Company, insolvent, *et al.,* to obtain a construction of the will of Annie Greigg Ranken, in order that the trustee might properly administer same, in which, among other things, it was alleged that under a proper interpretation of said will, the said beneficiaries therein, Walter R. Richards and Donald L. B. Richards, had no title or interest in and to the lands in Jefferson and Lincoln counties which they could mortgage to the American Exchange Trust Company, and that the mortgage was void for that and other reasons. These are allegations that could have been interposed as defenses in the foreclosure suit brought by petitioner in the Jefferson Chancery Court, which first acquired jurisdiction to foreclose the mortgage.

There can be no question that the chancery court of Jefferson county was the proper tribunal in which to institute the foreclosure suit. The lands described in the mortgage were partly situated in that county. Section 1164, Crawford & Moses' Digest, reads, in part, 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:

"Third. For the sale of real property under a mortgage, lien or other incumbrance, or charge." *Wright* v. *LeCroy,* 184 Ark. 837, 44 S. W. (2d) 355.

The Jefferson Chancery Court having rightfully acquired jurisdiction over the necessary parties and subject-matter in the foreclosure proceeding, no other court of equal dignity or one having concurrent jurisdiction had any right to interfere in the foreclosure suit pending in the Jefferson County Chancery Court. This court said in the early case of *Estes, Adm., etc.* v. *Martin,* 34 Ark. 410, that: "It is a universal rule, so far as we know, in the courts of the various States and in the United States Courts, that where a court once rightfully acquires jurisdiction of a cause, it has a right to retain and decide it."

This general rule has been adhered to in all of our cases. In the recent case of *Wright* v. *LeCroy,* 184 Ark. 837, 44 S. W. (2d) 355, this court said: "Circuit courts and chancery courts are of equal dignity; and, in cases where there is concurrent jurisdiction, the court that first acquires jurisdiction has the right and jurisdiction to conduct the matter to an end without interference by another court of equal dignity."

Having decided the foreclosure suit was properly instituted in the chancery court of Jefferson county, that court acquired jurisdiction to try every question, both legal and equitable, that might arise in the case. This court said, in the case of *Merchants & Farmers Bank* v. *Harris,* 113 Ark. 100, 167 S. W. 706, that: "The Chancery Court having assumed jurisdiction for one purpose, will retain it for all and grant all of the relief, legal or equitable, to which the parties are entitled."

It is suggested by respondent that the only court that can construe a will is a court within the county of the domicile of the testator, which, in the instant case, was in Pulaski county. As a general rule, this is correct, but not so when the construction of a will is incident or ancillary to the equitable relief sought in the suit and which may be afforded by a final decree in the case. The rule applicable is clearly and tersely stated in 69 C. J., § 1976, p. 859, as follows: "When a case is

properly brought in a court of equity, under some of the known and accustomed heads of jurisdiction, and the question of the construction of a will incidentally arises, the court has jurisdiction to construe the will in order to afford the relief to which the parties are entitled. This is on the theory that, where a court of equity has obtained jurisdiction for any purpose, it is empowered to determine all questions that may arise in the progress of the case and to do complete justice."

It is also suggested by respondent that the restraining order was not issued against the chancery court or the officers thereof, but only against one of the defendants in the case pending in the chancery court of Pulaski county. The restraining order entered by the Pulaski Chancery Court against Marion Wasson, Bank Commissioner in charge of the American Exchange Trust Company forbids him "from applying for the appointment of a receiver in the foreclosure proceeding now pending in the Jefferson Chancery Court in the suit therein pending against Walter R. Richards and others, to take charge of the lands described therein, or any part thereof, or otherwise interfering with plaintiff's right to the possession and control of said lands as trustee in succession of the estate as heretofore ordered by this court pending further orders of this court," which, in effect, prevents the chancery court of Jefferson county from proceeding in an orderly way in the mortgage foreclosure suit pending in the court, which was instituted in the Jefferson Chancery Court before any suit was commenced in the chancery court of Pulaski county. The chancery court of Pulaski county was without jurisdiction to enter the order or execute it.

Respondent also suggests that a writ of prohibition cannot be invoked to correct an order already entered even though entered without or in excess of jurisdiction. Technically, perhaps, this is true, but by treating the application as one for certiorari to cancel the order made without or in excess of jurisdiction, the technicality may be avoided and confusion and conflict of jurisdictions prevented. We therefore carve through the technicality and treat the application as one for a writ of

certiorari and grant the writ quashing the order. The effect of this is to permit E. A. Henry, trustee in succession of the estate of Annie Greigg Ranken, deceased, to intervene in the foreclosure suit pending in the chancery court of Jefferson county, and set up any defenses he may have to the foreclosure of the mortgage.

ARKANSAS GAME & FISH COMMISSION *v.* PAGE, TREASURER.

4-4341

Opinion delivered May 11, 1936.

McRae & Tompkins, Brundidge & Neelly, Vol T. Lindsey, D. G. Beauchamp and *Miles & Amsler,* for appellants.

Carl E. Bailey, Attorney General, and *Thomas Fitzhugh,* for appellee.

BAKER, J. This suit was brought to test the validity of a certain part of act 194 of the Acts of the General Assembly for the year, 1935, that part being a purported appropriation of money belonging to the Arkansas Game and Fish Commission. The pertinent part of said act involved is § 2, which provides: "During the fiscal year ending June 30, 1936, there shall be transferred from the Game Protection Fund the sum of Five Thousand Dollars ($5,000) and the State Treasurer is hereby directed to effectuate such transfer, notifying the Secretary of the State Game and Fish Commission at the time the entry is made, and the sum of eleven thousand three hundred fifty dollars ($11,350) shall be transferred from a General Revenue Special Fund which it is contemplated will

be hereafter created. For the fiscal year ending June 30, 1937, there shall be transferred from the Game Protection Fund the sum of four thousand dollars ($4,000), and from a General Revenue Special Fund, to be hereafter created, the sum of ten thousand six hundred fifty dollars ($10,650)."

By reading the caption or title of the act, which is styled "An Act to Make Appropriation for the Maintenance and Operation of the State Park Commission," and by reading § 5 of said act, it may be surmised that the moneys from the game protection fund might be expended by the State Park Commission in the acquisition or development of some park area upon approval by the Governor of the expenditure, and moreover § 6 of the act, the emergency provision, is to the effect that the Federal Government is now carrying on an extensive park development program in the State, thereby furnishing employment for a great many citizens of the State, and accelerating business to an appreciable extent, and offering the State an unusual opportunity of having its recreational sites developed without cost to the State, except providing the necessary sites and guaranteeing the proper administration of such areas when the development is completed.

From the foregoing copied and stated portions of act 194, Acts 1935, the State Park Commission makes claim to $5,000 of money to the credit of the Arkansas Game and Fish Commission for the year of 1936, and if successful in this claim will, of course, claim the additional $4,000 for 1937, provided for therein.

Dr. W. F. Smith, who is also one of the appellants, sues as a taxpayer to enjoin the Treasurer of the State from a transfer of this $5,000 from the Arkansas Game and Fish Commission's account, designated as the "Game Protection Fund," act 160 of Acts of 1927. The Arkansas Game and Fish Commission and Dr. W. F. Smith alleged that the Treasurer will, unless enjoined, make transfer of these funds from the account of the Arkansas Game and Fish Commission; that such transfer would be wrongful and illegal for several reasons. The principal reason urged is that the part of the act

making the appropriation is void by reason of its indefiniteness and uncertainty. It is also urged that a transfer of the money belonging to the Arkansas Game and Fish Commission, if appropriated to the use of the State Park Commission, would be a diversion of the funds and in violation of § 11 of article 16 of the Constitution, and further it is said that if the fund be transferred by the Treasurer to the State Park Commission's account that the State Park Commission still cannot make use of the fund unless the use thereof is first approved by the Governor of the State, and that, therefore, the appropriation is conditional and incomplete until the use or the expenditure of the said fund be approved by the Governor.

In stating this last proposition, it is further urged that since the money cannot be used except by and with consent of the Governor that the Legislative Department has, without warrant therefor, delegated to the chief executive a function or duty purely legislative.

The view we have of this controversy is such that it becomes unnecessary, we think, to discuss all these several matters or causes however meritorious they may appear.

It is not often that Legislative bodies fall into the error of enacting a bill or a statute so indefinite, vague, or uncertain as to be invalid. Where there is no rule or guide to be followed as a measure of accuracy or completeness in drafting a legislative enactment the task is ordinarily, not so difficult as it is when certain requisites must be met.

The State, however, by its organic law has made certain provisions in relation to the collection and disbursements of public revenue, and however simple it might otherwise seem, ordinarily, one who undertakes to draft an act affecting taxation or public funds derived therefrom should have some definite knowledge of the requirements of the Constitution of this State, and must follow these requirements.

Section 29 of article 5 of the Constitution of this State is as follows: "No money shall be drawn from the treasury except in pursuance of specific appropriation

made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years."

However apparently simple, direct and understandable the foregoing provision of our Constitution may appear to the reader, it is certain that § 2 of act 194 of the Acts of 1935, which is the controverted portion of the act under discussion, meets and complies with said § 29 only in one particular, and that is, it fixes definite or certain amounts which may be transferred from the account of the Arkansas Game and Fish Commission, $5,000 for the year 1936; $4,000 for the year 1937.

It does not distinctly state in the bill the purpose of the transfer of this money. If it be urged that the bill is sufficiently definite and certain, when taken altogether to determine that the State Park Commission should be the beneficiary of the transfer by reading the caption or title of the bill, and by reading §§ 5 and 6, the purpose of the transfer is not stated. In fact, § 4 of the bill is to the effect that if the Commission shall determine that any item or portion thereof appropriated herein, for a specific purpose is not needed for such purpose, it may certify such fact to the State Comptroller and Governor, and the Governor may, at his discretion, cause transfer to be made from one item to another.

We find in the face of the bill such uncertainty, such vagueness that if this transfer be treated as an appropriation that some commission, either the Arkansas Game and Fish Commission, or the State Park Commission, should determine some portion of the money is not needed for a particular item it (one of the commissions) may present the problem to the State Comptroller and to the Governor, and the Governor may cause transfer to be made from one item to another, supplying the purpose unstated in the act.

Section 5 of the act is to the effect that before any moneys from the Game Protection Fund are expended in the acquisition or development of any park area the Governor shall approve the expenditure. But so far as

the act is concerned if the money were transferred from the account of the Arkansas Game and Fish Commission to the account of the State Park Commission, the State Park Commission may use the money in further acquisition and development of a park area, or for any other purpose.

This statement is not made with the idea that the State Park Commission might or should make any improper use of the fund. The whole course of conduct of the State Park Commission has been such as to refute any such conclusion. Its work has been one of growth, of development, of acquiring more material value for the State than has ever been accomplished in the history of the State by any other similar organization. Only a few years ago, it started having a sincere and honest enthusiasm to establish, build and maintain parks for the people of the State as its sole asset and without cost to the State by any special system of taxation, park values now amount to more than a million dollars. The park areas of the State are monuments to the great industry, integrity and public spirit of the commissioners.

But that is not the question we have before us. The public policy of the State is defined by its Constitution, and because of the fact that the Constitution says that the purpose of the appropriation shall be distinctly stated in the bill we cannot permit even honesty, integrity, good intentions, progressive enthusiasm or even successful operation to take the place of an essential or material part of the appropriation bill.

The State Park Commission pleads: "If $5,000 is transferred as herein prayed, the Park Commission will use it, if permitted by the Governor, to acquire additional areas for fish and game refuges at all State parks, and to aid in completion of the Lonoke Fish Hatchery, thus helping not only the game and fish, but also the human beings in Arkansas. If it is not transferred, it will help only the game and fish."

The foregoing statement taken from the intervention or answer of the State Park Commission may be taken as a pledge for the proper use of the money, but it also amounts to an admission or confession of a failure

on the part of the attempted appropriation to state a specific purpose or general purpose of the appropriation.

The constitutional provision applicable requires no interpretation; no form of elucidation could state the rule more clearly or forceably.

It only remains to determine if the salient provisions are directory or mandatory. *Dickinson, State Auditor,* v. *Johnson,* 117 Ark. 582, 176 S. W. 116; *Dickinson, State Auditor,* v. *Edmonson,* 120 Ark. 80, 178 S. W. 930.

Peculiarly applicable to the instant case is the announcement in *Dickinson, State Auditor,* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909.

"All moneys must be specifically appropriated and specifically applied." *Lund* v. *Dickinson, State Auditor,* 126 Ark. 243, 190 S. W. 428. These provisions of the Constitution are mandatory and must be enforced.

Without going into a discussion of the other matters or reasons, we think this transfer must fail because it is not in compliance with the requirements of that provision of the Constitution above quoted.

The decree of the chancery court is, therefore, reversed, the intervention dismissed, and the purported appropriation held invalid.

FIREMEN'S INSURANCE COMPANY *v.* DOZIER.

4-4269

Opinion delivered May 11, 1936.

Cravens, Cravens & Friedman, for appellant.

W. A. Bates and *Donald Poe,* for appellee.

SMITH, J. Appellant insurance company issued appellee Dozier a policy of insurance in the sum of $1,000, which covered storm damage to the insured property. The roof of the insured building was blown off by a storm and the wallpaper in one of the rooms was ruined.

The policy was issued and delivered by M. C. Bird, the local agent of the insurance company, to Dozier, who reported the damage to Bird. The rain which followed the storm was still falling when Bird and Dozier went to the insured house. Bird gave orders for the immediate repair of the roof and these repairs were made at a cost of $136.37. An insurance adjuster inspected the roof and inquired its age, which he estimated would have lasted for twenty years. He was told the roof was eleven years old and he calculated its value at 9/20 of its replacement cost, or $61.37. He prepared a report or proof of loss based upon these findings which Dozier signed and acknowledged before a notary public. Dozier did not read this paper which he denominates the auditor's report. Bird, the local agent, had undertaken to repair the damages and he was not interested in the cost thereof. He was not then expecting to be paid any money.

A voucher was issued by the insurance company for $61.37, payable to Dozier's order, which was mailed to Bird, the local agent, who was also the cashier of the local bank. This draft was in form a voucher which recited that it was in full payment and final settlement of any and all claims for damages resulting from or relating to the storm. When the draft was presented to Dozier, he declined to cash it or to accept it, when he saw the amount for which it was drawn. The draft was held at the bank for about ninety days before it was finally indorsed by Dozier and deposited for collection for his account. After being indorsed and deposited, the draft was paid in due course, and it is now pleaded as an accord and satisfaction of the claim for damages for the recovery of which this suit was brought.

The law of this subject has been frequently and recently declared. A leading case on the subject, which has been often quoted and approved, is that of *Barham v. Bank of Delight*, 94 Ark. 158, 126 S. W. 394, where it was held that if a check or draft is given in satisfaction of a disputed claim and recites on its face that it is a payment in full, its acceptance constitutes an accord and satisfaction although the creditor protests at the time that it is not all that is due him. The creditor's option is to accept the check or to reject it. He cannot accept it as a part payment to be credited on the demand, when it was tendered as full payment and satisfaction of the demand.

Dozier recovered judgment for a less amount than the sum sued for, but he did recover judgment for damages in excess of the amount of the draft. Was this recovery barred by cashing the draft containing the recitals set out above? Ordinarily it would, but we think it was not under the facts of this case hereinafter set out.

As has been said, Dozier was not expecting a payment in money of his damages. Bird had undertaken to repair the damages and had assumed a personal obligation for the material and labor used in the repair of the roof which he personally paid. It was with Bird, as cashier of the bank, that Dozier deposited the draft for collection. Before the draft was finally indorsed and deposited there was considerable correspondence about it, induced by Dozier's refusal to receive it.

The State general agent for the insurance company and its chief adjuster for this State endeavored without success to induce Dozier to accept the draft. The Hughes Insurance Agency attempted also to settle the matter and employed M. H. Bird to assist. M. H. Bird was the notary who took Dozier's acknowledgment to the proof of loss. He is a brother of M. C. Bird, the local agent, who issued the policy and was present at the conference between Dozier and the insurer's State agent and its chief adjuster and heard the State agent tell Dozier to consult the Hughes Insurance Agency about settling the difference about the damages in excess of the draft.

Dozier testified that he was induced to indorse the draft by the statement of M. C. Bird, who had written the policy and who had the draft in his possession for delivery, that he would have the case reopened, and would see that Dozier got more money. Bird did not deny making this statement. Indeed, the effect of his testimony was to corroborate it, and it cannot, therefore, be said as a matter of law that the indorsement of the check was an accord and satisfaction. Bird was the insurer's agent and he knew when Dozier accepted and indorsed the draft that he was doing so in part and not in full payment of the disputed demand. At the time this controlling transaction took place, Bird was in effect acting as an adjuster for the insurer and it cannot therefore be said as a matter of law that the recitals in the draft, written some months before, are conclusive that the check was tendered as a settlement in full which could not otherwise be accepted. *The Home Insurance Co., of New York* v. *Hall, ante* p. 283, 91 S. W. (2d) 609.

There appears to be no error, and the judgment must be affirmed. It is so ordered.

BANK OF DOVER *v.* JONES.

4-4313

Opinion delivered May 18, 1936.

C. C. Wait, for appellant.

Robert Bailey, Reece A. Caudle, A. S. Hays and *J. M. Smallwood,* for appellees.

McHaney, J. Appellant sued appellees in August, 1933, on a past-due promissory note for $252.67 and interest, and at the same time sued out a writ of attachment, on the ground that appellees were nonresidents of the State, which was levied on a 180-acre tract of land owned by appellee, Mrs. H. Jones, who is the mother of appellee Bud Jones. Service was had upon them in the State of Texas under the provisions of § 1157, Crawford & Moses' Digest. Bud Jones did not answer, but Mrs. H. Jones answered November 6, 1933, denying generally the allegations of the complaint, and particularly denying that she was a resident of the State of Texas, and alleged that she is a resident of the State of Arkansas and had been all her life; that she had lived on the attached lands practically all her life and that she claims the same as her homestead; that she had reared a large family of children thereon, had never abandoned it and had never been out of the State except on a visit. This answer was not verified and no motion was made to require it. On October 31, 1934, Mrs. H. Jones sold and conveyed to her son, Bud Jones, 160 acres of said tract, and on the same day sold and conveyed the remaining 20 acres to Ida Mae Jones, wife of Bud Jones. About the same time Bud Jones and his wife moved upon the 160-acre tract, made it their home and have since resided thereon. On April 2, 1935, a consent judgment was entered against appellees in the sum of $330 and the matter of the attachment was continued. Thereafter, on December 2, 1935, execution was issued on said judgment and levied on said 180-acre tract. Bud Jones filed his schedule claiming the 160 acres bought by him as his homestead, and Ida Mae Jones intervened claiming the 20-acre tract as her separate property. A supersedeas was issued to Bud Jones by the clerk allowing his claim of homestead. On January 13, 1936, an adjourned day of the November term of circuit court, appellant renewed its motion to have its attachment sustained and moved to quash the supersedeas. The court permitted Mrs. H.

Jones to verify her answer over appellant's objections and dissolved the attachment, refused to quash the supersedeas, sustained the schedule of Bud Jones and allowed his claim of homestead to the 160-acre tract. The court made no order as to the 20-acre tract on the intervention of Ida Mae Jones except to take same under advisement and except that the attachment as to the whole 180-acre tract was dissolved. The case is here on appeal.

Appellant says two questions are presented for our consideration: 1. Should the attachment have been sustained? 2. Should the supersedeas have been quashed? We assume, for the purpose of this decision, that the affidavit for attachment was properly verified; also that service was had on appellees in Texas under § 1157 of Crawford & Moses' Digest. We think it unimportant whether the answer of Mrs. H. Jones, sometimes referred to as Maggie Jones, was verified or not. We are also of the opinion that the court did not abuse its discretion in permitting her to verify her answer when it became apparent that appellant sought to take some advantage of her failure to do so. It is undisputed in this record that 160 acres of the 180-acre tract was the homestead of Mrs. H. Jones. The Constitution of this State, art. 9, § 3, provides: "The homestead of any resident of this State * * * shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or process thereon," with certain exceptions not pertinent here. Since appellant's attachment was levied on the homestead of Mrs. H. Jones, it was a nullity as to so much of the land as constituted the homestead not to exceed 160 acres of the value of $2,500 to be selected by her. Const., art. 9, § 4. Moreover, it is also undisputed that Mrs. H. Jones was never a nonresident of this State. Her answer or motion to dissolve the attachment so states, and appellant declined to offer proof of the alleged ground of attachment, to-wit, nonresidence, and therefore his attachment fails and constituted no lien as to any part of the 180-acre tract. Therefore the court correctly dissolved the attachment as to the whole tract.

As to whether the schedule of Bud Jones was properly allowed, the facts are that at the time his mother conveyed to him the 160-acre tract, there was no judgment against him. He immediately entered into possession and impressed it as a homestead. There is no showing made that its value is in excess of $2,500. We assume that the same 160 acres was the homestead of Mrs. H. Jones, and, if so, there can be no question of fraudulent conveyance as to it, for, as to the homestead, there are no creditors, other than the exceptions mentioned in the Constitution. *Stanley* v. *Snyder,* 43 Ark. 429.

The trial court took under advisement the question of the intervention of Ida Mae Jones as to the 20-acre tract, and does not appear to have rendered any final judgment thereon. So that matter is not before us.

The judgment must be affirmed.

SPARKS *v.* CHITWOOD MOTOR COMPANY.

4-4310

Opinion delivered May 18, 1936.

W. D. Swaim, for appellant.

A. T. Davies and *Barber & Henry,* for appellees.

MEHAFFY, J. The appellant, Harry A. Sparks, brought this suit in the Garland Circuit Court against

Chitwood Motor Company, a corporation, and Al Miller, for damages alleged to have been caused by the negligence of Miller. It was alleged that the appellant was in the employ of the appellee, Chitwood Motor Company, as salesman in the used car department, and that the automobile wreck was caused by the negligence of his superior, Al Miller, who was driving the automobile at the time, and was engaged in transporting appellant and other employees of said Chitwood Motor Company from Little Rock to Hot Springs. The Chitwood Motor Company is a corporation engaged in selling, trading-in, and repairing automobiles and trucks manufactured by the Chevrolet Motor Company. Appellant alleged that Al Miller was in the employ of Chitwood Motor Company as manager of its used car department, and performed various duties of a managerial and supervisory sort with respect to other departments; that Al Miller stood in the relationship of vice-principal, and was acting in the capacity of agent, employee and vice-principal of the motor company at the time of the injury.

The Chevrolet Motor Company was accustomed to hold zone meetings, at which, it is alleged that the salesmen of the distributors of the Chevrolet Motor Company throughout Arkansas, were invited and expected to attend. A meeting was held at the Marion Hotel at Little Rock on October 9, 1934. Appellant alleges that he was directed by Miller, his superior, to attend the meeting, and was instructed to report at the motor company's place of business in the late afternoon of October 9 prepared to accompany appellee, Al Miller, and other employees of the company to Little Rock for the purpose of attending the zone meeting. It was the practice of the Chitwood Motor Company to defray the expenses of its employees who were required to attend these zone meetings, and that Miller went to the motor company prior to departing for Little Rock and secured money to defray the expenses; that the motor company provided the car to be used on the trip; that the appellee Miller assumed control of the operation of said car. It is alleged that pursuant to the direction of Miller, appellant got in the car and took his place in the rear seat

and was transported to Little Rock, where they were taken to the Marion Hotel, the place of the meeting. At the conclusion of the meeting, about 10 or 11 o'clock, p.m., the appellant and other salesmen returned to the automobile and appellant took his place on the rear seat. Miller was driving and they started back to Hot Springs. At a place on the highway where the upper Hot Springs highway leaves the main highway, and the main highway curves to the left, Miller drove the automobile off the highway and collided with a tree; that Miller was driving at an excessive rate of speed, and operating the car in a careless, reckless and negligent manner. As a result of the automobile striking the tree, appellant suffered grave and permanent injuries, and prayed for damages in the sum of $45,000.

The appellees filed separate answers denying the material allegations of the complaint.

At the conclusion of the testimony the court directed the jury to return a verdict in favor of appellees, which was done.

There were five persons in the party coming to attend the meeting; the appellant, Harry A. Sparks, appellee, Al Miller, Mack Lewis, John R. Tate and H. D. Gossett.

Before the party left Hot Springs, they stopped on Central Avenue at a place known as the Black Cat and purchased two pints of liquor. They stopped at Van's Cabin after they left Hot Springs and purchased some coca-colas and drank some of the liquor. They then stopped at Benton, and again got coca-cola and drank some more of the liquor. They stopped again at Irene's Place, and there drank some beer. All of them were drinking, and, when they got to Little Rock, they went to a cafe to eat supper, and Sparks says that he became sick, went out in the alley and vomited, and then returned to the restaurant. He did not finish his supper, but went out to the car and waited for the others. They then went to the Marion Garage and Gossett and Sparks stayed in the car a while, and the other boys left and said they were going to the meeting. In about ten or fifteen minutes Gossett left to go to the meeting. Sparks testified

that later he went in and stayed fifteen or twenty minutes, and then came out and took a walk; he saw the other men at the meeting but did not talk to them. Sparks testified that he was all right when they started home; that he had been drinking whiskey, but was not drunk. He was in the back seat as they were going home, and they stopped again at Irene's Place. Sparks says, however, that he did not go in, but stayed in the back seat; that Gossett stayed with him a while and then went in, came back in a little while and got in the back seat with Sparks.

There was some conflict in the testimony, but all of the testimony shows that they were all drinking, and the preponderance of the testimony shows that they were all drunk. It is said that on the return from Little Rock to Hot Springs, just before they reached the upper Hot Springs road, some one told Miller, who was driving, that there was a sharp curve ahead, and Miller said he would straighten it out. Miller was unquestionably guilty of negligence, but according to all of the evidence, appellant was bound to know all about it; he knew that Miller was drunk and careless, and, according to all of the evidence, acquiesced in it, and made no protest. The fact is that they were all out having a gay time, and were all guilty of negligence.

The appellant insists that there is substantial evidence to support appellant's contentions, and that the court, therefore, erred in directing a verdict. He insists that there was nothing to indicate to his mind that Miller was in a condition that made it unsafe to ride with him. Sparks himself, however, testified that when they got out on the road, Miller was driving and a Ford car passed him, and Miller said that they could not do like that and get away with it. He testified that Miller took after the Ford and gained on it, kept driving fast, and that Gossett said: "You'd better slow down. We have a bad curve up there ahead." Miller said: "I'll try to straighten that out." Sparks was bound to know the condition of Miller, and knew that he was driving recklessly. He did not make any protest, but acquiesced in whatever Miller did.

Appellant calls attention to a number of authorities holding that when an automobile is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and the furtherance of the master's business. There is no dispute about this. If Miller was in the employ of the Chitwood Motor Company and about its business, the motor company would be liable if Miller was; but it will not be contended that the motor company would be liable except for the negligence of Miller, and, as we have already said, Sparks acquiesced in everything Miller did, and did not protest.

Appellant also calls attention to authorities to the effect that whether a guest in an automobile is guilty of contributory negligence is a question for the jury; and whether his failure to protest is contributory negligence is also a question for the jury.

Appellant calls attention to Blashfield Cyclopedia of Automobile Law, vol. 4, § 2185, p. 45. Of course the guest might not be guilty of negligence simply because he failed to protest. If the occupant of the automobile did what a person of ordinary prudence would have done under the circumstances, he was not guilty of contributory negligence; but, when a crowd of people go out together and all of them participate in drinking whiskey, and each one acquiesces in what the others are doing, all of them are guilty of negligence, and neither of them can recover against the other.

The degree of care required not only of the driver of the car, but also the occupants, is such care as a prudent person would exercise under the circumstances. Blashfield Cyclopedia of Automobile Law, § 631.

"The conduct of a passenger in continuing to ride in an automobile after knowing that the driver was intoxicated, has been held to amount to negligence barring recovery for injuries due to the negligence of such driver, and the driver of an automobile which came into collision with them." Berry on Automobiles, § 5.180.

"We need not consider whether or not each one of the intoxicated four would be criminally liable under this

statute; we are, however, satisfied that none of the parties should recover damages which he suffered, and which can be traced to the intoxication in which he was engaged. The jury should have been instructed in substance, in addition to the charges made, that if these four men were out in the car for a good time, were stopping from place to place and drinking, and became intoxicated; that the intoxication of each may be deemed the result of the action of the others so far that none of them could recover for any damages caused by the general intoxication." *Kinnie* v. *Town of Morristown,* 172 N. Y. S. 21, 184 App. Div. 408.

"If the occupants and driver of an automobile drink together and become intoxicated, each is as responsible as the driver for negligent driving, and none can recover for injuries due to such negligence." Berry on Automobiles, § 5.181.

An adult, while intoxicated, riding with others intoxicated, and knowing or having reason to know that the driver is intoxicated, is guilty of contributory negligence, which bars his recovery. *Besserman* v. *Hines,* 219 Ill. App. 606.

One cannot, with knowledge that the driver is so intoxicated as to be incompetent as a driver, remain or continue to ride in the automobile and recover damages if he is injured by the negligence of the drunken driver. Blashfield Cyclopedia of Automobile Law, § 2453.

The driver of the automobile was under no greater obligation to exercise care than the appellant was. Every one is under the duty to exercise ordinary care for his own safety. In this case the appellant voluntarily engaged in a drinking spree with his companions, and none of them is liable for the injuries to the others caused by this intoxication.

The judgment of the circuit court is, therefore, affirmed.

THE EQUITABLE LIFE ASSURANCE SOCIETY *v.* BAGLEY.

4-4292

Opinion delivered May 18, 1936.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Jas. S. McConnell, for appellee.

JOHNSON, C. J. This is the second appearance of the subject-matter of this lawsuit here. See *Equitable Life Assurance Society* v. *Bagley,* 188 Ark. 1009, 69 S. W. (2d) 394.

On the former appearance we affirmed the decree of the Howard Chancery Court wherein it was adjudicated that appellee was totally disabled in purview of the contracts of indemnity on and prior to August 19, 1933.

This decree was fully paid by appellant, but, after paying the monthly installments for only a few months, it refused to recognize continued total disability, or that the contracts were in existence, whereupon the present suit was instituted by appellee, Bagley, in the chancery court of Howard county to recover from appellant,

Equitable Life Assurance Society, damages to the extent of the present value of the contracts.

Upon trial of the pertinent issues joined, the chancellor decreed in favor of appellee for the present value of the contracts, but denied to him attorneys' fees and penalties as allowed by § 6155 of Crawford & Moses' Digest, from which an appeal and cross-appeal have been prosecuted to this court.

On direct appeal it is contended that the testimony adduced does not warrant the finding that appellee is totally disabled. In consideration of this contention it should be said that we stated the pertinent testimony on former appeal as follows:

"On the date the policies were issued, and at the time appellee was injured, he was engaged in running a distributing station for the Magnolia Oil Company. The distribution of the company's products to farmers and retailers was by truck. The duties incident to appellee's position required a strong, able-bodied person, and in order to obtain such a position, one had to stand and pass a satisfactory examination. Appellee received an injury in an automobile wreck on October 15, 1931, which practically destroyed the use of his left hand and arm so far as labor was concerned. On account of this injury, he was discharged by his employer on February 15, 1932, and did not seek employment until September 15, 1932. At that time, he had learned to drive an automobile with one hand, but not with the same security and speed he formerly did. He was unable to secure employment in any avocation he had theretofore followed until April 12, 1933, when he was employed by a friend, Walter Westbrook, largely through sympathy, at a salary of $30 a month to assist him in running distributing oil and gasoline station. He was unable to do many things connected with the business, such as lifting tanks of considerable weight, changing tires, covering as much territory in the solicitation of business as he formerly did, and in loading and unloading the truck. In serving the customers, he had to depend on them for assistance. If the roads were in bad condition, he did not venture out to solicit business or deliver the products. The only lift-

ing he could do was with his right hand and with his right knee or leg. Walter Westbrook, as well as appellee himself, testified that he could not install equipment, unload tank cars, load motor oil on the truck, or deliver many of the products to the customers without aid, all of which duties were required of an oil and gasoline agent or of one in charge of a distributing station.

"There is no dispute in the testimony as to the permanency of the injury and appellee's inability to perform, in the usual and customary way, the hard labor incident to any avocation or occupation for which he was qualified before the injury."

The court's finding of fact as approved by us on former appeal, that appellee was totally disabled in the purview of the contracts of indemnity on August 19, 1933, is conclusive and binding on this appeal. *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278; *National Surety Co.* v. *Coates,* 83 Ark. 545, 104 S. W. 219; Freeman on Judgments, 5th ed., vol. 2, p. 1418; 15 R. C. L., p. 974; *Southern Pac. Ry. Co.* v. *United States,* 168 U. S. 1, 18 S. C. 18, 42 L. Ed. 355; *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, 17 S. Ct. 905, 42 L. Ed. 202.

In the first case cited, *supra,* we stated the applicable rule as follows: "A right, question or fact distinctly put in issue and directly determined as a ground for recovery cannot be disputed in a subsequent suit between the same parties or their privies."

Since we are concluded by the former opinion on the question of appellee's total disability on August 19, 1933, the legal query arises, what presumption attends such finding on future circumstances?

The rule seems to be that, in the absence of proof to the contrary, it must be presumed that appellee was totally disabled on August 20, 1933, and at all times subsequent thereto unless and until it is made to appear affirmatively, by testimony, that appellee has recovered subsequent to the former adjudication. See 10 R. C. L., p. 872, § 15.

In view of the stated declaration of law it follows that, after appellee introduced in evidence the testimony supporting the former adjudication, the burden

shifted to appellant to establish by a preponderance of the testimony that appellee had recovered from total disability subsequent to the former adjudication. The only difference between the testimony adduced on this trial and that produced on the former trial was to the effect that the business in which appellee is employed has enjoyed a marked increase; that appellee now receives $45 per month salary instead of $30 per month and board as formerly; that his crippled hand shows some evidence of use, and that he probably has a little better use of said member than formerly. This additional testimony falls far short of showing that appellee has recovered from total disability as formerly adjudicated. It may be that the former adjudication was wrong in principle, and in fact, but nevertheless it is an established precedent and must be treated as such.

Appellant does not complain of the amount awarded by the decree or the determination that the indemnity contracts have been repudiated by it; therefore, these features of the case are not considered or discussed by us.

On cross-appeal appellee insists that the damages awarded by the trial court in his behalf are for a sum less than the present value of the contracts, and also that he should have recovered penalty and attorney's fee as prescribed by statute. Appellee did not recover the full sum claimed in his complaint; therefore, he is not entitled to recover penalties and attorney's fee. We have so decided many times. *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433; *Mississippi Life Ins. Co.* v. *Meadows,* 161 Ark. 71, 255 S. W. 293; *Mutual Relief Ass'n* v. *Poindexter,* 178 Ark. 205, 10 S. W. (2d) 17.

Without going into a detailed discussion of the theory upon which the present worth of the insurance contracts were ascertained by the trial court, it suffices to say that the theory adopted is not in conflict with previous opinions of this court. *New York Life Insurance Co.* v. *Jacques,* 188 Ark. 46, 64 S. W. (2d) 96.

No error appearing, the decree is affirmed on appeal and cross-appeal.

THE TRAVELERS PROTECTIVE ASSOCIATION *v.* SHERRY.

4-4314

Opinion delivered May 18, 1936.

Owens & Ehrman and *E. L. McHaney, Jr.,* for appellant.

Vick & Sluyter and *June P. Wooten,* for appellee.

BUTLER, J. The appeal in this case challenges the verdict and judgment of the court below for several reasons. It will be necessary, however, to notice only one; that is, the contention made that the verdict is not supported by sufficient legal evidence.

The action is based upon an accident policy issued by the appellant to appellee's husband who was killed in an automobile accident on January 27, 1935. On January 30, following, the insured's son, acting as agent for Mrs. Julia Sherry, the beneficiary, notified the local agent of appellant company of the death of his father and made inquiries concerning the status of the accident policy. He was informed that there was no liability for the death of the insured because of failure to pay the semiannual premium due and payable on December 31, 1934. At that time the son informed the agent that the insured had received an accidental injury on the evening of December 31, 1934, at about 10:30 p. m., which had totally disabled the insured for a time and partially disabled

him for an additional period, and requested that $7.50 of the benefits for this disability be applied to the payment of the past-due premium. When this information was received by the agent, he furnished blanks for making proof of claim and notified the association by letter at its home office informing it that the insured had been killed in an automobile accident subsequent to the injury in December preceding. Upon receipt of proof of injury appellant paid for the total and partial disability claim without investigation in the sum of $57.15. This payment was made by check which was indorsed and collected by Mrs. Sherry. Thereafter, in March, 1935, a claim was made for death benefits in the sum of $2,500, which the association refused to recognize and the suit followed resulting in a verdict and judgment in favor of appellee.

The position was taken by the appellee, and is now contended for, that while it is true that the insured failed to make the semiannual premium payment of $7.50 due on December 31, 1934, yet, because of the injury received by the insured on that date from which disability followed, the appellant owed the insured a sufficient amount to pay the premium and that the appellant's duty was to apply a sufficient amount of this indebtedness to the payment of the premium so as to avoid a forfeiture of the policy. This contention must be determined by the applicable provisions of the policy and by-laws.

The insured was a Class "A" member of the association and entitled, so long as the policy was in force, to receive a certain amount of weekly benefits for accidental injury resulting in total or partial disability, and also, in case of death from accidental injuries, in the sum sued for. The dues or premiums were payable annually in advance on December 31 of each year, or in semiannual installments, if preferred, on December 31 and June 30 without notice. No grace period was provided in which the policy should remain effective after the maturity date of the premium, but any member might be reinstated, if, within forty-eight days after default, the premium was paid. He was not, however, entitled to receive benefits for any injury between the date of default and the tender

and acceptance of the past-due premium. It was further provided that after the forty-eight days had elapsed the member could be restored only by making formal application in the manner provided for new members. There was the further provision that the board of directors of the association might cancel any membership if deemed advisable whenever the risk, in the opinion of the board, became more hazardous than when first assumed, "or, for any other reason which at the discretion and in the opinion of the board of directors makes such cancellation advisable;" and "* * * that the board of directors shall have the power at any dues-paying period to refuse to renew the membership of any member and decline to accept his dues when the member's duties or physical condition in the discretion and in the opinion of the board of directors warrants such action."

The accident suffered by the insured which resulted in his total disability occurred at 10:30 p. m. on the 31st of December, 1934. The notice was given certainly not earlier than January 30, following, and proof was made on February 6, following. According to the certificate of the physician which was accepted by appellant the insured was totally disabled for approximately a week and partially disabled thereafter until January 26, and claim was made for these disabilities in the sums of $21.43, total disability for six days, and $35.72, partial disability for two weeks and six days. These amounts were allowed and paid to the appellee. If it be conceded that something was due the insured on December 31, 1934, for the injury he suffered at 10:30 p. m. on that date, it could not have been for a period of more than one and a half hours before midnight of that day and would have been insufficient to cover the semiannual premium due of $7.50, and to prevent suspension of the benefits under the policy.

The cases referred to by counsel for appellee where it is held that the lapse of a policy was prevented were those where the insurer had in its hands at or before the lapse of the policy sufficient funds to keep the same in force until the death or disability of the insured. Typical of these is the case of *American National Insurance*

Company v. *Mooney,* 111 Ark. 514, 164 S. W. 276. In this case the insured died and liability was denied on the ground that he had failed to pay the premium and the policy had lapsed. In addition to the death benefit, however, there were sick benefits provided by the policy. The contention was made by the beneficiary that at the time of the alleged lapse the insurance company owed the insured sick benefits sufficient to carry the policy beyond the date of his death. The court there announced the following to be the rule: "If, however, as plaintiff contended, a sum of money was due, sufficient to pay the premiums and keep the policies alive up to the death of Weatherall, then there was no forfeiture of the policies, for the reason that the amount due should have been applied by the company in satisfaction of the premiums, so as to keep the policies alive."

This rule has no application to the instant case for the reason that there was nothing due the insured by the association until after the policy had lapsed or became suspended. Furthermore, under the provisions of the by-laws which have been set forth, no absolute duty rested upon the association to reinstate the policy where payment was tendered after the due date, but such reinstatement was discretionary with the board of directors.

The appellee strongly relies upon the case of *Order of Ry. Conductors of America* v. *Skinner,* 190 Ark. 116, 77 S. W. (2d) 793, where it was held that payment of a premium after the expiration of the grace period named in the contract was sufficient to keep the policy in force. This conclusion rested upon the fact shown that repeated acceptance of premiums beyond the grace period waived that provision of the contract, where no demand was made by the insurer that the insured should comply with the provisions of the contract. In the case at bar, however, there was no waiver. The most the evidence shows is that on a number of occasions the premiums were not paid on their due dates, but they were all made within the forty-eight days allowed by the contract in which payment might be made and these payments served to reinstate the insurance. The only effect of the non-payment of the premium on the due date was to suspend

the obligation of the contract, but, if a loss was sustained during its suspension, the insurance could not be recovered. 3 Couch Cyc. Ins. Law, 2023.

In all contracts of insurance of dubious or doubtful meaning the construction should be placed upon them most favorable to the insured, but where the provisions are unambiguous they must be construed according to their plain meaning. We find no ambiguity in the contract relating to the payment of premiums after their due date. The forty-eight days in which these payments might be made are clearly not days of grace, as in the ordinary policy, the effect of which is to extend the liability of the insurer throughout those days, but it is plain that during the time the premiums remain unpaid, the insurance is not in force.

It follows from the views expressed that the trial court erred in refusing to direct a verdict for the appellant. The judgment is therefore reversed, and as the cause seems to have been fully developed, the case is dismissed.

STUART *v.* JOHNSON, SHERIFF.

4-4315

Opinion delivered May 18, 1936.

D. K. Hawthorne, for appellant.

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

BAKER, J. Jeane Stuart was arrested in Craighead county upon a warrant charging her with having committed embezzlement in the State of Oklahoma and with having fled from that State. Her arrest was upon a warrant issued for her extradition under act No. 126, approved March 19, 1935, and generally known as "The Uniform Extradition Act." There is no question here as to any failure of a substantial compliance with the provisions of said act as to matters of form. There is, however, the question of identity as the basis for the *habeas corpus* suit whereby appellant has sought her release. Incidentally there is an allegation to the effect that offense charged is barred by the statute of limitations of three years and that there is a variance in the proof offered on *habeas corpus* and the affidavit charging the offense.

The matter of identity of Jeane Stuart as the person charged with having committed the offense in Oklahoma was presented in a way most unique.

Upon a petition for a writ of *habeas corpus* whereby she sought release from the arresting officer she offered as a witness A. Garland Marrs, sheriff of Tulsa county, Oklahoma, and by him had identified the several different instruments or documents used in the process of extradition, including affidavit of prosecuting witness and preliminary information filed in the court of common pleas and warrant of the judge of said court and other procedural papers.

The affidavit charged "Carolyn Morgan" with the offense, and did not mention or incorporate the name of Jeane Stuart. Among these was a petition of the county attorney of Tulsa county, Oklahoma, to the Governor of Oklahoma, praying that Carolyn Morgan, alias Jeane Hamilton Coty, alias Jeane Stuart, be extradited from Arkansas. Other documents thereafter mentioned her in like manner.

Under his examination Sheriff Marrs testified that the prisoner, petitioner for the writ of *habeas corpus,* was arrested in Tulsa, Oklahoma, on the night of October 3, 1935, and again on the succeeding night, October 4; that she made bond for $1,000 for her appearance on October 11; that she did not appear but defaulted; that the woman arrested on October 3d and 4th was the same woman charged in the affidavit and preliminary information as having committed the offense of embezzlement in 1930.

After the appellant had offered this proof, she then proceeded by offering testimony of numerous witnesses to the effect that she was not in Oklahoma on October 3d and 4th, 1935. By this testimony offered over the objection of the prosecuting attorney she made and raised the principal issue upon which she relies for discharge.

Even if her contention in this respect be true, it does not follow that she was not present in Oklahoma at the time and place of the alleged commission of the offense charged. The proof of a mistaken identity in 1935 does not in any manner tend to prove the appellant was not the same person identified by the prosecuting witness as the one to whom she had delivered her money or check. It does not prove she is not Carolyn Morgan, alias Jeane Hamilton Coty, alias Jeane Stuart. By her own witness she brought into the record, by identification, the papers or records showing the several names under which she was known, and by her most intimate friends established the fact she was so known. Section 5 of said act No. 126, Acts 1935, furnishes the measure of proof required. That requirement has been met.

Appellant argues that the charge is barred by limitations. That may be, or she may have been a fugitive so as to prevent the statute bar from attaching. At any rate that is a matter of defense which may be offered in defense of the charge, but not here.

As to the alleged variance in the charge as set out by affidavit and information and proof offered we have nothing to do. Suffice it to say there is a "substantial charge" of a violation of the laws of the demanding State. Section 3, act No. 126, *supra.*

Besides, affidavits and informations may be amended. This seems to be peculiarly true in Oklahoma. See 31 C. J., 648, and footnote 96 for Oklahoma cases there cited to support the text. The matter of defective affidavits may be raised by proper motion filed in due time before amendment. *Muldrow* v. *State,* 4 Okla. Crim. 324, 111 Pac. 656.

The whole matter may be disposed of by quoting from second headnote in the case of Ex parte *William Germain,* 155 N. E. 12, 258 Mass. 289, 51 A. L. R. 789. This is a correct epitome of the decision and seems to be according to the weight of authority.

"Whether or not a requisition for interstate rendition shall be honored is a question for the executive, over which the courts have no control, if the statutory requirements are fully complied with."

The trial court's judgment was correct, and is affirmed.

THE PHARIS TIRE & RUBBER COMPANY *v.* MAY.

4-4308

Opinion delivered May 25, 1936.

Barber & Henry, for appellant.

Carmichael & Hendricks, for appellee.

HUMPHREYS, J. The question involved on this appeal is whether the trial court correctly interpreted the letters and testimony introduced in evidence as being a conditional guaranty by appellee, Dr. W. S. May, of fifty per cent. of the account, not exceeding $500, of appellant against Odell's Tire & Battery Company.

Prior to March 29, 1934, appellant had sold merchandise to the Odell Tire & Battery Company on a C. O. D. basis, but Odell wanted to buy on open account and so informed appellant's salesman. The salesman made an effort to get appellant to sell its goods, wares, and merchandise to the Odell Tire & Battery Company on open account, but received the following reply from it: "If Dr. May will write to us stating that he will guarantee account, will accept order for $500. Guarantor must state willingness to also guarantee account paid on due date. Wrote you fully on 27th."

When the salesman approached appellee about it, he wrote and delivered to the salesman the following letter, which the salesman attached to an order for goods, wares and merchandise in the amount of $315, which he mailed to appellant:

"W. S. May, M. D.
"Eye, Ear, Nose and Throat
"319½ Main Street
"Little Rock, Arkansas
"March 30, 1934.

"Pharis Tire & Rubber Co.,
"Mr. W. I. O'Bryan,
"Newark, Ohio.

"Dear Sir:

"This is to certify that I will guarantee fifty per cent. Odell's Tire & Battery Co. account with you up to ($500) five hundred dollars, to be paid according to terms each month, tenth prox.

"Respectfully yours,
"W. S. May (signed)
"Dr. W. S. May."

On the receipt of the letter, appellant shipped a part of the goods, wares and merchandise to Odell's Tire & Battery Company. Thereafter, on April 5, appellant wrote appellee as follows:

"April 5, 1934.

"Dear Sir:

"This will acknowledge your letter of the 30th in which you state that you will guarantee the account of

Odell's Tire & Battery Co., up to $500. You state that you will guarantee this account fifty per cent., and we do not quite understand whether you mean you will guarantee the account up to $500, as your fifty per cent., or whether you mean that you will guarantee the account for $250.

"We would thank you to enlighten us on this so that the proper guarantee can be sent you for the amount you wish to be covered for.

In the meantime, we are making shipment of the order amounting to $300 and trust that our terms of payment of 10th prox. will be complied with.

"Thanking you for your kind co-operation in this respect, beg to remain,

"Very truly yours,
"The Pharis Tire & Rubber Co.
"W. I. O'Bryan, Credit Manager."

Not receiving a response from appellee, appellant again wrote to him on April 19, as follows:

"April 19, 1934.

"Dear Sir:

"We wrote you under date of April 5 in reference to a guarantee you made on Odell's Tire & Battery Co., and inasmuch as we are desirous of getting this correction made on our credit files, we would thank you to reply to this letter by return mail.

"Yours very truly,
"The Pharis Tire & Rubber Co.,
"W. I. O'Bryan, Credit Manager."

Upon the receipt of the last letter, appellee answered these letters as follows:

"Little Rock, Arkansas.
"April 22, 1934.

"The Pharis Tire & Rubber Co.,
"Newark, Ohio.

"On March 30, 1934, I had an agreement with your Mr. Grimes—I believe his name—that I would go fifty-fifty with your company on Odell's account. That is to say that I will pay half—if it should come to the worst—of his account up to five hundred dollars. To make it

plain: You are not to give him over five hundred dollars' credit and expect me to be responsible for one-half of the account, and should he fail to pay you I would pay one-half of the amount he was due you up to five hundred dollars; for example, should he owe you $500 I would pay you $250 or if his account be $300 I would pay $150. I do not believe that you are taking much chance on his account as I have found him to be honest and a hard worker and a darn good salesman. I truly believe that some day you will be glad that you have him your representative here. I hope this is plain to you. Do not think for one moment but what I am going to be on his nect *(sic)* to keep him going; if needs be. I do believe that he should have thirty days on the and each shipment.

"I am yours truly,

"(Signed) W. S. May."

After receiving appellee's letter, appellant did not answer same nor send him a written guaranty for the amount he had indicated he wished to be bound for.

After receipt of appellee's last letter, appellant continued to ship goods, wares and merchandise to Odell's Tire & Battery Company on open account until May 7, 1934, at which time the orders shipped amounted to $615.59. Being unable to collect the account from Odell's Tire & Battery Company, it turned same over to the American Credit Indemnity Company for collection on July 14, 1934. In a short time thereafter, appellee wired appellant as follows: "Send man at once see about Odell's account, rush."

Appellant replied by telegram and letter on August 13, 1934, to take up matter with Barber & Henry, local counsel of appellant. He did so, and their investigation resulted in finding that Odell had disappeared without leaving any assets in the building he had occupied as tenant of appellee. Appellee then requested time to make further investigation as he had an idea Odell was worth something which would relieve him of liability. The request was granted. Appellee then left the city, and, upon his return a few weeks thereafter, notified

Barber & Henry that he, appellee, would resist payment; whereupon, this suit followed by appellant against Odell's Tire & Battery Company for $615.59 and against appellee for $250 of the amount on his alleged guaranty.

The cause was tried, and appellant introduced testimony, in substance, as detailed above.

At the conclusion of the testimony introduced by appellant, the court, at the request of appellee, and over the objection of appellant, instructed a verdict in his favor on the theory that the undisputed evidence showed that the guaranty was on condition that appellant should send appellee a written guaranty to sign, showing the amount he wished to be bound for, and that having failed to do so, the minds of appellant and appellee never met on a contract of guaranty, and, from the judgment discharging appellee, is this appeal.

The court committed reversible error in instructing a verdict for appellee on the ground that the undisputed evidence showed the minds of the parties never met on the guaranty contract.

We are of opinion that the first letter and the shipment of goods in reliance thereon constituted an absolute guaranty and acceptance thereof to the extent of $250. The minds of the parties met, and the contract was complete upon the receipt of the first letter and the shipment of the goods pursuant thereto. The subsequent correspondence was simply explanatory of, and in no way changed, the original guaranty and acceptance thereof.

On account of the error indicated, the judgment is reversed, and a judgment is directed to be entered here for $250 and interest from date suit was filed in favor of appellant against appellee.

AMERICAN NATIONAL INSURANCE COMPANY *v.* HAMILTON.

4-4291

Opinion delivered May 25, 1936.

Thomas E. Sparks and *Coleman & Riddick,* for appellant.

J. A. Watkins, for appellee.

BAKER, J. This suit was filed originally in the Municipal Court of North Little Rock. From a judgment rendered, an appeal was taken to the circuit court of Pulaski county, Second Division, and from an adverse judgment there the insurance company prosecutes this appeal. The complaint alleges a breach of an insurance contract; that the insurance company has refused to be bound by the terms of its policy and has refused to continue the insurance in favor of the insured, and that the insured is entitled to recover damages for an amount equal to the premiums paid, with interest thereon, and, in addition, penalty and attorney's fees. The defendant demurred to the complaint, and the demurrer being overruled, answered, denying the material allegations of the complaint and pleading specifically certain provisions of the policy of insurance not pleaded by the plaintiff. Upon a development of the case, the defendant asked the court to give to the jury a peremptory instruction to find for the defendant. The court refused to do this, but submitted the case upon instructions presenting plaintiff's theory.

If there is any error in this trial, it has arisen out of the failure or refusal of the court to direct a verdict for

the defendant. The contending parties are in substantial agreement about the facts, but differ only in the matter of law applicable thereto.

The principle relied upon by the plaintiff in this case is that announced in the case of *Supreme Council A. L. H.* v. *Black,* 123 Fed. 650, 653, as follows: "According to the clear weight of authority, if an insurance company wrongfully cancels a policy, or otherwise wrongfully renounces the contract, the insured may, at his election, treat the contract as rescinded, and recover back all the premiums he has paid." *Mutual Relief Ass'n* v. *Ray,* 173 Ark. 9, 292 S. W. 396, incorporates this quotation with approval.

We have approved this salutary principle in other decisions, but it remains in this case to determine whether the rule as announced is applicable to the facts and to the policy or contract.

Upon an application made by the appellee the policy issued in this case by the appellant was dated July 12, 1924. For it there was charged a policy fee of $2, a premium of $1.85, which paid for the insurance to the first day of August following. The insurance was to be kept in force by the payment of monthly premiums of $1.85, which were to be paid on the first of the month or within five days thereafter, the grace period. Except for the five days grace period the policy would have expired or lapsed on the first day of each month. There was no extended insurance, no reserve built up by payment of premiums, consequently no cash surrender value. The contract was for term insurance, each payment of premium was a renewal for an additional term of one month.

The insurance was somewhat peculiar. One provision is as follows: "does hereby insure Mrs. Mary Elizabeth Hamilton subject to all the conditions herein contained and indorsed hereon, from 12 o'clock noon, standard time, of the day this contract is dated, until 12 o'clock noon, standard time, of the first day of August, 1924, and for such further periods, stated in the renewal receipts, as the payment of the premium specified in said application will maintain this policy and insurance in force, against death or disability resulting directly and exclu-

sively of all other causes, from bodily injury sustained solely through external, violent and accidental means, said bodily injury being hereinafter referred to as 'such injury,' and against death and disability from any bodily disease or illness, etc.''

There is a further provision in the policy for double indemnity under certain conditions and also health insurance whereby specified amounts would be paid the insured who might become wholly disabled and prevented, by bodily disease or illness, from performing any and all duties pertaining to any business or occupation.

The appellee paid her premiums upon this insurance with more or less regularity until the insurance fell due on the first day of November, 1930. Prior to that time she had frequently been somewhat tardy in the payment of these premiums, that is, her payments were made after the expiration of the grace period. One payment to which attention was called was made perhaps more than twenty days after the expiration of this period, but notwithstanding these delinquencies of a few days from time to time the insurance was kept in full force, and when the insured tendered the November premium in 1930, she sent postal money order for the amount, on November 6th.

On November 7th she received a letter from the company, or its agent, stating: ''We are in receipt of your postal money order for $1.85, which find inclosed. We have had instructions from our home office that we are unable to reinstate you and so are returning your money herewith.''

Very shortly thereafter the appellee had her attorney write a letter complaining to the company about the fact of the return of her premium and the fact that the home office had declined to reinstate the insured. Without attempting to quote from this argumentative letter, it is sufficient to say that the contention made therein to the effect that her policy had not lapsed, although she was a day or two late in forwarding the premium, was justified. No notice had been given to her that payment must be made strictly within the grace period and the course of business or custom followed prior thereto justified the belief that the premiums would be continued to be ac-

cepted as they had been in the past. *Columbian Mutual Life Ins. Co.* v. *High,* 188 Ark. 798, 67 S. W. (2d) 1005.

The company, however, appreciated this fact and, responding to the attorney, admitted that the policy had not lapsed, but stated that the act of the company was merely a refusal to renew the insurance. Upon receipt of this letter, negotiations between the parties seem to have ceased, and nothing else was done about the matter until the complaint was filed in the municipal court of North Little Rock on May 14, 1935.

There was incorporated in the complaint filed the letter written by the insurance company on November 7, 1930, in which the company had stated that it was unable to reinstate the insured. There was also incorporated therein § 16 under the standard provisions of the policy which reads as follows: "The company may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the company, together with cash or the company's check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto."

Plaintiff, appellee, pleads that she had no notice of the intention to cancel the policy. With this allegation of her complaint we disagree. The letter of November 7 declining "to reinstate" clearly could have indicated nothing else to the insured except that the company did not intend to be bound longer by the contract of insurance. The effect of the return of the premium indicated the same fact.

The above quoted provision of the policy does not prescribe what form the written notice shall take. It must, therefore, be seen that such notice as will reasonably apprise the insured that the company does not intend to be longer bound by the contract is sufficient. Certainly the letter sent to her attorney, that the company refused to renew the contract, was not susceptible of any other interpretation than that placed upon it by the insurance company. It will be observed that from the first foregoing quotation from the policy that the insurance

was one of renewable terms, which could be renewed only at the instance of the insurer by the issuance of a receipt for money accepted by the company.

The insured advances a theory that the insurance was canceled because she was late in her payments. She may be correct. Whatever may have been the excuse or reason for delay in the payment of premium, the course of business or custom to accept payment, although made out of time according to the strict letter of the contract, could have had but one effect, and that was to prevent the company from successfully denying liability in accordance with the terms of the policy if such liability had accrued while the policy was in full force and effect, or when it should have been reasonably deemed to have been in full force and effect, on account of the tender of payments made in the usual or ordinary manner, though perhaps a few days beyond the days of grace. The authorities cited by appellee, particularly *Columbian Mutual Life Ins. Co.* v. *High,* 188 Ark. 798, 67 S. W. (2d) 1005, would have been applicable in the event the appellee had suffered an accident during the month of November, after the tender of her premium on the 6th day of that month, but she did not suffer such accident, nor did the company become otherwise bound to her or liable on account of any condition or provision of the policy of insurance. Had such accident or liability occurred shortly after the tender of this premium and the question of the sufficiency of the notice of cancellation had arisen, then the rule announced in *Commercial Standard Ins. Co.* v. *Waller,* 190 Ark. 636, 80 S. W. (2d) 78, would have been applicable.

The question here, however, is not one of liability for insurance under any provision of the policy. Therefore the authorities cited and relied upon have no application.

Appellee sues here upon an entirely different theory. She says the insurance company has repudiated the contract and refuses to be bound thereby. On that account she is entitled to recover the amount she had paid in premiums. The appellee has shown by her original pleading filed in this case the right under the contract of in-

surance existing in favor of the insurer to cancel the insurance at any time. If it has in its hands at the date of cancellation any unearned premium, it must return such unearned premium. On the date the appellant refused to renew this insurance for another month, it returned to the appellee her postal money order just received. It did not violate any provision of the policy in so doing, but acted in accordance with its provisions. This was not a breach, but the exercise of a contractual right and for which there can be no liability. *Rumkle* v. *Citizens Ins. Co.,* 6 Fed. 143; *Certificial Ice Co.* v. *Reciprocal Exchange,* 192 Ia. 1153, 184 N. W. 756; *Northern Pine Crating Co.* v. *Liverpool & London & Globe Ins. Co.,* 143 Wis. 433, 128 N. W. 70. See also *Davidson* v. *German Ins. Co.,* 74 N. J. L. 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, and notes; *National Union Indemnity Co.* v. *Standard Accident Co. of Detroit,* 179 Ark. 1097, 20 S. W. (2d) 125.

We cannot make contracts between the parties, but we must enforce them as they are written.

It follows the court erred in not directing a verdict for the defendant. The case has been thoroughly developed. It could serve no purpose to remand. The judgment is, therefore, reversed, and the cause dismissed.

WOODROW *v.* RIVERSIDE GREYHOUND CLUB, INC.

4-4280

Opinion delivered May 25, 1936.

Harrison, Smith & Taylor, for appellants.

N. F. Lamb, Chas. D. Frierson, Charles Frierson, Jr., for appellees.

JOHNSON, C. J. On February 28, 1935, E. E. Fox and wife for a recited consideration of $650, conveyed to L. D. Landers the "Harahan Racing Park" which is a small acreage tract of land situated on the west bank of the Mississippi River in Crittenden county, Arkansas, and immediately adjacent to the city of Memphis, Tennessee. For the purposes of this opinion it is not necessary to describe this tract of land by metes and bounds. The granting clause of this deed of conveyance reads as follows:

"That we, E. E. Fox, of Columbus, county of Franklin, State of Ohio, and Frances M. Fox, his wife, for and in consideration of the sum of six hundred and fifty and 00/100 ($650.00) dollars, of which three hundred and fifty ($350) dollars, was paid in cash, the receipt of which is hereby acknowledged, and one promissory note of even date, in the sum of three hundred ($300) dollars, being due and payable on or before the 28th day of August, 1935, by L. D. Landers, the said E. E. Fox, and wife, Frances M. Fox, do hereby grant, sell and quitclaim unto the said L. D. Landers all of their right, title and interest, in and to the following lands lying in Crittenden County, State of Arkansas, to-wit:"

Subsequent to the delivery of said deed the appellants here, John A. Woodrow, Shirley J. Cowing, John Mackler and J. H. Ellis instituted this suit in the Crittenden Chancery Court against L. D. Landers, Mabel Landers, Riverside Greyhound Club, E. E. Fox, Frances M. Fox, R. V. Wheeler and George H. Partin, appellees here, the purpose of which was to obtain a decree declaring appellees trustees of said tract of land instead of owners in fee as they appear to be of record.

Generally, it was alleged by appellants that the Landers, Wheeler and Partin entered into a conspiracy the purpose of which was to acquire by fraudulent means

and methods the "Harahan Racing Park" property. Specifically the complaint alleged that appellants are the owners in fee of said property and that E. E. Fox held the naked legal title thereto; that the Landerses, Wheeler and other appellees well knew of the limitations upon Fox's title at the time of the conveyance first mentioned and purchased subject to the trust relation; that as an inducement and procuring cause of said purchase and sale Partin falsely, fraudulently and corruptly represented to Fox that the property had been sold for State and levee taxes and that the time for redemption thereof had long since expired; that said representations were knowingly and wilfully false and untrue and were made for the purpose and did induce Fox to execute said deed. Other things are alleged by appellants, but the above will suffice to show the trend of the issues joined.

By joint and separate answers all the material allegations of the complaint were put in issue. The appellees, Riverside Racing Club, Landers and Wheeler affirmatively pleaded that they and each of them were and are innocent purchasers for value of said tract of land and without notice of any trust relation between Fox and appellants at the time of the purchase.

Upon testimony adduced by the parties the chancellor dismissed appellants' complaint for want of equity from which this appeal comes.

We have concluded that the chancellor was correct in dismissing the complaint for the following reasons: first, that appellees Riverside Greyhound Club and the Landerses by their respective purchases from Fox occupy the position of innocent purchasers for value without notice of appellant's asserted rights. This conclusion is impelled because the law is well settled in this State, as well as elsewhere, that one who purchases property in good faith and pays a valuable consideration therefor without notice of secret equities becomes the owner thereof. *Green* v. *Clyde*, 80 Ark. 391, 97 S. W. 437; *St. Louis & Ark. Lbr. & Mfg. Co.* v. *Godwin*, 85 Ark. 372, 108 S. W. 516; *Davis* v. *Harrell*, 101 Ark. 230, 142 S. W. 156. This rule is also applicable as against the beneficiary of a secret trust in real estate. *Rubel* v.

Parker, 107 Ark. 314, 155 S. W. 114; *Bragg* v. *Hartney,* 92 Ark. 55, 121 S. W. 1059; *The Calais Steamboat Co.* v. *Scudder,* 67 (2 Black) U. S. 372.

The only contradiction in the testimony that Landers purchased the tract of land from Fox upon the faith of Fox's record title is that Fox claims that Partin, who acted as Landers' agent in the purchase and sale, knew all about Fox's title and appellants' trust agreement. Partin denied in his testimony that he knew anything about the alleged trust relation between appellants and Fox at the time of the purchase. This suffices to show that the chancellor's finding that Landers is an innocent purchaser for value is not against a preponderance of the testimony and under repeated opinions of this court cannot be overturned on this appeal. *Harlan* v. *Edwards,* 182 Ark. 1185, 31 S. W. (2d) 127; *Jackson* v. *Banks,* 182 Ark. 1185, 33 S. W. (2d) 40; *Menees* v. *Strickland,* 183 Ark. 1153, 34 S. W. (2d) 772.

But appellants contend that Landers' grantee, the Greyhound Racing Club, is in no event an innocent purchaser for value because, as it is argued, that R. V. Wheeler, its president, conveyed an undivided one-half interest in said property to Fox in 1927; that Wheeler held the title in trust and thereby knew that his conveyance to Fox was likewise in trust. The conveyance from Wheeler as trustee to Fox was exhibited in testimony as also was the resolution of the beneficiaries in the Wheeler trust directing Wheeler to convey to Fox. Without setting out in detail the Wheeler deed to Fox or the resolution authorizing its execution, neither one has one word or sentence indicating that Wheeler's conveyance to Fox was in trust or in continuation of the trustee relationship theretofore existing. On the contrary the resolution of the Wheeler trust beneficiaries authorizes and directs Wheeler as trustee to convey to Fox without limitations and Wheeler's conveyance to Fox merely followed directions. It follows from what we have said that Wheeler had no notice of any trust relation between Fox and appellants and that the Riverside Greyhound Club is an innocent purchaser for value from Landers without notice.

Secondly, the testimony adduced by appellants is wholly insufficient to show that Fox in his sale to Landers acted upon any representation of existing facts, in reference to the property, made by Partin. True it is that Fox says that Partin misrepresented the status of the title to the property and the uses contemplated thereof in the event of purchase, but Fox further admits that he did not rely upon any representation made by Partin. This because he immediately communicated with attorneys located in Memphis, Tennessee, in close proximity to the property and specifically refused to consummate the deal with Partin until advised to do so by his Memphis attorneys. On this phase of the case the law is that to warrant the court in setting aside a conveyance as being superinduced by fraudulent representations the testimony must not only show such fraudulent representations, but that the grantee relied thereon. *Troyer* v. *Cameron,* 160 Ark. 421, 254 S. W. 688; *Nix* v. *Kirkland,* 173 Ark. 291, 292 S. W. 664.

No error appearing, the decree is affirmed.

ASHTON *v.* ASHTON.

4-4284

Opinion delivered May 25, 1936.

Barber & Henry and *Troy W. Lewis,* for appellant, *Rita L. Callaway,* for appellee.

BUTLER, J. The appeal in this case is from the decree of the court below awarding the appellee a divorce from the appellant.

Appellee filed his suit in the Pulaski Chancery Court on May 15, 1935, alleging that he was, and had been for more than two months prior to its institution, a *bona fide* resident of Pulaski county and State of Arkansas. After reciting the marriage of himself and the appellant in Michigan on April 5, 1909, appellee alleged that on or about July 25, 1920, appellant, without reasonable cause, wilfully deserted him, and that they have continuously remained apart since that date. For a second ground, appellee alleged unkind, cruel, harsh and tyrannical treatment.

To this complaint appellant filed a special plea challenging the jurisdiction of the court on the ground that appellee was not a *bona fide* resident of the State, and that his presence in Arkansas was for the fraudulent purpose of defeating the legal rights of appellant. This plea was overruled by the trial court, and other pleadings were filed by the appellant which finally culminated in an amended answer interposing the plea of *res judicata,* and containing general denials of the allegations of appellee's complaint. Thereafter, by leave of court, appellee amended his complaint so as to charge desertion as the sole ground for divorce.

In support of the alleged ground, appellee testified in his own behalf introducing the depositions of several other witnesses. The testimony of appellee related to the alleged desertion of the appellant in 1920 and the circum-

stances thereof. The testimony of the other witnesses also related to that occurrence. This testimony was controverted by that of the appellant. In support of the plea of *res judicata* appellant introduced, without objection, certified copies of records or proceedings in the courts of the States of Illinois, Colorado and Nevada. From these the following facts appear. Willard H. Ashton, appellee, and Cora B. Ashton, appellant, were married on April 10, 1909. Soon thereafter they established their residence in the home of appellee at Rockford, Illinois, and were residing there in July, 1920. Some time after this date, Mrs. Ashton brought suit in the circuit court of Winnebago county, Illinois, against Willard H. Ashton alleging that defendant had wilfully and without probable cause deserted her, and she prayed for separate maintenance under the provisions of a statute of that State. Revised Statutes, ch. 68, § 22. The defendant entered his appearance and answered denying the allegations and alleging that Mrs. Ashton had wilfully deserted him on or about July 17, 1920, and prayed that the complaint be dismissed. The case was duly tried and among other things the court found and decreed "that the allegations in the said bill of complaint contained, are true as therein stated; that the said Willard H. Ashton, defendant, has been guilty of wilful desertion as charged in said bill of complaint, and that the said complainant is now living separate and apart from the said defendant without any fault, cause or misconduct on her part; that on or about the 17th day of July, 1920, the said Willard H. Ashton wilfully abandoned and deserted the said Cora B. Ashton without excuse, provocation or reason, and that he, the said Willard H. Ashton, has since said date continued to absent himself from the said complainant, and his home in the city of Rockford, Winnebago county, Illinois." It was further adjudged that Mrs. Ashton be paid $75 per week as separate maintenance until further orders of the court.

In 1927, Mr. Ashton filed suit against his wife in Larimer county, Colorado, alleging that he was a citizen and resident of that State, and praying for a divorce on the ground that his wife had been guilty of extreme and

repeated acts of cruelty toward him. Mrs. Ashton defended by general denial, and the issues were presented to a jury which found in her favor. The court ordered that Ashton pay his wife $75 per week "as heretofore." Thereafter Ashton returned to Illinois, and there sought a modification of the decree of the Illinois court. The court, on the showing made, reduced the payments to the sum of $60 per week. Ashton next appears in the courts of Colorado as plaintiff in a proceeding against his wife, and the sheriff of Larimer county seeking a modification of the decree relating to the temporary alimony awarded by the court in his previous action for divorce. In 1931, he appears in a court in Clark county, Nevada, alleging that he is a resident and citizen of that State, and praying for a divorce from his wife. This proceeding was a long drawn-out affair, numerous pleadings being filed and orders made by the court. It finally went to trial on December 5, 1932, when the issues were submitted to a jury, resulting in a verdict and judgment denying the prayer of Ashton's complaint. Thereafter, this judgment was set aside, and a decree was entered in favor of Ashton granting the divorce as prayed. Upon motion of Mrs. Ashton this decree was vacated, the court finding "that there was irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial, and further that error in law occurred at the trial, and that there was irregularity in the order of the court in sustaining plaintiff's demurrers to defendant's affirmative defenses in said action by which the defendant was prevented from having a fair trial." This order was made on July 23, 1934.

In this state of the record, and without proceeding further in the Nevada court, Ashton, on May 13, 1935, filed his complaint in the Pulaski Chancery Court, and on June 24, 1935, filed a motion in the Nevada court for the dismissal of the action there pending, on the ground that he had moved his citizenship to Arkansas. This motion was overruled, and the cause is now pending in the Nevada court.

It is the contention of the appellee that the orders of the courts of Illinois, Colorado and Nevada, hereinbe-

fore mentioned, were inadmissible for the reason that all the pleadings and proceedings on which the judgments and orders were based were not authenticated and produced so as to show that the courts were authorized to render the judgments upon which the appellee rests her plea of *res judicata.* This contention is made on the familiar rule that "to maintain an action on a judgment against a plea of *nul tiel* record, a certified copy of the judgment alone is not sufficient, but all the pleadings and proceedings on which the judgment is founded, and to which as a matter of record it necessarily refers, must be produced." *Hallum* v. *Dickinson,* 47 Ark. 120, 14 S. W. 477; *Hall* v. *Roulston,* 70 Ark. 343, 68 S. W. 24; *Swing* v. *St. Louis Refrigerator & Wooden Gutter Co.,* 78 Ark. 246, 93 S. W. 978, 115 Am. St. Rep. 38; *McCarthy* v. *Troll,* 90 Ark. 199, 118 S. W. 416. A sufficient answer to this contention is that the orders and decrees were introduced without objection, and there was no plea of *nul tiel* record.

It is next insisted by appellee that the plea cannot be sustained as to the judgment rendered by the Illinois court in 1921, because, he says, that decree was set aside and vacated. In this appellee errs. On June 25, 1935, during the pendency of the instant case, Mrs. Ashton filed her petition in the Illinois court for a citation requiring the appellee to appear and show cause why he should not be adjudged guilty of contempt of court on his failure to pay $11,428 due her under the decree rendered in her favor on March 23, 1931. Very opportunely for Mr. Ashton, the Legislature of the State of Illinois, by its act filed July 20, 1935, amended the statute upon which Mrs. Ashton's proceeding for separate maintenance was based. This act in part provides: "That where there are no living children born of such marriage, no person having once received separate maintenance or temporary alimony for a period of two (2) years or a fraction thereof shall be entitled to further separate maintenance or temporary alimony against the same spouse, except for such portion of the two (2) years as remains unexpired." The court found in effect that Ashton was protected by the act quoted and denied the petition of Mrs. Ashton, and

decreed: "that he shall go hence without any other or further liability to the plaintiff herein under any decree or orders heretofore entered herein, and that his property, either real or personal, and wheresoever situated, is freed from any liability or lien which has or might have caused such property to be subjected to the payment of any moneys which have or might have accrued under any decree or order heretofore entered herein." The only effect of this order was to free Ashton from payment of further sums for separate maintenance, but it did not nullify the finding upon which the decree of March 23, 1931, was based, namely, "that the said Willard H. Ashton, defendant, has been guilty of wilful desertion as charged in said bill of complaint, and that the said complainant is now living separate and apart from the said defendant without any fault, cause or misconduct on her part."

On the appellant's plea of *res judicata,* the question is: Was the decree in her favor for separate maintenance, entered in the Illinois case, conclusive upon appellee in a divorce proceeding in this State on the issue of wilful desertion? That issue, present in the instant action for divorce, was identical with the issue of absence without fault involved in the Illinois maintenance suit. The desertion charged in this proceeding is said to have occurred and continued on and after the date identical in the proceeding for maintenance in the Illinois court, and the evidence adduced by the appellant in this case related solely to matters antecedent and contemporaneous with the date on which the desertion is alleged to have occurred in the Illinois case. The question in both cases therefore was whether the separation and subsequent living apart was by reason of the fault of the wife. It is clear that the issues raised and determined in the Illinois case are identical with those in the case at bar. The judgment of the Illinois court is, therefore, a complete bar to the maintenance of the instant case, and the trial court should have so held.

The case of *Harding* v. *Harding,* 198 U. S. 317, 49 L. Ed. 1066, 25 S. Ct. 679, is directly in point and is conclusive of the decision we have reached. There

a husband sued his wife in a court in the State of California for divorce on the ground of desertion. In bar of that action the wife pleaded a judgment of the courts of Illinois wherein it was adjudged, in a proceeding under the laws of that State (being the same statute heretofore cited) brought by the wife for separate maintenance, that she was entitled to separate maintenance, and in the decree it was recited, among other things, that the court "doth find that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant." The courts of California denied the plea and on the evidence found that the husband was entitled to a divorce and decreed accordingly. The Supreme Court of the United States, in reversing the case and holding that the plea of *res judicata* ought to have been sustained, took occasion to notice that to maintain her cause of action in the courts of Illinois, it was necessary for the wife to show that she was living apart from her husband without fault on her part and for good cause, and that the sustaining of her right to separate maintenance, based on the establishment of want of fault upon her part, was a judicial finding by the court. The Supreme Court concluded that the decree of the Illinois court and the evidence sustaining it were identical in effect with the cause of action alleged in the California courts and that the decree of the former court conclusively operated to prevent the same separation from constituting a wilful desertion of the husband by the wife. In conclusion, the court said: "From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case, it follows that the Supreme Court of California in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States."

With the change of names and dates, the above case is on all fours with this one and rules it.

If the present action was not barred by the decree of the Illinois court, it would be by the judgment of the court of Larimer county, Colorado. The contention that the verdict of the jury in that case was not supported by a judgment cannot be sustained. In the opinion of the court in a collateral proceeding, which was duly certified and introduced in evidence without objection, the judgment based on the jury's verdict is quoted verbatim. In that opinion the court recited the return of the verdict in the divorce proceeding finding the defendant, Cora B. Ashton, not guilty of cruelty, the denial of the motion for a new trial, and the final judgment of the court rendered in these words: "It is considered by the court that said plaintiff take nothing by his said suit, and that said defendant go hence, and have and recover of and from the said plaintiff her costs in this behalf laid out and expended to be taxed as costs and have execution therefor."

It is true, the cause of action alleged in the Colorado case was "cruel treatment," etc., and the ground for divorce in the instant case is desertion. But this ground might have been alleged and presented to the Colorado court and its judgment is as binding on that issue as if it had been formally presented. In the recent case of *Robinson* v. *Missouri Pac. Transportation Co., ante* p. 593, 93 S. W. (2d) 311, in line with many former decisions which are therein cited, the court laid down the following rule: "It is well-settled doctrine in this jurisdiction that a judgment of a court of competent jurisdiction is conclusive of all questions within the issue, whether formally litigated or not. It extends not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

The trial court allowed appellant the sum of $87.50 per month as alimony *pendente lite* and refused to allow her any fee for her present attorneys, it appearing that $200 had been allowed an attorney who had been employed to file a special plea, and who had withdrawn from the case. The present attorneys have rendered

faithful and efficient service under difficult circumstances, and should be allowed a fee commensurate with those services, taking into consideration the financial condition of the appellee; so, also, should the alimony *pendente lite* be allowed. In the matter of services the attorneys have rendered we are well advised, but as to the financial status of appellee, there is but little in this record to enlighten us save the *ex parte* affidavits of appellant and appellee. We prefer to disregard these affidavits and seek, as the source of our information, the proceedings and orders of the court in which the marital difficulties of the litigants have been last considered—that is, the Nevada court. An examination of the exhibits discloses that much evidence was taken, a considerable part of which, we are constrained to believe, related to the wealth of the appellee. A number of petitions were filed for allowance of alimony *pendente lite* and attorneys' fees and evidence appears to have been taken on these motions. Petitions for modification of the orders as to these matters were filed and modifications were made from time to time. It appears that during the first year or two of the litigation in Nevada, alimony *pendente lite* in the sum of $45 per week was allowed. As late as September 14, 1933, the allowance of $45 per week was continued by the court. Finally, in February, 1934, the alimony *pendente lite* was fixed at $175 per month. Attorney's fees were allowed from time to time in substantial amounts aggregating a large sum which has been calculated by the appellant to amount to $4,700. We have not examined the pages of the transcript referred to, but accept this as the true aggregate, since appellee does not dispute it. We are of the opinion that the proceedings in the Nevada court, where the matters involved appear to have been thoroughly investigated, are a more accurate criterion and a better source of information than the *ex parte* affidavits of the parties. It is not likely that the financial status of the appellee has greatly changed since February, 1934, and we, therefore, think that the alimony *pendente lite* should be fixed at $175 per month, the amount found reasonable and proper by the Nevada court at that time. We are also of

the opinion that the sum of $750 is a reasonable and proper fee for appellant's present attorneys.

It is, therefore, ordered that appellant be allowed $175 per month from June 3, 1935, the date of her special appearance, until the present date. It is further ordered that the appellant be allowed the sum of $750 as attorneys' fees, and that the judgment of the court below be reversed, and appellee's complaint be dismissed for want of equity.

MAGNOLIA PETROLEUM COMPANY *v.* SAUNDERS.

4-4317

Opinion delivered May 25, 1936.

Cockrill, Armistead & Rector, for appellant.

J. H. Lookadoo, Tom W. Campbell and *Lyle Brown,* for appellee.

SMITH, J. Appellee recovered judgment in the Clark Circuit Court against the appellant for the sum of $30,000, and for the reversal of this judgment numerous errors are assigned and discussed in the briefs. One of these was that the court was not legally in session at the

time of the trial, and as we think this assignment is well taken other questions raised are moot.

The suit was filed July 6, 1935. The circuit court convened July 22, 1935, and remained in session until July 31, when there was an adjournment. As to the date to which the court adjourned the presiding judge made the following statement: "The petit jury was excused until the 4th day of November and the court was adjourned. The court ordered that the court would be adjourned until the 4th day of November. * * * The court has never made any order vacating the order which had previously been made adjourning the court until the 4th day of November."

The clerk of the court was also called as a witness. He produced the record of the proceedings of the court which he had made and entered as follows: Opening order made July 22; an order adjourning court until July 23; an order adjourning the court until July 29; an order adjourning court until July 30, and an order adjourning until July 31. An order was entered on the last-mentioned date adjourning court until 9 a. m., August 5, 1935. A session of the court was held on that date and proceedings had which were authorized only at a session of court. The clerk testified that he left the records of August 5 open and entered no adjourning order on that date, but that an adjourned day of court was held on August 21, but that, so far as he knew or as was shown by the records of the court, no adjourning order to August 21 was made. However, the record of the proceedings of August 21 recites that the court met on that date pursuant to adjournment, the regular judge of the court being present and presiding, when the proceedings there recited were had and done. He also testified that he entered no adjourning order at the close of the record of the proceedings on August 21, as he did not know when the judge would return, but that the judge did return on September 11, at which time he entered an order adjourning the court to the last-mentioned date. The record of the proceedings of September 11 recites that the court convened pursuant to adjourn-

ment on that date, with the regular judge present and presiding, when certain judgments were entered in the proceedings of that day. A part of the proceedings entered as of September 11 was an order adjourning court until October 17. The clerk testified that this adjourning order entered in the proceedings of September 11 was not entered as of that date, as he did not know, at the time court adjourned on September 11, when the judge would return, but that he did return on October 17. He then entered an adjourning order as of September 11. The court record was introduced showing that court met on October 17 pursuant to adjournment, with the regular judge present and presiding. No adjourning order was entered in the proceedings of October 17.

The clerk further testified that he "had a little record book," which was the minutes book he kept on his desk while court was in session, but was not the regular permanent record book of the proceedings of the court, in which he noted all court proceedings as they occurred, and on August 5 he entered a notation in the minutes that the court adjourned until November 4. At the close of the proceedings on July 31 he entered in the court records an order adjourning court to November 4, but when the judge appeared and held court on August 5 he changed the adjourning order to show that the court had adjourned—not to November 4, but to August 5.

Upon this testimony of the clerk, and this statement by the presiding judge, the order showing an adjournment to August 5 was changed to read that the court had adjourned, on July 31, to November 4, whereupon, over the objections of the appellant, the trial proceeded to a verdict and the judgment here appealed from.

Sessions of circuit court are of three kinds under the practice in this State: (1) Regular sessions; (2) special or called sessions; (3) adjourned sessions. It is not contemplated that there should be any uncertainty as to when these sessions are to be held. It would be an intolerable condition if litigants, whose rights are to be adjudged, should remain or be in doubt as to when the court will convene before which they are required to appear.

All persons have notices of regular terms of court, for these meet at the time appointed and fixed by law. Special terms of court may be called pursuant to the provisions of §§ 2111-2223, Crawford & Moses' Digest. The statutes cited require the order of a court calling the session to be entered by the clerk on the records of the court, and it has been consistently held, since the early case of *Dunn* v. *State*, 2 Ark. 230, that the failure of the court to enter the order as required by statute invalidated the proceedings of the special term.

There are also adjourned sessions, referred to in § 2112, Crawford & Moses' Digest, as special adjourned sessions. That section reads as follows: "Special adjourned sessions of any court may be held in continuation of the regular term, upon its being so ordered by the court or judge in term time, and entered by the clerk on the record of the court." This statute, brought forward from the Revised Statutes, chap. 43, § 28, was given the following construction in the case of *Davies* v. *State*, 39 Ark. 448: "An adjourning order to a distant day, made by the *court*, is as effectual an entry on the record of an order for an adjourned session, as can be made. There is no new term of the court. It is simply a continuation of the present one."

It was held in the case of *Burks* v. *Cantley*, 191 Ark. 347, 86 S. W. (2d) 34, that an omitted adjourning order may be entered *nunc pro tunc*, provided the day to which the adjournment was taken was not in conflict with the regular terms fixed by law in other counties of said court. So, that the order of the court, entered November 4 *nunc pro tunc*, correcting the adjourning order of July 31, would have saved the adjourned term held on November 4 if there had been no other orders. But there were other orders, and they may not be disregarded as clerical misprisions, for the reason that the records of the court not only recite that the adjourned sessions above mentioned would be held, but the undisputed testimony shows that they were actually held.

In the case of *Roberts & Schaeffer Co.* v. *Jones*, 82 Ark. 188, 101 S. W. 165, the validity of an adjourned term of the circuit court was involved. A record entry

was made subsequent to the regular term showing that the term had been adjourned to a certain future date. It was said that the record entry sought to be corrected, while presumed to be correct, did not import absolute verity when attacked directly, and not collaterally. There is involved here a direct—and not a collateral—attack upon the order of the court correcting the original adjourning order made July 31.

When the facts herein recited are taken into account, it cannot be said that there were no adjourned sessions of court intervening between July 31 and November 4. Now, valid sessions of the court might have been held on each of these intervening days, and then on November 4 also. It would have only been necessary to have adjourned the court during the sessions thereof from one day to the next, as the record shows was done, up to and until October 17, and to have adjourned from October 17 to November 4, provided there were no other courts appointed by law or other orders of court for those days. But there was no adjourning order from October 17 to November 4. Therefore the session beginning November 4 at which the judgment here involved was rendered, was unauthorized, and that judgment is void.

Judges do not have the power to hold sessions of court at their pleasure. If the session is not (a) a regular term or (b) a special or called session, then, to be valid as an adjourned session, it must be a continuation of a regular or special session held pursuant to an adjourning order made in term time of a regular or special session of court. Section 2112, Crawford & Moses' Digest.

In the case of *House* v. *McGehee,* 188 Ark. 277, 65 S. W. (2d) 21, the facts were that the judge of the Perry Circuit Court adjourned the court without fixing a definite date for it to reconvene. He later advised the clerk to enter an order reconvening the court on the day named in his direction to the clerk. Application was made to this court for a writ of prohibition to prevent the adjourned session from being held. The relief prayed was granted. The headnote in that case reads as follows: "Adjournment of the circuit court subject to

call without specifying a day on which the court will reconvene without interference with the holding of courts in other counties in the same circuit is void, and prohibition will lie to prevent the court from reconvening in pursuance of such a call."

The case of *Southwest Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373, illustrates the necessity for certainty as to when special sessions of court will be held, apart from the requirements of the statutes in that respect. In the case last cited the facts were that the complaint was filed August 21, 1928, in which service was had August 29, 1928. A term of the court convened on the first Monday in July, which adjourned on July 16, to September 27, when the court adjourned to court in course. Prior to the first Monday in January, which was the first day of the next ensuing regular term of court, to-wit, on December 28, 1928, a petition and bond to remove the cause to the Federal court was filed. In denying the petition to remove attention was called to the provisions of the Judicial Code of the United States, which provides that such a petition may be filed at any time before the defendant in the action is required, by the law of the State or by the rules of the State court, to answer or plead. Attention was also called to the provisions of § 1139, Crawford & Moses' Digest, providing that the time fixed in the summons for the defendant to answer shall be within twenty days after service when the summons is directed within the State. Attention was also called to § 1208, Crawford & Moses' Digest, which provides that "The defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session after service * * * where the summons has been served twenty days in any county in the State."

It was there held that the defendant having been served with summons for more than twenty days before September 27, the adjourned day, it had not filed the petition to remove in the time required by the Federal Judicial Code. It was there said: "It can make no difference, so far as the power company is concerned, that the court was in session only one day, or the char-

acter of business transacted, if any, or that it had no actual knowledge that it would meet in adjourned session on said date. It is sufficient that the court was in adjourned session on that day, and the petition and bond for removal were not filed by noon of that day. More than twenty days had expired after service on September 27, and we therefore hold that the petition and bond were filed out of time, and that the circuit court correctly so held.''

There is involved here no question of removal, but the Southwest Power Company case, just cited, announces the rule which must be applied when it is raised. In that case an intervening adjourned day fixed the date with reference to which the petition and bond to remove had to be filed. So, here, August 5, being a day on which an adjourned session of court was actually held, could not be left out of account in determining whether a petition to remove had been filed in apt time.

We think the orderly and certain administration of justice require us to hold that the adjourned session convening November 4 was held without authority, and, if so, the judgment here appealed from is void, and must be reversed, and it will be so ordered. Cause remanded.

HEYDEN *v.* BARNSDALL REFINING COMPANY.

4-4235

Opinion delivered May 25, 1936.

Akers & Thurman, for appellants.

F. V. Phipps and *Miles & Amsler*, for appellee.

HUMPHREYS, J. This is a suit to enforce the specific performance of an alleged renewal lease of a filling station at the corner of Markham and Elm streets in the city of Little Rock, and to recover $625 rent therefor from January 1, 1934, to the date the suit was instituted at the rate of $125 per month. The original written lease was executed on the first day of January, 1929, covering a period of five years, at a monthly rental of $85. The rent was paid through December 31, 1933, or until the expiration of the original lease. Relative to a renewal of the lease, the following clause appears in the original rental contract. "Lessee shall also have the right and privilege of renewing this agreement upon the same terms and conditions as herein set out for an additional five-year period at a rental of one hundred twenty-five dollars ($125) per month, said renewal to be exercised by thirty (30) days' notice in writing at the expiration of the primary term thereon."

The gist of appellants' complaint is that appellee continued to occupy the premises for several months after the expiration of the original lease, and that by doing so it elected to extend the term of the lease for a period of five years at the monthly rental stipulated therein, viz., $125 per month.

The appellee filed an answer denying that it occupied the premises after the expiration of the original lease, and alleging that the original lease provided the method by which appellee might extend the original lease

if it desired to do so, and, having failed to give the notice specified therein, the lease was not renewed.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, resulting in a dismissal of the complaint, from which is this appeal.

The clause of the original lease, quoted above, was an option to renew the lease on the part of appellee by giving thirty days' written notice to appellants at the expiration of the original lease and was not a covenant to extend same. The notice provided for was a condition precedent and, not having been given, it cannot be said, as a matter of law, that a mere holding over for a few months constituted a renewal of the lease. Had the clause been a covenant to extend the lease without the performance of a condition precedent, a holding over may have extended same as a matter of law. *Bluthenthal* v. *Atkinson*, 93 Ark. 252, 124 S. W. 510; *Neal* v. *Harris*, 140 Ark. 619, 216 S. W. 6; *Riverside Land Company* v. *Big Rock Stone & Material Company*, 183 Ark. 1061, 40 S. W. (2d) 423.

Appellants contend, however, that appellee held over after the expiration of the original lease, and thereby created the relationship of landlord and tenant, and are liable for the rent for the period of five years. It is undisputed that appellee ceased to conduct business on the premises in October or November, 1933, when it discharged its agent and checked him out. The evidence is sharply conflicting as to whether appellee notified appellants in December, 1933, that it would not renew the lease and whether it removed its stock and equipment from the building before or after January 1, 1934. According to the testimony of witnesses introduced by appellants, the stock and equipment was not removed from the building until in February or March, 1934. According to the testimony of the witnesses introduced by appellee, the stock and all the equipment was removed from the building in December, 1933.

The chancellor found that the stock and equipment was removed from the building prior to December 31, 1933. After a careful reading of the testimony, we are

unable to say the chancellor's finding on this issue of fact was contrary to a clear preponderance of the evidence.

It is true the undisputed evidence reflects that the gasoline tanks under ground and the stationary pumps, all on the outside of the building, were not removed, but left in place on the premises. It seems that this was done pursuant to the Federal Trade Code or else a custom that, when a company or individuals should abandon a service station it or they had operated, it or they might leave the tanks and pumps on the premises so that any one succeeding by purchase or otherwise in the business might have an opportunity to buy such equipment. This being the case, the failure to remove them was not evidence, and should not be treated as a circumstance showing an intention to renew the original lease.

It is also true that the undisputed evidence shows the keys to the premises were not tendered to appellants until some time after January 1, 1934, but when they were tendered appellants refused to accept them, and there is nothing in the record to show that they would have accepted them had they been tendered at an earlier date.

No error appearing, the decree is affirmed.

SMITH *v.* SCHOOL DISTRICT NO. 14.

4-4252

Opinion delivered May 25, 1936.

[redacted]

J. C. Brookfield, for appellants.

Giles Dearing, for appellees.

MEHAFFY, J. Some time in 1904 or 1905, Mrs. Sallie E. Smith, the appellant, and her husband, T. H. R. Smith, conveyed to School District No. 14, one acre of land. A school house was built on the land, and the house and acre of land were used by the school district until District 14 and other districts were consolidated, creating Parkin Special School District.

On November 30, 1934, Mrs. Sallie E. Smith and M. T. Smith, appellants, filed suit in the Cross Chancery Court against the appellees, J. G. and Tom Woods, Parkin Special School District, School District No. 14, Mrs. A. H. Park, president of the Board of Directors, I. H. Thompson, Roy Coldren and Joe Wood, Jr., directors. Appellants alleged that M. T. Smith, appellant, was the owner by deed from appellant, Sallie E. Smith, and by inheritance from his father, T. H. R. Smith, of the northeast quarter of the southeast quarter of section 3, township 8 north, range 5 east; that Sallie E. Smith is the widow of said T. H. R. Smith, deceased, and that she was the owner of one-half interest in said land, and that her husband was the owner of one-half interest; that District No. 14 has been absorbed and succeeded by Parkin Special School District. Appellants allege that the one acre conveyed to the school district was with a reservation to the effect that whenever the land should cease to be used for school purposes, it should revert to the grantors or their heirs and assigns. It was also alleged that the school house was not built on the lands conveyed, but that that location was abandoned and the school house built at a different place; that the property was used for school purposes until recently, when it was abandoned, and that appellees refused to return possession of the one-acre tract to appellants. They further alleged that the deed had either been changed since it was signed, or was a forgery as it now appears of record. They prayed for a cancellation of the deed, and that they be restored to possession.

Appellees filed an answer denying the material allegations in the complaint, and alleging that the acre of land was purchased for a valuable consideration, and denied that there was any reservation in the deed.

The deed, which appears to have been introduced in evidence, is not in the transcript. The decree, however, recited that in 1905 T. H. R. Smith and the appellant, Sallie E. Smith, did for a valuable consideration, execute and deliver to School District No. 14 of Cross county, Arkansas, one acre of land as described in the complaint, but the court further finds that by an honest mistake on the part of all parties the deed was written to recite: "Beginning on one-fourth (¼) section *section* line 12 links south of center of section three," when in truth and in fact it was intended to read and recite "Beginning on one-fourth (¼) section line 12 chains south of the center of section three, in northeast quarter (NE¼) of the southwest quarter (SW¼) of section three (3), in township eight (8) north, range five (5) east, in Cross county, Arkansas."

The principal question in the case is whether there was an absolute deed to the acre of land for a valuable consideration, or whether the land was given to the district with a provision in the deed that it should revert to the grantors if it ceased to be used for school purposes.

The lower court found that the schoolhouse was in truth and in fact actually located upon the one acre of ground twelve chains south of the center of the section described, and upon the lands actually intended to be conveyed to said school district; that there are no conditions, reservations or exceptions in said deed, and that the plaintiffs have wholly failed to establish their contentions in said action, and that their complaint is dismissed for want of equity.

Evidence was introduced by the appellants tending to show that the property had been abandoned for school purposes, and also evidence tending to show that T. H. R. Smith had stated on numerous occasions that the property was to revert to the grantors when it ceased to be used for school purposes. The appellant, Mrs. Sallie E. Smith, testified that her husband had told her that he

had leased the land to the school district and that, if they did not need it or use it for school purposes, it was to come back to him or his heirs. There was also evidence that S. M. Rogers, now deceased, had stated that the understanding was that the land was to revert to Smith if it ceased to be used for school purposes.

The deed itself showed, as found by the court, that it was an absolute deed for valuable consideration; was properly acknowledged and recorded, and was executed about 30 years ago. The evidence also shows that there was a mistake in the description in the acre of ground, but that the schoolhouse was built on the ground actually intended to be conveyed, and the mistake was in describing the place of beginning as so many links, instead of chains.

It is first contended by appellant that the court did not consider the testimony as to what Smith and Rogers said, and that this testimony was competent. In the first place, the record shows that there was a motion to strike this testimony, but the record does not show that the court ruled on this motion. The decree, however, shows that the court considered the testimony of these witnesses.

Appellant calls attention first to 22 C. J. 232, Note A. The quotation by appellant is from the case of *Smith* v. *Hanson,* 34 Utah 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520. The court in that case held the evidence incompetent. The court said: "Was it sufficiently made to appear that the declarations were against the interest of the declarant at the time when made? The authorities generally hold that to be against interest the declaration must be against a pecuniary or proprietary interest of the declarant."

It was held in that case that the declaration was not against the interest of the declarant, and in the instant case it may be said that if Smith made the declaration which the testimony shows he made, the statement was not against his interest, but was more in the nature of a self-serving declaration. Smith was conveying the property, and a declaration that it was to revert to him under

certain conditions was certainly not against his interest, and the testimony was, therefore, incompetent.

This court has said: "Where the deed is absolute on its face and contains no reservations of the rents, proof of an oral reservation is not admissible." *Nelson* v. *Forbes & Sons,* 164 Ark. 460, 261 S. W. 910.

The deed in the instant case was absolute on its face. It conveyed title in fee simple for a valuable consideration. It had been made more than 30 years, and the evidence tending to contradict or vary the terms of the deed was incompetent.

It is true that parol evidence is admissible for the purpose of showing the true consideration, or that the consideration is other and different from that expressed in the written instrument, but this is an exception to the rule, and if the stated consideration is in the nature of a contract, that is, if by it a right is vested, created or extinguished, the terms of the contract thereby evidenced cannot be varied by parol evidence. *Texas Company* v. *Snow,* 172 Ark. 1128, 291 S. W. 826.

Moreover, the terms of the deed are controlling. "The testimony of this witness to the effect that he saw a deed from his uncle, Jake Wolf, to M. J. Wolf, in which Dry Branch was made the line, is incompetent for the reason that, if such deed was in existence, it was the best evidence. It was not shown that this deed was lost or destroyed, nor that it could not be produced. The testimony of this witness that his uncle, M. J. Wolf, told witness that this Dry Branch was the line between these lands conveyed to Baker and Caldwell was pure hearsay and cannot be considered." *Spencer* v. *Pierce,* 172 Ark. 108, 287 S. W. 1019.

If the deed or conveyance was for a valuable consideration, it is wholly immaterial whether the school district continued to use the property for school purposes. The evidence shows that $50 would be a good price for the acre now, and that $35, the amount mentioned in the deed as a consideration, was the full value of the acre of land at the time. Having reached the conclusion that the competent evidence shows conclusively that the land was sold, and a fair value paid for

it; it becomes unnecessary to decide the other questions discussed by counsel.

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

WALKER, MAYOR *v.* PIERCE.

4-4370

Opinion delivered May 25, 1936.

James H. Johnston and *Ira J. Mack,* for appellants.

Fred M. Pickens, for appellee.

McHANEY, J. On March 16, 1935, act No. 108, page 258, Acts of 1935, known as the "Arkansas Alcoholic Control Act," was approved and became a law. Thereafter, on March 25, 1935, the city council of the city of Newport, a city of the second class, adopted ordinance No. 370, which amended ordinance No. 320 of said city, which latter is the general occupation tax ordinance of said city levying an occupation tax upon certain trades, callings, businesses and professions carried on therein, by levying an occupation tax on wholesale liquor dealers of $350 per annum and on retail liquor dealers of $200 per annum. Thereafter, on December 30, 1935, the city council adopted ordinance No. 373, amending ordinance No. 370 by raising the occupation tax on wholesale liquor dealers from $350 per annum to $3,500 per annum, and on retail liquor dealers from $200 per annum to $2,000 per annum.

Appellee is a retail liquor dealer in the city of Newport and brought this action to enjoin appellants, who are the mayor, marshal and treasurer of said city, from

enforcing the provisions of both of said ordinances No. 370 and 373 on the ground, among others, that said ordinances are void because contrary to the statutes of this State, and particularly in violation of said act No. 108, above referred to; and further, that ordinance No. 373, fixing a tax upon his business as a retail liquor dealer in the sum of $2,000 per annum is unreasonable, unjust, inequitable, confiscatory and discriminatory. On a trial the court found in favor of appellee on both grounds and permanently enjoined the enforcement of both ordinances. This appeal followed.

We find it unnecessary to discuss both grounds, for we are of the opinion that city or town councils have no power under the Alcoholic Control Act to levy an occupation tax on the business of selling liquor either at wholesale or at retail. Subsection (a) of § 1, Art. 3, of said act authorizes and empowers the Commissioner of Revenues to determine the number of permits for the sale of liquor to be granted in each county or within the corporate limits of any municipality of this State, to determine the location thereof and the person or persons to whom they shall be issued, having due regard to the ordinances and regulations of the municipalities of this State. Subsection (b) of § 1, Art. 3, reads as follows: "Nothing in this act shall be construed to prevent municipal corporations of cities of the first class, through their legislative bodies, from licensing the manufacture and sale of vinous, (except wines) spirituous or malt liquors by the permittees so authorized by the Commissioner of Revenues, provided that the municipal license fee shall not exceed an amount equal to one-half of the license fee collected by the Commissioner of Revenues for the State of Arkansas. Nothing in this act shall be construed to prevent the county court from licensing the sale and manufacture of vinous, (except wines) spirituous or malt liquors by the permittees so authorized by the Commissioner of Revenues, provided that the premises permitted are located outside of the corporate limits of a city of the first class but within the county in which the said county court is located; and provided that the license fee collected by said county court shall not exceed the amount

equal to one-half of the license fee collected by the Commissioner of Revenues for the State of Arkansas. No county license fee shall be collected from any permittee where the premises permitted are located within the corporate limits of a city of the first class. No permittee shall be required to pay both a city and a county license fee for the same premises permitted by the Commissioner of Revenues. Nothing in this act shall be construed to prevent the prohibition of the manufacture and sale under the provisions of this act, in whole or in part, by means of local option elections as authorized by the provisions of this act."

As we understand this language, it authorizes cities of the first class to license the manufacture and sale of liquors by the permittees who have also been so authorized by the Commissioner of Revenues, and limits the amount of the license fee to be collected by the city to an amount not to exceed one-half the license fee collected by the Commissioner of Revenues. Also that the county court may license permittees so authorized by the Commissioner whose premises are located outside the corporate limits of a city of the first class, but within the county of the licensing court and the county is likewise limited to a license fee not to exceed one-half the license fee collected by the Commissioner. The county court cannot license or collect any fee from a liquor dealer in a city of the first class, but, in all municipalities of a lower grade than a city of the first class, the county court may license and collect a license fee as above stated. Again quoting: "No permittee shall be required to pay both a city and county license fee for the same premises permitted by the Commissioner of Revenues."

The city of Newport is apparently endeavoring to evade the plain provisions of this statute by the passage of said ordinances and calling the tax to be collected an occupation tax instead of a license fee. The act above referred to confers no such authority. Cities of the second class and incorporated towns are not given any authority in said act to collect any kind of tax on liquor dealers, and cities of the first class are limited to a license tax not to exceed one-half the amount collected

by the Commissioner. Appellants seek to uphold the ordinances on the ground that the tax levied thereby is an occupation tax and not a license tax; that they are mere amendments to ordinance No. 320 which was passed by the city under the authority of act 94 of the Acts of 1919, which is digested as §§ 7618 to 7623, inclusive, Crawford & Moses' Digest; and that the constitutionality of occupation tax ordinances was sustained by this court in *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 769. It was there held that the act of 1919, authorizing cities to tax occupations, authorizes the imposition of a tax and not merely a license fee for purposes of regulation, and that "while the State may not impose a license fee for purposes of regulation on a lawful business which needs no regulation, the power to tax even lawful occupations has no such restriction upon it." Headnote No. 8. This case has been followed consistently since, the most recent case being *City of Helena* v. *Russwurm,* 190 Ark. 601, 79 S. W. (2d) 993. When the act of 1919 authorizing municipalities to levy occupation taxes was passed, the liquor business was prohibited by law. The Alcoholic Control Act of 1935 legalizes such business and states the terms and conditions upon which persons seeking to engage in that business may do so. It is state-wide in its scope and it is elementary that the statute giving the power of regulation to the Commissioner of Revenues or to the State necessarily excludes the powers of cities and counties not therein granted, and a municipal ordinance in conflict therewith is invalid. "The reason is," as stated by the late Chief Justice HART in *Shipley Baking Company* v. *City of Hartford,* 182 Ark. 503, 31 S. W. (2d) 944, "that the statute of the State operates within the limits of the municipal corporation the same as it does elsewhere, and that local laws and regulations are at all times subject to the paramount authority of the Legislature. Hence ordinances of cities and towns inconsistent with statutes on the same subject must be held of no effect unless they are authorized by an express legislative grant." *Carpenter* v. *Little Rock,* 101 Ark. 238, 142 S. W. 162; *State* v. *Haynes,* 175 Ark. 645, 300 S. W. 380;

Duncan v. *Jonesboro,* 175 Ark. 650, 1 S. W. (2d) 58; and *Bragg* v. *Adams,* 180 Ark. 582, 21 S. W. (2d) 950.

Some reliance is placed by appellants on *Texarkana* v. *James & Mayo Realty Company,* 187 Ark. 764, 62 S. W. (2d) 42. All that was decided in that case is stated in a headnote as follows: "Under Crawford & Moses' Digest, § 7618, authorizing cities to impose an occupation tax on persons engaged in business therein, a city ordinance imposing a broker's tax on persons engaged in buying and selling real estate therein is valid though they did not maintain an office in such city, but only in another State." In that case, as stated by the court: "The appellee's sole defense in this case is that they have no offices or places of business in the city of Texarkana, Arkansas, and are not subject to any occupation tax attempted to be imposed upon them by the city of Texarkana, Arkansas, for engaging in the real estate business therein."

Appellants also insist that there is nothing in the Alcoholic Control Act which directly or impliedly repeals the statute authorizing the imposition by cities of an occupation tax on the business of retail liquor dealers. A sufficient answer to this is that when the occupation tax statute was enacted there were no retail liquor dealers, and there can be none now except in compliance with law legalizing such business, and, since the act legalizing them prescribes the terms and conditions upon which they may engage in such business and provides who may levy and collect a tax upon them, leaving out cities of the second class and other municipalities of a lower grade, they may not, under the guise of an occupation tax, levy and collect any license fee or other taxes not authorized therein.

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

JOHNSON, C. J., and HUMPHREYS, J., dissent.

BUTLER *v.* STATE.

Crim. 3989

Opinion delivered June 1, 1936.

[redacted]

H. S. Grant, for appellant.

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

MEHAFFY, J. The appellant, Bert Butler, was indicted, tried and convicted in Jackson county, Arkansas, of the crime of grand larceny, and there was a second count in the indictment, charging the appellant with receiving stolen property. The first count in the indictment reads as follows:

"The grand jury of Jackson County, in the name, and by the authority of the State of Arkansas accuse Bert Butler, Oscar Butler and M. B. Maples of the crime of grand larceny, committed as follows, to-wit: 'The said Bert Butler, Oscar Butler and M. B. Maples in the county, district and State aforesaid, on the ..... day of December, A. D. 1935, 15 hogs, the property of Ernest Eden, did unlawfully and feloniously take, steal, and carry away, with the unlawful and felonious intent then, and there to deprive the true owner of his said property as aforesaid and against the peace and dignity of the State of Arkansas'."

As to the second count, which charged appellant with receiving stolen property, the court directed the jury to disregard this charge, and try appellant alone on the first count. The jury returned a verdict of guilty on the first count, fixed his punishment at two years in the penitentiary, and judgment was entered accordingly.

To reverse this judgment, this appeal is prosecuted.

Appellant first contends that there is no evidence that shows that the hogs in question belong to Ernest Eden, alone. Ernest Eden testified that they were his hogs, and that they found them at the appellant's place, and that he, Ernest, now has them in his possession. Ernest Eden is the son-in-law of Mr. Arnold, and they had hogs that ran together, but the hogs that appellant was charged with stealing belonged to Eden and not to Arnold. Eden further testified on cross-examination, that he and Arnold had hogs together, but that the hogs that he was claiming were stolen, were his.

Arnold testified that the hogs which they found at appellant's place belonged to Eden. He testified that they were Eden's hogs. He said: "The whole bunch there was Ernest Eden's." His testimony shows that he and Eden both had hogs, and that he looked after them, but that the hogs in question belonged not to him, but to Ernest Eden.

It is argued by appellant, however, that because Eden did not assess any hogs in Lawrence county, that he is estopped from claiming the hogs. It may be that Eden wrongfully failed to assess hogs, but whether he did or not, is wholly immaterial. If they were his hogs that were stolen, whoever stole them would be guilty of larceny whether they had been assessed or not. Some witnesses testified that Arnold's reputation was bad, but these questions as to the credibility of the witnesses, whether they should be believed or not, were questions for the jury, and the jury's verdict finding that the hogs belonged to Eden is conclusive here. We do not pass on the credibility of witnesses, nor the weight of their testimony.

Several witnesses testified about the confession made by appellant. It is urged by appellant that this evidence

was incompetent. The court, however, properly and fully instructed the jury, not only as to the admissibility of the testimony, but as to all the issues in the case, and no objection was made to any of the instructions given by the court.

The evidence showed that the officers and others found the hogs belonging to Eden at appellant's home; that the marks had been changed; that some of the hogs had been killed, and they found the meat in appellant's house; and that appellant claimed he did not know the meat was there. There is no dispute or conflict in the evidence as to finding the hogs and meat at appellant's house.

All questions of fact were properly submitted to the jury, and we are bound by the jury's finding.

We find no error, and the judgment of the circuit court is affirmed.

AMERICAN NATIONAL INSURANCE COMPANY *v.* AMBORT.

4-4270

Opinion delivered June 1, 1936.

Coleman & Riddick, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

SMITH, J. J. E. Ambort was a member of a labor union known as the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, hereinafter referred to as the Brotherhood. Its general office is in Kansas City, Missouri. As a member of the

Brotherhood, Ambort was entitled to receive, and did receive, a certificate showing that his life was insured in the sum of a thousand dollars under a certain group insurance policy which the Brotherhood had procured from the American National Insurance Company upon the lives of its members. This group policy was issued in July, 1929, and has since been in effect. Ambort's certificate under the group policy was issued to him November 6, 1933. The Brotherhood is a fraternal order composed of members of the craft of boilermakers and ship builders. It is both a labor union and a fraternal association.

The constitution and by-laws of the Brotherhood prescribe the terms upon which one might become a member, and the required action on the part of a member to continue his membership. The master or group policy provides that the Brotherhood itself shall pay to the insurance company, monthly in advance, the premium required of each member in good standing. The insurance company did not collect premiums from the individual members. It did not know and was not required to know where the monthly premium per member paid to it by the Brotherhood came from. The master policy provides that "the International Brotherhood shall pay to the (insurance) company one and 1/6 dollars per month, in advance, bearing in mind the grace period herein provided, for each member insured hereunder."

By its express terms the master policy covered only members of the Brotherhood, but covered all members who were in good standing. The individual certificates issued to the members contain recitals to the same effect. The constitution of the Brotherhood granted members sixty days' grace in the payment of monthly premiums, but provided that the member whose premiums remained delinquent beyond the grace period should automatically be suspended. The insurance automatically ceased to be effective upon the suspension of the member.

The last premium paid the Brotherhood by Ambort was on March 31, 1934. He was shot on the night of September 21, and died from the effects thereof on September 30, 1934. During this six months' interval Am-

bort was not employed at his craft. He was given what is called a withdrawal card, which recites that "when holder returns to work at trade this card must be deposited immediately; failure to do so it stands revoked. All rights and privileges of membership terminate with the acceptance of this withdrawal card."

On the morning after Ambort was shot, a friend of his beneficiary applied to Gibson, the secretary of the local lodge of the Brotherhood, for Ambort's reinstatement, and was advised by Gibson that the sum of $3.75 was required and would suffice to effect the reinstatement of Ambort as the holder of an effective certificate of insurance. That sum was paid to Gibson, who remitted it to Charles F. Scott, the national secretary-treasurer of the Brotherhood, in Kansas City. The remittance was made with a postoffice money order, which Scott promptly returned to Gibson, in whose possession it has since been.

In the letter from Scott to Gibson returning the remittance of $3.75 it was explained that, when the members to whom these cards had been issued, returned to work, "they must immediately deposit their emergency cards and make application for membership, as explained in another letter going forward today."

The letter from Gibson to Scott advised that the $3.75 was sent to pay two months' back insurance and the current month's premium. Scott replied that if Ambort, the applicant, had returned to work, to send his withdrawal card, with the membership application, and a total remittance of $5, to pay two months' back insurance and to cover the cost of one month's dues and insurance, "and his receipt will be issued accordingly." The letter continued: "If he has not returned to work at the trade, have him keep his emergency withdrawal card, to be deposited when he does return to work at the trade." This letter was written under the assumption that the 1930 Constitution of the Brotherhood governed.

No attempt was made to comply with these directions. The insistence is that it was not necessary to do so, as the representative of Ambort's beneficiary had

done all that Gibson had said was necessary to reinstate the insurance, to-wit, pay him $3.75.

The directions given by Scott in the letter above referred to were in conformity to the revised constitution of the Brotherhood adopted in 1930, and the insured's beneficiary insists that compliance with the constitution of 1930 was not essential, as the certificate here sued on was governed by the 1925 constitution of the Brotherhood by the express provisions of the recitals of the master or group policy. It appears to be conceded that the provisions of the 1930 constitution were not complied with, and that the certificate of insurance had lapsed if the constitution of 1930 governs.

We find it unnecessary to determine whether the 1930 constitution governs or not, as we are of opinion that the certificate here sued on had lapsed under the provisions of the 1925 constitution. Assuming, therefore, that the insured's beneficiary is correct in the contention that the 1925 constitution applies, we consider the provisions of that constitution only, although it appears that the letters from and to the local secretary above referred to were written under the assumption that the 1930 constitution governed.

Ambort's wife was named as his beneficiary. She brought this suit as such, and from a judgment in her favor is this appeal.

Now, the undisputed fact is that Ambort had voluntarily terminated his relation with and his membership in the Brotherhood. This being true, his insurance automatically ceased. He was not delinquent in any respect, as he had paid all dues and premiums to March 31, the date of his withdrawal card. Notwithstanding his withdrawal Ambort might have continued his insurance. Section 13 of article 12 of the constitution of 1925, provided that this might be done by the monthly payment of $1.50, which payment would have kept the insurance in full force and effect except as to double indemnity benefits.

Ambort did not make these payments, and for the last six months of his life his status was that of an ex-member, having withdrawn from the Brotherhood without continuing his insurance in force, as he might have

done. Ambort was never reinstated as a member, and never made any effort whatever to be reinstated.

Now, it is true that representatives of his beneficiary, after he was shot, had paid Gibson, the secretary of the local union, the sum of $3.75, which they were told was all that was required to reinstate Ambort's insurance. But this was not true under the constitution of 1925 or that of 1930. Gibson had no connection with the insurance company, and was not its agent. He did have authority to collect dues and assessments from the local members and to make remittances to the Brotherhood, furnishing names of members whose premiums were paid. But he had no authority to make payments for persons who were not members of the Brotherhood, as only its members were covered by the group insurance policy. Ambort, not being one of the members, was not covered by the group policy, and the remittance to Scott, the general secretary of the Brotherhood, even though it had been for the correct and sufficient amount, did not have the effect of making Ambort's certificate effective.

A verdict should therefore have been directed for the insurance company, as there are no disputed questions of fact. The judgment will be reversed, and as the cause has been fully developed it will be dismissed.

JOHNSON, C. J., and HUMPHREYS and MEHAFFY, JJ., dissent.

MILLER COUNTY *v.* SEWELL, SHERIFF.

4-4321

Opinion delivered June 1, 1936.

James D. Head, for appellant.
Ned Stewart, for appellee.

McHaney, J. Appellee is the sheriff of Miller County, and, as such, earned in lawful fees, from April to October, 1935, both inclusive, in misdemeanor cases in the municipal court of Texarkana, Arkansas, the sum of $1,341, no part of which was collected. He presented his claim to the county court in said sum for allowance, not that he sought to be paid that sum in cash, but only to be allowed as a credit on his receipts of office, because of the salary act of Miller county hereinafter mentioned. The county court disallowed the claim. He appealed to the circuit court, where the claim was allowed, and the county has appealed.

The facts are not in dispute, but are stipulated. As above stated the claim arises out of services rendered in misdemeanor cases in the municipal court of Texarkana. All of it, except $233.10, is based on warrants issued on information filed by the prosecuting attorney or his deputy. The appellee paid into the county treasury each month all cash fees collected in misdemeanor cases as required by said salary act, but none of the fees involved in this claim have been collected, as the defendants were either discharged or laid out the fine and costs in the county jail. The appellee's office operated from October 1, 1935, to January 1, 1936, without any salary being paid to him or his deputies because of the ninety per cent. provision in said salary act. In 1934, the people of said county adopted an initiated salary act whereby all county officers were placed on salaries. The pertinent provisions of said act are §§ 7 and 13. Section 7 fixes the salary of the sheriff at $4,000 per annum for all services to be performed by that office in lieu of all fees and commissions allowed by law. A further provision is: "In addition thereto, he shall be paid actual and necessary expenses of travel of himself and deputies when on business for the county, but in no event shall the salaries and expenses annually exceed ninety (90) per cent. of the gross receipts of the office, and shall be payable only

from such receipts." Said sections fixes the number and salaries of deputies, provides his duties as jailer, and allows compensation for feeding prisoners. Section 13 relates to the duties of all salaried county officers in charging and collection of fees, costs, commissions, etc., as now provided by law, and the manner of reporting to and settlement with the county therefor. It is stipulated "that the only question involved is whether the sheriff is entitled to credit for these fees (the sum of $1,341 which he did not collect) on the gross receipts of his office for the year 1935 under the salary act."

We answer this question in the negative. It would seem just and equitable to allow the claim, as it represents services rendered and fees earned. But the salary act provides otherwise by this language in § 7: "But in no event shall the salaries and expenses annually exceed ninety (90) per cent. of the gross receipts of the office and shall be payable only from such receipts." We understand this language to mean that the salaries of the sheriff and his deputies together with their necessary expenses of travel when on business for the county, shall not annually exceed ninety per cent. of the gross cash receipts of the office. "Gross receipts" means gross cash receipts, and this is made doubly certain by the clause, "and shall be payable only from such receipts." Salaries and expenses could only be paid by cash receipts. Certainly they could not be paid with earnings not collected, or at least it would appear to be an unsatisfactory way to collect salaries and expenses. Webster defines the word "receipt" as: "3. That which is received; that which comes in, in distinction from what is expended, paid out, sent away, and the like; usually in pl.; as, the gross receipts." In *Ft. Smith Gas Co.* v. *Wiseman,* 189 Ark. 675, 74 S. W. (2d) 789, we held that the words "gross earnings," as used in the act there under consideration, were synonymous with "gross receipts." See, also, *Railway Co.* v. *Shinn,* 52 Ark. 93, 12 S. W. 183.

Moreover, the county is not liable for costs in misdemeanor cases. Section 3272, Crawford & Moses' Digest. While it is true appellee is not trying to collect

these fees from the county as costs in misdemeanor cases, he is seeking to have them classed as "gross receipts" of his office, and then expend 90 per cent. thereof in salaries and expenses of the office.

Since, as we have shown, these uncollected, but earned, fees are not receipts, and since the county is not liable for same as costs, there is no ground on which to allow the claim. As said in *Johnson County* v. *Jamison,* 85 Ark. 609, 109 S. W. 1025: "Before fees in criminal cases can be adjudged against a county, there must be found express authority of law for so doing." Citing cases.

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

BETHUNE *v.* BETHUNE.

4-4316

Opinion delivered June 1, 1936.

Atkinson & Stewart, for appellant.

B. E. Friday and *Robert L. Rogers, II,* for appellee.

BUTLER, J. In August, 1930, the appellee, Johnnie Mae Bethune, nee Owen, resided with her father in the

town of Wynne, Arkansas. In that month she was married to the appellant, Roderick A. Bethune, in Marion, Arkansas.

The appellant admits his cohabitation with the appellee as man and wife, but testified that this occurred only on a very few occasions. The appellee, on the other hand, testified, and was corroborated in her statement, that appellant visited her in her home nearly every week-end for several months, and at other times they would spend the week-end in Memphis or some other city. Appellant is a civil engineer, and at this time had employment in Arkansas. In November following the marriage, appellant left the appellee, and it appears that he filed suit for divorce in Pulaski county soon thereafter. Before, this, however, during the period when he was visiting his wife from time to time, he secured a sum of money from her. He stated that it was about $200, and she says it was $250. Appellant had gotten into some kind of trouble as a result of an automobile collision and needed money. He informed his wife of this, and she told him she had $250 she would let him have with the understanding that he was to return it to her whenever she needed it. Appellant claims that it was a gift, but even from his own statement, there is nothing to justify his contention. He admits mentioning to appellee his need of money, that she volunteered to let him have some, and handed him the money one evening while they were in his car. In this connection, appellant stated: "Nothing was said about whether it was a loan or a gift."

Appellant abandoned his suit for divorce in Arkansas, and moved to Bastrop, Louisiana, early in 1931. He obtained employment with the Louisiana Highway Commission, and was transferred to Plaquemine in that State. The appellee learned of his being at this place, and in December, 1931, went there to endeavor to collect the money she had let him have. When he learned she was in town he reported the matter to his lawyer, and, as a result of his conversation with the lawyer, the latter procured the sheriff who took charge of the lady and searched her for a weapon. Finding none, she was released. She was unable to collect the money, however, and then asked

appellant to pay her hotel bill and to give her enough money to go back home, both of which he refused to do. According to appellee's statement, she learned definitely that appellant had married another woman while she was "at the races." A short time afterward she filed suit for divorce and alimony. She obtained a decree to reverse which this appeal is prosecuted.

As a defense to appellee's suit, appellant pleaded a divorce which he had obtained in the State of Morelos, Mexico, and further that she was estopped from prosecuting her present action because of acquiescence in the divorce decree granted in Mexico. The facts relating to this divorce are: Shortly after appellant established his residence in Bastrop, Louisiana, he went to Mexico on March 12, 1931, in order to obtain a divorce in that country. He stayed in the State of Morelos, Mexico, nine days, hired a lawyer, signed a power of attorney and returned to Bastrop. Later he received a certified copy of a decree of one of the courts of Mexico granting him a divorce from the appellee on the alleged ground of "incompatibility of temperament." From this decree it appears that suit was filed on March 17, 1931, and final decree was rendered on May 30, 1931. The appellant appeared in the Mexican court only one time, and, as before stated, signed a power of attorney. He gave no testimony by deposition, or otherwise in the Mexican court.

There is nothing in the record by which we are advised what the laws of Mexico are concerning divorce, but we presume they are such that some evidence must be taken to establish the grounds for divorce alleged, and that something more than a brief stay in the country is required to give the court jurisdiction of the person. Indulging that presumption, the decree obtained is clearly a fraud on the courts of Mexico, and would accordingly have no binding effect there or elsewhere. If, however, the laws of Mexico do not require any residence within its territory as a basis for jurisdiction excepting a mere entry and a stay for the number of days disclosed by this record, and no evidence to support the allegation for divorce, its decree is entitled to no faith and credit in this State, for as is said in *Bergeron* v.

Bergeron, 287 Mass. 524, 192 N. E. 86, "to recognize the Mexican divorce as valid in the circumstances here disclosed would frustrate and make vain all State laws regulating and limiting divorce. By such recognition State control over the marriage relation would be destroyed." Another reason why the Mexican divorce has no binding effect is that the ground alleged was "incompatibility of temperament" which is not a ground for divorce in Arkansas. The matrimonial domicile of the parties, during the time of their cohabitation as husband and wife, was at all times in this State, and any case for divorce urged by the appellant in a Mexican court on the residence proved must necessarily have occurred in Arkansas. No cause of action having been set forth, we cannot recognize the Mexican divorce upon the ground alleged.

"The first essential for the validity of a decree of divorce between parties is that it should be pronounced by a competent court of jurisdiction, and one of whom at least is a *bona fide* subject of that jurisdiction. Even in this country, where it is prescribed by the Constitution that full faith and credit must be given in each State to the judicial proceedings of another, it is well settled that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, and, if the want of jurisdiction appears on the face of the record, or is shown either as to subject-matter or the person, the record will be regarded as a nullity. The rule is certainly as strong, if not stronger, when applied to a court of a foreign county." *Ryder* v. *Ryder,* 2 Cal. Ct. App. (2d) 426, 37 Pacific (2d) 1069.

The contention that the appellee is estopped from questioning the validity of the Mexican divorce cannot be sustained, even were this question to rest upon the testimony of the appellant alone. The contention is based largely upon what occurred in Plaquemine. Appellant, in relating what was said by appellee regarding the decree of divorce in Mexico, and his contemplated marriage to another, testified: "Q. Did she know anything about your plans to be married? A. Apparently—she told me that I was planning on getting married in a week or so."

Further on in his testimony, he stated she said to his lawyer: "I was planning on getting married, but what I was going to do was to get myself in the penitentiary. I had gone to Mexico and gotten a divorce that wasn't any good." A few days after appellee's conversation with appellant's lawyer, the effect of which has been testified to by the appellant, he married again on December 24, 1931. If we accept appellant's testimony as true in all particulars regarding appellee's knowledge of the divorce and his intention to remarry, it is the reverse of acquiescence for she was denying the validity of the divorce and his right to marry again. Appellee testified that she did not know that the appellant had married again until a short time before she brought this suit. Whether she did, or did not, know of this marriage, she did nothing which tended to put the appellant to a disadvantage or to in any way estop her from contesting the validity of the Mexican divorce.

The trial court ordered the appellant to pay the appellee $25 per month as alimony, beginning on September 7, 1935, and continuing for a total period of twelve months. Appellant urges that this award was, in effect, an allowance of alimony in gross, and as such cannot be sustained under the rule announced in *Brown* v. *Brown,* 38 Ark. 324; *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762, and *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S. W. (2d) 550. As a further reason for reversal of the judgment for alimony, it is urged that there is no evidence upon which to base the allowance. In support of this, appellant cites the case of *Rowell* v. *Rowell,* 184 Ark. 643, 43 S. W. (2d) 243, where we said: "Before a decree is passed or order for alimony is made, the court should be in possession either by the admission of the parties or by testimony, of all the facts necessary to form a just decision, * * * but the decree or order for alimony cannot rest upon mere presumption or conjecture." We recognize and adhere to the principles announced in the cases cited, but, under the peculiar facts as disclosed by this record, it cannot be said that the decree is violative of those principles. The evidence, both direct and circumstantial, is sufficient to justify the conclusion of the court below that the appel-

lant was able to pay the sum of $300 over a period of twelve months. It is shown that he is a member of one of the professions which usually carries with it employment over the greater portion of the time, and which, in one of the lean years (1931), paid him the sum of $185 a month which he considered below his usual earnings. The decree for alimony has some of the aspects of an award in gross within the meaning of the cases cited, but the chancellor evidently had in mind the amount of money appellant had obtained during the time he was married to the appellee, and, at the appellant's figure ($200), the alimony would amount to that sum with interest. The effect of the decree, therefore, was but to require the appellant to restore to the appellee the money which she had advanced to him. There can be no question, but that the decree of the chancellor in its entirety is correct, and is as liberal to the appellant as he could expect. The view we have reached as to the effect of the sum awarded appellee is such as to create an exception to the general rule laid down in the cases cited.

Affirmed.

ROBINSON *v.* MEANS, JUDGE.

4-4331

Opinion delivered June 8, 1936.

C. Floyd Huff, Jr., Gordon E. Young and *Murphy & Wood,* for petitioners.

Glover & Glover, Huie & Huie, F. D. Goza and *McMillan & McMillan,* for respondent.

BAKER, J. The petitioners seek a writ of prohibition to prevent the Hot Spring Circuit Court from proceeding with trial of a suit filed in that court against them by Barbara Bossinger and Juanita Hall and Mrs. Charles Hall on account of a collision or accident which occurred in Garland county, near the city of Hot Springs in November, 1935, wherein two of the plaintiffs were alleged to have been injured and the third, Mrs. Charles Hall, suffered a loss by damage to her automobile. Elmer Robinson, one of the defendants in that damage suit, and one of the petitioners here, was the driver of a taxicab that collided with the car belonging to Mrs. Hall. The taxicab business was conducted in or near the city of Hot Springs, though sometimes trips were made to nearby cities or towns, but this was not often done and that kind of business was not sought.

Service of summons was had upon Elmer Robinson, according to the record presented here, on the same day the suit was filed in the Hot Spring Circuit Court, December 30, 1935. Summons was issued at that time and delivered to the attorney filing the suit. Elmer Robinson and Mrs. Austeel did not reside in Hot Spring county, and neither could at that time have been found in that county. The attorney, however, delivered the summons for service to a deputy sheriff and directed him to go to Tigre Creek Bay in Hot Spring county and wait there, for Elmer Robinson would appear there within the next few hours. Later in the day the attorney who had delivered the writs to the deputy sheriff went to Tigre Creek Bay and had the deputy sheriff return to Malvern and advised him to wait at the Elite Cafe for Elmer Robinson, who would be at that place some time after dark. Definite instructions were that Robinson would be there between eight o'clock that night and two o'clock the next morning. One Kelly Hall, a near relative of one of the plaintiffs, on the same day, went to Hot Springs, in Garland county, where he, shortly after nightfall, called the taxicab office and talked with Elmer Robinson and asked to be carried by him in a taxicab to Malvern and agreed to pay and did pay for the service $6. Hall stated to Robinson that he was anxious to make

the trip at once as he had a "hot date" at Malvern, and when he reached the town of Malvern he invited Elmer Robinson into the cafe to get a sandwich and a glass of beer. After Robinson left the cafe and returned to the taxicab, ready to go back to Hot Springs, he was accosted by the deputy sheriff, who had watched for him at Tigre Creek Bay in the forenoon and who was still waiting for him at the Elite Cafe that night and who served the summons upon him. The service of this summons was for himself and Mrs. Austeel, who was later also served in Garland county.

The question raised here is whether the summons so served upon Elmer Robinson was good service.

A motion was filed in the circuit court alleging that Elmer Robinson had been inveigled by plaintiffs and their attorney, their kinsmen and agent, into making the trip to Hot Spring county for the sole purpose of getting service upon him at that point in order that the case might be tried in Hot Spring county, rather than in Garland county where both the defendants reside. The facts and circumstances in relation to the manner of procuring Robinson to make the trip to Hot Spring county is set out in detail in this motion. The plaintiffs, in response, have denied the material allegations of the motion. The petitioners offered, by way of proof, the testimony of the deputy sheriff, and of Elmer Robinson, and perhaps some other testimony, all of which may be said to be substantially in conformity to the allegations of the motion. The plaintiffs, although they denied the allegations set up in the motion, offered no proof contradicting the testimony offered by the petitioners.

The court, without making any declaration of his findings of fact, overruled the motion of the defendants who then filed their petition here alleging all the facts and setting up their theory of this alleged abuse of process whereby one of these defendants was induced to appear in a county other than that of their residence, and was therein served.

The briefs are rather strong in their denunciation of this method of securing the service of summons, and

briefs for respondent are highly commendatory of the vigilance and diligence of attorneys and officers in serving those sued who may be "found in the county" where the suit was filed.

The foregoing statement indicates, we think, with clearness that the question of properly invoking the jurisdiction of the circuit court is one that could be determined only upon matters of fact, proof of which must be offered in evidence in that court. In cases of that kind wherein jurisdiction depends upon the presentation or establishment of certain facts, then that question must be decided by the trial court, and even though he should decide wrong we are not at liberty to correct his error except on appeal. *Finley* v. *Moose*, 74 Ark. 217, 85 S. W. 238.

We said in *Arkansas Democrat* v. *Means,* 190 Ark. 948, 82 S. W. (2d) 256: "Where the court has jurisdiction over the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy." *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448. Not only has this rule been announced but upon reconsideration has been approved several times. *Equitable Life Assurance Society* v. *Mann,* 189 Ark. 751, 75 S. W. (2d) 322.

Probably in most instances the facts upon which jurisdiction may rest or be determined are controverted. In most other instances they might be controverted, that is to say, there is the possibility of the facts being disputed. In either event the matter is one that must be determined by the trial court, and in the proper exercise of the trial court's functions we do not interfere by prohibition. We might differ most seriously from the view taken by the trial court, but if we think the trial court erred, we can correct that only upon appeal.

We think the case of *Simms Oil Company* v. *Jones, Judge, ante* p. 189, 91 S. W. (2d) 258, is conclusive of questions raised here.

It is argued, however, that these petitioners, defendants, have no adequate remedy except by the issuance of

a writ of prohibition. That if required to answer and upon an adverse decision they appeal, they thereby enter their appearance although this court might hold the service bad.

The same argument was made in the case of *Chapman & Dewey Lbr. Co.* v. *Means*, 191 Ark. 1066, 88 S. W. (2d) 829, to the effect that in the event upon appeal it should be determined that the service was improper, by appealing the case defendants will have entered their appearance and it would then remain only to have the case remanded for a new trial, in a jurisdiction wherein they were strangers. Again we give warning, as indicated in the last-cited case, that the matter of entry of appearance by appeal from a judgment rendered upon improper or wrongful service is a matter that is being re-examined by this court.

This statement is not made as a promise of definite predetermined future action, nor to bind in any manner the future conduct of the court, but it has been thought proper to indicate to litigants and their counsel that it might be proper for them to take into consideration the fact that an empty victory might not be the full reward of establishing improper service, upon an appeal wherein all rights have been at every step preserved.

It must be recognized by all parties that abuse of process can be shown only by testimony as to the facts. Courts do not look with favor upon any form of trickery or chicanery. Any conduct smacking of such improprieties will properly be scrutinized with jealous caution to prevent successful perpetration.

The denial of the writ of prohibition here is no criticism or approval of any matter presented upon the motion to quash service of summons.

In accordance with the authorities the writ must be denied. It is so ordered.

HOLLIS *v.* PURVIS.

4-4256

Opinion delivered June 8, 1936.

Robert J. Brown, Jr., for appellant.

Walter M. Purvis, pro se.

JOHNSON, C. J. This replevin action was instituted by appellant, W. E. Hollis, against appellee, Walter M. Purvis, in the Little Rock Municipal Court to recover possession of one city of McGehee, Arkansas, improvement district bond of the par value of $500. The result in that court being adverse to appellant, he appealed to the circuit court of Pulaski county, where by agreement of the parties a jury trial was waived and the cause was submitted to the court upon testimony then and there adduced. The result in that court was the same as in the municipal court; therefore, this appeal.

The question for consideration is one of fact; therefore, the testimony adduced by the parties is here summarized. That introduced by appellant was to the effect that in September, 1932, he loaned one city of McGehee, municipal improvement district bond of the par value of $500 to appellee for the purpose of sale and remittance of proceeds for his account; that the bond was never sold; therefore, a return was proper. That adduced by appellee was to the effect that the bond was first delivered by appellant to appellee for the purposes asserted by appellant, but that a few days subsequent appellant employed appellee as his attorney to procure a divorce, and to compensate this service it was agreed that appellee might retain possession of the bond until compensated.

The trial court adjudicated the issues in favor of appellee and awarded a judgment in his behalf for attorney's fee.

But one contention is urged by appellant for reversal, namely: that there is no substantial evidence to sustain the court's finding of fact. This contention is refuted by the summary of the testimony set out above.

No error appearing, the judgment is affirmed.

RHODES *v.* CITY OF STUTTGART.

4-4382

Opinion delivered June 8, 1936.

W. A. Leach, for appellants.

Joseph Morrison and *M. F. Elms,* for appellees.

HUMPHREYS, J. This is a suit to enjoin the city of Stuttgart from issuing bonds in the sum of $75,000 for the purpose of constructing, widening, straightening, and paving streets, alleys and boulevards within said city, and to restrain the collection of a tax levied to pay same. It was estimated that this could be done at a cost of about $160,000, which amount could be raised through a bond issue of $75,000, bearing interest at the rate of 4 per cent. per annum, and a direct gift of $61,000 from the PWA.

Amendment No. 13 to our Constitution authorizes cities of the first and second class to issue bonds to make such improvements if approved by a majority of the electors of said city voting on the question in an election duly called for that purpose.

Pursuant to authority conferred upon said cities, the City Council of Stuttgart enacted ordinance No. 339 on July 5, 1935, providing for a bond issue of $75,000 for such purpose, and fixing a date for the election. The election was held on August 12, 1935, and the proposal was defeated. The city thereafter, on September 6, 1935, enacted ordinance No. 343, providing for the second election to be held on October 17, 1935, to the end that a bond issue of $75,000 for such purpose might be approved or rejected, which election resulted in the approval of the bond issue by a large majority of the electors voting on the question. The City Council of Stuttgart then unanimously adopted a resolution levying, in the year 1935, a tax of 3¼ mills upon the assessed values of the properties in the corporate limits of the city, which tax was extended, and is now being collected.

The gist of the complaint filed by appellant seeking to enjoin the issue of the bonds and collection of the tax is as follows:

"1. The second election on the same proposal was unauthorized and illegal.

"2. The bond and interest maturities require the levy of an annual tax in excess of the rate permitted by the Constitution.

"3. Seven different projects are included in the ordinance, and were submitted to the voters, but were not submitted in such a manner that each could be voted on as the Constitution requires."

The answer filed by appellees denied the allegations of the complaint.

Upon a final hearing of the cause, the court dismissed the complaint for want of equity, from which is this appeal.

The first question arising on this appeal is whether the City Council of Stuttgart was precluded from enacting the second ordinance submitting the proposal of the

bond issue for the purposes therein stated which were submitted by the first ordinance and defeated in the first election.

It is argued by appellants that Amendment No. 13 to our Constitution authorized only one submission of the question of the issue of bonds for any particular improvement to the qualified electors of the municipality. The language of the Amendment is as follows: "Provided, that cities of the first and second class, may issue by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election, etc."

There is nothing in the language of the Amendment prohibiting a second election. This court said in the case of *Hargraves* v. *Solomon,* 178 Ark. 11, 9 S. W. (2d) 797, that: "What we have said in this opinion should not be construed to prevent the common council of the city of Helena from passing an ordinance to hold another election for the purpose of issuing bonds for a city hospital, if said council should deem such course to be wise and expedient. The fact that the first issue has been declared illegal in no sense exhausts the power of the city council to commence a new proceeding in accordance with the provisions of the amendment to the Constitution in question."

This announcement finds support in the following cases: *Supervisors* v. *Galbraith,* 99 U. S. 214, 25 L. ed. 410; *Society for Savings* v. *New London,* 29 Conn. 174; *Smith* v. *Clark County,* 54 Mo. 58; *Woodward* v. *Calhoun Co.,* Fed. Cas. No. 18002, 2 Cent. L. J. 397; see, also, 19 R. C. L. 998.

The next question arising on the appeal is whether the City Council exceeded its constitutional authority in levying 3¼ mills for the year, 1935, upon the assessed values of the properties in the corporate limits for the purpose of paying interest on the bonds. According to the agreed statement of facts, only one and three-fourths mills had theretofore been levied for improvements under Amendment No. 13, so according to § 4, art. 12, of

the Constitution, this left a margin of 3¼ mills which might be levied to care for the bonds in question. Section 4, art. 12, of the Constitution provides that: "No municipal corporation shall be authorized to pass any law contrary to the general laws of the State; nor levy any tax on real or personal property to a greater extent, in one year, than five mills on the dollar of the assessed value of the same. Provided, that, to pay indebtedness existing at the time of the adoption of this Constitution, an additional tax of not more than five mills on the dollar may be levied."

The city council, therefore, did not exceed its authority in making the levy of 3¼ mills for the purposes specified in the ordinance.

It is argued by appellants that the levy of 3¼ mills will not be sufficient, if continued from year to year, to pay the interest and the bond maturities. According to the agreed statement of facts, the assessed value of the property in the city of Stuttgart is $2,138,792, and also that one and three-fourths mills levied theretofore under Amendment No. 13 to make other improvements will not be needed after three years for such purposes. In view of this fact, a levy can be made from year to year which will be more than sufficient to pay the interest on the bonds and to pay the bonds as they mature.

Again, it is argued by appellants that the levy which was made by the quorum court was not made on a day provided by law, and that it does not appear in the proceedings of the levying court that the names of the justices voting for or against the levy was entered. This was immaterial, as the levying court has no power under the Constitution to levy municipal taxes. Under § 4 of art. 12 of the Constitution, such power is conferred exclusively on the city councils. The resolution adopted by the city council immediately after the bond issue was approved by vote made the levy, and the county clerk extended it on the tax books, and same is being collected.

The next and last question arising on this appeal is whether the ordinance is violative of Amendment No. 13 in failing to set out specifically what amount of the bonds should be used for construction, what amount for

widening, what amount for straightening, and what amount for paving. It is true Amendment No. 13 requires that an ordinance providing for an election on a proposal to issue bonds "shall specifically state the purpose for which the bonds are to be issued, and if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose, etc." The ordinance provided that the bonds were to be issued and sold for the sole purpose of the construction, widening, straightening and paving the streets, alleys, and boulevards within the corporate limits of the city of Stuttgart. The general purpose expressed in the ordinance is to improve the streets, boulevards, and alleys in the city by constructing, widening, straightening, and paving them. The manner and method by which the improvements were to be made were incident and germane to the general purpose and cannot be said to be separate and independent purposes. Not being separate and independent purposes, it was not necessary to the validity of the ordinance to specify therein the amount of the bonds to be used on each kind of work in making the general improvements. *Atkinson* v. *Pine Bluff,* 190 Ark. 65, 76 S. W. (2d) 982.

No error appearing, the decree is affirmed.

WADE *v.* BROCATO.

4-4279

Opinion delivered June 8, 1936.

Hal P. Smith and *Joe B. Norbury,* for appellant.

Mann & Mann, for appellee.

MEHAFFY, J. On January 29, 1934, the appellant filed in the Monroe Circuit Court a complaint against the appellee, alleging that the bus was operated by the appellee as a common carrier, transporting passengers for hire from place to place in Monroe county, operating on regular schedule, and charging fixed fares therefor. She alleged that about 4:30 o'clock on the afternoon of October 30, 1933, she boarded defendant's bus at Brinkley, Arkansas, and paid her fare to Clarendon, Arkansas; that said bus is equipped with six windows and three rows of seats; that defendant seated her on the left end of the middle row of seats immediately behind the driver's seat which was occupied by appellee; that all of said windows were closed except the window by the driver's seat, on the left side of said bus; that after leaving highway No. 70 said bus proceeded along highway No. 17, a gravel road leading to Clarendon, Arkansas; that at a point some four miles after leaving highway 70 and on highway 17, said bus passed an automobile traveling at a high rate of speed; that at this point as well as on all other points on said highway 17, there was loose gravel; that in passing, a gravel or small stone was thrown through the said open window near the driver's seat, striking appellant in the left eye, injuring her in the manner set out. She then describes the injury and the extent of it, and the pain and suffering, and alleges that the injury was the result of the carelessness and negligence of appellee in leaving open said window; that appellee operated said bus personally several days a week on said road, and had been doing so for a number of years; knew the condition of the highway; knew of the

loose gravel thereon, and knew of the danger to appellant from flying gravel; or by the exercise of ordinary care, should have known and appreciated said danger, and should in the exercise of ordinary care have closed the said window at all times while said bus was operating over said gravel road, and especially while said bus was passing or being passed by other cars; that the appellant was not accustomed to riding in automobiles and busses, and did not know of or appreciate the danger from flying gravel, and if she had known, she had no authority to close the window, and save herself from injury.

On April 15, 1935, appellant filed an amendment to her complaint alleging that it was a cool day, and there was no necessity that said window be left open, but if it was necessary to leave it open for ventilation, there were three other windows on the right side of said bus that could have been opened, and injury avoided, for the reason that said gravel or small stone complained of, or any other, could not have been thrown through these windows by passing automobiles; that all the facts were well known to defendant, or by the exercise of care could have been known, and his carelessness and negligence in not using said windows on the right side of said bus, but using the open window on the left side, was the cause of the injury to appellant.

On November 12, 1934, another amendment was filed by adding at the end of the second paragraph, immediately before the prayer, a new paragraph, alleging that the injury was a result of the carelessness of the defendant in failing to screen the window, or to place shields or guards or some other obstruction thereon to protect appellant from the hazard of flying gravel, which danger was well known to appellee, or by the exercise of ordinary care should have been known to him, but which was not known or appreciated by appellant.

The appellee filed the following demurrer to the complaint:

"Comes the defendant by his attorneys, Messrs. Mann & Mann, and demurs to the complaint and the amendment thereto, and for cause says:

"That the complaint as amended does not state facts sufficient to constitute a cause of action against the defendant.

"Wherefore, defendant moves that the cause be dismissed."

The court, on November 18, 1935, entered the following judgment:

"The demurrer filed herein, is by the court sustained, exceptions saved, plaintiff stands on her complaint, and prays an appeal to the Supreme Court, which is by the court granted, and plaintiff given 60 days to file bill of exceptions."

Pleadings under the code are liberally construed and every reasonable intendment is indulged in favor of the pleader, and 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. *Manhattan Const. Co.* v. *Atkisson,* 191 Ark. 920, 88 S. W. (2d) 819; *Arkansas Bond Co.* v. *Harton,* 191 Ark. 665, 87 S. W. (2d) 52; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. (2d) 849.

In appellant's original complaint she alleged that the injury was caused by the negligence of appellee in leaving the window open; that he had been operating a bus, and knew the condition of the highway, and knew there was loose gravel and danger of flying gravel. In her first amendment to the complaint, she alleged that the weather was cool, and there was no occasion for the window to be left open, but if there was, the windows on the other side of the bus could have been opened. In her second amendment, she alleges that the appellee failed to screen the windows.

Appellant first contends that it is the duty of persons operating busses as common-carriers to exercise the highest degree of care reasonably to be expected from human vigilance and foresight.

This court has held that the law imposes the highest degree of skill and care upon common carriers consistent with the practical operation of their cars for the

protection of their passengers, and we have also held that the rules applicable to common carriers govern in operating busses carrying passengers. We said: "It is true that 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." *Missouri Pacific Transportation Co.* v. *Robinson,* 191 Ark. 428, 86 S. W. (2d) 913.

The appellant cites and relies on *Teche Line Inc.* v. *Bateman,* 162 Miss. 404, 139 So. 159. In that case the party who brought the suit was not a passenger in the bus, but was riding in a private automobile, and it was alleged and the proof established that the bus was going at an excessive rate of speed in violation of the statute of Mississippi. The evidence in that case showed that the bus was traveling at a rate of speed from fifty to fifty-five miles an hour. The company's witnesses testified that it was not exceeding forty miles an hour. The court, in instructing the jury, said: "The court instructs the jury that, if you believe from a preponderance of the evidence in this case, that the plaintiff herein was injured by flying gravel thrown from a bus belonging to the defendant herein, while said bus was traveling at a reckless, negligent and excessive rate of speed, and that gravel was thrown by said bus because of the reckless, negligent and excessive rate of speed at which said bus was driven at said time, and that the reckless, negligent and excessive rate of speed of said bus, if any, was the proximate cause of said injury, then you shall find for the plaintiff."

The court also said in the above case, after quoting the Mississippi statute: "Of course, it is the duty of every person who operates a vehicle upon the highway to do so in accordance with the law of the land. The statute was enacted for the public safety, and to secure the safety by reasonable operation of motor vehicles. It is well known that cars proceeding at a high rate of speed on gravel roads throw gravel by reason of the force of the car striking the gravel, or by reason of the suction of the car; and it is well known that such flying gravel or small rocks are calculated to inflict injury. The greater

the rate of the speed, the more violent, the hurling of such gravel or rocks becomes. It may be safely assumed that a person traveling the highway assumes the risk incident to travel in a reasonable and lawful manner, but when a person exceeds the speed limit allowed by law, and as a result of such excessive speed injury is inflicted upon another using the highway, such party is liable for the injury occasioned thereby."

Our statute is similar to the Mississippi statute, and if the appellant in this case had brought suit against the driver of the automobile which was going at an excessive rate of speed in violation of law, and had alleged that this caused the automobile to throw the gravel, and she was thereby injured, she would have stated a cause of action, and it would have been similar to the case relied on. Appellant, however, does not state that the bus was going at an excessive rate of speed, or that it was violating the law in any way. The only negligence alleged is the open window.

Our statute, among other things, provides: "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, etc." Acts of 1927, p. 721.

The driver of the bus had a right to assume that no one would violate the statute and operate an automobile on the public highway at an excessive rate of speed. There is no allegation in the complaint that the operator of the bus was negligent in any manner except in leaving the window open.

Appellant alleges that the bus was equipped with six windows and three rows of seats. It is true she says the defendant seated her at the left end of the middle row of seats, immediately behind the driver's seat, which was occupied by appellee; that all of the windows were closed except the one by the driver's seat. It is a matter of common knowledge that when a person takes passage on a bus or a railroad train, they may take any unoccupied seat. The complaint, while it alleges there were three rows of seats, does not allege that any of them were occupied. They may all have been vacant. The appellant may have been the only passenger. She does

not, however, allege whether the other seats were occupied or not. There is no law requiring bus companies to screen their windows, and the cause of the damage and injury, as shown by appellant's complaint, was the wrongful conduct of the person driving the automobile at an excessive rate of speed, thereby throwing the gravel which injured appellant.

Appellant alleges that the automobile was traveling at a high rate of speed.

The next case to which appellant calls attention is *Denker* v. *Lowe,* 192 Ky. 660, 234 S. W. 294. We think the facts in the above case have no application to the facts in the instant case. The question there was whether, where the concurrent negligence of the city obstructing the street, and the transfer company's driver in not reducing speed, the company could avoid liability on the theory that its negligence was not the proximate cause of the injury. The court said: "It is a clear case of the combined and concurrent negligence of the city in permitting the obstruction to be in the street, and the negligence of the taxicab driver in driving into it with such reckless abandon as to produce a violent jolt to a passenger, or negligently failing to slacken his speed and drive around obstruction producing the injury."

Appellant calls attention to a number of other cases, but all of them are cases where negligence is alleged and proved against the party sued. In the case of *Batte* v. *St. Louis S. W. Ry. Co.,* 131 Ark. 568, 199 S. W. 907, this court held that the railroad company was under no duty to screen its car windows, and its failing to screen its windows was not negligence. It is said in that case: "It is the duty of the defendant company to keep its engines in good repair and see that they were supplied with the best known appliances to prevent the escape of cinders."

That is true because of the constitutional provision which reads as follows: "All railroads which are now or may be hereafter built and operated, either in whole or in part, in this State shall be responsible for all damages to person and property under such regulations as

may be prescribed by the General Assembly." Section 12, article 17 of the Constitution.

Section 8562 of Crawford & Moses' Digest reads as follows: "All railroads which are now or hereafter may be built and operated in whole or in part in this State, shall be responsible for all damages to persons or property done or caused by the running of trains in this State."

This court has repeatedly held that under the constitutional provision and the statute, when the plaintiff shows that the injury was caused by the running of a train, a *prima facie* case was made. Therefore, when the plaintiff, in a suit against the railroad company for injury caused by running a train, shows that the injury was caused by running a train, the burden is then upon the railroad company to show that it was not guilty of any negligence. There is no such constitutional provision or statute with reference to the operation of buses, and the plaintiff, in bringing a suit against a bus company or any other person, except a railroad company for injury caused by the running of a train, must allege facts constituting negligence. Negligence means the failure to do something that a person of ordinary prudence would do, or the doing of something that a person of ordinary prudence would not do under the circumstances.

The Massachusetts court held that the mere fact that a passenger on a railroad train is struck in the eye by a cinder on a warm day when the windows and doors of the car are open, does not establish liability on the part of the railroad company. *Shine* v. *New York, New Haven & Hartford Rd.,* 236 Mass. 419, 128 N. E. 713, 11 A. L. R. 1075.

It was not negligence on the part of the bus company to have the window open, and if some other person negligently and wrongfully operated a car so as to throw gravel into the open window and injure a passenger, there would be no liability against the bus company unless the bus company itself was guilty of negligence. There would be no more liability in wrongfully throwing gravel, than there would be if the third party running an automobile negligently and wrongfully operated his car

so as to collide with the bus and injure the passenger. The question is the negligence of the bus driver, and our conclusion is that the complaint does not state facts constituting negligence.

The judgment of the circuit court is therefore affirmed.

STATE EX REL. SMITH *v.* LEONARD.

4-4301

Opinion delivered June 8, 1936.

Henry E. Spitzberg, for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellees.

McHANEY, J. Appellee Roy V. Leonard was formerly the State Treasurer for the State of Arkansas, serving as such from 1931 to 1935, and the appellee Fidelity and Casualty Company of New York was the surety upon his official bond. As such State Treasurer he deposited at different times in the Planters Bank and Trust Company of Forrest City, Arkansas, the sum of $37,500 of State funds, pursuant to a contract between said bank and the State Depository Board. Said deposit was secured by a pledge of bonds as authorized by law. Thereafter, from time to time appellee Leonard, as State Treasurer, made withdrawals from said deposit in said bank and at the same time permitted said bank to withdraw a like

portion of the bonds it had pledged as collateral, until on January 11, 1932, when said bank was closed and placed in charge of the State Bank Commissioner, the amount of the deposit therein was $10,000, which was secured by $10,000 of bonds of Howard and Sevier Road Improvement District No. 1. Thereafter an order was entered in the St. Francis Chancery Court freezing the deposits in said bank so as to make them payable 15 per cent. February 1, 1933, 35 per cent. February 1, 1934, and 50 per cent. February 1, 1935. An agreement was made between the State and said bank that it would not call for its deposit until the maturity of the bonds it held as collateral security for said deposit, which was September 1, 1933. At that time the value of the bonds was doubtful, being quoted on the market at 35 per cent. to 50 per cent. of their face value. Counsel for the bank proposed a cash compromise settlement of the State's claim of $4,000 by writing a letter to the Attorney General to this effect. Under date of January 9, 1933, the then Attorney General, Hon. Hal L. Norwood, addressed a letter to the bank's attorney as follows:

"Your letter of the 6th instant would have been answered sooner but it was of such importance that I wanted to give it deliberate consideration.

"I note that when the Planters Bank & Trust Company was closed in January, 1932, that the State had on deposit $10,000 and held as security the same amount of old road improvement district bonds; that when the bank was permitted to open it was agreed that the State would not call for its deposit until the maturity of the bonds. I presume this is the reason that the order did not provide for certificates of deposit to be paid in one, two and three years to be issued to the State the same as other depositors.

"I have talked with Mr. Leonard and he says the reason that this agreement was made was because the bonds would mature in about a year and he thought that at their maturity the State would be able to pay the bonds and that therefore upon the payment of the bonds the bank could use the same money to pay the State. The Treasurer is now confronted with quite a different prob-

lem. There is no money to pay the bonds and provision has been made to issue revenue bonds, payable in ten years.

"It appears to me that under the agreement made with the bank the State would not be in a position to enforce collection of the amount due it for ten years, and if it could enforce collection at this time, the bank, not anticipating that there would be a default in the payment of the bonds, is not in a position to pay the State. I do not think it would be proper to accept the bonds in full settlement of the amount due the State because the money due the State was collected for various funds, and whatever is collected must be disbursed by these several funds. Of course, the cancellation of the bonds would liquidate that much of the debt due the road improvement district that issued the bonds, but we have no right to take money belonging to other funds to cancel a debt of these road districts. If the State took the bonds it would be its duty to dispose of them in order to apportion the amount to the several funds composing the deposit in your bank, and it is extremely doubtful what amount could be obtained for the bonds.

"I requested Mr. Leonard to make inquiry as to the market value of these bonds. He reported to me that he talked to the bond department of several banks and that these bonds were quoted from thirty-five to fifty cents on the dollar, but sometimes there is a difference between quotations and what can be actually received. They might not bring more than your offer of $4,000 in settlement, but in view of the fact that they are quoted as high as fifty cents on the dollar, I do not think it would be proper to accept less than $5,000 in settlement of the State's claim. I attach some little importance to the responsibility of the bank, however, we cannot tell what will be the condition of a bank ten years from now, but I think that this should be taken into consideration in the margin between what you offer and what we are willing to settle for. I do not think that we have a legal right to call on the bank at this time for settlement, in view of the agreement and in view of the State's default in its obligation.

"Considering the whole matter, I have reached the conclusion that if your bank will pay $5,000, that it would be best for the funds to which the money is due to accept it. If this is agreeable, the bank may pay the Treasurer $5,000 and I authorize the Treasurer to accept the amount in full compromise settlement under the authority given me by act 157, approved March 21, 1923.

"I am handing a copy of this letter to the Treasurer."

Acting on the advice of the Attorney General, appellee Leonard as State Treasurer accepted a draft of said bank drawn on the Peoples' Trust Company of Little Rock in the sum of $5,000 in full settlement of said claim. This draft for $5,000 was received by appellee Leonard on January 16, 1933, in full settlement of the State's deposit. The Peoples' Trust Company had on deposit on said date, and at all times thereafter until it closed its doors, a sum more than sufficient to pay said draft. "Due to confusion in the office of the State Treasurer, because the Legislature was in session, the defendant, Leonard, withheld said draft from the regular channels of business, and he failed to present same to the Peoples' Trust Company, a banking institution in Little Rock, Arkansas, the city in which the State Treasurer's office is and was located. Said draft was kept in Leonard's personal possession, without his having had same presented to Peoples' Trust Company for payment, for the period of forty-two days." Agreed statement of facts. On May 28, 1934, the State Treasury received from the Peoples' Trust Company a 30 per cent. dividend on its claim for $5,000, in the sum of $1,500, and it is unknown what additional amount will be paid thereon.

Appellant brought this action to recover judgment against appellees in the sum of $8,500 and interest, being the balance due on the total deposit in said bank, less the amount collected on said draft from the Peoples' Trust Company, on the ground that the settlement was improvident and that the Attorney General was not authorized to make same, and that appellee Leonard was negligent in the handling of the said $5,000 draft or check drawn on the Peoples' Trust Company. Appellees defended

on the ground that the letter of the Attorney General was authority for appellee Leonard to make the settlement and that he was protected by the advice of the Attorney General and was not guilty of any negligence in the handling of said draft. The trial court entered a judgment against both appellees in the sum of $3,500 and interest at 6 per cent. from Januay 17, 1933. From this judgment comes this appeal on the ground that the court should have granted judgment for $5,000 additional.

For the reversal of the judgment, appellant makes some argument that appellee Leonard permitted a deposit of $37,500 in the Planters' Bank and Trust Company which was $7,500 in excess of the amount permitted by law, which limits the amount that may be deposited in any bank to one-half its capital and surplus, and that since said bank's capital and surplus was only $60,000, a deposit of only $30,000 was permitted as a maximum. It appears, however, that the deposit in the sum of $37,-500 was permitted by the State Depository Board, and it is undisputed that the State has suffered no loss by reason of the fact that the deposit was in excess of that authorized by law. Only $10,000 was on deposit at the time said bank closed its doors, which was $20,000 under the limit provided by law, and that amount was secured by bonds of equal face value and were of a class permitted by law to be accepted by the Treasurer as security for deposits.

Some further argument is also made regarding the negligence of Leonard in the handling of the $5,000 draft in settlement of the State's deposit, but judgment was rendered against appellees for this amount less the dividend paid by the Peoples' Trust Company, and from this judgment there has been no cross-appeal.

Appellant contends that the Attorney General was not authorized to make the settlement with said bank under the provisions of act 157 of 1923, p. 129. The Attorney General thought he had such authority, for in the letter above quoted he said: "Considering the whole matter, I have reached the conclusion that if your bank will pay $5,000, that it would be best for the funds to which the money is due to accept it. If this is agreeable, the bank

may pay the treasurer $5,000, and I authorize the treasurer to accept the amount in full compromise settlement under the authority given me by act 157, approved March 21, 1923." We do not stop to consider whether this act authorizes the Attorney General to advise the settlement which he did advise, for the reason that, whether this particular act confers authority, he did have such authority under the general statutes of the State, as well as under the common law. The Attorney General is the chief law officer of the State. He is required by statute, upon request, without fee or reward, to give his opinion to the Governor of the State, "and to the heads of the several executive departments thereof, upon any constitutional, or any other legal question that may concern the official action of said officers." Section 4521, Crawford & Moses' Digest. Appellant says appellee Leonard made no request of the Attorney General for an opinion, but the letter itself, above quoted, shows that the Attorney General and Leonard had discussed this question, and we think it is inferable that his advice and counsel had been sought. It is true that the letter was not addressed to Leonard, but to the attorney for the bank, but a copy thereof was given to the treasurer.

We are furthermore of the opinion that the letter of the Attorney General affords a complete defense to appellees from this action in so far as it seeks to hold the compromise settlement void. We have recently had occasion to consider the effect of the advice of the Attorney General to State officials in two cases. *State* v. *Fidelity & Deposit Company of Maryland,* 187 Ark. 4, 58 S. W. (2d) 696, and *State ex rel. Attorney General* v. *Broadaway, ante* p. 634, 93 S. W. (2d) 1248. In the latter case we said: "The reply of the Attorney General was in effect that the claims were legal obligations under act 153 of 1929, and as such payable out of any funds remaining in the appropriation. In delivering the voucher, and in approving it, the Commission acted upon the advice of the Attorney General, and its members are therefore protected against liability to the State under the rule laid down in *State* v. *Fidelity & Deposit Company of Maryland,* 187 Ark. 4, 58 S. W. (2d) 696. There being no liabil-

ity on the part of Blackwood and Williams, it follows that none attaches to the surety upon their official bonds."

If it were not so, State officials could not afford to accept the advice of the Attorney General. They would be compelled to act upon such advice at their peril. Such is not the law. The letter of the Attorney General authorizing appellee Leonard to make the settlement relieves him and the appellee surety company from any liability for having made this settlement.

The judgment is correct, and must be affirmed.

ARKANSAS GAME & FISH COMMISSION *v.* CLARK.

4-4332

Opinion delivered June 8, 1936.

Carl E. Bailey, Attorney General, and *J. Hugh Wharton,* Assistant, for appellant.

Woodrow H. McClellan, Jim C. Cole and *Curtis R. DuVall,* for appellee.

SMITH, J. Pursuant to the authority conferred by act 323 of the Acts of 1935 (page 889), the Game and Fish Commission passed and promulgated certain regulations for the protection of the wild life of the State. Among the regulations so passed was one prohibiting the chasing of deer with dogs in Grant and other counties, but not including the whole State, and changing the

season and days in which deer might be taken in Grant and other counties, but not including the whole State.

Appellees, citizens of Grant county, sought to enjoin the Commission from promulgating and enforcing these rules relating to chasing and taking deer in Grant county, and from a decree granting that relief is this appeal. It was decreed by the court that, in so far as act 323 "directs and permits the Game and Fish Commission to regulate the season and manner in which deer may be taken in any part of the State less than the whole State is unconstitutional and void."

It is not questioned that act 323 authorizes and permits the Commission to promulgate the regulations complained of changing the seasons for taking fish and game and the manner of taking in the various counties. But it is insisted that so much of the act as confers this authority violates Amendment No. 14 to the Constitution, which prohibits the passage of local bills. The court below sustained that contention, and the correctness of this ruling is the question presented for decision.

The case of *Special School District No. 60* v. *Special School District No. 2,* 181 Ark. 253, 25 S. W. (2d) 443, involved the validity of an act conferring authority to form school districts and to change boundaries of such districts, but containing a proviso that the act should not repeal or affect an act creating a special school district in Lonoke county. It was held that this was not a local or special act "because the act applies to and affects alike all persons and things of the same class and condition who elect to bring themselves by proper procedure within the terms of the act." But such is not the effect of act 323 of the Acts of 1935. It contemplates and authorizes diversity in rules and regulations in the various counties. One who wished to hunt or fish would have to know in what county he was in in order to know what regulations governed the chasing and killing of deer. The season might be open in one county and closed in another, and the method of hunting or fishing lawful in one county might be unlawful in another. The General Assembly prescribed no method by which the classification might

be made, and did not itself make the classification. On the contrary, the Commission was authorized to make the game regulations here complained of, which are not required to be of general application, but may be, and are, local in application. In other words, the General Assembly has attempted to do indirectly what this court has held may not be done directly, that is, to pass game laws having application to portions of the State less than the whole.

We have a number of cases dealing with the subject of local legislation since the adoption of Amendment No. 14 prohibiting such legislation. That such legislation may not be enacted is not questioned. The question usually involved is whether the particular legislation under review is in fact local in character.

One of the most recent of these cases is that of *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. (2d) 55. By act No. 250, passed at the 1933 session of the General Assembly, the salaries of all the county officers of all the counties in the State were classified except those of the officials of Union county. The act was held void as to this portion thereof as being a local act, in violation of Amendment No. 14, by reason of having exempted Union county from its provisions. Other portions of that act were held valid, however, in the case of *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. (2d) 909, its provisions being held to be severable.

In the case of *Dupree* v. *State,* 184 Ark. 1120, 44 S. W. (2d) 1097, an act of the 1931 session of the General Assembly, providing for open and closed seasons on hunting squirrels, which exempted certain counties from its operation, was held to be a "local or special" act, and therefore prohibited by Amendment No. 14. In the case just cited the appellant was convicted of unlawfully killing a squirrel in violation of an act of 1927 which made it unlawful to kill squirrels in any county in this State except between the days of May 15 and June 15, both inclusive, and from October 1 to January 1, both inclusive. An act relating to killing squirrels was passed at the 1929 session of the General Assembly which applied to fifty-seven counties only. The law was further amended

at the 1931 session of the General Assembly by an act which provided there should be no closed season for hunting squirrels in eleven counties there named. It was held that the acts both of 1929 and 1931 were void as applying to portions of the State less than the whole, and that the act of 1927 had continued in effect, notwithstanding these attempts to amend it, the amendatory acts being void as local legislation, violative of Amendment No. 14.

So, here, the rules promulgated by the Game and Fish Commission, applying to portions of the State less than the whole, were properly held to be void and of no effect. If the act 323, *supra,* did not authorize the promulgation of the rules here complained of, they would be void for that reason. If it does authorize these regulations, and we think it does, then there is an attempt to do indirectly what Amendment No. 14 provides may not be done directly, that is, to pass local game laws or other local legislation.

The court below therefore properly held so much of the regulations of the Game and Fish Commission as were local in character to be void and of no effect, and that decree is affirmed.

J. W. BEST, INC. *v.* REMMEL PLAYGROUNDS PARK ASSOCIATION, INC.

4-4324

Opinion delivered June 15, 1936.

Henry S. Grant and *Jones & Wharton,* for appellant.
Ras Priest and *C. M. Erwin, Jr.,* for appellee.

HUMPHREYS, J. This suit in unlawful detainer was brought by appellee against appellants in the circuit court of Jackson county on the 12th day of July, 1935. Written notice was served on appellants on the 3rd day of June to vacate the premises on the 10th day of July, 1935. Appellee owned lot 3, block 2, in the Original Town of Newport, and at the time it purchased the lot, same was occupied by appellants under a written lease of one year at $50 per month. The lease contained no provision for a renewal thereof, and no attempt was made by either party to renew same for a definite period. The lease was dated March 9, 1931. The appellants occupied the premises continuously thereafter, but, by oral agreement, the rents were reduced to $25 a month on account of the depression, and, at the time notice was served to vacate the premises, appellants were in arrears on their rent for about three months. After the notice was served, appellants paid the rent to July 5, 1935. On July 10, 1935, they tendered $50 to appellee for a month's rent, which was refused on the ground that appellee had rented the premises to another person from and after July 10, 1935.

Appellants interposed the defense to the suit that they had occupied the premises under the yearly rental contract, and could not be deprived of the possession thereof until March 10, 1936, the expiration of the year, and then only upon six months' written notice to vacate instead of thirty days' notice to do so.

The issue joined was submitted to the court, sitting as a jury, upon the evidence adduced by the parties, resulting in a finding that appellants were tenants from month to month, and not tenants under a yearly rental contract.

Judgment was accordingly rendered against appellants for the possession of the lot and rents thereon from July 10, 1935, at the rate of $50 per month until vacated, from which judgment is this appeal.

The testimony introduced by appellants tended to show that they continued to occupy the premises under

the yearly rental contract save that the rent was reduced during the depression.

The testimony introduced by appellee tended to show that at the expiration of the written lease an oral agreement was entered into whereby appellants might occupy the premises at the reduced rental from month to month until appellee found a tenant who would pay more rent.

The court found the issue of fact against appellant, and there is ample evidence in the record to sustain the finding.

Appellants contend, however, that the acceptance of the past-due rents after notice to vacate estopped appellee from instituting the unlawful detainer suit and cites the case of *Geary* v. *Parker,* 65 Ark. 521, 47 S. W. 238, 53 S. W. 567, to sustain their position. In the case cited, the issue was whether failure to pay rents forfeited a rental contract for fifteen years with option to buy, and, of course, the tender of rent after notice prevented the institution of the suit. In this case the issue was whether the contract was a yearly or monthly contract, so the payment and acceptance of past-due rent did not settle the issue involved nor prevent the institution of a suit to determine the issue.

No error appearing, the judgment is affirmed.

MONTGOMERY COUNTY *v.* ELDER.

4-4311

Opinion delivered June 15, 1936.

Houston Emory and *Murphy & Wood,* for appellant.

Jerry Witt and *Martin, Wootton & Martin,* for appellee.

HUMPHREYS, J. On February 16, 1935, in response to a citation to file a final settlement as county treasurer, showing the amounts he, Morris Elder, received for the county with the disbursements thereof, he filed an account in which a credit of $1,105.83 was claimed by him on account of the nonpayment of a check in said amount which the collector of the county, George A. Jackson, had given to him in their settlement in October, 1932.

The county court heard testimony relative to the credit claimed by Elder with which he had been charged in his former settlement, and found that he had been properly charged with the item, and rendered judgment against him in favor of the county for $1,105.83. From the judgment, Elder appealed the case to the circuit court of said county. Upon a hearing in the circuit court, the judgment was reversed, and Elder was allowed credit for the amount of the check he failed to collect, from which is this appeal.

The record reflects without dispute that during the general election in said county in 1932, reports were current and it was being charged that George Jackson, who was a candidate for re-election as tax collector, had not made full settlement with the county according to his agreement when he received his appointment as tax collector from the Governor; that in order to allay this criticism and clear himself of the charge, he gave the county treasurer, Morris Elder, a check for $1,105.83 on his account with the bank as collector, and obtained a receipt from the treasurer, which he exhibited to the electors in his canvass of the county; that there was sufficient money in the bank to pay the check; that the collector and treasurer, in their subsequent settlements covering a period of two years, treated the check as a cash item, and the treasurer apportioned the amount thereof to the school districts in the county, the county general fund, county road and bridge fund, the different towns in the county, and the State's fund; that on February 18, 1933, George A. Jackson brought a suit in the

chancery court of said county to correct and surcharge the settlement he made with the county in 1931 and 1932 and to recover the amount of the check he had given Elder, the treasurer, and for which Elder receipted him; that Elder was made a party defendant in that suit; that the complaint alleged, in substance, that he had made a mistake in the settlement with the treasurer, particularizing how the mistake had occurred; that a demurrer was sustained to the complaint and same was dismissed; that an appeal was prosecuted to this court, where the decree of the chancellor was affirmed on October 30, 1933, in the case of *Jackson* v. *Elder,* 187 Ark. 1094, 63 S. W. (2d) 991; that this court said in the case that: "It will be noted from the allegations of the complaint that this suit was instituted on February 18, 1933, and charged generally that the county court of Montgomery county through mistake wrongfully, erroneously and illegally transferred a credit from plaintiff's account to that of another. These allegations do not constitute a charge of fraud. On the other hand, they come squarely within the purview of § 10,165 of Crawford & Moses' Digest as amended by act 339 of 1927, which said amendatory act reads as follows: " 'When any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within one year from the date of such settlement, to reconsider and adjust the same.'

"Had appellant filed his claim in the county court of Montgomery county on February 18, 1933, instead of in the chancery court, he could and would have received adequate relief under his July, 1932, settlement. If relief had been denied him in the county court, an appeal could have been perfected to the circuit court.

"This court has many times held that the county court has original exclusive jurisdiction to audit, settle and direct the payment of all demands against the county. *Chicot County* v. *Crews,* 47 Ark. 80, 14 S. W. 469; *Shaver* v. *Lawrence County,* 44 Ark. 225.

"It suffices to say that appellant had a plain, adequate and complete remedy under § 10,165 of Crawford & Moses' Digest, as amended by act 339 of 1927, which

afforded him an exclusive remedy for all the things complained about in his complaint."

Like Jackson, in the case referred to, Elder's only remedy for all the things complained of in his settlements was to have proceeded under § 10,165 of Crawford & Moses' Digest, as amended by act 339 of 1927. This was his exclusive remedy. This he attempted to do in his final settlement of 1935, but it was too late to correct errors, if any, in his settlements of 1931, 1932 and 1933. Said section of the statute, in part, is as follows: "When any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within one year from the date of such settlement, to reconsider and adjust the same."

In his prior settlements, he treated the check as a cash item and apportioned it to the several funds entitled thereto, and cannot now correct it even though a mistake was made.

All other questions raised and argued in the able briefs are beside the real issue in the case.

On account of the error indicated, the judgment of the circuit court is reversed with directions to enter judgment against Morris Elder for $1,105.83, and interest thereon from October, 1932, to date.

BEENE *v.* HUTTO.

4-4377

Opinion delivered June 15, 1936.

Culbert L. Pearce, for appellants.

R. W. Robins, for appellees.

MEHAFFY, J. This suit was begun in the Faulkner County Circuit Court. The following petition was filed:

"Plaintiffs are qualified electors and taxpayers of Faulkner county, and, as such, have an interest in the subject-matter of this action and bring suit for themselves and others who are similarly situated, and desire like relief.

"Defendant J. A. Hutto is county judge, defendant John Griffith is clerk of the county court, defendant A. H. Burkett is clerk of the circuit court, defendant Neel Webb is county treasurer, defendant Jason I. Summers is sheriff and ex-officio collector, and defendant Bert M. Tilley is assessor of Faulkner county, having been duly elected, did qualify and now are acting as provided by law.

"On August 21, 1934, plaintiff Roy Rogers, for himself and others, tendered to John Griffith, as county clerk, for filing, a petition in several parts, signed by 676 persons who claimed to be qualified electors of the county, ordering proposed initiative act No. 1, entitled 'An act for the purpose of fixing the compensation and expense 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,' to be submitted to the electors of the county, for approval or rejection, at the general election held on November 6, 1934. Copy of said initiative petition, containing the full text and title of said act, is made a part hereof and marked exhibit A.

"Defendant, John Griffith, as such clerk, received said petition, issuing his receipt therefor. Copy of said receipt is made a part hereof and marked exhibit B.

"On September 29, 1934, defendant, John Griffith, as county clerk, after having examined said petition, found and certified, '*That according to the 1934 voters record said petition does have the requisite number of legal and qualified electors which would qualify said petition to be placed upon the ballot in accordance with Amendment No. 7 to the Constitution.*' Copy of said certificate is made a part hereof and marked exhibit C.

"On October 29, 1934, defendant, John Griffith, as such clerk, made and delivered to the sponsors a certified copy of said petition, and the certificate of sufficiency thereto attached, and they caused the same to be published for the time and in the manner prescribed by law. Copy of the proof of publication of said petition and certificate is made a part hereof and marked exhibit D.

"On October 29, 1934, without notice to the sponsors, the board of election commissioners arbitrarily announced that the ballot title of said proposed act would not appear on the ballots to be used in the approaching general election.

"On the following day, the sponors sought counsel and were advised to obtain stamps or stickers bearing the proposed title of said act, as follows, to-wit:

" 'Initiative act No. 1, of Faulkner County'

" '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.

" 'For initiative act No. 1,'

and to invite the use of such stamps or stickers by electors at the polls as a means of expressing their choice and vote for said proposed act. The sponsors thereupon announced through newspapers published in the county, and by handbills, that rubber stamps would be furnished to electors at the various polling places, and,

in accordance with said announcement, procured stamps, bearing the ballot title of said act as above set out, and offered them to electors who appeared at the various polling places throughout the county on election day.

"At said election, which was legally called and legally held, there were 2,101 ballots cast by electors of the county, and 1,187 of said ballots were imprinted and stamped by the voters with the rubber stamp bearing the ballot title of said initiative act, as above described, and no votes were cast against it. The electors thereby expressed approval of said act and cast their ballots for it, giving it a majority of all votes cast by those voting on the question. It thereby became a law 30 days after said election, and at all times since then has been, and now is, in full force and effect as a local initiative act. Said act repealed all other local laws that were in conflict with it.

"At all times since the adoption of said act, the defendants, by agreement and acting in concert, have openly, purposely, systematically and wrongfully refused to abide by or to enforce its provisions, in whole or in part, and, as a result, said act is not being enforced or obeyed by them, their deputies and persons transacting business with them as such officers.

"Under said act, all fees, commissions, emoluments and perquisites of whatsoever kind paid to and received by the defendants as such officers is the property of the county and should be by the recipient paid into the county treasury. The county judge would then be entitled to file claim and receive from the county $2,000 as salary and $600 as expenses; the clerk of the county court $2,000 as salary and $900 for deputy hire; the clerk of the circuit $2,000 as salary and $900 for deputy hire; the county treasurer $1,800 as salary and no deputy hire; the sheriff and collector $2,000 as salary, $2,100 for deputy hire, and actual expenses; and the assessor $1,500 as salary and $900 for deputy hire per annum, but the defendants are not following these requirements. They are drawing salaries and receiving fees under statutes which were in effect before said initiative act was adopted and thereby are receiving much greater amounts

than they are lawfully entitled to receive under said act, all to the detriment of these plaintiffs and others as taxpayers of Faulkner county.

"Plaintiffs have no other adequate remedy at law and therefore demand special relief.

WHEREFORE, premises being seen, petitioners pray that a writ of mandamus issue, commanding and requiring the defendants to file reports showing all fees, commissions, emoluments and salaries received, collected and drawn since said act became effective that they be required to account for and pay into the county treasury all sums so received in excess of the salaries and expenses authorized by said act and, in the event of their failure or refusal to obey said order, that plaintiffs have judgment against each of them, *for the use and benefit of Faulkner county,* for all fees, commissions, emoluments and salaries received, retained and drawn over, above and in excess of such as are provided and authorized by said act that the defendants, and each of them be required to comply with and enforce the provisions of said act in the regular and due administration of the duties of their respective offices; that such further orders be made as may appear necessary to preserve the rights of the plaintiffs and other taxpayers; and that plaintiffs have all other and proper relief." The petition was properly verified.

Notice of hearing was issued and served, and a motion to quash and strike was filed.

Thereafter a summons was issued and served, and the appellees filed the following demurrer:

"The defendants in the above entitled cause, not waiving their motion to strike the petition and motion of the plaintiffs herein from the files of the court to quash the return on the notice served herein, but expressly insisting upon the same, and insisting that no suit has been filed herein, or is pending herein, and that the court is without jurisdiction to make any order herein, demur to said petition and motion and move that same be dismissed on the following grounds:

"(1) Said petition and motion does not state grounds sufficient to constitute any cause of action herein.

"(2) Said petition and motion does not state facts sufficient to entitle the plaintiffs to the relief prayed for therein or to any relief herein.

"(3) There is a misjoinder of parties herein, in that the defendants are improperly joined in said petition and motion.

"(4) Said petition and motion discloses on its face that it is not brought by the proper parties, for the reason that the plaintiffs are not shown by said petition and motion to have any special interest in the subject-matter in controversy, or any interest therein other than that had by all other taxpayers of Faulkner county; and for the further reason that this action was not brought in the name of the State of Arkansas or by the authority of the State of Arkansas through any of its duly constituted officers.

"(5) By said petition and motion the plaintiffs seek relief by way of discovery, which is a remedy solely of equitable jurisdiction.

"(6) By said petition and motion the plaintiffs seek to enforce a continuing duty, and to enforce the continual performance of various acts, all of which is beyond the jurisdiction of the court in a mandamus proceeding.

"(7) If the facts set forth in the said petition and motion are true the plaintiffs have other plain and adequate remedies."

The court sustained the demurrer, dismissed the complaint, and the case is here on appeal.

A case involving the initiative act came to this court on appeal from the chancery court, and this court held that under I. & R. Amendment No. 7 the only jurisdiction conferred on the chancery court was to review the action of the county clerk in determining the sufficiency of all local petitions for initiating local laws. The court cited and quoted from the amendment to the Constitution as follows: "The sufficiency of all local peti-

tions shall be decided in the first instance by the county clerk * * * subject to review by the chancery court."

The court further held that the sufficiency of the petition in that case was a moot question when the suit was filed. The suit was filed after the election, and the amendment to the constitution provides: "The failure of the courts to decide prior to the election as to the sufficiency of any such petition shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure if it shall have been approved by a vote of the people." *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68.

It, therefore, appears that after a question is submitted to and voted upon by the people, the sufficiency of the petition is of no importance. It is not important because, whether sufficient or insufficient, if the measure is adopted by the people at the election, it becomes the law. The I. & R. Amendment also provides that it shall be self-executing, and all of its provisions shall be treated as mandatory.

It is contended first by the appellees that mandamus does not lie to enforce the performance of a continuing or future duty, and to support this contention the case of *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118, 128 S. W. 557, is cited. We find nothing in this case that sustains the contention of the appellee. It is said in that case that the writ of mandamus is only employed in unusual cases, and where no other remedy is available. The case cites High's Extraordinary Remedies, § 9, and § 188. That § 9, among other things, provides that the right to issue the writ rests in the sound discretion of the court, and it must also appear that the writ, if granted, requires the performance of acts that is within the power of the respondent to do, as well as his duty to do. But the section further provides that the discretion with which the courts are clothed is not an arbitrary discretion, but it must be exercised under established rules of law and in accordance with well-settled principles.

Section 188 referred to simply provides that if there is another adequate and specific remedy, that the writ should not be granted.

"But the mere fact that there is another remedy, will not prevent the issuance of a writ of mandamus if the remedy is not adequate, or, in other words, if the remedy is not equally convenient, beneficial and effectual." 38 C. J. 693.

The authorities cited by appellees on the question that mandamus does not lie to enforce the performance of a continuing duty are all to the effect that the writ of mandamus will not lie to compel a general course of official conduct for a long series of continuous acts to be performed under various conditions. We have no such situation here.

It is next contended by the appellee that this proceeding was improperly brought for the reason that it was invoked not to protect a private right, but ostensibly to protect the rights of all taxpayers of the county, and it was not brought in the name or by the authority of the State.

"Although in the case of an application for mandamus, where private or corporate rights are affected, the relator must show an interest, the rule established by the preponderance of authority is that, where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. Or, as the doctrine has been more succinctly stated, private persons may move for a mandamus, to enforce a public duty not due to the government as such, without the intervention of the government law officer." 18 R. C. L. 325.

Section 13 of art. 16 of the Constitution reads as follows: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

It is not only the rule announced by a majority of the courts that a suit may be brought by a private citizen to enforce a public duty, but the above section of our Constitution specifically provides for such suits to be brought to protect the inhabitants against the enforcement of any illegal exactions whatever.

It is contended by the appellee that the complaint failed to state a cause of action entitling appellants to relief in any court. Appellees call attention to the case of *Condren* v. *Gibbs,* 94 Ark. 478, 127 S. W. 731, and also call attention to the Digest with reference to preservation of ballots.

The complaint alleges that the election was legally held and a majority of the voters of Faulkner county voted for the initiative act. The demurrer admits these allegations to be true.

Pleadings under the Code are liberally construed and every reasonable intendment is indulged in favor of the pleader, and 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. *Manhattan Const. Co.* v. *Atkisson,* 191 Ark. 920, 88 S. W. (2d) 819; *Arkansas Bond Co.* v. *Harton,* 191 Ark. 665, 87 S. W. (2d) 52; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. (2d) 849.

In considering the allegations in the complaint on demurrer, the allegations must be taken as true. If the allegations in the petition in this case are true, on August 21, 1934, a petition was tendered to the county clerk for initiated act fixing the compensation and salaries of county officers. On September 9, 1934, the clerk issued his certificate to the effect that the petition had the requisite number of qualified electors, which would qualify said petition to be placed upon the ballot in accordance with Amendment No. 7 to the Constitution. On October 29, 1934, the county clerk delivered to petitioners a certified copy of the petition and the certificate of sufficiency, and this was published for the time and in the manner prescribed by law. On October 29, 1934,

without notice to the sponsors the board of election commissioners arbitrarily announced that the ballot title of said proposed act would not appear on the ballot at the general election. At the election, legally held, there were 2,101 ballots cast in the county, and 1,187 of them voted for the initiative act. If these allegations are true, a certificate of sufficiency was given to the sponsors, and they of course, were led to believe that the ballot title would be on the ticket. It is alleged that the commissioners arbitrarily refused to have the ballot title printed on the ticket. Amendment No. 7 to the Constitution was adopted by the people for the purpose of reserving to themselves the right to initiate acts, both general and local, and they should not be prohibited from doing this by the arbitrary action of the county clerk or board of election commissioners.

This court has said: "In construing this amendment it is our duty to keep constantly in mind the purpose of its adoption and the object it sought to accomplish." *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. (2d) 72.

We also said in the above case: "Another reason not less cogent is that Amendment No. 7 permits the exercise of the power reserved to the people to control to some extent at least, the policies of the State, but more particularly of counties and municipalities as distinguished from the exercise of similar power by the Legislature, and since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction."

Treating the allegations of the complaint as true, the complaint stated a cause of action. The judgment of the circuit court is, therefore, reversed, and the cause is remanded with directions to proceed with the trial of the case according to law, and not inconsistent with this opinion.

JOHNSON, C. J., MCHANEY and BUTLER, JJ. dissent.

BALL *v.* STATE.

Crim. 3990

Opinion delivered June 15, 1936.

[redacted]

Newell D. Fowler, for appellant.

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

McHANEY, J. Appellant was convicted on a charge of assault with intent to kill, and sentenced to seven years in the State penitentiary. The indictment charged that he committed an assault upon one Everett Hood with a deadly weapon, a gun, with the unlawful and felonious intent at the time to kill and murder said Hood.

Appellant is a negro and is a member of the Southern Tenant Farmers' Union. On the night of January 16, 1936, a number of the members of said union, including appellant, all negroes, met at St. Peter's Church in Crittenden county, about five miles north of Earle. They had placed a guard at the door armed with a shotgun. While the meeting was in progress, Mr. Hood, a deputy sheriff, in passing by the church, noticed a light and approached to see what was going on. He saw two negroes at the door, and as he approached they started to run. He asked the one with the gun what he was doing and was told that he was guarding the door. He then took the gun from the guard, entered the church and most of the occupants fled, some through the back door and some through the windows. He ordered the others to pass out by him. Appellant was inside the rostrum, started walking towards Mr. Hood, and, when about half way down the aisle, he picked up from beneath a bench a double barrel shotgun. According to Hood, the following occurred: "and I said: 'What are you going to do with that gun; put it down.' And when

I said that he made two or three steps toward me, at the time he was coming up with the shotgun; so he cocked the gun down like this, and he shoved it down on his leg, and I said: 'Boy, put that gun down.' I had that other negro's shotgun in hand, I took from the doorkeeper, and when I said, why he didn't pay any attention to me; just started—I was just about the length of a bench, a seat, one of these benches, about eight feet long, and when he went to come up to me with the shotgun I throwed this negro's gun up and I hit the hammer of his gun, the cocked gun, and my foot slipped, and I had got a little closer to him, and as I was getting up off the floor, I grabbed the shotgun by both hands and started twisting the gun away from him and when I twisted the gun away from him I naturally knocked it out of his hands, and I pulled my pistol out—I had put the shotgun down—and I pulled my pistol out and put it in his ribs and told him to put up his hands; and there I was with all those negroes, and the two shotguns had disappeared, and he wanted to know what I was going to do with him, and I made him go out the door; and I had forgotten my flash light, and we went back and got the flash light."

For a reversal of the judgment against him, appellant contends that there is no evidence in the record that the gun, with which it is charged he made the assault, was loaded; but that on the contrary, appellant himself testified that it was not loaded. The contention is that the undisputed proof is that the gun was not loaded, and that, therefore, a necessary element of the charge of assault is lacking, that is "coupled with present ability to commit a violent injury upon the person of another." Our statute, § 2330, Crawford & Moses' Digest, provides: "An assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another." In the early case of *Keefe* v. *State,* 19 Ark. 190, it was said: "If one present a loaded pistol at another, threatening to shoot him, and being sufficiently near for the shot to take effect, it is an assault. Under such circumstances, the pistol is presumed to have been loaded, and if it were not, this must be shown in defense." This case was cited with approval in *Wells* v. *State,* 108 Ark.

312, 157 S. W. 389. So, here, appellant drew a cocked shotgun on Hood. The presumption is it was loaded. He says it was not, but he is an interested party and his testimony cannot be said to be undisputed. The jury had a right to disbelieve such testimony which they did, as the court instructed them that if they found appellant's gun was not loaded, and that he did not have the means at hand with which to carry out the intent to murder or to inflict other bodily harm, they should find him not guilty. The gun used by appellant, as well as the one taken from the guard, disappeared during the melee, so it was not known to Hood whether it was loaded or not. A number of loaded shotgun shells were found on appellant at the time.

No question is raised regarding the instructions, but an examination thereof discloses that the court fully and fairly covered the law of the case, defining assault to kill, assault with deadly weapon and simple assault, the burden of proof, reasonable doubt and presumption of innocence. When we consider the facts set out above, we cannot say there was no substantial evidence on which to base the verdict and judgment. But, in view of the fact that appellant and others were peaceably and lawfully assembled in furtherance of what they considered their own welfare, and in view of the manner of entry by the deputy sheriff, Mr. Hood, coupled with the fact that no shot was fired by appellant, we are of the opinion that the sentence is excessive, and it will be reduced to one year in the penitentiary, the minimum punishment imposed by statute for assault with intent to kill.

As thus modified, the judgment will be affirmed. It is so ordered.

ÆTNA LIFE INSURANCE COMPANY *v.* MARTIN.

4-4306

Opinion delivered June 15, 1936.

Owens & Ehrman, for appellant.

J. B. Milham and *C. T. Cotham,* for appellee.

JOHNSON, C. J. In 1926, appellant, Ætna Life Insurance Company, issued to appellee, A. V. Martin, its policy of life and disability insurance whereby appellee was indemnified against death in the sum of $25,000 and against total and permanent disability in the sum of $250 per month during disability; indemnity for total disability was conditioned, however, upon accrual prior to the insured's attaining 60 years of age.

In 1935, appellee instituted this suit against appellant in the Saline Circuit Court and therein alleged that he became totally and permanently disabled within the purview of the contract of indemnity on or about January 15, 1930, and prior to attaining 60 years of age and at a time when the contract was in full force and effect. The prayer was for $2,000 as principal, attorney's fees and costs.

By answer, appellant admitted the execution of the contract and that it was in force and effect on January 15, 1930, but denied that appellee became totally and permanently disabled on January 15, 1930, or that he became totally and permanently disabled prior to attaining 60 years of age.

Upon trial to a jury, a verdict and consequent judgment was entered in favor of appellee for $500 indemnity.

By this appeal appellant seeks reversal, and by cross-appeal appellee seeks modification because of insufficient relief.

The only issue presented on direct appeal is stated by appellant to be "whether or not there was sufficient

evidence to submit to the jury on the question of the alleged total and permanent disability of appellee." Consideration of the contention urged makes it necessary to review the testimony adduced at the trial. That upon behalf of appellee was to the effect that appellee was first advised by physicians, in 1929, that he was suffering from diabetes, and was thereupon put upon a rigid diet and directed to take insulin treatments daily. These directions have been consistently followed by appellee up to the time of the trial. Appellee was also advised by his attending physician that he should not undertake continuation of his previous activities as a contractor and that his physical effort should be restricted to mere supervision and direction. Prior to 1930, appellee had performed, not only supervision and direction of his contracting work, but had made a regular hand in the execution of his business, working from 12 to 15 hours daily; subsequent to his contracting diabetes he has been unable to give but little attention to his business. That appellee's business, due to his neglect, under the circumstances, had greatly depreciated in value, etc. Appellee attained his 60th birthday June 5, 1930, and his disability accrued prior to that time and has continued up to the trial.

The testimony in behalf of appellant was to the effect that appellee had prosecuted his contracting business with all the diligence and vigor subsequent to 1929 and 1930 that he had employed prior thereto, and a mass of testimony was adduced so indicating. It was also shown that appellee had engaged in the banking business subsequent to the time he claimed to have become totally and permanently disabled. Also, that a person suffering from diabetes might pursue his vocation without serious impairment under normal circumstances. The above is a very brief summation of the testimony adduced by the parties, but will suffice to show the general trend of the positions taken by them.

The law which obtains in this State in reference to total and permanent disability under contracts of indemnity similar to the one under review has been repeatedly stated by us to be: disability exists when the insured is able to accomplish only some of the duties

essential to the prosecution of his business; or when he is able to do only occasional acts or is unable to do any substantial portion of the work connected with his vocation, this is sufficient to establish total and permanent disability. *Ætna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. (2d) 1007, and cases therein cited.

The rule stated another way is that total and permanent disability is such as renders the insured unable to perform the substantial and material acts of his vocation in the usual and customary way. *Travelers Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364, and cases therein cited.

The uncontradicted testimony in this record reflects that in 1929, at a time when the contract of indemnity was in full force and effect and at a time prior to appellee's attaining 60 years of age, he contracted diabetes which is admittedly a dangerous and incurable disease and may be held in check only by use of insulin, the observance of strict diet, and refraining from over-exertion.

This inquiry, therefore, narrows to a determination of whether we shall declare as a matter of law that one suffering from a pronounced case of diabetes is not totally and permanently disabled. The victim of diabetes holds the key to his continued life. If he follows diet instructions consistently, if he submits his person to insulin inoculation as may be necessary or required, and if he refrains from over-exertion he may live out his life expectancy; but deviation from these requirements means immediate death. Indeed, a reasonably prudent person could hardly be found at fault by strictly observing necessary requirements which have the purpose and effect of prolonging his life, and when observance of necessary requirements results in cessation of performance of the material duties of his vocation, under the law, it means total and permanent disability.

In recent cases and under analogous circumstances we have declined to declare as a matter of law that certain physical defects were partial and not total and permanent. In *Ætna Life Insurance Company* v. *Sanders, ante* p. 590, 93 S. W. (2d) 141, we refused to declare that an insured was required to undergo a minor operation to

relieve himself from total and permanent disability. In *Holmes* v. *Metropolitan Life Ins. Co.,* 187 Ark. 388, 60 S. W. (2d) 557, we held that the loss of one eye when viewed in the light of attending facts and circumstances presented a jury question of total and permanent disability. See, also, *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. (2d) 640; *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520.

Whether the loss of a leg under attendant facts and circumstances constituted total and permanent disability was held to be a jury question in *Prudential Insurance Co.* v. *Lane,* 189 Ark. 7, 70 S. W. (2d) 43. See, also, *Jefferson Standard Life Ins. Co.* v. *Slaughter,* 190 Ark. 402, 79 S. W. (2d) 58.

Even so in the instant case, it is and should be a question of fact for ascertainment by the tryers of fact, whether one suffering from diabetes is able to perform substantially all the material duties of his vocation. But appellant urges that the Person case, *supra,* is authority opposing this view. We do not so consider it. Person was suffering from an arrested case of tuberculosis. Its effect was, under the attendant facts and circumstances, to partially disable, only. In the instant case, however, such is not the undisputed facts. We are of the opinion and so hold that under all the facts and circumstances of this record it was a question of fact for the jury's consideration whether appellee was totally and permanently disabled prior to June 5, 1930, and that their finding that he was is supported by substantial testimony.

On cross-appeal but little need be said. Appellee failed to file a motion for a new trial, which is the only method of preserving error for review arising from the testimony in law actions. *Stacy* v. *Edwards,* 178 Ark. 911, 12 S. W. (2d) 901.

No error appearing, the judgment is affirmed on appeal and cross-appeal.

CLARK *v.* HUNT.

4-4319

Opinion delivered June 15, 1936.

E. P. Toney and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

J. T. Cheairs, for appellees.

SMITH, J. Appellants, as trustees of Lake Village Baptist Church, brought this suit against appellees to restrain the erection of a filling station for the sale of oil and gas and automobile accessories in Lake Village near that church. What is known as the old town of Lake Village was surveyed and platted to front beautiful Lake Chicot, along the bank of which runs a street called Lake Shore Drive. This frontage was divided into lots, but not into blocks. Main, Jackson, Washington and other streets run, at right angles, into Lake Shore Drive, and, in connection with other streets running parallel to Lake Shore Drive, divide the old town into blocks, although they were not numbered as blocks or so called.

Lake Shore Drive became and is a part of State and federal highway No. 65, which is one of the principal highways in the State, and probably the longest in the State, as it extends diagonally from the northwest to the southeast corner of the State. It is proposed to build a filling station on lot 50, which fronts on highway 65. The church is located on lot 65, which also fronts highway 65. These lots are separated by Washington, a street 40 feet wide. Each of these lots has a frontage on highway 65 of 104.5 feet.

The church is a new and beautiful building, and its officers and others testified that it had been built to replace another church building adjacent to a filling station,

and that the present church site had been selected because there was no filling station near it. They also testified that the proposed filling station would be annoying to persons attending religious services in the church, and for this reason would constitute a nuisance if erected. There was no testimony, however, that this filling station would be operated in any manner different from that of the ordinary properly conducted filling station. A proposal to close the filling station on Sundays during the hours of religious services, made to placate the objectors to the erection of the filling station, was rejected. Other testimony was offered to the effect that the station, if erected, would not, or should not, annoy persons assembled in the church for religious worship.

The decree, denying the relief prayed, contains recitals of fact which are decisive of the case. The following finding of fact appearing in the decree is not only not contrary to a preponderance of the testimony, but appears to accord with the undisputed testimony: "The site upon which it is proposed to erect the service station lies directly across Washington street, and if constructed would stand some 100 feet distant from the church building, and on lot 50, according to the map above referred to. It would front on highway 65 and extend some distance west along the south side of said Washington street. This street seems to be, and is, the north boundary of that block of business property forming the north side of Court Square, hence it is within the business district of the city."

An old resident of Lake Village testified that in the early days of the town its first stores were on the lot where the new Baptist Church now stands and on the lot where it is proposed to build the filling station. Another citizen—the first mayor of the town after its incorporation—testified that the lot on which Mrs. Hunt (one of the appellees) proposes building the filling station is on the block adjoining court square, where the county courthouse is located, and on north Lake Shore Drive, and half of the block is now filled with brick business buildings—the Lake Shore Hotel, Chicot Spectator (a newspaper and printing plant), and an old picture show

building and offices in the rear, which recently were remodeled for the General American Farms.

Among the cases cited and relied upon for the reversal of the decree here appealed from is that of *Huddleston* v. *Burnett,* 172 Ark. 216, 287 S. W. 1013. There the erection of a filling station and garage was enjoined in what was said to be "distinctively a residence section located some five or six blocks away from the business district." It was there said that a filling station and public garage is a lawful business, and not a nuisance *per se,* but that the erection and operation of a filling station and public garage in a residential district which would result in creating incessant noise in the neighborhood would be enjoined.

Here it is proposed to erect a filling station, but not a public garage, and the proposed site must be said, as was found by the court below, to be in the business district of the city, although it is adjacent to a church.

The testimony shows that after a railroad entered Lake Village the business section grew away from the lake front and towards the railroad depot, and that the church and the proposed site of the filling station lie in what is now the outskirt of the business district, as there are no business houses north of them fronting the Lake Shore Drive or highway 65. But these sites are still in the business district of the town. The principal business section of the town is the portion adjacent to and near the courthouse, which building is across the street from the leading hotel, which is adjacent to lot 50.

There appears to be no controversy about the law of the case, which has been frequently declared by this and other courts. A recent case reviewing earlier cases of similar purport is that of *Moore* v. *Wallis,* 191 Ark. 551, 86 S. W. (2d) 1111, where declarations of law were made to the following effect. Every person may make any lawful use of his own property which does not interfere with another's lawful right to use and enjoy his own property. A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings. The erection of a filling station

and garage is not a nuisance *per se,* and when 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 of the erection, leaving the complainant free to assert his rights thereafter in an appropriate manner, if the contemplated use results in a nuisance. It was there further held that as a filling station was not a nuisance *per se,* its erection would not be enjoined where the evidence fails to show that the station will constitute a nuisance in fact.

So, here, the proposed filling station not being a nuisance *per se,* its erection and operation will not be enjoined unless it shall be so operated as to become a nuisance in fact. Many cases in point are cited in the notes to §§ 4881, 4882 and 4901, Blashfield's Encyclopedia Automobile Law.

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

MONTGOMERY COUNTY *v.* CEARLEY.

4-4393 and 4397

Opinion delivered June 15, 1936.

Osro Cobb, for appellant.

Jerry Witt and *Trieber & Pope,* for appellees.

BUTLER, J. Certain landowners appealed to the circuit court of Montgomery county from an order of the county court assessing their damages for land taken in the widening of a highway and incident injuries suffered in the construction of same across their lands. On the evidence adduced and instructions of the trial court, the cases were submitted to a jury which returned verdicts in favor of each of the landowners in excess of the sums allowed by the county court. The circuit court accordingly entered judgment for each of the landowners in sums fixed by the jury, and adjudged that they recover the same out of the "turn-back fund" due or to become due to Montgomery county. From that judgment comes this appeal.

1. It is first insisted that the case should be reversed for the refusal of the trial court to permit appellant to prove the assessed valuation of the lands over which the highway runs involved in the several actions brought by the landowners. The competency of the alleged offered testimony is based upon § 1 of act No. 205 of the Acts of 1929, which is as follows:

"All courts and juries in case of condemnation of land for right-of-way for State highways shall take into consideration the fact that lands are required to be assessed at fifty per cent. of their true value, and shall also take into consideration the fact that owners of automobiles and trucks living miles off of a State highway pay the same gas tax and auto license tax as those being fortunate enough to own land adjoining the State highway, and any court or jury considering claims for right-of-way damages shall deduct from the value of any land taken for a right-of-way the benefits of said highway to the remaining lands of the owner."

On suggestion of the appellees that no evidence was offered at the trial to establish the assessed values of the lands, we have carefully examined the bill of exceptions and find that there was, in fact, no evidence offered to support the contention of the appellant in this particular. We fail to discover where the custodian of the assessment rolls was called and where such rolls were offered in evidence. The nearest approach to the ques-

tion of the assessed value of lands came in the cross-examination of one of the appellees who was asked what he had assessed his lands for and he replied that he didn't remember. The trial court, in that connection, remarked that the question sought to elicit incompetent evidence. No objection was interposed to the ruling of the court, and no further inquiry was made at any other time or in any other manner during the trial of the case. Whether the court was correct or not in its ruling is of no consequence; first, because the appellant was not prejudiced for the reason that the witness did not know the assessed valuation of the lands, and second, that no objections were made or exceptions preserved.

2. The next ground urged for reversal is that the case was submitted to a jury of less than twelve qualified jurors, and that the verdict was signed by the foreman only. There is no merit in this contention, because the record reflects that the submission to a jury of less than twelve was by consent, and the presumption is that where a verdict is signed only by the foreman it is the verdict of all the jurors. Provision is made by § 1299 of Crawford & Moses' Digest for the removal of any doubt as to the unanimity of the verdict by the requiring, on the request of either party, a poll of the jury. If any juror disagrees, provision is made (§ 1300, *ib.*) for further deliberation by the jury, and, when neither party requires the jury to be polled, the verdict is complete and final. If, on a poll of the jury, it appeared that the verdict was not the verdict of all the jurors, then Amendment No. 16 to art. 2, § 7 of the Constitution, invoked by the appellant, would be applicable and the jurors consenting to the verdict, where they were less than twelve, would be required to sign their names. The record reflects that no request for a poll was made, and it must be presumed that the verdict was unanimous and the signatures of the jurors, therefore, were not required. *Browne* v. *Dugan,* 189 Ark. 551, 74 S. W. (2d) 640.

3 and 4. It is contended that the evidence is not legally sufficient to support the verdict, and, if there was legal evidence the verdict is excessive. These conten-

tions are based to a large extent on the contention that improper evidence was permitted to go to the jury and that the court failed to give proper instructions as to the measure of damages.

It is insisted also that the testimony of the appellees and their witnesses as to the acreage actually taken in the construction and widening of the highway is demonstrably false, and we are asked to take judicial notice of the accuracy of certain calculations submitted by counsel for appellant. On this proposition all that need be said is that plats were introduced in evidence, appellees and their witnesses testified regarding the acreage actually taken, and appellant did not see fit on the trial of the case to dispute this testimony. The estimates made by the witnesses may have been inaccurate, but it was certainly appellant's duty to disclose this at the trial of the case. It is too late to bring this first into question on appeal. Likewise, as to the evidence complained of and the instructions given by the court, on the trial no objection was made or exceptions saved to any of these questions. These observations dispose of all the questions presented except the sufficiency of the testimony. It requires the citation of no authority to support this view, for it is a rule well settled by the text writers and decisions of the courts of almost universal application, that questions, of whatever nature, not raised and properly preserved for review in the trial court, cannot be considered on appeal.

Appellant concedes this rule, but advances the novel theory that it has no application in suits where counties are parties litigant, particularly where a county is acting to enforce a public right or protect a public interest. In support of this contention we are cited to the case of *Gordon* v. *Camden Curb & Gutter District,* 172 Ark. 94, 287 S. W. 761. We have carefully examined this case and find that it contains no reference to the rule we have stated. The other cases cited simply announce the well-established principle that the sovereign, proceeding to enforce a public right or to assert a public interest, is not precluded by any laches of its officers or bound by any statute of limitations, unless it has clearly manifested

its intention to be so bound. *United States* v. *Mack,* 295 U. S. 48, 55 S. Ct. 813, 79 L. Ed. 1559, Annotation 61 A. L. R. 412; *Gordon* v. *Camden Curb & Gutter District, supra; Cooke* v. *United States,* 91 U. S. 389; 23 L. Ed. 237; *Reinecke* v. *General Combustion Company,* 237 Ill. App. 404. This principle is not involved in the instant proceeding, but here the county appears as a party litigant and is bound by the same rules of practice as any one else. The same rules of evidence obtain, the same methods are provided by which it may advise the court of an objection to any ruling or declaration of law, and the same methods for the preservation of those objections so they may be presented to the appellate court for review.

There were six different proceedings by as many land owners which were consolidated by the court for purposes of trial, and, in the absence of objections to the testimony and the instructions given, we think the evidence sufficient to support the award of damages fixed by the trial courts. The springs which supplied some of the farms with water were destroyed or greatly injured, and this appears to have been a necessary consequence to the construction of the highway no matter how carefully the work was done; at least, there is no testimony to the contrary. The highway divided some of the farms into small patches making cultivation extremely difficult; standing timber and fruit trees were destroyed; fences of some of the claimants were destroyed and the farms and homes generally, injured for the purposes for which they were used or intended to be used. Taking all these elements into consideration, we think the evidence is sufficient to show the damage to the market value of the properties in the sums fixed by the jury.

It is lastly insisted that the judgment ordering payment of the awards for damages out of the county turnback fund is an unlawful diversion of said fund in that it gives priority to the judgments of the appellees over warrants previously issued against the fund and registered with the county treasurer.

A sufficient answer to this contention is that it is made for the first time in this court. No objection was

made nor exception saved to this part of the judgment of the trial court nor was it preserved in the motion for a new trial. Subsequently, on a petition for writ of mandamus, the court found in effect that an allotment of approximately $1,200 had been made by the State Highway Department to Montgomery county as the "turn-back fund" and that said sum would soon be paid to its treasurer. The court further found that the warrants previously issued on the "turn-back fund" were based on claims for supplies, materials and labor, and that none of said warrants were for claims for right-of-way on any State highway project in Montgomery county. The court further declared that the judgments in favor of the appellees constituted a prior lien on the "turn-back fund," and as such had preference and priority over other claims of a contractual nature. No motion for a new trial was filed, no objection to this last order of the court was preserved, and, therefore, neither order of the court relating to the fund out of which payment of the judgments should be made can be reviewed by this court.

It follows that the judgments must be affirmed, and it is so ordered.

[redacted]

ARKANSAS STATE HIGHWAY COMMISSION *v.* WISEMAN, COMMISSIONER.

4-4394

Opinion delivered June 15, 1936.

[redacted]

Neill Bohlinger, for appellant.

Carl E. Bailey, Attorney General, and *Thomas Fitzhugh,* Assistant, for appellee.

BAKER, J. The appellant filed its complaint in the Pulaski Chancery Court to enjoin the appellee from collecting a sales tax on commodities bought by the Highway Department. In the beginning, the purpose of the suit was to obtain credit for severance tax laid and collected upon these same commodities, but that phase of the suit has been abandoned by appellant upon the theory that Arkansas State Highway Commission is a branch or arm of the State government and that as such the tax should not be imposed for the reason the ultimate result is "that of taking money from one pocket and putting it in another"

The Emergency Sales Tax Act No. 233 of the Acts of 1935 imposes the 2 per cent. tax on sales made, the exemptions from the act being set forth in sections 15 and 16, 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 or license is already collected. In this case the 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.

"Section 16. Deduction. A governmental agency may apply to the Commissioner for refund of the amount of tax levied and paid upon sales to it for food-stuffs

used for free distribution to the poor and needy or to public penal and eleemosynary institutions."

It is conceded that there is no express exemption of the appellant or other agency of the State from the effect of the act, and it is also conceded that it is within the power of the State to impose the sales tax on such commodities as might be purchased by such agencies to the same extent and effect as upon any individual.

In determining the intent or will of the Legislature it will not be necessary to argue either of the foregoing propositions, as we agree that the tax may be imposed although one of the agencies of the State must pay the tax, and also if there be an exemption from payment of the tax such exemption must arise by interpretation and by reason of public policy.

The argument is highly persuasive that it was not the intention of the Legislature that the Highway Commission should pay sales taxes, as that organization is merely a State agency. *Arkansas State Highway Commission* v. *Nelson Bros.*, 191 Ark. 629, 87 S. W. (2d) 394. Therefore, the State is merely collecting a tax from itself for paying a tax to itself. Such was the holding of the Supreme Court of Missouri—that it is unnecessary and, therefore, not enforceable. *State* v. *Smith,* (Mo.) 90 S. W. (2d) 405.

The similarity of the Missouri case to the case under consideration is very striking. Both are emergency measures limited in duration, designed for the same kind of relief. If we may judge from the opinion there was nothing in the statute itself that required or impelled the court's conclusion that the agencies of the State would be exempt from the sales tax, but the court argued that the sales tax should not be treated as a component part of the purchase price, and, since the appropriation acts did not provide a fund to pay such taxes, it was necessarily implied that such agencies were exempt.

The Kentucky Supreme Court in a comparatively recent case held that the Welfare Department of the city of Covington was not subject to the payment of the tax because expressly excepted or exempted by the statute, but other sales to the municipalities except those so ex-

pressly exempted must pay the sales tax. *City of Covington* v. *State Tax Commission,* 257 Ky. 84, 77 S. W. (2d) 386. The logic of the Kentucky case is like that in the case of *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182. We there said: "Therefore, it was the clear intent of the Legislature, when these various provisions are considered together, from the language used, to tax all motor vehicle fuel sold or used in this State, regardless of the purpose to which it is put."

Again another State agency, Pulaski County, felt aggrieved that the county's motor vehicles were not tagged free of charge or license tax by the State, and by suit sought to evade such tax. It was there argued, as in this case, that there was an implied exemption. But this court held that since there was no legislative exemption, there should not be any by judicial interpretation. *Blackwood* v. *Sibeck,* 180 Ark. 815, 23 S. W. (2d) 259.

It must be observed that if the matter were one of interpretation aided only by abstract principles of government, our court has followed the same lines of reasoning as actuated the Supreme Court of Kentucky, and these decisions had already been rendered when act No. 233 was approved.

Moreover, said act No. 233, in § 16, quoted above, indicated pretty clearly what was in the legislative mind. That is, all State agencies should pay sales taxes and only that most favored agency of the State, the one dispensing charity to the helpless, could secure a refund of the tax by it paid. Certainly, if any agency of the State could be deemed by interpretation exempt from the sales tax it must be that agency to which the taxes collected will be refunded. This is the only form of exemption not common to every one the act recognizes.

Let it be sufficient to say the act provides that certain articles or commodities may be sold free of tax. All other commodities are taxed and the tax, as regards the purchaser, is incorporated in the price of sale as much as the transportation charges or the dealer's profit. It is only more easily identified and necessarily is this true. There is no exempt class of purchasers. None was intended.

The debilitating and corrupting evils of special exemptions and "free service" have been avoided most scrupulously.

The decree is affirmed.

TEMPLE COTTON OIL COMPANY *v.* BROWN.

4-4138

Opinion delivered June 22, 1936.

Dwight Crawford, Shaver, Shaver & Williams, Owens & Ehrman and *E. L. McHaney, Jr.,* for appellant.

J. H. Lookadoo and *Sam T. & Tom Poe,* for appellee.

HUMPHREYS, J. This is a suit brought by appellee against appellant in the circuit court of Clark county to recover damages for personal injuries received by him in the performance of his duties as an employee of appellant, through the alleged negligence of appellant in failing to furnish him a reasonably safe place to work. The particular acts of negligence alleged consisted in a failure to provide a toe board, rail or guard of some kind to prevent a hand truck, being used to off-bear cotton seed hulls, from falling off a runway about three feet wide, used to convey cotton seed hulls to a point where they were dropped to the floor below to be stacked; and in allowing the truck to be used or operated by two boys, the sons of Newt Hudgens, who was in the employ of appellant.

Appellant filed an answer denying the allegations of negligence and interposing the defenses of assumed risk, contributory negligence, and an efficient intervening cause that resulted in the injury.

The cause was submitted to the jury on the evidence adduced, and instructions of the court, which resulted in a verdict and consequent judgment in favor of appellee for $15,000, from which is this appeal.

The undisputed facts reflected by the record are as follows:

At the time of receiving his injuries, appellee was employed by appellant at its cotton oil plant in Ashdown. He was working as a day laborer at $1.25 per day in the hull room, which was 125 feet long and 80 feet wide. The roof was 50 feet above the floor. Cotton seed hulls were conveyed into this room from another part of the mill to be sacked and stored. There was a platform 20 feet square and seventeen feet high in this room, where two hull packing machines were installed. A runway about three feet wide extended from this platform almost the length of the hull room, which has a fall of 21 inches the first twenty-one feet, and is then level to the end thereof, at which point a stairway extends to the concrete floor of the hull room. When the plant was in operation, hulls would be conveyed to the platform and there sacked and placed on a two-wheeled hand truck weighing 120 pounds, which was pushed along the runway by the off-bearer to such point as desired to unload the sacks and drop them to the concrete floor, which is about sixteen or seventeen feet below the runway, for the purpose of stacking and storing them. On September 27, 1933, about seven o'clock p. m., appellee, who was off-bearer on one of the shifts, went down to the lower floor to stack the sacks of hulls he had conveyed along the runway on the truck and dropped down on the floor during the afternoon, and while engaged in stacking them, the truck, being pushed by two boys on the runway, ran off and fell for a distance of about seventeen feet on appellee. He did not know the boys were up on the runway or platform or that they were operating the truck. The truck fell on appellee's head, fracturing his

skull, and injuring his brain. The bone on the right side of his head, three inches in length and an inch wide, was removed. The brain bulges out of this hole against the membrane and skin or scalp. His brain also bulges out of the hole in the skull at the site of the injury against the membrane and skin. The pulsations of his heart are visible at this place. In addition to the pain and suffering endured by him at the time of the injury, and during the period of recovery, he suffers from dizziness and nausea at times, and the vision of his right eye is impaired. Appellee was 31 years of age, and had an expectancy of 36 years at the time he received his injuries. He was strong and healthy and was earning $1.25 a day.

The record reflects a sharp conflict in the testimony as to whether there was a toe board or rail on the side of the runway to prevent the truck from falling off when being operated, and whether appellee assumed the risk.

It is apparent from the facts detailed above that the injuries were the result of the concurrent acts of appellant in failing to maintain a toe board or rail on the runway, and of the boys pushing the truck down the runway. If the boys had not pushed the truck down the runway, it would not have fallen and struck appellee, and, although they did this, the truck would not have fallen off had toe boards or rails been on the side of the runway to support and prevent it from falling on him. The two concurring acts were, therefore, the proximate cause of the injury. The party responsible for either of the concurring acts of negligence is liable unless the accident would have happened without his concurring act of negligence. This is the rule announced by this court in the case of *Phillips Petroleum Co.* v. *Berry,* 188 Ark. 431, 65 S. W. (2d) 533. Syllabus six of this opinion reads as follows: "Where several causes combine to produce an injury, one is not relieved from liability because he is responsible for only one of these causes, if, without his negligent act, the injury would not have occurred."

The instant case is ruled by the case referred to. In view of the rule announced in the case cited, instruc-

tion No. 1 requested by appellee and given by the court is correct. Said instruction is as follows:

"If you find from a preponderance of the evidence that plaintiff, Willie Brown, while working for defendant, Temple Cotton Oil Company, and stacking sacks of cotton seed hulls in the hull room of defendant's Ashdown mill, was injured by a truck falling on him, without fault on his own part, and while exercising ordinary care for his own safety; and if you also find from a preponderance of the evidence that defendant, Temple Cotton Oil Company, negligently failed to have a board, or rail or other guard, along the side of the floor of the runway from which the truck fell, and that such negligence of defendant, if any, was the proximate cause of the injury of plaintiff, if any, then you are instructed to find for the plaintiff unless you should further find that plaintiff assumed the risk."

The issues of whether appellant negligently failed to maintain a toe board or railing on the side of the runway and whether appellee assumed the risk were submitted to the jury under proper instructions, and appellant is bound by the adverse finding of the jury on those issues.

Under this view of the case, it is immaterial whether Newt Hudgens, the father of the boys, was a fellow-servant of appellee or a foreman for appellant. There is no evidence in the case tending to show appellee was guilty of contributory negligence, so that defense was or is eliminated.

The only remaining question in the case is whether the judgment is excessive. A majority of the court are of opinion that the question was properly raised, and that the verdict is excessive. The court is of opinion that in view of appellee's small earning capacity, and that he is not permanently disabled that the verdict should be reduced to $7,500. The writer does not concur in this view.

The judgment is therefore reduced to $7,500, and, as modified, is affirmed.

MARKS *v.* STATE.

Crim. 3992

Opinion delivered June 22, 1936.

McDaniel, McCray & Crow, for appellant.

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

JOHNSON, C. J. Appellant, Mrs. William Marks, was indicted for the crime of assault with intent to kill alleged to have been committed by shooting Pauline Daugherty with a pistol. She was convicted and has been sentenced to a term of ten years in the penitentiary. The prosecuting witness is a young woman 19 years of age at the time of the trial.

Appellant is 42 years old. These women were neighbors residing on adjacent lots, and were bitterly hostile to each other. Mrs. Daugherty testified that she saw Mrs. Marks go across the road to her mail box when she also went across the road to speak to Mrs. Marks, who without warning or provocation began shooting at her, firing twice. She was struck by one of these shots and painfully wounded. Under correct instructions, the jury found that Mrs. Marks had committed an assault with intent to kill, and the testimony is sufficient to sustain that finding.

A reversal is asked because appellant was placed upon trial at a time when her physical condition made this perilous to her life and prevented her from properly presenting her defense. The trial judge remarked that he had a reputable doctor examine Mrs. Marks who had

reported that she had no physical ailments that would prevent her trial from proceeding. This physician's report is not in the record, nor is their any testimony relating thereto, but neither is there any testimony in the record to the contrary.

Mrs. Marks testified at length in her own behalf, and nothing appears in the record to show an abuse of the discretion which trial courts must exercise in this and in similar matters.

At the conclusion of the State's evidence Mrs. Hogue who had been duly subpoenaed was called as a witness. She was not then present, and appellant objected to proceeding until Mrs. Hogue was first placed upon the stand. The judge ordered the trial to proceed, and remarked that Mrs. Hogue would be brought into court, if she had to be brought in on a stretcher. Mrs. Hogue later appeared and testified, but after other witnesses had been placed on the stand.

Clearly, there was no error in the court's ruling, in refusing to delay the trial for the absent witness, when other witnesses were present who could be and were called. A large discretion is vested in trial judges as to the time of introducing testimony and reversals will not be ordered unless it is shown that this discretion has been abused to the prejudice of the objecting party. No prejudice appears to have resulted from the refusal to delay the trial until Mrs. Hogue should appear. The remark of the court that she would be brought in on a stretcher, if necessary, appears to have been more emphatic than the occasion required, but it can not be said that this was prejudicial error calling for the reversal of the judgment.

Instructions were asked, which have been held proper to be given, where the prosecution relies upon circumstantial evidence for a conviction; but they were properly refused in this case as the prosecution did not rely on circumstantial evidence, and the jury was properly instructed as to the law relating to the existence of a reasonable doubt of the guilt of the accused.

We are of the opinion, however, that the sentence is excessive. The remarks of the trial judge in imposing

sentence indicates that he was of the same opinion, although he ordered no reduction, as he might have done.

Mrs. Daugherty testified that immediately before she was shot appellant fired her pistol. Appellant admitted doing so, but stated that she shot at a hawk in her own yard. It is not contended that appellant fired this shot at Mrs. Daugherty. There was testimony to the effect that Mrs. Daugherty had said she was going to beat the hell out of the appellant, and this threat had been communicated to Mrs. Marks. Mrs. Daugherty denied making the threat. Mrs. Daugherty saw Mrs. Marks going across the road to her mail box. She testified that Mrs. Marks had been telling some terrible things about her which she wanted cleared up. "I had gone far enough." Mrs. Marks got a letter out of her box which she was reading when Mrs. Daugherty approached. Mrs. Daugherty admitted that Mrs. Marks told her to stop when she saw her approaching, but she did not do so as her intentions were peaceable, and she only wanted to clear up the gossip. She admitted that she struck Mrs. Marks, whose eye was blackened by the blow, but stated that she did not do so until she had been shot. Mrs. Marks testified that she saw Mrs. Daugherty angrily approaching with something in her hand, which she now thinks was a rock; and that Mrs. Daugherty struck her with this object, whereupon they clashed and fell to the ground, and she fired the pistol. Mrs. Louella Garrett, a neighbor, being in the house adjacent to that of Mrs. Marks, testified that she was standing at a window and through it she saw the encounter; the women were on the ground when the shots were fired, and that Mrs. Marks did not fire until Mr. Daugherty, Mrs. Daugherty's father-in-law, began beating Mrs. Marks over the head with his cane.

Mrs. Hogue gave testimony to the same effect. This testimony was contradicted by Mrs. Daugherty and this conflict in the testimony was, of course, a question for the jury. But there are some facts about which there is no conflict. Mrs. Daugherty followed Mrs. Marks across the road where she had gone to get her mail. There can be no question that Mrs. Daugherty was belligerent in manner. She admitted that Mrs. Marks asked her to

stop, and that she did not do so. She intercepted Mrs. Marks as she was going home reading her letter, and she was between Mrs. Marks and Mrs. Marks home when the encounter began.

Mr. Daugherty testified that he saw Mrs. Marks fire her pistol, but he did not see any hawk. He heard her say "Pauline don't come another step closer to me, I will kill you if you come any closer," and the shots were fired before the women clinched and fell. When they fell he walked up and began striking Mrs. Marks over the head with his cane, and also struck her with his fist. Mrs. Marks testified that she was so excited and frightened that she does not remember when or how she fired.

Under these circumstances, while the testimony is legally sufficient to sustain the conviction for assault with intent to kill, we are of the opinion that the sentence is excessive and should be reduced to the minimum punishment provided by statute, namely, one year, and it will be so ordered. *Ball* v. *State, ante* p. 858, 95 S. W. (2d) 632.

[redacted]

REID *v.* WOODS

4-4320

Opinion delivered June 22, 1936.

[redacted]

Fred M. Pickens, for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

SMITH, J. Appellee Woods recovered a judgment against W. A. Eldred and Lee Reid, from which only Reid has appealed, to compensate an injury, which appellee sustained, resulting from a collision of an automobile in which he was riding with another car owned by Reid, but being driven by Eldred. For the reversal of this judgment only one error is assigned and argued; and that is that the testimony does not show that Eldred, at the time of the collision, was the agent of Reid, or that Eldred was acting within the scope of his agency.

The testimony stated in the light most favorable to plaintiff, appellee, is to the following effect. Reid is the sheriff of Jackson county, and his duties as such required him to make a trip to Hattiesburg, Mississippi, to pick up a prisoner at that place. Reid took Eldred with him on long trips to help drive, as Eldred was a good driver. It is not usual for one man to go anywhere alone after a prisoner; and Eldred was carried along to drive.

Reid visited Woods in the hospital after the collision, and stated to him that Eldred was a deputy; and that he and Eldred were on their way to Mississippi to get a prisoner, and that he carried Eldred with him to look after the car.

Reid, accompanied by Eldred, drove the car from Newport to Little Rock, a distance of 90 miles, where they arrived about 9 a. m. Reid was in Little Rock to testify before the Federal Grand Jury, and to attend to some other business. Eldred borrowed the car to go out to his sisters for dinner. It was agreed that Reid and Eldred would meet again at 8 a. m., the following day and resume their journey, a distance of 400 miles from Little Rock. With this understanding Eldred drove away in the car at 5:30 p. m., to his sister's home. This was purely a social visit with which Reid had no concern. After borrowing the car, for the purpose of making this visit, Eldred drove it to the home of his sister who told him that their brother, a city fireman, had a poisoned hand. They went for this brother and brought him to their sister's home. After dinner Eldred was driving his brother back to the fire station, where he was em-

ployed, and while on the way there the collision occurred in which appellee was injured.

The agency of Eldred as Reid's chauffeur ceased at 5:30 p. m., and had not been resumed when the collision occurred. The effect of the undisputed testimony is to establish the fact that Reid had loaned his car to Eldred to use for a purpose having no relation to his agency, to make a social visit, with which Reid had no concern.

In 5, Blashfield's Cyc. of Automobile Law, a section numbered 3025 entitled "Loan of Automobile to Servant," extending from page 165 to page 170, states the law to be that "Under the general rule a loan of a machine does not carry with it responsibility for the negligence of the borrower, where a servant, while not engaged in the master's business, and during a time when he is free to engage in his own pursuits, uses the master's automobile for his own purpose, and while so using it negligently injures another by its operation, the master is not liable, no statute so prescribing, although such use is with the knowledge and consent of the master."

If this is a correct statement of the law, there can be no recovery against Reid. That it is a correct statement of the law appears from the numerous cases cited in the note to the text quoted.

We have a number of automobile cases which support the principle of law upon which the quoted statement is based. Among others, the following: *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229; *Volentine* v. *Wyatt,* 164 Ark. 172, 261 S. W. 308; *Bizzell* v. *Hamiter,* 168 Ark. 476, 270 S. W. 602; *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595; *Campbell Baking Co.* v. *Clark,* 175 Ark. 899, 1 S. W. (2d) 35; *Keller* v. *White,* 173 Ark. 885, 293 S. W. 1017; *Hunter* v. *First State Bank,* 181 Ark. 907, 28 S. W. (2d) 712; *Southwestern Bell Telephone Co.* v. *Roberts,* 182 Ark. 211, 31 S. W. (2d) 302; *Mullins* v. *Ritchie Gro. Co.,* 183 Ark. 218, 35 S. W. (2d) 1010; *Casteel* v. *Yantis-Harper Tire Co.,* 183 Ark. 475 and 912, 36 S. W. (2d) 406, 39 S. W. (2d) 306; *Featherston* v. *Jackson,* 183 Ark. 373, 36 S. W. (2d) 405; *Ricks* v. *Sanderson,* 185 Ark.

828, 49 S. W. (2d) 604; *Richards* v. *McCall,* 187 Ark. 61, 58 S. W. (2d) 432.

We conclude, therefore, that Reid was not responsible for Eldred's negligent driving of the borrowed automobile, which was being used for a private and personal purpose having no relation to Eldred's agency; and, as the case has been fully developed, it must be dismissed, and it is so ordered.

CHICAGO R. I. & P. RY. CO., LOWDEN, TRUSTEE *v.* SCOTT, ADMR.

4-4326

Opinion delivered June 22, 1936.

Thos. S. Buzbee, H. T. Harrison and *A. S. Buzbee,* for appellants.

Lawrence E. Wilson, for appellee.

MEHAFFY, J. This suit was begun in the Ouachita Circuit Court by the appellee, administrator of the estate of Sam Woods, deceased, to recover damages for the death of Sam Woods, who was alleged to have been killed by the negligence of the appellants. The appellee alleged that Woods was a passenger on a mixed train from Craney, Arkansas, to Crossett, Arkansas.

It was alleged that as a passenger he was directed to ride in an empty box car; that after the train proceeded, and upon its arrival at Hermitage, the train did some switching, and thereafter the mangled and mutilated body of Sam Woods was found upon the switch track.

There was a jury trial, and a verdict and judgment against appellants in the sum of $500. Motion for new trial was overruled, and the case is here on appeal.

Letters of administration upon the estate of Sam Woods were introduced, and Bertha Woods testified in substance as follows: She lived at Harrell, Arkansas, and her husband's name was Sam Woods; they had two children, nine and seven years of age; Sam Woods left home the fifth day of February; he was found on the sixth at Hermitage; Sam was going to Crossett, and on the fifth of February left home to go to his cousin's Crola Strong, at Craney, and from there to Crossett; it was about nine miles to Craney; Sam had one dollar; she identified the clothes that Sam had on at the time he was found.

Levi Ellerson testified in substance that he lived at Hermitage, knew Sam Woods about ten years before his death; he saw Sam Woods body on the morning of February 6, 1935, lying on the passing track on the rail at Hermitage; he stopped and looked at Sam and went on to his work; Sam was dead; there were some cars on the passing track, and Sam's body was between two of the cars; there were other people there, but he did not know who they were; there was a highway through there, and Sam was lying north of the highway; between the highway and the station; he was on the outside rail from the main line.

Jesse Paynix testified in substance that he saw the body of Sam Woods on the morning of February 6; he was dead; there were some box cars on the side track; did not know how many, north of the highway that goes through Hermitage; something like three or four cars between his body and the highway; he was lying between two cars on the outside rail from the main track.

Alex W. Williams testified that he stayed all night at Crola Strong's, and met Sam Woods there; Sam

slept with him that night; Sam told him he was going to Crossett, and left early next morning; the train was out there when Sam got up; he did not know what became of Sam after he left the room; the train got there before Sam got up, and had started moving off when Sam left the house; there was a water tank at Craney, and the train stopped to take water; Crola Strong woke Sam up, and about the time he got ready to leave the house the train was moving off; he heard about his being dead the next evening.

Lena Strong, wife of Crola Strong, testified that Sam Woods spent the night at their house the night before he was found dead the next morning; did not know what time Sam left, but before day; the train was at Craney before Sam left the house; was starting off when he left. Her husband told Sam when he left to be careful; they heard nothing more from him until they heard he was dead.

Robert W. Meeks, the engineer, testified that between 5:30 and 5 o'clock they got to Hermitage; Hermitage is about six miles from Craney; he did not see or know of anybody getting on the train at Craney; they did some switching, and while they were doing that he was keeping a lookout; saw nobody on the track, and did not run over anybody that night.

R. C. Russell, an employee of the Rock Island, was on the local freight at the time when Sam Woods body was found; it was a little after five o'clock when they passed Hermitage; about twenty before that they had been at Craney; they took water at Craney. This witness, as conductor, was in charge of the train. They carried a big steel coach for passengers, but carried a caboose in addition to that; they did not take any passengers at Craney; did not see anybody board the train at Craney; when they got to Hermitage they did some switching, and witness had told one of his brakeman to stay in the caboose. He saw nobody at Hermitage, except the trainmen; he first found out that this boy was dead when they got to Crossett; it was his duty to make a report showing the passengers he had, and this report shows that he took on the first passenger at Hermitage.

He saw the body of Sam Woods, and it was not mangled; he was dead. This witness would not say as to how or when Sam Woods was killed.

The conductor's report was introduced in evidence.

H. W. Holdridge, a brakeman on the train, testified that he got out on the ground at Craney, but did not see anybody board the train.

Edgar Bryant, Saul Crime and W. Warren, employees of the appellant, all testified, and in substance their testimony is the same as that of the other employees of the appellant, and Warren testified that the body was not mangled.

This suit was brought and the case tried on the theory that Sam Woods was a passenger on the train; that he boarded the train at Craney. There is, however, no evidence that he boarded the train at Craney. The evidence is to the effect that the train was starting when he left the house of Strong, and he left intending to get on the train. It is shown that he had a dollar in his pocket with which to pay his fare; but the undisputed evidence is that he did not board the train as a passenger. The evidence does not show whether the dollar was in his pocket when the body was found.

There is but one question argued by appellants, and that is that the testimony was not sufficient to justify the submission of the case to the jury, and that the jury should have been directed to return a verdict in appellant's favor. Under the statute and decisions of this court, if an injury is shown by the evidence to have been caused by the running of the train, a presumption arises that the injury was caused by the negligence of the railroad company. Before this presumption can be indulged, however, there must be some evidence that the injury was caused by the operation of the train. There is no evidence in this case that there were any bruises or wounds found on the body. It is true that the appellee introduced the clothing worn by Sam Woods, and it was torn; but if Woods had been killed by the operation of a train, there would certainly have been some evidence that the train struck him.

The statute reads as follows: "All railroads which are now or may hereafter be built and operated in whole or in part in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State." Crawford & Moses' Digest, § 8562.

The only evidence is that Sam Woods' body was found on the track. There is no evidence that he was killed by the train, and in order to hold the railroad company liable, under this statute, the evidence must show that the damages were done or caused by the running of a train. Woods might have died from any one of a number of causes. No one knows how he died.

This court has said: "It is true that no eye witness testified about the injury to the deceased, the railroad company not introducing any testimony of the operatives of its train, but the testimony adduced shows that the body of deceased was found upon the right-of-way, and within a few feet of the track of appellant with the skull crushed in such a manner as would have been the result had he have been struck by certain parts of the engine (the cylinder head or monkey-motion outside the drivers) of the train, and his shoulder likewise broken and crushed with black oil smeared upon the hair and the clothing on the shoulder, the kind of oil used in the operation of the engines of appellant, which would have brushed off the machinery when it had come in contact with the body of deceased. The jury could have found from these facts established, and the reasonable and probable inference therefrom that deceased was struck and killed by the train." *St. Louis-S. F. Ry. Co.* v. *Crick,* 182 Ark. 312, 32 S. W. (2d) 815; *Missouri P. Rd. Co.* v. *Crew,* 187 Ark. 752, 62 S. W. (2d) 25.

We also said: "Before the jury would have been justified in finding for the appellee, it must have found as a fact that the dog was killed by the train. The evidence must have shown this. It was not necessary to show by direct evidence, but the fact might be shown by circumstantial evidence." *Missouri P. Rd. Co.* v. *Hull,* 182 Ark. 873, 33 S. W. (2d) 406; *Missouri P. Rd. Co.* v. *Foltz,* 182 Ark. 941, 33 S. W. (2d) 51.

"When the evidence shows that the injury was caused by the operation of a train, the presumption is that the company operating the train was guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence." *Baldwin* v. *Clark*, 189 Ark. 1140, 76 S. W. (2d) 967; *St. Louis S. W. Ry. Co.* v. *Vaughan*, 180 Ark. 559, 21 S. W. (2d) 971; *Kelly* v. *DeQueen & Eastern Rd. Co.*, 174 Ark. 1000, 298 S. W. 347.

All of our cases hold that to recover against a railroad company, it is necessary to show by evidence, either direct or circumstantial, that the injury was caused by the operation of a train, and in this case there is no evidence from which the jury could have found that Woods was killed by the running of a train.

The trial court should, therefore, have directed a verdict in favor of appellants.

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

STREET IMPROVEMENT DISTRICT NO. 74, BROWNING ET AL., COMMRS. *v.* REFUNDING BOARD OF ARKANSAS.

4-4404

Opinion delivered June 22, 1936.

Murphy & Wood and *Robert L. Rogers, II,* for appellant.

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

MCHANEY, J. Appellant, Street Improvement District No. 74, of the city of Hot Springs is a municipal improvement district created by ordinance of said city, and the individual appellants are its board of improve-

ment. Said district was created for the purpose of grading, draining, curbing, guttering and paving Hobson Avenue in said city from Central Avenue to Summer Street, Summer Street from Hobson to Albert Pike Road, and the latter from Summer to the west boundary line of the city. It constructed said improvements in 1925. In 1927 the State Highway Commission designated the following portions of streets improved by said district as a part of State highways: Hobson Avenue and Third Street to Summer Street, the latter from Hobson to Albert Pike Road, and the last from Summer Street to the west city limits, as a part or continuation of State highway No. 70, and also as a part or continuation of State highway No. 6 (now No. 270).

Acting pursuant to the provisions of act 85 of the Acts of 1931, the Highway Commission issued and delivered to said district certificates of indebtedness as follows: No. ..... for $2,177.62 due October 15, 1931, which was paid; No. 2 for $2,073.08 due October 15, 1932; and No. 3 for $1,335 due October 15, 1933. Nos. 2 and 3 have not been paid. Appellants presented said unpaid certificates of indebtedness to appellee for refunding under the provisions of act No. 11 of 1934, and a resolution was adopted to refund them. Later, however, appellee rescinded its order to refund same, and now refuses to do so.

This action was instituted to compel by mandamus the issuance of refunding certificates of indebtedness to take up said two certificates of indebtedness outstanding. To a complaint alleging the above facts, and an amendment thereto alleging that the board had refunded other certificates of indebtedness, and, although it is the express duty of the board so to do, it has arbitrarily refused to refund same, a demurrer was interposed and sustained. Upon appellants' declining to plead further, their complaint was dismissed, and this appeal followed.

It is conceded that appellee has the power and authority to refund these obligations. Sub-section (d) of § 2, §§ 11 and 12 of said act No. 11 of the Acts of 1934 so provide. The question is: Has the board any discretion in the premises, or is it a mere ministerial duty

which may be controlled by mandamus? Section 12 of said act 11 reads in part as follows: "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 § 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."

It will be noticed that the language is: "Refunding certificates of indebtedness are hereby authorized to be issued," etc. This is language conferring power, but not imposing an absolute duty. Discretion is involved in determining its duty, and mandamus will not lie to compel the performance of a discretionary duty. We so held in the recent case of *Refunding Board of Arkansas* v. *National Refining Co.*, 191 Ark. 1080, 89 S. W. (2d) 917. We there said: "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." Citing cases. In that case, § 15 of act 11 was involved, and, for this reason, appellants attempt to distinguish it from this, since their reliance is based on § 12. While § 15 refers to a different subject-matter, it confers authority to refund in substantially the same language: "The refunding board is hereby authorized," etc. So it appears to us that the attempted distinction is without merit, and that said case is conclusive of this. Some argument is made that the board acted arbitrarily in the matter, and that, even though it is vested with discretion, its action in refusing to refund these certificates is an arbitrary abuse of discretion. The amendment to the complaint alleging arbitrary ac-

tion is a mere conclusion of the pleader, and no facts are alleged to show arbitrary action. It is alleged that the board has refunded other certificates. Even so, it may have refused to refund others.

The trial court correctly sustained the demurrer, and its judgment is affirmed.

CLARK *v.* WOMACK.

4-4336

Opinion delivered June 29, 1936.

James D. Shaver and *Will Steel*, for appellants.

Bert B. Larey and *T. B. Vance*, for appellees.

HUMPHREYS, J. Appellants in this case are the heirs-at-law of R. H. Terry, deceased, and S. C. Clark, to whom they conveyed an oil lease on 120 acres of land in Miller county, and Clark's assigns.

The appellees are alleged owners of said tract of land under mesne conveyances thereof from R. H. Terry, deceased. Appellees instituted this suit in the chancery court of Miller county to cancel the gas and oil lease executed on July 2, 1935, by the heirs of R. H. Terry, deceased, to S. C. Clark, on said lands, which was duly

recorded on July 27, 1935, in the mortgage records of said county, and to quiet their title to said lands as against the lessors, as heirs-at-law of R. H. Terry, deceased, their lessee, S. C. Clark and his assigns.

The main and controlling issue joined by the pleadings in the case was whether a deed of trust or mortgage executed by R. H. Terry upon said lands on December 15, 1913, to Kelley Dixon and J. P. Yates to secure a loan of $362.25, evidenced by a note due in one year, was foreclosed in conformity to a power of sale contained in said mortgage so as to pass the title to P. E. Gold, the purchaser at the sale, who is one of the grantors in the chain of appellee's title.

This issue, together with other issues joined in the pleadings, was submitted to the court upon the evidence adduced by the respective parties, resulting in the following finding as to this issue: "* * * that the said R. H. Terry mortgaged the lands to the said Kelley Dixon and J. P. Yates to secure a sum of three hundred sixty-two ($362) dollars and interest; that he defaulted in said payment and that the said trustees fully complied with the law and the conditions contained in the deed of trust with regard to the sale of the land; and that P. E. Gold became the purchaser of the land for three hundred eighty ($380) dollars and received a deed from the said Dixon and Yates, which was duly filed for record in vol. '56,' p. 401, of the Deed Records of Miller county, Arkansas."

Other findings were made favorable to appellees which are unnecessary to set out, as this finding, if correct, justified the decree of the court canceling the gas and oil lease and quieting the title to said tract of land in appellees as against appellants, from which is this appeal.

Appellants admit in their brief that if the sale made by Dixon and Yates on December 26, 1914, upon which appellees predicate their title to said land, is valid, it is the end of the lawsuit. They then contend that the sale was void because, (a) there was no appraisement of the land, (b) that the trustees' deed from Kelley Dixon and P. E. Yates, executed December 26, 1914, affirmatively shows that the land sold for $362.50 (more than $350)

and that there was no publication of notice, as required by § 6807 of Crawford & Moses' Digest, and (c) the sale was made by a substituted trustee and not by Dixon and Yates, the trustees authorized in the mortgage to make the sale, when the mortgage provided that if made by a substituted trustee, the substitution must appear on the margin of the mortgage or by written authority, which was not done.

This sale was made twenty years or more before this suit was instituted, and all the more is the reason that the recitals of the deed executed by the trustees should be given credence. The mortgage, however, provides as follows: "And I authorize the said grantees to convey said property to any one purchasing at said sale, and to convey an absolute title thereto and the recitals of the deed of conveyance shall be taken as *prima facie* true."

(a) The trustees' deed recited that the land sold for $380, more than two-thirds of its appraised value. There is nothing in the record to show that the property was not appraised before the sale, so the recitals in the deed, under the terms of the mortgage, must be accepted as true. The recital that it sold for more than two-thirds of its appraised value necessarily implies that the appraisement was made before the sale. This court said, in the case of *McConnell* v. *Day*, 64 Ark. 464, 33 S. W. 731, that, "The burden of proving the invalidity of the trustee's deed reciting substantial compliance with the trust deed is on the person objecting thereto."

(b) There is nothing in § 6807 of Crawford & Moses' Digest evidencing an intention on the part of the Legislature in passing it to prohibit parties from contracting in regard to the manner of advertising property for sale in case of default in payment of the debt. The mortgage or deed of trust in the instant case provided that in case of default, the grantees might sell the land at public sale to satisfy the debt by notices posted in two public places in said county, and the deed made by the grantees under the mortgage recites that notice of the time, terms, and place were given by written notices posted in two public places in Miller county and

on said land. This recital in the deed must be accepted as true, there being no substantial evidence to the contrary.

(c) The contention of appellants that the substituted trustee made the sale without written authority or indorsement on the margin of the mortgage is without merit for the reason that there is no substantial evidence in the record to the effect that the substituted trustee made the sale. The deed recites that the sale was made by the trustees named in the mortgage. They executed and acknowledged the deed. One witness, Jim Davis, testified that the sale was made at the court house and that he thought it was made by A. G. Sanderson, but was not positive. This is not the character of evidence required to overcome the recitals in the deed, which the law recognizes as *prima facie* true.

No error appearing, the decree is affirmed.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD. *v.* MCDANIEL.

4-4330

Opinion delivered June 29, 1936.

Owens & Ehrman and *John M. Lofton, Jr.,* for appellant.

Jeff Bratton, for appellee.

JOHNSON, C. J. On November 1, 1931, appellant, Zurich General Accident & Liability Insurance Company, Ltd., issued to appellee, William T. McDaniel, its certificate of indemnity under a master policy theretofore issued to the Missouri Pacific Railroad Company where-

by its employees were indemnified as follows: against loss of life, the sum of $2,000; against loss of sight of both eyes, $2,000; and against loss of sight of one eye, $1,000.

On demand, premiums were paid by appellee on this certificate regularly up to the times hereinafter mentioned.

Appellee instituted this proceeding against appellant in the Greene Circuit Court to recover indemnity for the alleged loss of his left eye by accidental means in November, 1934. Appellant defended the suit on the theory that appellee lost the sight of his left eye in 1930, more than one year prior to the inception of the contractual obligations between appellee and appellant. Upon trial to a jury and under instructions, not here complained of, a verdict and consequent judgment were entered in favor of appellee, from which this appeal comes.

Appellant urges but one contention for reversal, namely: that the testimony is insufficient to support the jury's verdict.

The testimony adduced by the parties, when viewed in the light most favorable to appellee as we are required to do under repeated opinions of this court, is to the effect that on November 5, 1930, which was approximately one year prior to the inception of appellant's contractual obligation with appellee, appellee suffered an accident to his left eye which materially impaired his vision therein. Specifically in reference to the vision of his left eye subsequent to the injury in 1930, appellee testified as follows:

"* * * I had enough sight that I could distinguish light, could see to tell who my family was, in the house, with glasses, proper glasses over that eye, and no failing that I could tell until this accident in '34, November, '34, when I was struck with the plunger out of an air hammer * * *."

"Q. Up until then could you tell? A. I could tell who my family was, if I would meet anybody on the street I couldn't have told. Q. Could you have seen well enough to see your way? A. Oh, yes. Q. You mean to say it is

all gone now? A. Yes, sir, left eye. Q. And that same condition obtains today; you can't use your left eye with your work? The Court: In other words, what could you have done without right eye at that time? A. As I have stated before, I figure I could have got around and seen my way, and feed myself, but as far as doing work, I couldn't have done any shop work. Q. Then since you received the injury in the right eye, could you at any time have done anything if the right eye had been entirely out? A. Could not. Q. And would you have been what you might call totally blind? A. I figure so."

In reference to the injury for which appellee seeks compensation in this action, he testified that in November, 1934, he received an injury to his right eye by accidental means and that his left eye, out of sympathy with his right eye, became totally blind.

The pertinent inquiry then arises whether, under the undisputed facts, appellee suffered the loss of his left eye in 1930 or in 1934, when measured by the applicable rule of law in the law of insurance. In the recent case of *Locomotive Engineers Mutual Life & Accident Association* v. *Vandergriff, ante* p. 244, 91 S. W. (2d) 271, we had occasion to consider the rule in reference to the loss of sight in insurance law. There we stated the applicable rule as follows: "It is manifest, when we abandon sophistry and indulge in plain thinking, that where one has no practical use of his eyes he is blind, and the ordinary person having a policy such as the one in the instant case would think that he was insured against blindness—so he is. 'The ability to perceive light and objects but no ability to distinguish and recognize objects is not sight, but blindness.' "

The above pronouncement is supported by the great weight of American authority. *International Travelers Association* v. *Rogers,* (Tex.), 163 S. W. 421; *Watkins* v. *U. S. Casualty Co.,* 141 Tenn. 583, 214 S. W. 78; *Murray* v. *Ætna Life Ins. Co.,* 243 F. 285; *Pan American Life Ins. Co.* v. *Terrell,* 29 F. (2d) 460; *Travelers Prot. Ass'n* v. *Ward,* 97 Ind. App. 706, 187 N. E. 55; *Locomotive Engineers Mutual Life Ins. Co.* v. *Meeks,* 157 Miss. 97, 127

So. 699; *Continental Casualty Co.* v. *Linn,* 226 Ky. 328, 10 S. W. (2d) 1079; *Travelers Ins. Co.* v. *McInerney,* 119 S. W. 171; *Tracey* v. *Standard Acc. Ins. Co.,* 119 Me. 131, 109 Atl. 490, 9 A. L. R. 521.

Appellee's testimony, heretofore quoted, when measured by the rule of law just stated, demonstrates that he suffered the loss of sight in his left eye in November, 1930, and not in November, 1934. His testimony when given its full meaning and effect is that he lost the sight of his left eye for all useful and practical purposes prior to the inception of his certificate of insurance with appellant.

For the reasons stated the trial court erred in refusing to direct the jury to return a verdict in favor of appellant as requested.

The case having been fully developed, will be dismissed.

MANKEY *v.* STATE.

Cr. 3986

Opinion delivered June 22, 1936.

H. S. Grant, for appellant.

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

BUTLER, J. Appellant was indicted, tried and convicted for stealing a hog. The sole ground urged for reversal is that the verdict is not supported by substantial competent testimony. Briefly stated, the evidence

is to the effect that on a certain day in March, 1935, appellant sold a hog to J. O. Campbell and delivered it to him in his lot. When Campbell went to the lot the next morning, he discovered the hog was gone and saw a mark on the ground indicating that it had been dragged to the road and walked on its fore legs down it. A boy, Carl Simons, testified that the night the hog was stolen he was standing in front of a little restaurant when appellant came by with a hog, and asked witness to help him take it to his home. Appellant told him that the hog belonged to Campbell, and that witness should say nothing about its being in his possession. Witness went with appellant, driving the hog along the road, until they reached appellant's home where they put the hog in a small chicken house. On cross-examination, this witness testified in a manner from which his animus against the appellant might be inferred. It appeared, however, that this was created in his mind after he had testified before the grand jury and disclosed to that body the facts to which he testified on the trial of the case.

It is insisted that Simons was an accomplice of the appellant in the commission of the larceny, and that his testimony was not corroborated. We think the facts establish that relation to the appellant as to the commission of the crime. In *Murphy* v. *State,* 130 Ark. 353, 197 S. W. 585, the following definition of "accomplice" was adopted. "An accomplice in the full and generally accepted legal signification of the word is one who in any manner participates in the criminality of an act, whether he is considered in strict legal propriety as a principal in the first or second degree or merely as an accessory before or after the fact." Under § 3181 of Crawford & Moses' Digest, a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. The amount of corroborating evidence necessary, however, is a question for the jury. *Kennedy* v. *State,* 115 Ark. 480, 171 S. W. 878. If, therefore, there is any substantial evidence tending to connect the defendant with the commission of the crime, although it may be slight, it will be sufficient

to support the jury's verdict. *Townsend* v. *State,* 148 Ark. 573, 231 S. W. 1.

It was in evidence that the chicken house, said by Simons to be the place where the hog was taken and confined, was in a condition that made it insecure, and the day following the larceny the hog was discovered in a rice field, the location of which with respect to appellant's home not being disclosed by the evidence. It was further in evidence that on the night of the larceny two men were seen driving a hog along the road in the direction of appellant's home. The witness was unable to distinguish more than the general outlines of the two men, but stated they approximated the height of appellant and Simons. This corroborating evidence, while not altogether satisfactory and convincing, is sufficient under our decisions to warrant the submission of the case to the jury as to the sufficiency of the evidence to corroborate the testimony of Simons, the accomplice. The case must, therefore, be affirmed.

It is so ordered.

SOUTHWESTERN GREYHOUND LINES, INC. *v.* WISDOM.

4-4325

Opinion delivered June 29, 1936.

[redacted]

Buzbee, Harrison, Buzbee & Wright, for appellant.

Tom W. Campbell, for appellees.

HUMPHREYS, J. This is an appeal from judgments in favor of appellee, Mrs. W. J. Wisdom, for $2,000, and in favor of appellee, W. J. Wisdom, for $412.20 for damages sustained by appellees on account of a breach of a contract by appellant to transport Mrs. W. J. Wisdom on a bus line from Memphis, Tennessee, to Little Rock, Arkansas, over a smooth or hard-surfaced road on a schedule leaving Memphis at 7:45 p. m., and arriving in Little Rock at 11:59 p. m.

The alleged breach of the contract consisted in rerouting her at Memphis on her through ticket from Lawrenceburg, Tennessee, by way of Nashville and Memphis to Little Rock, which route was over a smooth or hard-surfaced highway and on a schedule leaving Memphis at 7:45 p. m., and arriving at Little Rock at 11:59 p. m., around by Stuttgart and Pine Bluff over a rough gravel road and on a schedule leaving Memphis about midnight and arriving in Little Rock at 8 o'clock the next morning.

Appellant contends the judgment should be reversed because it did not make a contract to transport Mrs. W. J. Wisdom from Memphis to Little Rock over a smooth or hard-surfaced road on a schedule leaving Memphis at 7:45 p. m., to arrive in Little Rock at 11:59 p. m. The evidence is in sharp conflict in this particular, the agent who sold the ticket swearing he made no such contract, and W. J. Wisdom, who purchased the ticket, swearing that such a contract was entered into. Appellant argues that the written itinerary containing the schedule showing the time of departure of the bus from Memphis and the arrival thereof in Little Rock was no part of the contract. This itinerary containing said schedule was

wrapped around the ticket when it was delivered by the agent to the purchaser and provided that Mrs. W. J. Wisdom might leave Memphis at 7:45 p. m., and arrive in Little Rock at 11:59 p. m. W. J. Wisdom testified that he had informed the agent before buying the ticket that his wife was in Lawrenceburg, Tennessee, and he wanted a routing for her to come home to make it as convenient as possible; that she had been sick and was getting along all right and that he did not want anything to happen that would set her back; that he wanted her to return on a paved highway so that she would not be jarred or jolted; that the agent said he could sell him a ticket and routing that would not inconvenience his wife; that all she had to do was to get on the bus.

The evidence is ample to sustain the finding of the jury that appellant entered into a contract to transport Mrs. W. J. Wisdom from Memphis on a bus operated on a smooth or hard-surfaced road on a schedule leaving Memphis at 7:45 p. m., and arriving in Little Rock at 11:59 p. m. Appellant argues, however, that it was not liable for breach of the contract because it had no bus leaving Memphis at 7:45 p. m. over a smooth or hard-surfaced highway and no transportation agreement with other bus lines operating such a bus. In other words, that its agent made a mistake in making a contract it was not in a position to carry out. The agent was acting within the apparent scope of his authority, and his mistake did not relieve appellant of liability for damages resulting on account of the mistake of its agent.

Appellant also argues that it is exempt from liability because it reserved the right in the itinerary furnished appellees to change its schedule without notice to the purchaser or user of the ticket. There is no merit in this argument for, in the instant case, there had been no change in schedule from the time the contract was made and the ticket was offered for passage.

Appellant also argues that both judgments must be reversed because the judgment in favor of W. J. Wisdom, as to a breach of the contract, is wholly dependent upon the testimony of his wife and that the judgment in favor of her was dependent on his, the husband's tes-

timony, as to the contract entered into. In support of this argument, they cite § 4146 of Crawford & Moses' Digest, which is, in part, as follows:

"All persons except those enumerated herein shall be competent to testify in a civil action. The following persons shall be incompetent to testify:

"* * *

"Third. Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent."

It is true that the breach of the contract was proved by the testimony of Mrs. W. J. Wisdom and that the recovery of W. J. Wisdom was and is dependent wholly on her testimony. She was in no sense the agent of her husband, and her testimony in support of his judgment must be regarded as incompetent. Without her testimony, his judgment is not supported by sufficient substantial testimony, and must be reversed. While she was not his agent, he was her agent in making the contract for her transportation from Lawrenceburg, Tennessee, to Little Rock, and in that capacity was not precluded from testifying relative to the contract in her behalf. Mrs. W. J. Wisdom wrote her husband she was ready to come home and wanted him to make provision for her to come. Instead of sending the money to her for her to buy a ticket, he purchased the ticket in Little Rock from appellant's agent for her, and was particular to procure a routing and schedule which would make it convenient, safe, and comfortable for her in traveling. He was acting in her behalf and made the contract for her benefit, and was her agent within the meaning of said section of the statute. His testimony as to the contract was admissible in her behalf.

The contract for transportation having been sustained, its breach is reflected by the undisputed testimony. When Mrs. Wisdom reached Memphis enroute to Little Rock, she was told by the bus driver she must

have the ticket agent O. K. her ticket. She got out of the bus and went to the depot for this purpose. She handed the agent her ticket, which he kept and issued her another one to Little Rock by way of Brinkley, Stuttgart, and Pine Bluff, and told her she could not leave until midnight. This rerouting was a breach of the contract.

The only remaining question raised by appellant is that her judgment is excessive. Appellant contends that she was only entitled in case of breach of the contract to an amount necessary to purchase a ticket from Memphis to Little Rock. This she could not do because she had only 70 cents in money. It is also not true because her husband notified appellant's agent when he bought the ticket and made the contract that she was ill, and, if she traveled on a rough road and was subjected to undue jolting, it would bring about a recurrence of her trouble or illness. In case of breach, this entitled her to any special damages which the breach of the contract subjected her to. She testified that she protested when the agent took up her ticket rerouting her by Brinkley, Stuttgart, and Pine Bluff, but that he told her she would have to accept the new ticket and leave Memphis about midnight. She could not go to the hotel because she did not have the means to do so and remained in the depot until midnight. She had written her husband to meet her at 11:59 p. m. and was very much worried on account of the delay and being rerouted around by Brinkley, Stuttgart, and Pine Bluff over a rough gravel road. It was a rough ride for her, and she was up all night, being unable to sleep, and did not arrive in Pine Bluff until daylight and in Little Rock until 8 o'clock the next morning. She testified that she was a wreck when she reached Pine Bluff, that the rough night ride caused her a return of her illness, from which she had practically recovered before she went to visit her relatives in Tennessee with permission of Dr. Shipp on condition she would travel in the bus on smooth hard-surfaced highways. Her illness was due to hemorrhage of the uterus. The return of this trouble, caused by the rough night ride from Memphis by way of Brinkley, Stuttgart, and Pine Bluff,

had to be treated with radium in order to stop the flow of the blood and prevent hemorrhages. This necessary treatment caused her uterus to atrophy and caused her vaginal tract to contract until it was two-thirds less in depth than it was in the first place and to become very much narrower, but that in order to keep the vaginal tract from closing entirely, it is necessary at intervals to dilate or stretch it. Each time the dilation is done, it produces bleeding and very much pain. Her physician testified that the recurrence of the hemorrhage and displacement of the uterus again was due, in his opinion, to the vibration and loss of sleep in riding over the rough road by way of Brinkley, Stuttgart, and Pine Bluff. He also testified that the permanency of the condition would remain, and, perhaps, grow worse. We do not think $2,000 is excessive when the special damages she sustained is taken into consideration.

The judgment in her favor is affirmed, and the judgment in favor of W. J. Wisdom is reversed, and his complaint is dismissed.

BENSBERG *v.* PARKER.

4-4342

Opinion delivered June 29, 1936.

Ed F. Saxon, H. G. Wade, Leibert W. Bower and *G. R. Haynie*, for appellants.

Thomas Gaughan, for appellees.

MEHAFFY, J. This action was instituted in the chancery court of Ouachita county by the appellees against the appellants and others to subject certain lots and parcels of land situated in Camden Paving District No. 3 to the payment of certain delinquent street improvement taxes levied and assessed against all property located within the district.

The appellants, G. J. Bensberg, W. E. Pryor, and Leonard Powell are trustees of the First Presbyterian Church, owners of property described as church property in the complaint. The trustees of the First Presbyterian Church filed answer admitting that they owned the property and held title to it for the use and benefit of the members of the First Presbyterian Church of Camden. They denied that the commissioners of the improvement district had any power or authority to include the church property, and denied that there was any power or authority of law to assess any benefits upon or against said property, and denied that there was any authority of law to assess or extend any improvement taxes, as set forth in the complaint.

The commissioners of the improvement district filed demurrer to answer of the trustees of the church. The court sustained the demurrer and entered a decree that the plaintiff should have and recover of and from the property of the defendants described in the complaint, the sum of $620 with interest and attorneys' fees, and all costs, and declared said judgment a lien on the property belonging to the church.

An appeal is prosecuted to this court to reverse the decree of the chancery court.

Our Constitution provides: "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." Const., art. 16, § 5.

The established rule is that the constitutional exemption refers alone to taxes for general purposes of

revenue, and has no reference to special taxes or assessments for local improvements. *Board of Improvement* v. *School District,* 56 Ark. 354, 19 S. W. 969.

"It is the well-established rule that a constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes, for the general purposes of government—State, county, or municipal—and does not relieve those in whose favor such exemption exists from the obligation to pay special assessments for local improvements which are charged upon property on the theory that such property is specially benefited thereby." 25 R. C. L., § 40, page 124; Sloan on Improvement Districts, vol. 1, § 5.

Assessments in local improvement districts are based on the benefits to the land. The land must be benefited to the extent of the assessment. On no other theory can assessments be collected.

Appellants concede that the constitutional exemption does not exempt from special assessments in improvement districts, but they contend that the improvement district has no right to collect unless the statute specially authorizes the levy and assessment, and they cite and rely on the *Waterworks Imp. Dist. No. 2* v. *Logan County,* 155 Ark. 257, 244 S. W. 4. In that case the court was speaking of assessments against public property—court houses and jails—and not private property.

Appellants also cite the case of *Board of Improvement* v. *School District,* 56 Ark. 354, 19 S. W. 969. In that case the court said: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the State and its municipalities and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed whose compensation would go to increase the useless levy. It can-

not be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact."

Property as described above is held by the State or municipalities for governmental purposes. It is supported by taxation. This is not true with reference to church property. It is privately owned, and, while exempt from general taxes, it is not exempt from special assessments. The assessments can only be collected on the theory that the benefit to the land is equal to or greater than the assessment.

Whatever division of authority there may be on this question, we think it is definitely settled by the opinion in the case of *Ahern* v. *Board of Imp. District No. 3 of Texarkana,* where the court said: "The defendants contend that, in order to ascertain the majority in value of the property in the district, all the assessable property should have been included, and that all of said property was not included—for instance, the real property of churches, which they show to have been of the value of $2,800. Church property is exempt from general taxation, and therefore does not appear as valued on the county assessor's list. By a decided weight of authority, however, although exempt from general taxes, church property is liable for local improvement assessments. The contention of the defendants is therefore sustained, and in such case extraneous proof of value is properly made." *Ahern* v. *Board of Improvement Dist. No. 3 of Texarkana,* 69 Ark. 68, 61 S. W. 575.

In the case of *Martin* v. *Reynolds,* 125 Ark. 163, 188 S. W. 4, this court held that an act passed by the Legislature exempting church property in cities and towns was void because it did not exempt rural church property. Of course, if appellants' contention is correct, all the church property, both in cities and towns and the country, was exempt, and the court would have so held; but the Legislature passed the law assuming that it was

all subject to assessment, and exempted certain portions. The court said: "Thus there was an unjust and unequal discrimination between lands of the same class. In this respect the act is an arbitrary and manifest abuse of power."

We think this case is controlled by *Ahern* v. *Board of Improvement Dist. No. 3 of Texarkana, supra,* and the decree of the chancery court is, therefore, affirmed.

ARKANSAS RURAL REHABILITATION CORPORATION *v.* LONGINO.

4-4344

Opinion delivered June 29, 1936.

Floyd Sharp, T. E. Donham and *Leon B. Catlett,* for appellant.

Ned A. Stewart, for appellee.

BUTLER, J. Action for damages for breach of lease contract and appeal from judgment in favor of appellee, plaintiff below. The contract was entered into on October 9, 1934, and designated, "Lease of Real Estate for Small Grains." By its terms, the appellee leased 120 acres of land to the appellant corporation for a period of time beginning with the date of the lease and terminating when the crop was harvested, the consideration therefor being one-fifth of the crop payable to the lessor. On October 12, following, the appellant sought a cancellation of the contract, which was refused, the reason given by the appellee being that he had discharged his tenants and sold his mules and farming equipment.

On April 20, 1935, the appellant planted to oats approximately thirty-five acres of the land leased, but did not attempt to cultivate any of the remainder of the land in small grain or any other character of crop. The land not cultivated grew up in brush and weeds. Some years before the lease contract was made the 120 acres of land had been set to pecans, twelve trees to the acre. From time to time a number of these had died and had been replaced by others.

In the action damages were laid in a sum equal to one-fifth of the oat crop on the entire 120 acres, for damages to the land by reason of failure to cultivate it and thereby keep down weeds and shrubs, and for further damage for the destruction of a certain number of pecan trees occurring during appellant's tenancy. The court, sitting as a jury, found for the plaintiff (appellee) in the sums of $516.60 for rent, $126.30 for damage to lands, $623.25 for loss of trees, and $91.50 for injury to trees, in the total sum of $1,357.65. The facts, as found by the court, briefly stated, are that there were 114.8 acres of tillable land in the tract which, if properly cultivated, would have yielded 5,166 bushels of oats which, at the time of harvesting, were worth fifty cents a bushel; that,

under the lease, appellee was entitled to one-fifth of the amount which would have been realized. In addition to this the court found that owing to appellant's negligence and its breach of contract, a certain number of pecan trees were destroyed, valued at $2.25 each, a certain other number were partially destroyed to the extent of seventy-five cents each, and that 84.2 acres had grown up in bushes by reason of appellant's failure to cultivate the land to appellee's damage in the sum of $1.50 per acre. The court declared the law to be that, under the lease, the appellant was required to follow the usual and customary methods prevailing in the cultivation of land for small grain, that oats was the grain contemplated to be planted, and that in failing to cultivate the land appellant was liable for all damage sustained by reason of failure to comply with the contract, including damages to the property itself, the rent of the land, and the damage to growing trees thereon.

The appellant contends that the judgment of the trial court is contrary to the evidence: first, as to the yield of appellee's land per acre if planted to oats, and, second, as to the damage sustained by reason of appellant's failure to cultivate the same. The judgment of the court below on these questions is conclusive if there is any substantial evidence in the record to support it. The same rule obtains where the court sits as a jury as where the jury itself renders the verdict. This rule is so well established and has been stated so many times by this court that the citation of authorities is superfluous. We therefore examine the testimony, giving to it its strongest probative value in order to support the finding of the lower court, if that be possible. Thus considered, it may be briefly stated as follows: It was understood that the purpose in mind of the parties to the lease was that the lands in question should be planted to oats. The lease was entered into early in October, 1934, but no part of the land was put to oats until April 20, 1935. The land was fertile and well drained. Land in the immediate vicinity and of the same character, and not as well drained, produced on an average, forty-five bushels of oats per acre. Only thirty-five acres of the land leased

was broken and planted to oats by the appellant, and the remainder, because it was not put in cultivation, grew up in grass and shrubs which must be removed before the land can again be cultivated. This will cost between two and three dollars an acre. This evidence was of a substantial nature and supports the finding of the trial court, although there was substantial evidence in contradiction.

The trial court was the judge of the credibility of the witnesses and the weight to be accorded their testimony. His judgment on these matters, like that of the jury, is binding upon us. As appellant's brief presents no exception that the trial court was in error in its declaration as to the law controlling on the above questions, the contentions for reversal being based solely on the insufficiency of the evidence, the judgment must be affirmed as to these items.

The trial court found in favor of the appellee for the destruction of a number of pecan trees and for damages for injury to others, amounting to the sum of $623.25 and $91.50, a total of $714.75. As to these items, it is contended there is no evidence sufficient to fix liability on the appellant. To this contention we agree. It is true, there was testimony to the effect that some of the trees had been killed and others injured during the winter of 1934-35 by rabbits which found shelter in the weeds and bushes allowed to grow and remain on the land, and that if the land had been put in cultivation the rabbits would not have invaded the pecan grove and inflicted the damage. This testimony was given by one who was engaged in the servicing, budding and grafting of pecan trees, as part of his occupation, and claimed to have had ten years' experience in this business. If we give full effect to this evidence, still no liability attaches to the appellant for the reason that the damages claimed are special in their nature, and would not naturally flow from breach of a contract of leased land for the purpose of cultivation in small grains. There is no evidence to the effect that appellant was apprised of the predatory habits of rabbits with respect to pecan trees, and that a failure to break

the land in the fall or early winter would cause the orchard to become infested with these animals.

The law is well settled as to the character and quantum of evidence necessary to support special damages awarded for breach of contract. The rule is stated in *Southwestern Bell Telephone Co.* v. *Carter,* 181 Ark. 209, 25 S. W. (2d) 448, cited by the appellant, as follows: "To make him liable for the special damages in such a case, there must not only be knowledge of the special circumstances, but such knowledge 'must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' In other words, where there is no express contract to pay such special damages, the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part."

The judgment of the trial court will, therefore, be modified so as to eliminate the special damages allowed for destruction and injury to the pecan trees, and, as modified, it is affirmed.

HOME INSURANCE COMPANY OF NEW YORK *v.* JONES.

4-4327

Opinion delivered June 29, 1936.

Verne McMillen, for appellant.

Galbraith Gould, for appellee.

McHaney, J. Appellant issued its policy of insurance to appellee and Universal Credit Company (hereinafter called Credit Company) on May 20, 1935, covering for one year loss or damage by fire, theft or collision to a 1933 model Plymouth automobile. It contained a cancellation clause as follows: "This policy may be canceled at any time by this company by giving to the assured five (5) days written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the assured stated in this policy shall be sufficient notice." The policy also provided that loss, if any, should be payable to the Credit Company for the account of all interests.

On July 15, 1935, appellant elected to cancel the policy under the above provision therefor, and notice thereof was mailed on said date to appellee and the Credit Company—that to appellee being addressed to him at 402 West Fifth Street, Pine Bluff, Arkansas, the address stated in the policy, and his correct address at that time. On July 26, 1935, said automobile was damaged by collision in the sum of $265.77. Demand for payment was refused and this suit followed, first in the municipal court and then in the circuit court, and from the latter to this court. The judgment against appellant was for the above sum less $50 deductible under the policy.

Appellant defended on the ground that it had canceled the policy more than five days before the accident and was not, therefore, liable. Appellee contended and the court held that he did not receive the notice, and that the provision above quoted with reference to notice of cancellation is unreasonable, unfair, uncertain and, therefore, unavailing. The trial court also found that the unpaid notes on this car were bought on June 22, 1935, by the Simmons National Bank, and that there-

after the Credit Company had no interest in the transaction, and that the refund to the Credit Company by appellant on July 15, 1935, of the unearned premium on the policy was ineffective to bring about a cancellation thereof, and that it was in full force and effect on July 26, the date of the collision. The court made a finding of fact, (and it was so stipulated) as follows: "That notice of cancellation was mailed in Detroit on the 15th day of July, 1935, to the correct address of the insured, which was eleven days before the loss occurred."

The court erred in rendering judgment against appellant instead of for it. In the recent cases of *Home Ins. Co. of N. Y.* v. *Hall, ante* p. 283, 91 S. W. (2d) 609, and *General Exchange Ins. Corporation* v. *Coffelt, ante* p. 468, 92 S. W. (2d) 213, we specifically recognized the validity of identical cancellation clauses in similar policies. In the former case we said: "The cancellation clause in the contract of insurance existing between the appellant and appellee gave to the insurer the undoubted right to cancel the policy, by strictly complying with its provision." In the latter case we said: "With these fundamental rules in view we proceed to an analysis of the cancellation clause of the policy under consideration. The language employed by the parties is plain and unambiguous and no resort to construction is necessary. It expressly states that cancellation of the policy may be effected with or without return of the unearned premium, but it is expressly conditioned that the refund must be made upon demand.

"If the five days' notice of cancellation includes a promise to refund on demand, and no demand for refund be made during this period, the cancellation becomes effective, but if the insured demands a return of the unearned premium during the five days' period provided for cancellation, and such refund be refused by the insurer, then the cancellation of the policy is automatically deferred until the unearned premium is refunded."

In the former case it was contended that a directed verdict should have been given in appellant's favor because its witnesses testified the notice was mailed, while

appellee testified she did not get the notice, although living at the address named in the policy, and her attorney testified that appellant's adjuster admitted to him the notice was not mailed. A majority of this court held a jury question was made by this testimony. In the latter case we held that the cancellation notice was not effective because it promised to refund the excess premium on demand; that Coffelt made immediate demand for refund; and that it was not complied with.

Here, however, there is no question as to the proper mailing of the notice of cancellation to the proper address. It is so stipulated. There is no question as to demand for refund, as it was paid to the Credit Company when notice was given it. There is nothing to show that appellant knew the bank had bought the notes and succeeded to the rights of the Credit Company. We cannot agree with the trial court that the provision with reference to notice of cancellation is unreasonable, unfair, etc., and, therefore, void. On the contrary, the provision is valid, but must be strictly complied with to be availing. If the notice is given strictly in accordance with its terms, it is not necessary that the insured shall receive it to be effective, as its receipt is a risk he assumes under the plain provisions of the contract.

The judgment will, therefore, be reversed, and the cause dismissed.

ANCIENT ORDER OF UNITED WORKMEN OF KANSAS *v.* DUENSING.

4-4419

Opinion delivered June 29, 1936.

Chrisp & Nixon, for appellant.

Wm. C. Gibson, W. A. Leach and *Ingram & Mohr*, for appellee.

BUTLER, J. Dr. Theodore C. Duensing died from the effect of pistol shot wounds sustained about 3:10 p. m. on June 28, 1935. At the time of his death he was insured in the appellant order in the sum of $3,000, the beneficiary being Anna F. Duensing, the appellee. The policy was in full force and effect at the time of Dr. Duensing's death, and this action was instituted by the beneficiary against the appellant to recover for the death of the insured.

The policy provided that, if the insured committed suicide within two years from its date, whether he were sane or insane, the only liability should be for an amount equal to the contributions paid to the order. This stipulation was pleaded as a defense to the action on the theory that the insured had committed suicide. The trial resulted in a verdict and judgment in favor of the appellee for the amount sued for. From that judgment is this appeal.

Dr. Duensing was killed near Belleville, Illinois, while on a passenger train en route from Memphis to St. Louis in a vestibule between a day coach and a Pullman immediately to its rear. The sole ground urged for reversal is that the undisputed evidence establishes appellant's affirmative defense and, therefore, the verdict of the jury is without substantial evidence to support it. This contention is based upon the testimony of Edward Flannigan and Charles R. Peters, special agents of the Illinois Central Railroad.

The effect of the testimony of Mr. Flannigan is that he first saw Dr. Duensing when he (the witness) was boarding the train. The doctor was standing upon the steps of the day coach holding to the grabirons on each side and leaning with his head out of the vestibule. The conductor was heard to say something to Dr. Duensing and to Smoky Allen. The witness did not understand

what Allen said, but did hear the doctor say, "No, I wouldn't do anything like that—I have too much sense." When the doctor said this he stepped back, and witness passed into the day coach and took a seat. The doctor came into the same coach and sat down some two or three seats to the rear of the witness and across the aisle from him. This occurred while the train was at its station stop and Charles Peters, a fellow officer of Flannigan, got on the train just as it started to pull out and entered the same coach with witness and the doctor. The conductor, with whom witness appeared to be on friendly terms, soon came in, and while he and witness were standing in the aisle talking together, in the language of the witness, the following occurred: "I heard two shots fired in the back end of the coach. I turned and there was a pause of a few seconds and I heard some one holler he was killing himself. I ran to him, and as I was running down the aisle he was standing between the two coaches. He put the gun to his breast, looked down at it and shot three shots into his breast, and fell on his back." The train was headed north and, describing the point where the tragedy occurred, the witness said: "It happened on the north end of the coach south of the day coach." This was the Pullman immediately to the rear of the day coach. Continuing, the witness said, "I was about fifty feet, I guess—forty or fifty feet—when he shot the first two shots. I didn't see very much." Witness stated that when he heard the first shots he ran down the aisle in that direction and met a negro man running toward him. The day coach door was open and the door to the Pullman was closed. When witness reached the doctor he was dead and a pistol was lying beside him near his right hand. Witness picked up the pistol and handed it to Mr. Peters who was there "a second after I was." Witness described the pistol as a Smith & Wesson squeezer hammerless of the revolver type carrying five cartridges, all of which had been exploded when he picked it up and examined it before handing it to Mr. Peters. This weapon required pressure to be exerted on the handle before the trigger could be pulled or the cylinder revolved.

The testimony of Flannigan tends strongly to sustain the defense of suicide and would be conclusive on this question if it were consistent in its entirety and if there were no circumstances in evidence or testimony tending to conflict with it. *St. Louis-San Francisco Ry. Co.* v. *Harmon,* 179 Ark. 248, 15 S. W. (2d) 310.

Mr. Peters testified in effect that when he boarded the train and started through the car he heard three shots fired in rapid succession and saw Flannigan run that way. Witness followed Flannigan and when he reached the rear end of the coach the doctor was lying dead on the platform within the vestible. He was on his left side, "all doubled under." The body was just a few inches from the left hand door of the vestibule which was about three feet from its center, and a pistol was lying close to the right shoulder a little way from the neck. As Flannigan ran down the aisle with witness following, when the former had reached a point a little beyond the center toward the rear of the coach, he met a negro who was running up the aisle in the opposite direction. This negro appeared to be badly frightened and was coming from the platform of the day coach toward which witness and Flannigan were running. After the negro passed Flannigan he fell into a seat before witness reached him. Witness stated the negro's name is Walter Owen and at the time of the testimony he was living in St. Louis, his name and address both being known to witness at the time of the death of Dr. Duensing. Witness further stated that he saw the negro and Flannigan meet in the aisle at about the time the three shots were fired; that when he heard the shots and started running down the aisle he didn't know what had happened. After describing the position of the doctor's body and the location of the pistol with reference to it, the witness testified that a brakeman who had arrived on the scene, a Mr. Dipple, reached over, picked up the pistol and handed it to him. The witness described how the passageway between the two cars was formed to the effect that a platform extends a short distance from each car and they are joined together. On each side of these platforms are doorways with steps which can be let down

and, when these are raised and the doors are closed, the platforms are level. There are curtains made of canvas which are part of the vestibule. When witness reached the body he made an examination of the vestibule and found the doors closed so that the space between the two cars was inclosed, except for a door which opened into the day coach from which he had come. In testifying as to the condition of the vestibule, Mr. Flannigan had stated in answer to questions propounded on cross-examination that he did not remember whether or not the passageway between the two coaches was open, that it generally was, but "there is a curtain in there" and he could not say whether this curtain was open or closed at the time of the tragedy.

It will be seen that there are conflicts in the testimony of the witnesses, Flannigan and Peters, as to material facts and inferences which may be drawn from the testimony of Peters tending to render the accuracy of the statements of Flannigan doubtful. It will be remembered that Flannigan testified that he saw the doctor fire the last three shots. Peters, who was immediately behind Flannigan, stated that he did not see the shots fired because Flannigan was in his way. By the same token, Flannigan's vision was bound to have been obscured by the negro who was running toward him down the narrow passageway between the seats. According to Flannigan, the doctor must have died immediately and without a struggle, and if Peters is correct as to the location of the body it might reasonably appear that Flannigan could not have seen Dr. Duensing when the last three shots were fired even though the frightened negro had not been in his way. There are further contradictions in the testimony of Flannigan and Peters; the location of the pistol with relation to the body and who picked it up; Flannigan says one thing and Peters another. Flannigan stated that the pistol lay by the right hand of the deceased and that he picked it up, examined it, and handed it to Peters, while the latter says that the pistol lay near the right shoulder of the body near the neck and that it was one Dipple who picked it up and gave it to him.

The circumstances as narrated by Peters and the conflict between his testimony and that of Flannigan raise a doubt as to the accuracy of Flannigan's testimony which may be indulged without reflecting upon the integrity of the witnesses, for nothing is more certain than that human perception and memory is far from infallible. When we consider the strong instinct of self-preservation which exists in all sentient creatures and finds its highest example in man, the doubt as to the testimony of Flannigan becomes stronger. This instinct is generally recognized by the text writers and the courts, and is said to create a presumption against suicide even where the proof shows that death is self-inflicted. *Grand Lodge A. O. U. W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742. This presumption was recognized and applied by this court in a number of cases; notably among these are *Eminent Household of Columbian Woodmen* v. *Matlock,* 144 Ark. 126, 221 S. W. 858, and *Guardian Life Ins. Co.* v. *Dixon,* 152 Ark. 597, 240 S. W. 25.

In the Matlock case, Mrs. Matlock was heard talking to her husband in pleading tones by a near neighbor, and at this time Matlock fired a shotgun at his wife, severely wounding her. He immediately walked out of the room in which the shooting occurred. Almost instantly the gun was heard to fire again and Matlock was found with his chin and face shot away and the gun, a double-barrel shotgun, lying parallel with his body. There was nothing in the testimony indicating that Dr. Matlock had contemplated suicide. This court was of the opinion that the theory of suicide appeared to be more probable than any other. Under the circumstances of that case, the court affirmed the judgment of the lower court, holding that the death of Matlock was not as a matter of law the result of suicide on the ground that the question of probability was one properly submitted to the jury.

In *Guardian Life Ins. Co.* v. *Dixon,* 152 Ark. 597, *supra,* the testimony was to the effect that Dr. Dixon had an altercation with a Mr. Vaughan in the office of Mr. Burkhart, an attorney, and in the presence of a Mr. Buchanan. Without warning, Dr. Dixon

drew a revolver and shot Vaughan, who fell to the floor insensible. Burkhart led Dr. Dixon out of the room and entered a connecting office for the purpose of telephoning. He heard a shot and, turning in an instant, saw Dr. Dixon falling to the floor. Buchanan, who had remained in the room where Vaughan had been shot, testified that after Burkhart had led Dr. Dixon out of the door, he came back into the room, looked down for a moment at Vaughan lying on the floor, then placed the pistol to his head and shot himself, immediately falling dead with his face on the floor. This court, in affirming the judgment of the lower court against suicide, noticed the settled rule of practice against disturbing a verdict on appeal unless it appears to be against the uncontradicted evidence and every reasonable inference deducible therefrom. The circumstances in the Dixon case tending to dispute the testimony of eye-witnesses to the tragedy were also noticed by the court. Among these was the fact that no powder burns appeared near the location of the wound which was thought to be significant, although from the testimony it appeared that the pistol was loaded with smokeless powder which would not cause powder burns. Certain bruises were found on the head and face of the deceased which might have been explained by his falling on the floor. A person in a room underneath that where the shooting occurred, immediately before the shots were fired, heard some noise in the room above from which testimony the jury might have inferred that there was "a scuffle of some kind going on in the room" before the third shot was fired. There was also some testimony tending to show that Buchanan had testified at the coroner's inquest somewhat differently from his testimony at the trial. The court observed that the testimony of Buchanan and Burkhart was not so consistent with itself that it overcomes the circumstances tending to contradict it. The court stated its conclusion as follows: "We cannot say, as a conclusion of law, that the evidence is not legally sufficient to support the verdict, when viewed in the light of all the surrounding circumstances and the presumption against self-destruction. Where reasonable men may differ as to the legal suffi-

ciency of the evidence, the jury, and not this court upon appeal, must determine the issue."

We are of the opinion that in the instant case the circumstances tending to cast doubt upon the accuracy of the testimony of Flannigan and against the theory of suicide are much stronger than those in the Dixon case to which we have just referred. In that case, Dr. Dixon was in an embarrassed financial condition which led to the altercation between himself and Vaughan, and a motive might be found for suicide in the horror with which he viewed his hasty act and the despair which must have been present in his mind when he looked at his victim. In the case at bar no motive appears, which is always a cogent circumstance tending to refute a suicidal intent. There is not the slightest intimation in the evidence to indicate the presence of the thought of self-destruction in the mind of Dr. Duensing. It appears that he was a doctor with a satisfactory practice, no financial difficulties, of temperate habits and a jovial disposition. One of his patients testified that on the day before his death he was in his usual cheerful mood, and a barber who shaved him while he was making preparation for the journey testified to the same effect. He left Stuttgart for St. Louis by way of Memphis and while in Memphis, not more than three hours before his death, he sent a friend in Stuttgart a telegram asking him to put up a sign that he would be back on the following day at noon.

More significant than lack of motive, however, is the weapon which caused the death of the doctor. No proof was made that it belonged to the doctor or that he had ever had one of similar character in his possession. On the contrary, his own pistol was found in his traveling bag, an unloaded thirty-eight caliber revolver, and also a number of cartridges of that caliber. Something had occurred between the doctor and Smoky Allen just previous to the shooting. Just what it was Flannigan did not know, but it was sufficient to cause the interference of the train conductor and for the doctor to remark, "No, I wouldn't do anything like that. I have too much sense." The conductor, who was an available witness, was not called, and what Smoky Allen said was not heard by

Flannigan. Where Allen went and what he did is not shown by any testimony. It is within the realm of probability that it might have been another's pistol and another's act which caused the death of Dr. Duensing. There was one person also who perhaps knew more about how, and by what agency, the pistol was fired than any one else, that is, the negro, Walter Owen, whose residence was known and who appellant did not see fit to call to testify.

Still more important, as tending to negative the theory of suicide, are the number and location of Dr. Duensing's wounds and their probable effect when first inflicted. As tending to support appellant's theory there was the testimony of Flannigan and Peters that the doctor's clothing and wounds on his body were powder burned. On this phase of the case there is some dispute. Other witnesses who examined the body found no indication of powder burns at the location of the wounds. It is argued by counsel for appellant that the absence of powder burns on the body, when viewed by appellee's witnesses, was because of the embalmer's art. There was no testimony offered, however, that such was the case. But, if it be admitted that there were such marks on the clothing and wounds, from their nature and location the jury might have reasonably inferred that the shots were not self-inflicted. Flannigan was a police officer of many years experience, familiar with the use of firearms and the location of the heart within the human body. He testified as to its position that if a straight line was drawn downward from the chin a portion of the heart would be on each side of that line and that Dr. Duensing's wounds were in the breast at the location of the heart, all five of which could be covered by the palm of the hand. Peters testified to the same effect as to the location of the wounds, stating that they could be covered with a playing card which measures about 2½x3"; that there were two wounds on the right of the middle line of the breast about an inch apart, three on the left slightly less than an inch apart, the distance between those on the left and those on the right was from an inch to an inch and a half, and "they could all have been covered with a

playing card." From this evidence it seems reasonably certain that all five of the bullets pierced the heart of Dr. Duensing. It is true, a physician called as an expert witness for the appellant testified that the heart could be pierced without any serious immediate effect; that it is possible for a person shot through the heart to live for some time; that if the pneumogastric nerve is hit it is possible for that person to live for days; that according to witness' literature there are many cases where a person shot through the heart recovers, one case where a man lived seven days with two bullets through his heart, and another where a man was shot ten times through that organ without being killed, but the doctor admitted that a bullet striking the heart would have a tendency to knock one down and "might shock him." The jury had the right to weigh this testimony in the light of the common experience of the race, which doubtless it did. Opposed to the testimony of this expert witness is the testimony of a witness who was expert in the use of firearms and, at the time of testifying, was an instructor in that art, and had been such in the army. He testified that he was familiar with the effect of wounds in the vital organs, and that where one was shot with a thirty-eight caliber pistol in the location as testified to by Flannigan and Peters that the arm would fall to the side and could not be raised again; that a bullet from a pistol of the character described would have an impact equivalent to a force of 181 ft. pounds and would require a minimum pressure on the handle of ten pounds before the cylinder would revolve and trigger act; that to raise the arm and exert such a pressure would have been impossible after the first two shots had been fired. It will, therefore, be seen that the testimony of Flannigan to the effect that he saw the doctor deliberately fire the last three shots into his breast was not conclusive, but was a question for the jury under all the facts and circumstances.

In a number of cases we have held the evidence therein sufficient to conclusively establish intentional self-destruction, notably the cases of *Ætna Life Ins. Co.* v. *Alsobrook,* 175 Ark. 523, 299 S. W. 744, chiefly relied on by appellant in the case at bar; *Fidelity Mutual Life*

Ins. Co. v. *Wilson,* 175 Ark. 1094, 2 S. W. (2d) 80; *New York Life Ins. Co.* v. *Watters,* 154 Ark. 569, 243 S. W. 831. In the Watters case there seem to have been no circumstances tending to refute the theory of suicide, and in the other cases, including the two last-above cited, a motive for suicide appears, either for shame and fear of disgrace, over-mastering despair or from melancholia induced by intemperate habits or disease. In the instant case all these elements are lacking and, when all of the circumstances are considered and the legal presumption against suicide indulged, we think the case was properly submitted to the jury, and the judgment should be affirmed. It is so ordered.

CALLAWAY *v.* ASHBY.

4-4345

Opinion delivered June 29, 1936.

Joseph Callaway, Fletcher McElhannon and *McMillan & McMillan,* for appellants.

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

BAKER, J. J. W. Callaway and wife, Nellie, have appealed from a decree of the Clark Chancery Court foreclosing a deed of trust covering certain real estate and other property.

The defense to this foreclosure as presented here affects only the real estate which the Callaways claim as a homestead. Mrs. Callaway denies she signed the note

and deed of trust and denies that she acknowledged the execution of the deed of trust.

Upon its face, the deed of trust was a conveyance to R. R. Golden, as trustee, for Greene & Meador, partners, both now dead, to secure a debt of $470, dated November 19, 1928, but kept in full force and effect by marginal notation, of a credit of $8, made within five years after the execution of the instrument. R. S. Ashby, plaintiff below, appellee here, was executor of the estate of R. H. Greene, deceased.

We forego a discussion of the testimony of J. W. Callaway for two reasons. The first is that a material part of his testimony is incompetent under § 4144 of Crawford & Moses' Digest; the second is that he discredits himself by a bold avowal of the forging of his wife's signature to the note and deed of trust he delivered to his benefactors who came to his relief at a time of sorrow and distress and loaned him money to bury a son accidentally killed.

Mrs. Nellie Callaway testified she did not sign or authorize any one to sign her name to either note or deed of trust; she denied all knowledge of these instruments, although she knew of the debt. She discussed with Mr. Frank Ashby the debt, the amount and the reason for borrowing. She gave up or permitted a steer, her property, to be taken as a credit thereon for the $8. But there is no testimony that she had any knowledge of the existence of the deed of trust if one of the signatures thereto was not in fact hers.

The notary public who took the acknowledgment of J. W. Callaway testified that Mrs. Callaway was not at any time before him to acknowledge the instrument, that he did not know her, and had not seen her; the certificate of acknowledgment was filled out and he had only to sign when presented to him; that Callaway asked him to sign the name of Nellie Callaway, but that he refused. Apparently he had no record required by law to be kept of his acts as a notary public and testified from memory only.

Two other persons were present when Callaway signed or acknowledged an instrument before the notary, and they testified Mrs. Callaway was not present. It

seems a fair inference to draw from the testimony that the notary took an acknowledgment to only one instrument, at least, at or near the time this acknowledgment was dated, November 19, 1928.

There was other testimony, but the foregoing is the gist of the material part of the record, except that admittedly genuine signatures of Mrs. Callaway are quite different from those on note and deed of trust.

Had Mrs. Callaway verified her answer, appellees must have failed to recover as there has been offered no word of proof to the effect that she signed either instrument. Failing to verify she assumed the burden of proving she did not sign and acknowledge. Section 4114, Crawford & Moses' Digest. See, also, same matter, § 580, Crawford's Civil Code, and cases there cited, especially *Terrill* v. *Fowler,* 175 Ark. 1010, 1 S. W. (2d) 75, and *Lavender* v. *Buhrman-Pharr Hardware Co.,* 177 Ark. 656, 7 S. W. (2d) 755.

We think she has sustained that burden. The trial court erred in holding otherwise.

It is argued, however, that she and her husband borrowed the money and they are estopped to assert the invalidity of the note and mortgage and numerous authorities are cited to support this theory. The latest of these is *Illinois Standard Mortgage Corp.* v. *Collins,* 187 Ark. 902, 63 S. W. (2d) 342. This citation is typical. In that case The Young Men's Building & Loan Association knew that the mortgage corporation believed it was receiving a first mortgage.

In the instant case the only things that connect Mrs. Callaway with the borrowing of the money from Greene & Meador are the note and deed of trust. There is no proof she knew of the existence of either. There can be no estoppel or ratification without knowledge of the facts. The citations offered are not in point.

The fact that the 160-acre tract of land constitutes a homestead is not questioned. It is within the limits of area and value. Therefore Mrs. Callaway could invoke the protection of § 5542 of Crawford & Moses' Digest as enforced in numerous cases, some of the latest of which

are: *Walthall* v. *McArthur,* 185 Ark. 437, 48 S. W. (2d) 227; *Ramey* v. *Pyles,* 182 Ark. 320, 31 S. W. (2d) 533.

But the deed of trust is invalid only in so far as it affects the homestead.

It follows the decree should be reversed as to judgment against Mrs. Callaway, and as to the lien against the homestead. In regard to other property, mortgage foreclosure may properly proceed.

It is so ordered on remand.

MILLER, RECEIVER *v.* COLEMAN.

4-4424

Opinion delivered July 6, 1936.

Ohmer C. Burnside, House, Moses & Holmes and *H. B. Solmson, Jr.,* for appellant.

Carneal Warfield, Lee Baker and *J. R. Yerger,* for appellees.

SMITH, J. The Southeast Arkansas Levee District was created and organized by act 83 of the 1917 General Assembly of the State of Arkansas (vol. 1, Acts 1917, page 367). The act recites the purpose of the improvement district to be the protection of the lands of the district from the overflow of certain rivers. It ascertained the betterments to be derived from the proposed improvement, and levied taxes to pay the cost thereof. The amount of these betterments were made liens upon the lands of the district to the extent of the respective assessments.

The act makes provision for the collection of the betterment assessments, and provides that if the assessments are not paid within the time limited for that purpose the delinquent lands shall be sold by the collector, and, in the absence of other bids, the lands shall be sold to the improvement district for the amount of the taxes, penalty and costs due thereon. Upon the failure of the delinquent owners to redeem, it is provided that the county clerk shall execute a deed to the levee district, "and such deed shall, in all respects, have the same force and effect that a tax deed to a private individual has." It is further provided that these sales for delinquent taxes and deeds made pursuant thereto may be confirmed by the chancery court "in accordance with the practice and proceedings of chancery courts in this State."

Later acts of the General Assembly amended this original act by increasing the assessments and enlarging the area of the district, but no change was made in the manner of enforcing the payment of delinquent taxes.

This suit was brought to enforce the payment and collection of the delinquent taxes for the years 1932, 1933 and 1934. The suit was brought to enforce the lien created by the acts above referred to in the chancery court of the county in which the delinquent lands are situated. Authority for this suit is said to have been conferred by the provisions of act 534 of the Acts of 1921 (General Acts 1921, page 573). It is insisted that the effect of this act is to change the procedure of the special acts above referred to relating to this district in the manner of enforcing the lien of the district for delinquent taxes. It is conceded that this result has not been accomplished unless the effect of act 534 of the Acts of 1921 is to repeal the provisions of the other acts relating to that subject.

A demurrer to the complaint praying foreclosure through a decree of the chancery court was sustained, upon the ground that the provisions of the prior special acts providing the manner of enforcing the payment of delinquent taxes had not been repealed. The correctness of that ruling is the question presented on this appeal.

In the brief of appellant it is said: "The question confronting the court is whether or not act 534 repealed, by implication, the procedure set up in act 83 with reference to the manner of enforcing the collection of the delinquent taxes due the district."

This act 534 has been considered in several cases to which reference will later be made, and we think the effect of these cases is to hold that act 534 amended act 83 in certain particulars, but did not repeal it, and that no amendment was made in the manner provided in act 83 for the collection of delinquent taxes.

This act 534 applies to the levee and other improvement districts there named, whose taxes are due and payable on or before the 10th day of April, and its provisions—whatever they may be—were held applicable to all such districts, whether organized pursuant to general statutes or created by special acts of the General Assembly. It was so held in the case of *Western Clay Drainage District* v. *Wynn,* 179 Ark. 988, 18 S. W. (2d) 1035. Section 4 of act 534 provides that "No suit for the collection of such delinquent taxes shall be brought after three years from date same became delinquent," and it was held in the case just cited that "There appears to be as much reason for the enactment of a statute of repose in a district created by a special act of the General Assembly as in one organized under the general law, and we find nothing in act 534 which limits its operation to districts of a particular character." That case was one to foreclose the lien for delinquent drainage assessments in a district created by a special act, and the opinion contains no intimation that act 534 had changed the procedure under which that relief would be granted. On the contrary, we there said: "Section 4 of act 534 does not in any manner affect the right to sue to enforce payment of delinquent taxes, nor does it change the procedure provided by any act, general or special, by which that right is made effectual. It only imposes a limitation as to the time within which the right must be exercised after it has accrued, and this time is three years."

The earlier case of *Beasley* v. *Hornor,* 173 Ark. 295, 292 S. W. 130, had pointed out that this act 534 of the

Acts of 1921 had not defined the method of procedure to foreclose liens for taxes, and had not, for that reason, impliedly repealed the provision of the special act there under consideration which had created a road improvement district. That special act made provision for the foreclosure and collection of delinquent taxes in the road improvement district in the manner provided by act 279 of the Acts of 1909, and it was held that these provisions of the act of 1909 remained effective notwithstanding the subsequent enactment of act 534.

It was said in the case of *Beasley* v. *Hornor, supra,* that "The fact that it alleges a compliance with said act 534 and that the allegations were not sustained by the proof, does not render the sale void, unless the requirements were jurisdictional. The requirements of said act were before this court in the case of *Moore* v. *Long Prairie Levee District,* 153 Ark. 85, 239 S. W. 380, and it was alleged that the filing of the delinquent list by the collector and the furnishing thereof to the clerk to be attached to the complaint was not a condition precedent to the right to sue. The court had jurisdiction of the subject-matter and parties, under act 223 of the Acts of 1921, so that failure to comply with said provision under act 534 of the Acts of 1921, not being jurisdictional, could not have the effect of defeating the foreclosure judgment for delinquent taxes on collateral attack; such irregularities could only be corrected, if necessary to correct them at all, under a direct attack. (Citing cases.)"

Act 223 of the Acts of 1921 is entitled "An act to facilitate the collection of the taxes of road improvement districts," and it was approved March 2, 1921, and provided that "Such proceedings shall be conducted in the manner provided by * * * act 279 of the year 1909." Act 534 was approved later, to-wit, March 26, 1921. Yet, it was expressly held, in the Beasley case, *supra,* that this latter act did not affect the foreclosure proceedings to which the former act applied.

This reference to and review of the still earlier case of *Moore* v. *Long Prairie Levee District,* 153 Ark. 85, 239 S. W. 380, appears to answer the insistence that the

case last cited holds that act 534 is a repealing act which provides a method of foreclosure superseding that provided in the various acts to which some of the provisions of act 534 apply.

Appellant cites also the case of *Arkansas-Louisiana Highway Improvement District* v. *Parrish,* 169 Ark. 549, 275 S. W. 898, as supporting the contention made in regard to the implied repeal effected by act 534. But such is not the effect of that case. Section 3 of act 534 (which has been amended by act 227 of the Acts of 1931, page 707) was designed to facilitate redemptions of delinquent lands and to preserve the evidence thereof.

The point decided in the Beasley case, *supra,* was that § 3 of act 534 had not been impliedly repealed by § 3 of the act 261 of the Acts of 1925, page 781, as the latter act was too vague and indefinite to constitute a workable law for the redemption of delinquent lands in road improvement districts.

The case of *Meehan* v. *Road Imp. Dist. No. 7 of Woodruff County,* 180 Ark. 606, 22 S. W. (2d) 904, also cited in the briefs, applied the three-year limitation on suits to foreclose contained in § 4 of act 534 to a suit by a road improvement district created by a special act of the 1920 session of the General Assembly; but that case contains no intimation that the procedure for the collection of the delinquent road taxes there involved had been changed by act 534.

We, therefore, answer the question which appellant says this appeal presents, as did the court below, by holding that act 534 has not impliedly repealed the provisions of the special act of 1917 and the acts amendatory thereof providing the manner of enforcing the payment of the delinquent taxes due the levee district. It must therefore collect its taxes in the manner provided by the acts creating it.

The decree so holding is correct, and it is, therefore, affirmed.

TURNER *v.* STATE.

Crim. 3993

Opinion delivered July 6, 1936.

Franz E. Swaty, for appellant.

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

MEHAFFY, J. The appellant was convicted in the Calhoun Circuit Court of murder in the first degree, and his punishment was fixed at death by electrocution. Motion for new trial was filed, overruled by the court, and the case is here on appeal.

W. A. May testified in substance that he lived at Ellisville, Arkansas, was a justice of the peace, and knew the appellant and Mrs. Turner; she lived about 200 yards from appellant's house. There was a blind boy, a little girl, Delma, ten years old, and Dennis, Jr., eight years old; another son, Milvin, but he was in a C C C camp in South Carolina. Mrs. Turner worked in the sewing room at Tinsman, which was five miles from her home. She walked to Tinsman, and on the morning of February 4 appellant came to witness' house about sunrise and desired that witness assist him in searching for Mrs. Turner. He helped in the search, and picked up her track on the road that goes to Leverett, and lost her track there. Appellant was with witness, also Rush Chamber, Charlie Smith, Vesta Watson, Curtis Aycock, and Cotton Smith. Witness called Vesta Watson, and said her track played out there, and said he saw a man's track there—about a number ten shoe. Witness then told Vesta that the woman was in the woods, and Vesta found her on a mound. The appellant, Charlie, and Cotton Smith, were on the west side. The body was found on the east side. She was dead. She had been knocked in the head and her jaws were broken. There was a wire around her neck, which showed evidence of having been twisted. There were bruises on her hip and shoulder. The death occurred in Calhoun county, and witness thought the wire around her neck caused her death. The death occurred on February 3. Witness does not know who put the wire around her neck. Mrs. Turner disappeared about two hundred yards from the railroad, which tramps frequently walk up and down.

Vesta Watson testified that he lived in Ellisville, and had known Mrs. Turner during her lifetime; found her dead in the woods of Calhoun county, February 4, 1936. This witness' testimony was substantially the same as that of May as to the tracks and wire, but he did not know who put the wire around her neck and did not know whose tracks the man's tracks were.

H. R. Chambers, who was also in the searching party, testified to substantially the same facts as May and Watson.

Larkin Furlow, the coroner, testified that they found two sets of tracks on the road; one a woman's, the other a man's. It looked like there had been a struggle. Where the woman's track played out, the man's appeared in the ditch. Made a careful examination of the man's tracks and measured them. Looked at appellant's shoe and they looked exactly like the imprint of the tracks on the road. The shoe appellant had on compared with the tracks made in the mud. Did not know who had the shoe on or who put the wire around Mrs. Turner's neck.

Cotton Smith, a cousin of appellant, testified substantially the same with reference to the tracks and wire.

Henry Farneld testified that he lived in El Dorado, was on the police force and was present when appellant made a statement. The statement was free and voluntary. There were no threats or promises, no influence or compulsion.

The confession of appellant was here introduced without objection. Appellant stated in the confession that he put the wire around her neck and took her to where the body was found; that when he put the wire around her neck he made a couple of twists, right quick; that she was standing up when he did this and that he laid her down and left; did not think she was dead when he left her; got the wire off the fence when he left the house that morning; he intended to kill her when he got up, and went down and waited for her to come along; he knew she would travel that road and knew about the time she would go. The confession is quite long, but it is unnecessary to set it out in full.

The coroner testified that appellant was in the mayor's office when his statement was made; that there were no threats, no lash exhibited, and appellant's hands were not put through the cell bars up high and thrust through the outside and handcuffed. Witness does not know what he underwent before he got to El Dorado; did not keep him up all night and question him until he made a confession; he did not ask for food or water; witness did not advise him that if he made a confession it would be used against him, nor did any one else in

his presence. Mr. Stevens read the confession over to appellant before he made his mark. When the confession was made they walked into the mayor's office, and the appellant said: "Well, Alvin, I guess you will burn me up," and Alvin said: "Dennis, I don't promise you anything." Appellant then sat down and said: "I know I am going to the chair." None of the police department made any threats to him, and they wrote up the confession about 4:30 in the morning. Appellant gave his confession while he ate, and told about what was written in the confession.

Barney Southall testified that he was a member of the police force and present when appellant made the confession; that it was made freely and voluntarily without promises or duress. Witness advised appellant that his confession would be used against him.

Frip Hill testified that he, Parker and Stevens took appellant to Little Rock, and returned Thursday. At appellant's home witness found some wire with a peculiar twist on it, and the wire was here introduced. Witness compared tracks in the field and in the land, and they compared identically. Mr. Stevens wrote the statement down as appellant talked, and when it was finished he signed by making his mark. The statement was given freely and voluntarily. They took appellant to Mr. Pitcock, chief of police at Little Rock, but witness does not know whether he made any statement to Mr. Pitcock.

Sell Parker, sheriff of Calhoun county, knew both appellant and his wife; investigated the murder; May held the inquest; he arrested appellant and took him to El Dorado for safekeeping and then took him to Little Rock before Mr. Pitcock, but a confession was not obtained. He was later returned to El Dorado for further questioning. Appellant was at the scene of the murder when witness arrived.

Delma Turner testified that she was the daughter of Dennis Turner and was eleven years old; that her mother was killed on February 3, 1936; her father came to her mother's house Sunday morning and asked her to marry him, but her mother refused and he said he would kill her if she did not; the morning her mother was killed

her father said she could have killed herself, been killed by somebody, or died on the road somewhere. Her father cried when her mother was found dead. She does not know who killed her mother.

L. E. Wagmon testified that he knew both the appellant and his wife and arrived at the scene of the murder about an hour and a half after they found the body; saw the tracks, but does not know who made them, and does not know anything about who killed Mrs. Turner.

The appellant testified that he lived at Ellisville, near where his wife lived; does not know when she was killed, but remembers she was missing that night; went to Tinsman to inquire about her, and next morning went to see Mr. May, and a searching party was formed, and they proceeded to track her to the place where her body was found; appellant assisted in the search; he had not asked his wife to marry him since she had him arrested; they took him to Little Rock where he was questioned by Mr. Pitcock; that night Mr. Hill and Mr. Stevens had him brought out and they questioned him again; later Pitcock questioned him about three hours; he asked Mr. Stevens if he could smoke a cigarette after he was brought into the mayor's office, and Stevens said: "Hell, no, you don't get a damn thing," and witness said: "O. K." He testified that he was put in a cell way back where one not well acquainted with the place would never have found him; they told him there would be no smoking, eating or drinking until he came clean; they brought out a lash about three feet long and about four fingers wide; it had a handle on the end of it; was made of leather, and there were some holes in the lower end; there was fringe on that part about six or seven inches long, and witness testified that Stevens said: "This will get it. This gets it when everything else fails." He then testified about somebody looking out and saying: "Don't let them come in here." After they kept that up a while they took him out of the chair and put handcuffs on him and had him sit down again; that they put him back in the cell, handcuffed his arms through the bars, and they were high up and were two bars be-

tween his arms; they left him in that condition and locked the door. They questioned him while he was fastened up, and he stayed there until he thought he would die, and Henry Farneld asked what he wanted, and witness said he wanted loose, he was nearly dead, and Farneld said: "Are you ready now to tell the truth?" and witness said: "Yes, just let me down." Farneld took the handcuffs off and told him to lay down on the bunk. He testified that he did not murder his wife, and did not know who did it; that the confession was not a voluntary confession; that they got it by putting his hands through the bars with two bars between his hands, and leaving him that way and punishing him; that he did not ask his wife to marry him; did not try to stay at his wife's house when she did not want him; did not tell the children she might have been murdered, died on the road, or committed suicide. Witness cannot read or write, and when asked by the prosecuting attorney to sign the confession, he did not know what was in it, and stated that he did not make numbers of the statements in the confession.

The appellant contends first that the court erred in permitting the State to introduce in evidence the confession of the appellant. He contends that the confession was not voluntarily made, but threats of harm, promises of favor, and show of violence caused the defendant to confess, and that the confession, to be proper evidence, must have been voluntarily made.

We have set out the evidence on this question above, and it will be noted that the several witnesses testified that the confession was voluntarily made, that there were no threats, and no improper methods used to obtain the confession. When proof showed to the satisfaction of the court that the confession was voluntary, then the confession was properly submitted to the jury. The court determines the admissibility of the evidence, and the jury determines its weight and the credibility of the witnesses. Much is left to the discretion of the trial judge in determining the question of admissibility. It is true that the appellant himself testified that the confession was not voluntary. He testified before the

jury and his evidence was considered, together with all the other evidence on the question, and the jury found against him. The confession was introduced without objection.

"Where incompetent evidence is offered, it is the duty of the party to object immediately, or at least within a reasonable time. If he fails to object at the time, and afterwards asks for the exclusion of the incompetent evidence, he cannot demand its exclusion as a matter of right, but the request addresses itself to the discretion of the court. A party cannot speculate upon what the testimony of the witnesses will be, and then at the end of the trial demand as a matter of right that the incompetent testimony be excluded." *Howell* v. *State,* 180 Ark. 241, 22 S. W. (2d) 47; *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186.

Appellant cites and relies on § 3414 of Crawford & Moses' Digest, which reads as follows: "In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that any prejudicial error was committed by the trial court in the trial of any case in which a conviction of capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified at the discretion of the court."

This section has been construed many times by this court, and, while the appellant does not have to save exceptions, he does have to make objections, and here no objection was made.

The Supreme Court reviews errors of the circuit court, but before it can consider an error of the circuit court as to the admission or rejection of evidence, objection must be made in the trial court, and this is true in capital cases as well as others.

In construing the statute above set out, this court said: "The Supreme Court of this State has appellate

jurisdiction only, except it may issue writs of *quo warranto* to the circuit judges and chancellors and to officers of political corporations when the question involved is the legal existence of such corporations. * * * As to the admission of evidence in a trial, a question as to its admissibility or competency must be presented to the circuit court by objection or otherwise for decision, before it can err as to its admission, and the same is true as to the law of the case. No exception to such decision is necessary, under the Act of 1909, to present to this court for review, neither is a motion for new trial in cases in which the defendants have been convicted of capital offenses. But it must appear that the decision was made, before we can find that the court erred." *Harding* v. *State,* 94 Ark. 65, 126 S. W. 90; *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477; *Howell* v. *State, supra.*

Appellant next contends that the court erred in permitting the prosecuting attorney to continually lead witnesses, and make prejudicial remarks. No objection was made to this, and the authorities above referred to settle this question.

Appellant contends that the court erred in permitting such great weight being given to circumstantial evidence, without proper instructions on such evidence. No request was made for instructions, other than those given by the court, and it appears that the court fully and fairly instructed the jury, and that no objections to instructions were made.

Where the State relies on circumstantial evidence alone, the circumstances must be such as to exclude every other reasonable hypothesis, but the guilt of the accused; but in this case the State did not rely wholly upon circumstantial evidence. The attorney for the appellant did not try the case in the court below, and, of course, is not responsible for the condition of the record.

It is next contended that the evidence is not sufficient to justify a verdict of murder in the first degree, and that, therefore, the punishment is excessive. If the appellant committed the crime at all, there can be no question as to his being guilty of murder in the first degree.

If the evidence is to be believed, not only the evidence of witnesses, but the confession of the appellant, the appellant murdered his wife by putting a wire around her neck and twisting it so as to cause her death. Whether the evidence is true or not was a question for the jury. The credibility of the witnesses was also a question for the jury.

We find no error, and the judgment is affirmed.

CITY NATIONAL BANK *v.* JOHNSON.

4-4356

Opinion delivered July 6, 1936.

James B. McDonough and *Joseph R. Brown*, for appellants.

Daily & Woods, for appellee.

MEHAFFY, J. This is an appeal from the Sebastian Chancery Court to reverse a decree of that court holding that the property described is the homestead of Jessie M. Johnson, and that she has lived continuously thereon since October 18, 1934; that the said property has been the home and homestead of Jessie M. Johnson since the title thereto was acquired by her in 1925; that the absence of Mrs. Johnson and her husband from said homestead from 1930 to 1934 was temporary only, and that during their said absence there was an abiding intent on

their part at all times to return to the homestead as a permanent home; that there was never any abandonment of said homestead either prior to or since the original decree on May 11, 1933.

The appellant says that the former decree declaring that Jessie M. Johnson was entitled to a homestead was obtained through fraud of appellees practiced on the court. Appellant also contends that appellees have abandoned the homestead since the decision of this court in which we said, referring to the former opinion in these appeals: "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. *Johnson,* 191 Ark. 29, 79 S. W. (2d) 987.

A history of these cases and the facts are stated in the former opinions, and it would serve no useful purpose to restate them. See *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S. W. (2d) 293; *City National Bank* v. *Riggs,* 189 Ark. 123, 70 S. W. (2d) 574.

The question of the homestead of Mrs. Johnson was involved in all these cases, and all the facts that the appellant now knows could have been known in the earlier cases. It was alleged in one of the cases that the Johnsons were nonresidents, and there is no evidence of any fraud on the court. The last case definitely settles the question of Mrs. Johnson's homestead, unless

the evidence shows that she has abandoned it. *City National Bank* v. *Johnson,* 191 Ark. 29, 79 S. W. (2d) 987.

In order to establish the fact that the Johnsons were residents of Oklahoma and not of Arkansas, appellants introduced a number of witnesses, some of them testifying that they had made a list of legal voters of Sequoyah county, Oklahoma, for the year of 1934. They obtained this list from stubs of the ballots that were used at that time. The record had been destroyed, and these lists were made by the witnesses for their private use, and showed the names of C. B. Johnson and Mrs. C. B. Johnson.

It appears, however, from the undisputed evidence, that C. B. Johnson, whose name was on the list, was the son of the appellee, and lived and voted in Oklahoma. C. B. Johnson, the husband of appellee, testified that his health was broken down, and he went to Oklahoma and opened up an agency at Sallisaw to sell Ford cars. When asked why he moved to the farm he said: "For one reason, I had nothing else to do, and my health was broken down; so I went out there and did actual work on the farm—plowed and chopped cotton and did everything in the world I had never done before—and it improved me wonderfully." He testified that he did not intend to stay on the farm—that it was just temporary. His intention was to reside in Fort Smith. He also said that neither he nor Mrs. Johnson entertained any intention of deserting their home in Fort Smith for good. C. B. Johnson did not vote in Oklahoma, and stated when requested to vote, that he was not entitled to vote there, but voted in Arkansas. The evidence shows that Mrs. Johnson was approached by the candidate for sheriff, who requested that she vote for him, and she told him at the time that her vote would not be counted because she was not entitled to vote in Oklahoma. This evidence was corroborated by the testimony of the candidate, who afterwards became sheriff, and also by another witness. There is considerable evidence that Mr. and Mrs. Johnson lived in Oklahoma and lived on the farm with their son, and that Mrs. Johnson voted under the circumstances stated. It would serve no useful purpose to set

out the evidence in full. Most of the facts are set out in the former opinions.

Appellant has called attention to a great many authorities on the question of the abandonment of a homestead. In the case of *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302, the court said: "The abandonment of a homestead is almost, if not entirely a question of intent. This intent must be determined from the facts and circumstances of each case."

Appellant, also, refers to the case of *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499. In that case the court said: "Numerous decisions of this court establish thoroughly the principle that a temporary removal from a homestead once impressed as such, does not constitute an abandonment." In support of this statement the following cases are cited: *Euper* v. *Alkire,* 37 Ark. 283; *Robinson* v. *Swearingen,* 55 Ark. 55, 17 S. W. 365; *Gates* v. *Steele,* 48 Ark. 539, 4 S. W. 53; *Robson* v. *Hough,* 56 Ark. 621, 20 S. W. 523; *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981; *Gebhart* v. *Merchant,* 84 Ark. 359, 105 S. W. 1034.

The court also said in *Harris* v. *Ray, supra*: "The Constitution of this State confers homestead rights upon a resident of the State who is a married person, or the head of a family, and when a homestead is acquired by a resident, temporary absence, even in another State, does not work an abandonment. Even where one exercised, during the time of temporary absence from the homestead, the rights of citizenship at another place, such as voting, this does not necessarily imply an abandonment of the homestead. In other words, where an actual resident of this State acquired a homestead here, the mere exercise of acts of citizenship in another State while temporarily absent from the homestead, does not necessarily amount to an abandonment, though it may be considered strong evidence of such abandonment."

To sustain this proposition the court cites the following cases: *Rand Lbr. Co.* v. *Atkins,* 116 Iowa 242, 89 N. W. 1104; *Cincinnati Leaf Tobacco Warehouse Co.* v. *Thompson,* 105 Ky. 627, 49 S. W. 446; *Minnesota Stoneware Co.* v. *McCrossen,* 110 Wis. 316, 85 N. W. 1019;

Corey v. *Schuster,* 44 Neb. 269, 62 N. W. 470; *Myers* v. *Elliott,* 101 Ill. App. 86.

The exemption laws must be liberally construed. We said in a recent case: "It is the settled policy of this court that our homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended." *Bunting* v. *Rollins,* 189 Ark. 12, 70 S. W. (2d) 40. To support the above statement the case of *Franklin Fire Ins. Co.* v. *Butts,* 184 Ark. 263, 42 S. W. (2d) 559, is cited.

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

All presumptions are in favor of the preservation and retention of the homestead. When property has been impressed with the homestead character, it will be presumed to continue so until its use as such has been shown to have terminated. 29 C. J. 961.

As we have said, the exemption laws are to be construed liberally. The Constitution provides for the homestead, and, when once established, the presumption is that it continues until it is shown by the evidence that it has been abandoned. The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the chancellor's finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence. We think the chancellor's finding in this case is supported by the preponderance of the evidence, and the decree of the chancery court is affirmed.

WISEMAN, COMMISSIONER OF REVENUES *v.* GILLIOZ.

4-4403

Opinion delivered July 6, 1936.

[redacted]

Carl E. Bailey, Attorney General, and *Thomas Fitzhugh,* Assistant, for appellant.

Hill, Fitzhugh & Brizzolara, Miles, Armstrong & Young, Fadjo Cravens and *Harry P. Daily,* for appellees.

MEHAFFY, J. This action was begun by appellees, and appellees state that the following is a brief statement of the facts:

"The city of Fort Smith has for years been in possession of and operating a municipal water plant and system consisting of a pump station on the Poteau River; storage basins located on high tracts of land in the city, into which the Poteau River water was pumped; and a complete distribution system. It became necessary for the city to abandon the pump station on the Poteau River, due solely to the poor quality of the Poteau River water. The storage basins and distribution system were adequate. In order to secure a new and adequate supply of water, the city acquired, and became the owner of, a perpetual right-of-way approximately twenty miles long, and some 1,227 acres of land in fee, and then entered into the three construction contracts for the improvement of its real estate.

"The complaint alleges that the improvements in the aggregate really constitute one project and consisted generally of the following: the building of clay-earth dam on the city's land with concrete wing wall and cutoff walls and a natural rock and concrete spillway. The dam and spillway were built for the purpose of impounding a large lake on the city's property. Included in the improvement was the clearing and grubbing of the lake site. Other improvements included in the contracts and project were the building of a concrete intake tower in the lake above the dam, the building of concrete settling basins, stone and concrete filtration house, and clear water well on the city's land some distance below the dam, and the connection of the concrete intake tower, by means of a 27-inch pipe line, with said settling basins, filtration house, and clear water well, and the connection of all of these, by means of a 27-inch steel pipe line and cast iron pipe line, with the present storage basins and distribution system of the city of Fort Smith. The complaint alleges, and the demurrer admits, that all of said improvements were made on and under the city's land and constitute permanent structures thereon and thereto, and were made pursuant to the three construction contracts involved in this case."

The complaint then alleges the separate contracts and what each one was to furnish, or rather, what each contractor undertook to do under his contract, and then alleges: "That much of the material used for the construction of this project was earth, clay and stone taken by the contractors from the city's land. There was no separate price to be paid by the city for any material used by the contractors. The complaint alleges, and the demurrer admits, that the contractors entered into construction contracts for definite sums, by which they were to furnish the materials and labor and construct the improvements to the city's land. The complaint further alleges that the appellant herein, as Commissioner of Revenue of the State of Arkansas, is demanding that the cost of materials to the contractors be treated as 'gross proceeds' of sale of materials by the contractors to the city under the construction contracts for lump sum con-

tract prices set forth in the complaint, and is demanding that the contractors pay a retail sales tax of two per cent. thereon to the State, and that they collect same from the city as consumer.

"The complaint alleges, and the demurrer admits, that the construction contracts were all entered into before the effective date of the Sales Tax Act."

The appellant demurred, the court overruled the demurrer, and entered a decree permanently enjoining the Commissioner of Revenues from enforcing the provisions of the Sales Tax Act, from which comes this appeal.

There are but two questions for our consideration: First, was there a sale of tangible personal property, taxable under the Sales Tax Law? Second, if there was such a sale, would the collection of the tax on contracts made prior to the effective date of the law be unconstitutional as impairing the obligation of the contracts?

The appellee is correct in stating that, without regard to the precise nature of the property sold, it is certain that under the express terms of the act, the transaction must be a sale or no tax is imposed. They call attention to the case of *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. (2d) 91, and state that it is there expressly held that § 4 of the act levies the tax. Section 4 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 consideration any property, thing, commodity, and/or substance.

"(c) All sales of admission or admittance to athletic contests, theaters, both motion picture and stage per-

formances, 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."

It will be observed that paragraph (b) of § 3 defines the term "sale at retail" to mean any transaction transfer, exchange, or barter by which is transferred for a consideration the ownership of any personal property, thing, commodity or substance, or the furnishing or selling for a consideration any of the substances or things hereinafter designated and defined, when such transfer, exchange or barter is made in the ordinary course of the transferor's business, and is made to the transferee for consumption or use, or for any other purpose than for resale.

Appellees cite and rely on *State* v. *J. Watts Kearney & Sons*, 181 La. 554, 160 So. 77, as showing that the contractors are not dealers. The question in that case was whether they were wholesale or retail dealers. The State was collecting a retail tax. It contended that it was entitled to collect both a wholesale and retail tax. The court in that case said in speaking of the contractor:

"He is not a dealer, or one who habitually or constantly, as a business, deals in and sells any given commodity. He does not sell cement and nails and lumber."

The court, in the above case, stated also that "sales to contractors are sales to consumers, and for this very reason the Legislature did not include contractors and sub-contractors in the term 'dealers for resale' as used in § 7, act No. 205 of 1924, but has placed them in an entirely different classification in § 24 of that act."

Section 24 of the act provides: "That every individual firm, company or corporation carrying on the pro-

fession or business of contractor, shall pay a license based upon the gross annual receipts of said business, which licenses shall be fixed and graded, etc."

The Chief Justice O'NIELL wrote a dissenting opinion in the case above in which he said: "The main question in these cases is whether the business of selling building materials in very large quantities to contractors and sub-contractors, and to municipalities and municipal boards and commissions, should be classed as a wholesale business or as a retail business in determining the rate of the license tax to be levied upon the business."

We have no such question here. The appellees contend that they did not make a sale, and that, therefore, they are not liable to pay any tax. In the case above referred to, on rehearing, not only the Chief Justice dissented, but two other judges. The above case is construing the Louisiana statute, and that statute is different from ours. However, as we have already said, the contractors in that case did not contend they were not liable for a tax, but that they should be taxed as retailers and not as wholesalers.

Appellees next refer to the case of *Bradley Supply Co.* v. *Ames*, 359 Ill. 162, 194 N. E. 272, a case relied on by appellants. This is an Illinois case, and the appellees argue that a contractor who builds and constructs houses and other improvements to real estate is not a dealer or a merchant. That on the contrary he is a builder. They say he does not sell the houses; that he constructs or erects them, and that he most certainly does not sell the lime, cement, lumber and steel which he uses and consumes in fabricating the completed structure which he erects upon and under the owner's land.

Of course, one would not say that the contractor sold the house, but unquestionably he sells the material that goes into the house. If one should contract to furnish the material and labor and build a house for the owner, he would necessarily estimate or calculate the value of the material furnished and the owner would have to pay for it. The contractor would sell this to the owner. The material would belong to the contractor before the contract was made, or he would purchase it from material

furnishers. Our statute says that sale at retail means any transaction, transfer, exchange or barter by which is transferred for a consideration the ownership of any personal property, thing, commodity or substance, or the furnishing or selling for a consideration any of the substances and things, etc. If the contractor owned this material and sold it to the city of Fort Smith, will it be contended that it was not transferred to the city of Fort Smith for a consideration? And if it was so transferred, it is subject to the sales tax under our statute.

It makes no difference that we would not say of a builder that he sold the house, or sold the lumber, shingles or nails, but that is, in fact, what he does. It is just as much a sale of the material as it would be if the contractor would agree on the price of the material and labor separately.

It seems to us that the only question is whether there was a transfer to the city for a consideration. If so, it comes within the terms of § 3 of the sales tax law.

If there was a transfer of ownership, as mentioned in § 3 of the act, there was a sale to the city upon which the tax must be paid, unless the appellees were 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.

"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." *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. (2d) 1007.

Appellees have a good deal to say about a dealer, but as to whether this is a sale by retail from the contractor to the city, must be determined by the sales tax law. That law provides: "The term 'retailer' shall mean any person, persons, partnership, firm or corporation, engaging in sale at retail."

"Sale at retail" is defined in the law as any transaction, transfer, or exchange by which is transferred for a consideration the ownership of personal property, etc. And it makes no difference what the seller or buyer may be called, if it comes within the terms of this law.

The city of Fort Smith unquestionably acquired this property from the contractor, and acquired it for the purpose of consumption and use, and not for resale.

It is argued by appellees that the contractor was not selling any property. They refer to the Louisiana case as holding that the contractor does not sell cement, gravel or sand, and they say that no title to personal property ever passed to the city. The title to the property was in the contractor, and the city of Fort Smith acquired title to that property. It acquired it for a consideration. Merely because the price of the property and the price of labor was estimated together, does not in any way affect the transaction so as to prevent its being a transfer of personal property to the city.

The case of *Wiseman, Commissioner,* v. *Arkansas Wholesale Grocers Ass'n, ante* p. 313, 90 S. W. (2d) 987, involved the question of sales tax on wrapping paper,

paper bags and twine sold at wholesale to merchants, and the merchants used them in wrapping up, tying, and as containers, for articles of merchandise purchased from them. This court said: "In the instant case, however, it is conceded that there is no fixed price for the above-mentioned articles. These articles are not only used by the merchant in the conduct of his business, but they often carry advertisements."

We also said: "In construing statutes it is the duty of the courts to give them a reasonable, sensible interpretation, and, where the language is clear and unambiguous, it is only for the court to obey and enforce the statutes. *Boyer-Campbell Co.* v. *Fry,* 271 Mich. 282, 260 N. W. 165, 98 A. L. R. 827."

Appellees contend that the sales tax act cannot operate retroactively and impose a tax upon a given transaction not taxable when it occurred. It is true we said in *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. (2d) 91, that the act would become effective when, and if, the judgment of this court as there announced becomes final. That was true in that case. Until it became final no penalties could attach, but we were construing § 9731 of Crawford & Moses' Digest, which reads as follows: "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."

It will be observed that the act provides: "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 act was effective as to the parties of that suit when the decision became final, but the statute says "acts done in good faith" before the reversal by the Supreme Court. All the contracts of the appellees were made after the reversal. The case was reversed on June 3d, and the contracts of appellees were all made after June 3d. How can it be said that they were made in good faith, relying on the construction of the chancery court, after it had been reversed by the Supreme Court?

What the parties did, according to their own statements, was to make contracts after the case had been reversed by this court. To be sure, it did not become final immediately, but it was notice to the appellees that the case was reversed, and it could hardly be said that one could act in good faith, relying on the decision of the chancery court, after it has been reversed by this court.

Besides that, there had been no delivery of the property, the titles to the materials had not passed, but they were delivered long after the decision of this court became final.

If appellees' contention is correct, then the State would be powerless to impose a tax or to increase its taxes, although it might become necessary to do so, so as to affect contracts made before a law became effective. One might have a valid contract, might have a note, the payment of which was secured by mortgage on large property, and no matter how necessary it became for the State to increase its taxes in order to meet its obligations, such increase would be void as to these contracts, if the contention of appellees is correct.

Increasing taxation or adding a new tax does not impair the obligation of a contract. It is true that the law, as it existed at the time the contract was made, is a part of the contract, but so is the law with reference to the State's power of taxation. If this were not true, all contracts with reference to real estate would become void as to the tax upon the creation of an improvement district, or the provision for a road tax, or any other tax. The State has the power to tax, and there is no contention made in this case that the tax is unreasonable, or that it is void for any reason, except that appellees say

that it cannot apply to them because their contract antedated the law.

There is no allegation and no showing in the complaint that the appellees acted in good faith in conformity with the construction of the chancery court. We think, therefore, that the demurrer should have been sustained, and the decree of the chancery court is reversed, and remanded, with directions to sustain the demurrer.

McHaney, Butler and Baker, JJ., dissent.

Bullion, Receiver *v.* Pope, Receiver.

4-4423

Opinion delivered June 29, 1936.

Miles & Amsler, for appellant.

Trieber & Pope and *Barber & Henry*, for appellee.

Baker, J. The proposition upon this appeal is to test again an appointment of a receiver for an insolvent insurance company, which appointment was made by the chancery court of Pulaski county.

On the 29th day of May, 1936, R. K. Haxton, as a stockholder of the National Standard Life Insurance Company, filed a petition in the Pulaski Chancery Court, asking for the appointment of a receiver. The complaint alleged among other things the insolvency of the corporation, and that a receiver was necessary to preserve assets and to carry on the business of the company until it could refinance itself.

The company filed an answer to this complaint and admitted the allegations thereof. Bruce Bullion was appointed receiver by order of the chancery court.

On June 3, 1936, Walter L. Pope was appointed receiver by order of the circuit court of Pulaski county, upon a petition filed by the Attorney General, after the Insurance Commissioner had certified to him the fact of insolvency of the insurance company, the cause being styled "*State of Arkansas ex rel. Carl Bailey* v. *National Standard Life Insurance Company.*" Pope made and filed his oath and bond as such receiver, and then filed in the chancery court a motion to discharge Bullion as receiver, and to dismiss the action pending in the chancery court. To this motion a demurrer was interposed, and upon a hearing the chancery court vacated its order of May 29, appointing Bruce Bullion receiver. It is from this order that this appeal comes.

The appellant concedes the effect of the cases of *Franklin* v. *Mann,* 185 Ark. 993, 50 S. W. (2d) 606, and *Walker* v. *McMillen,* 187 Ark. 586, 61 S. W. (2d) 455, and that they are decisive of the question presented here, unless we are willing to overrule both of these decisions.

The case of *Franklin* v. *Mann* was tried in June of 1932 and it was there held: "This is a special proceeding provided for by statute, for the purpose, among other things, as we have said, of protecting the interests of policyholders, and the property of the company." This special proceeding is authorized by the 8th paragraph of § 5951 of Crawford & Moses' Digest.

Without quoting or paraphrasing from the case of *Franklin* v. *Mann, supra,* it may be said that the holding is to the effect that a special proceeding has been provided for, in the matter of insolvent insurance organizations. The purpose of this special proceeding is for the protection of the assets of such organizations for the benefit of creditors, stockholders and others interested, and that the proceeding so provided for is not only an exclusive method or process of determining the matter of solvency or insolvency of an insurance organization, and upon insolvency having been found, provision is made for the appointment of a receiver by the circuit court to

administer the estate of such insolvent organization. This same statute was considered in the case of *Grand Lodge A. O. U. W.* v. *Adair*, 182 Ark. 684, 32 S. W. (2d) 430.

We again pretermit a discussion of the authorities as they are reviewed in the last-cited case. Such discussion would be a repetition.

The opinion in the case of *Walker* v. *McMillen, supra,* decided in 1933, followed by the dissenting opinion, shows that there was a complete and thorough discussion, re-examination and reconsideration of all the matters that are here argued upon the appeal in the instant case. It will be of no benefit to attempt a new discussion or thrash over the old straw. Perhaps, more chaff than grain would be found.

Let it suffice to say the court has not changed or modified conclusions heretofore announced. The writer is not in full accord with the present or former views as declared by these recent decisions. However, a special proceeding is in operation whereby substantial justice will be done.

The decree of the chancery court is affirmed.

JOHNSON, C. J., and HUMPHREYS, J., dissent.

C. H. ATKINSON PAVING COMPANY *v.* EDWARDS.

4-4369

Opinion delivered July 13, 1936.

Culbert L. Pearce, for appellant.

J. H. Moody, Jno. E. Miller and *C. E. Yingling,* for appellee.

MEHAFFY, J. Appellee instituted this action in the White Circuit Court against the appellant alleging that while in the employ of the appellant, on August 8, 1935, he was ordered by his foreman to go down into a pit and there tamp cement, which was being poured into the pit. He had never worked in cement before, and had no knowledge of the reaction caused from cement burns; that he was forced to work in said pit, tamping the cement with his feet, one entire day, while cement was being poured in the pit and upon him; that the cement got on his body, arms and legs, and after a short time began to burn and caused him to suffer great pain; said burns caused large blisters, which later became deep and painful sores; that he suffered both pain and mental anguish for several weeks; that the injury was caused by the negligence of appellant, and that he suffered painful and permanent injury.

The appellant filed answer denying all the allegations, and further answered that appellee allowed or suffered some of the concrete to get into his boots, causing his legs to blister and become slightly sore; that appellant negotiated a satisfactory settlement of its liability to appellee, and on August 30, 1935, paid appellee $36, taking his receipt therefor, which sum fully compensated appellee for all injuries and damages suffered. It also paid $14, appellee's medical bill; that appellee thereupon executed and delivered to appellant a written release, discharging it from all claims and demands growing out of said injuries. Said release was filed with the answer and made a part thereof.

Witnesses to Edward's signature were D. C. Horton, W. A. Clark and H. L. Harris. There was a jury trial and verdict and judgment for the appellee in the sum of $3,000. The case is here on appeal.

Appellee's evidence showed that he was in the employ of the appellant; that he knew nothing about concrete or cement and that this was the first day he worked; that he was ordered by the foreman to get into the pit and tamp the cement, and, in obedience to the orders of the foreman, he did that; he not only did not know anything about the cement making blisters and sores, but the foreman told him nothing about it; he was severely burned. It is not contended, however, that the evidence is not sufficient to show liability, but it is earnestly insisted that the court should have directed a verdict for the appellant because the release, signed by the appellee, was a settlement of the claim, and disentitled appellee to recover.

The appellee testified as to the release, that he told the foreman that he was not going to sign anything, and that the foreman said that that was all right and that they were going to pay him for two weeks more, and let him be off for two weeks more, and that they would pay him $36 and let him be off two weeks. There was a woman in the back of the car, writing on a typewriter, and they handed appellee a paper and said: "Sign your name right there." They said it was a check for $36 and told him to sign his name. The paper was folded up. He signed it on the hood of the car; handed it back to Mr. Horton, and Horton handed it to the insurance man, and he looked at it and said: "All right, you can get your cash at the bank." He went to the bank and got $36. Mr. Horton said: "I think that is pretty good, when you are going to get your job back." Appellee thought he was signing a check. He did not read anything, and it was not read to him. Witness said that he could read and write a little bit, and could sign his name. He admitted that the name was his writing, but he said when he signed it it was folded up, and the paper was blank; and he just wrote "Tom Edwards" down there; there was not anything on it; it had no printed matter, or Edwards did not see any. Witness said he did not sign anything in the presence of Dr. Clark, Mr. Horton and H. L. Harris. Whatever he signed had no writing on it, and he thought it was the back of the check.

Dr. Clark testified that the appellee told him he had settled for $36, and that appellee asked him what he thought about it, and he said he thought it was pretty good, because they usually paid the boys half time. Dr. Clark testified that he had authority to give all the company employees treatment that was necessary, resulting from injuries like this, as long as they needed it. He was present when appellee signed a paper, but did not know whether it was a release or not; did not know what was said; standing in the door of his office, and Mr. Myers and his wife were in the car, and Tom was standing right beside the car, and they asked witness if he would witness Tom's signature, and he signed it. When asked if he knew how the paper was handled and whether it was folded or not, he said: "I paid no attention to those things. It seems to me the paper had never been folded. Tom signed it on the fender of the car." He did not know what the paper was. They merely asked him to witness the signature. Mr. Myers asked witness to sign as a witness. Mr. Myers was the adjuster who settled the claim. Witness was standing in his office door, and they were out in the street, ten feet away. Mr. Horton was standing on the sidewalk, and Harris, the negro, was there. Witness does not remember whether they read anything or not; they just asked him to witness the signature.

Mr. Horton testified that the settlement took place in front of Dr. Clark's office. The release was not folded when it was handed to Tom. Witness does not think the release was read to him, but he told him he was signing a release, and appellee kept asking witness if he was signing his job away, and he told him that he was not, that he was just signing a release so he could not go on and bring suit; did not read the release, but thinks Mr. Myers did.

Neither Mr. Myers, the adjuster for the company, nor his wife, nor Harris, who witnessed the signature, testified. Myers, having prepared the release, and handed it to the negro, probably knew more about the circumstances than any other person, except his wife; but, as we have said, neither of these was called to testify. There is very little dispute in the evidence as to what occurred at the time the release was signed. Edwards was an ig-

norant negro in the employ of Horton; he could read a little and sign his name, and he testified positively that he was told where to sign it; he thought he was signing a check, and did not know that he was signing a release. No reason is given why Mr. Myers, the adjuster of the company, and his wife were not called as witnesses. They were right at the car. Mrs. Myers was in the car, and the undisputed proof shows that Edwards signed the paper on the fender or hood of the car. Whether advantage was taken of this negro in getting him to sign the release, under the circumstances disclosed by the evidence, was a question of fact for the jury.

"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.

Here the negro, who was an ignorant laborer, was surrounded by the foreman, Dr. Clark, physician of the company, Mr. Myers, the adjuster, and his wife, and the appellee testified very positively as to what occurred.

"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 cir-

cumstances, 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 releasee 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.

It is next contended that the court erred in giving instructions Nos. 2 and 5. No. 2 was an instruction on the duty of the master to exercise reasonable care to furnish a safe place to work. This instruction has been approved by this court many times, and it directed the jury, if the appellant had failed to exercise such care and the appellee was injured without fault or carelessness on his part, they should find for the appellee unless they further found that appellee knowingly signed the release.

Instruction No. 5, objected to by appellant, is an instruction on the measure of damages, and is a correct statement of the law.

We have examined carefully all the instructions and the objections and have reached the conclusion that the jury was properly instructed.

It is next contended by appellant that the verdict is excessive. In addition to the testimony of appellee, as to the burns and the extent of his suffering, Dr. A. J. Dunklin testified that the examination of appellee disclosed that he had multiple burns, with the result that it scarred the tissues which were involved. These scars or burns involved the skin of the forearms, hands, fingers and legs, from approximately the lower third of the thigh downward, including the toes. There was some scar tissue formation in the left eye, as a result of the burns. There were some 46 of these scars. Dr. Dunklin testified that he had treated about 100 cases and some of these areas are not well after a period of five or six months. He said there was some question about the healing of these areas, but certainly his scars are permanent. He thinks that

appellee still suffers pain and discomfort. That his ability to work as a common laborer has been diminished; that he has ulcerating areas on his right hand and in the space between the fourth and fifth toes on the right foot; that he had ulcerating areas on three portions of his anatomy that are not well yet. That he had lost the end joint of his right index finger by amputation, and that back of this nub he had a deep ulcer, extending around the finger that is unhealed.

Dr. Clark testified that he had had some experience, not a great deal, in treating cement burns, and he does not think there is anything permanent in appellee's case; just like any other burn; lot of surface involved, but after a few days it will heal, except in spots; a concrete burn is mighty slow to heal; more so than an ordinary burn; he testified that he did not know whether the injury to the finger, the joint of which was amputated, was from the burn or not; he could have gotten it hurt and infection set in; he does not think that the prognosis is as severe as Dr. Dunklin gives it; he thinks the appellee is perfectly well so far as the burns are concerned.

The evidence shows that burns of the character suffered by appellee are more severe than ordinary burns, and appellee necessarily suffered great pain because of the burns. All questions of fact were properly submitted to the jury, and the jury passes on the credibility of the witnesses and the weight of their testimony.

We find no error, and the judgment is affirmed.

SMITH *v.* STATE.

Crim. 3991

Opinion delivered July 13, 1936.

Sam W. Trimble and *Dave Witt,* for appellant.

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

BUTLER, J. Sampson Lee and his wife, Emaline Lee, two aged negroes, were living in the southeastern part of Drew county, Arkansas, on January 16, 1936. Shortly after dark on the evening of that day, nearby neighbors were attracted to their cabin and, on entering, found Emaline Lee lying dead on the floor, and Sampson Lee wounded and bleeding. The furniture of the room was in disorder, a trunk was open, and its contents scattered, dresser drawers pulled out and the room in a general state of confusion. On an examination of the body of Emaline Lee it was discovered that her skull had been crushed by the impact of some blunt instrument. A strip of heavy cloth was found lying near her head which might have been used for the purpose of strangulation or as a gag. Also there was a heavy piece of wood near the body. Three negro men were afterward arrested—Willie Smith, the defendant, Beverly White and Farlander McCormick —and on the 18th day of February, 1936, the grand jury of Drew county returned an indictment charging them with the murder of Emaline Lee. The trial of Willie Smith, the appellant, was set for February 26, 1936, a

day of the regular February term of the Drew Circuit Court. On that day, appellant moved for a continuance which motion was overruled, and the trial proceeded resulting in a verdict of guilty of murder in the first degree and a judgment fixing punishment at death.

The errors assigned as grounds for reversal and argued by appellant's counsel are (1) the refusal of the court to grant a continuance, (2) the giving of instruction No. 1 requested by appellee, and (3) the refusal to give instruction No. 9 requested by the appellant. There is little, if any, conflict in the testimony, the appellant contenting himself with the introduction of only one witness who merely testified as to appellant's age, the only question about which there is any dispute. This witness was appellant's brother, Otham Smith, who testified that appellant was born on July 16, 1917. The sheriff testified on rebuttal that appellant had told him he was twenty-five years old.

The evidence is to the effect that the appellant was a stranger in the community where the murder was committed; that he was seen first on the afternoon of the murder a mile or two from Sampson Lee's home. This testimony was given by a negro woman who identified Willie Smith at the time of the trial and stated that he had approached her house, requested a drink of water which was given him, and left going in the direction of the home of Sampson and Emaline Lee. Sampson Lee testified that he had been drawing a pension for many years; that he would bring the money home and give it to his wife who would take charge of it; that the last time they counted the money, in December, 1935, it amounted to $2,700. He testified further that late in the afternoon of January 16, 1936, appellant appeared at his home. He described the appellant on the witness-stand and pointed out Willie Smith as the one who came to his home. He stated that the boy appeared to be about 21 or 22 years of age, and looked as if he had not done much rough work, but was "mighty cunning and spunctious, telling plenty tales that no person of good judgment would pay any attention to;" that he told witness he had come from St. Louis to let witness know

that his son, Joe, had been killed, and to find out what disposition should be made of the body; that appellant stayed on until it was getting dark and, when told that he would have to go, left the house and disappeared for a short time; that he reappeared after dark, was again admitted, but finally went out and almost immediately returned accompanied by two other men; that they forced an entrance and came into the house together; that appellant attacked witness and his wife, Emaline, began "making such a big fuss this little fellow (meaning appellant) told this big-shouldered fellow and this tall fellow to stop that woman from making that noise. In a few minutes—my wife—she stopped making that noise;" that one of the three held witness and appellant opened the trunk, and, continuing the search, found money under the bed tick; that as soon as the money was found, appellant and his companions left.

The sheriff testified that he recovered a considerable part of the money—something over a thousand dollars. The evidence as to where and under what circumstances the money was found is obscure. Part of it, however, seems to have been taken from the person of appellant who was arrested in Monroe county and delivered to the sheriff of Drew county by the sheriff of Monroe county. After appellant was brought back to Drew county he confessed to the sheriff of that county that he had taken part in the robbery when Emaline Lee was killed. This confession was freely and voluntarily made. The sheriff and one of his deputies testified as to this confession and as to its voluntary nature, which testimony was not disputed.

The evidence conclusively points to the guilt of the appellant gathered (1) from the positive identification of the appellant by Sampson Lee as one of his assailants and (2) by his confession. The indictment charged the commission of the murder "by strangulation and suffocation and by beating and striking Emaline Lee on the head and body with a blunt instrument." It is argued that instruction No. 1 is erroneous in that it was "duplicitous." This instruction recites the substantial

allegations of the indictment; among other things, that appellant and his confederates, with the felonious intent to rob Sampson Lee and Emaline Lee, did kill and murder the said Emaline Lee "by strangulation and suffocation, beating and striking the said Emaline Lee on the head and body," and then tells the jury that the burden is upon the appellee to prove every material allegation of the indictment. To this instruction only a general objection was made, and its correctness depends upon the sufficiency of the indictment. An indictment is sufficient where the act charged as the offense is stated with that degree of certainty as will enable the court to pronounce judgment on conviction according to the right of the case. *Calhoun* v. *State,* 180 Ark. 397, 21 S. W. (2d) 606. An indictment is good which enumerates several acts in the conjunctive, which, together or separately, describe the commission of a single offense. *Kirkpatrick* v. *State,* 177 Ark. 1124, 9 S. W. (2d) 574. The indictment conforms to these rules and as the instruction complained of is but a recital of the indictment, it is not open to the objection now urged.

The trial court did not err in overruling the appellant's motion for a continuance. That motion recites the date of the return of the indictment; the setting of the case for trial on the 25th day of February, 1936; that appellant's attorney lived in Little Rock, a distance of a hundred miles; that five witnesses (naming them) resided in Pulaski county, and, if present, would testify that they had known defendant for a great number of years and know his general reputation "of being a quiet and law-abiding citizen and his general reputation for truth and veracity in the community in which he lives, and that said reputations are good." This motion was filed on the 26th day of February, 1936, the date of the actual trial of the case.

As a general rule, the question of continuance in an action is within the sound discretion of the court and its action will not be disturbed on appeal except where there is a clear abuse of discretion which amounts to a denial of justice. *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d)

946. There is no doubt but that appellant was present at the home of Sampson and Emaline Lee on the night of the murder, that he engaged in the robbery in question and aided and abetted the assault on Emaline Lee which resulted in her death. Therefore, the absence of witnesses who would testify as to the previous good character of defendant was not sufficient to remove the discretion of the court and compel a continuance. For that reason the motion was properly denied. 16 C. J. 464, note 53-4. Moreover, it appears that appellant did not exercise the proper diligence in securing the attendance of witnesses at the trial. In criminal prosecutions the burden is on the defendant who seeks continuance because of absent witnesses to show that he used diligence to secure their attendance. Here we have only the unsupported motion of appellant and there is no testimony to show that he could not have procured the attendance of the witnesses by the exercise of due diligence. By the admission contained in the motion, appellant's attorney who lived in Little Rock knew of the date of the trial at least four days previous thereto, and there is no showing made as to why he could not have had subpoenas issued and served upon the witnesses in time for them to have been in attendance at the trial. *Edwards* v. *State,* 180 Ark. 363, 21 S. W. (2d) 850.

Instruction No. 9, requested by appellant and refused by the court, in effect directed a verdict of acquittal if the jury should believe that appellant approached the house of Emaline Lee unarmed and that neither he, nor his codefendants, injured the said Emaline Lee in any manner with any dangerous weapon, or that they choked or suffocated her, and that the defendant (appellant) had no intention of doing her any bodily harm, and that the actual killing, if there was a killing, was done by some other person, or that she died from excitement or other cause due to her physical condition. The trial court properly refused this instruction, first, because it was abstract, and second, because it was an incorrect declaration of law. It is entirely immaterial what the intention of appellant was with respect to inflicting bod-

ily harm on the person of Emaline Lee, or that the killing was done by another person. The killing was done in the commission of a robbery in which appellant was an active participant, and, therefore, the death of Emaline Lee amounted to murder in the first degree for which the appellant is as culpable as if he, himself, had struck the fatal blow. There is no testimony tending to show that Emaline Lee died from any cause except the blow she received upon her head.

The trial court gave a number of instructions at the request of the appellant, all of which we have examined and find if there was any error in them it was because they were more favorable to appellant than he was entitled to. We have also examined the instructions given at the request of the appellee, and find that the trial court fully and fairly charged the jury, and that no error appears. The judgment is correct, and it is, therefore, affirmed.

PRIEST *v.* SILBERNAGEL & COMPANY.

4-4366

Opinion delivered July 13, 1936.

W. F. Norrell, W. W. Grubbs, O. C. Burnside and *J. R. Wilson*, for appellant.

M. L. Reinberger and *E. P. Toney*, for appellees.

SMITH, J. Appellant, Mrs. Maggie Priest, is the mother of Barton P. Priest, and is the administratrix of his estate, and in that capacity she brought this suit to recover damages for the alleged negligent killing of her son and intestate.

Testimony was offered at the trial from which this appeal comes to the following effect. On the afternoon of Saturday, July 20, 1935, Virgil T. Priest, a brother of Barton Priest, was driving an automobile which he (Virgil) owned, out of the city of Monticello to the home of his father, who lived some miles from Monticello. As he was leaving town he saw his brother, Barton, in company with another young man named Raymond Vest, and he stopped his car and invited them to ride with him. The invitation was accepted. It was intended to take Raymond Vest to the home of his father, which was on the road to the home of Virgil Priest's father, the destination of the owner and driver of the car. About three-quarters of a mile out of town they overtook a truck owned by Silbernagel & Company which was being driven by James Finney, a colored man. Another colored man was riding with him in the truck. Virgil, who was driving his automobile, honked his horn, and the driver of the truck leaned out of the window and looked back at the approaching automobile. The Priest car had been traveling about 25 miles per hour before it attempted to pass the truck. As the automobile sought to pass the truck, the driver of the truck accelerated his speed and turned the truck to the left, thus preventing the automobile from passing. Several similar attempts were made to pass. On the last and fatal attempt the driver of the automobile blew his horn several times and began to pull up alongside the truck. At this point, the view of the road was unobstructed for something more than 500

feet. The driver of the truck again turned it to the left, thus preventing the automobile from passing. In doing so the truck scraped into and collided with the automobile, pushing it further to the left in such a manner that the occupants of the automobile were unable to see another truck coming from the opposite direction over the crest of a small hill with which the automobile collided before the automobile could be turned back behind the truck which it had been following and had attempted to pass. The road at this point was 36 feet wide, and space would have been afforded for the three vehicles to pass in safety had each observed traffic rules and regulations. The collision wrecked the automobile and killed both Virgil and Barton Priest, who were young men 20 and 19 years old, respectively.

Inasmuch as a verdict was directed in favor of Silbernagel & Company, the owners of the truck which Virgil Priest had attempted to pass, we have stated the testimony in the light most favorable to the plaintiff, as we are required to view it, where a verdict has been directed. It may be said that there are many contradictions in the testimony, but these presented questions of fact for the decision of the jury.

In directing a verdict for the defendant, Silbernagel & Company, the court said that the testimony established the fact that the driver of the truck had been negligent in refusing to permit the automobile to pass and in blocking its passage; but the court also declared that it was established by the undisputed testimony "that it was the persistency of the Priest automobile that led to and produced the fatal injuries and deaths, that it was the contributory negligence of both the driver of the Priest car and the deceased (Barton Priest), jointly engaged, under their own testimony, in taking whiskey home to their father, and in this joint enterprise, and in their haste and without having any regard for what might be approaching from the opposite direction, that all these circumstances, to the court's mind, clearly evinced that the accident would not have happened, but for the negligence of the Priest boys themselves. Therefore, I shall instruct the jury to return a verdict for the defend-

ants." From the verdict and judgment pronounced thereon is this appeal.

Other portions of the court's statement show the conclusion above stated was influenced and reached by a consideration of the fact that the road curved for some distance before passing the point where the collision occurred, which was near the foot of the hill over which the approaching truck was coming, and with which truck the automobile collided. Raymond Vest was thrown from the automobile and rendered unconscious, but he survived the accident, and became the principal witness for the plaintiff. The case rests largely upon his testimony.

It is argued that the boys were drinking whiskey, and probably intoxicated; but the testimony does not establish that fact. Proof to the contrary was made by Raymond Vest and other witnesses. As much as can be said of the testimony to this effect is that it may have presented a question of fact for the jury. There was found in the car after the collision a small bottle of whiskey; but the testimony is to the effect that the whiskey had been given to Virgil Priest by a friend of his father's to take to his father, who was ill at the time. Virgil had the whiskey in the car when he invited his brother and young Vest to ride with him. Carrying the whiskey to the father of the Priest boys appears to have been an incident only of the trip. At any rate, it cannot be said, as a matter of law, that it was an enterprise in which Barton Priest was concerned.

It is unnecessary to consider or decide whether the court was correct in finding, as a matter of law, from what was thought to be the undisputed testimony, that the negligence of appellee's truck driver contributed to and was the proximate cause of the collision. Nor would it be conclusive of this case if it were conceded that the negligence of Virgil Priest contributed to his own death, and that of his brother, as was found by the court. The question would remain whether this negligence could be imputed to Barton, as would also the question whether Barton was himself guilty of negligence contributing to his death.

Vest testified to a remark made by Barton to Virgil just before the collision as follows: "He (Barton) always called him (Virgil) 'Bud.' He says, 'Bud, watch that fellow, he may turn over and hit you.' He said, 'And I believe he is going to make you eat the dust yet'."

This is an ambiguous remark, and is susceptible of more than one construction. The first sentence appears to be a caution to the driver to be careful. The last might be regarded as a challenge to cease "eating the dust." The road was of gravel, and the cars stirred up much dust, which filled the air. This may have been the reason the truck driver "hogged" the road, as Vest said he was doing in refusing to permit the automobile to pass, and the remark last quoted may have been construed by Virgil as a suggestion to speed up and pass the truck. But the inference to be deduced from the remark is a question for the jury. If it was intended to be cautionary, it may have been all that Barton could have said or have done in the exercise of due care for the safety of himself and the other occupants of the automobile. If it was intended to urge Virgil to pass the truck, the jury might find that it was an act of negligence to encourage the attempt to pass the truck under the circumstances stated.

Nor do we think that the negligence of Virgil—if it be conceded that he was negligent—is to be imputed to Barton as a matter of law. The latter was riding as an invited guest of the owner and driver of the car. Certainly it cannot be said, as a matter of law, that the brothers were engaged in a joint enterprise.

Counsel have cited many cases from other jurisdictions defining joint enterprise in the driving of automobiles and the legal consequences thereof. We do not review these cases, as we have a number of our own cases which define the law of this subject as applied to the facts of this case.

In the case of *Itzkowitz* v. *P. H. Ruebel & Co.*, 158 Ark. 454, 250 S. W. 535, Chief Justice McCulloch said: "We have distinctly held that negligence of the driver of a vehicle is not imputable to a guest or other person riding in the car, who is not the employer of the driver,

and who exercises no control over him. (Citing cases). Any occupant of a car or vehicle who has the opportunity to control the action and conduct of the driver, and fails to do so when ordinary care would require it, is guilty of negligence which prevents a recovery of damages, but that constitutes negligence of the occupant and not imputed negligence of the driver.'' See, also, *Beason* v. *Withington,* 189 Ark. 211, 71 S. W. (2d) 461, and cases there cited.

Appellee very earnestly insists that the negligence of Virgil Priest in attempting to pass the truck under the circumstances stated was the sole proximate cause of his own death and that of his brother, and that there can be no recovery in this case for that reason. But this cannot be said to be true as a matter of law, even though a jury might so find as a matter of fact. Certainly, the testimony as to the concurring negligence of the truck driver cannot be left out of account in considering that question, and this, as has been said, is a question of fact—a question for the jury, and not one for the court.

We conclude, therefore, that it was error for the court to declare, as a matter of law, that the Priest brothers were engaged in a joint enterprise; and that the negligence of Virgil should be imputed to Barton, this being a question of fact. So, also, is the question whether Barton was guilty of negligence contributing to his death. The judgment must therefore be reversed, and it is so ordered.

METROPOLITAN LIFE INSURANCE COMPANY *v.* MCNEIL.

4-4205

Opinion delivered July 13, 1936.

LeRoy A. Lincoln, Moore, Gray, Burrow & Chowning and *Streett & Streett*, for appellant.

Shaver, Shaver & Williams, Sam T. & Tom Poe and *T. H. Humphreys, Jr.*, for appellee.

JOHNSON, C. J. On May 1, 1926, appellant, Metropolitan Life Insurance Company, effected group insurance in favor of the Chicago, Rock Island & Pacific Ry. Co. employees, by the issuance of its group contract No. 3,000-G. On the same date the certificate of indemnity, here sued upon by appellee, Jett McNeil, was issued by appellant under said group contract. Subsequently, on November 27, 1927, a rider was issued by appellant increasing the death indemnity provided in the original certificate issued to appellee to the sum of $2,000, and for total and permanent disability, in lieu of death benefits, to $36 per month, for a period of sixty months.

On May 27, 1935, appellee instituted this proceeding in the Little River County Circuit Court against appellant, alleging the facts first stated, and that on or about October 6, 1933, he became totally and permanently disabled in purview of said contract; that due proof of disability had been made to appellant, but liability had been denied. He further alleged that appellant had breached its contract of indemnity. The prayer was for judgment for the present cash value of the sixty monthly installments of $36 each, attorney's fees, penalty and costs. The answer admitted the execution of the contract and that it was in full force and effect on October 6, 1933, but denied that appellee became totally disabled on said date or at any other time during the life of said contract. It was specifically denied that due notice of disability was given by appellee, but admitted that it was advised by appellee's attorney of the claimed total disability; it admitted that it had refused to pay the indemnity provided in said contract for total disability and affirmatively alleged that by the express terms of said indemnity contract, it had a legal right to do so. It therefore alleged

that its refusal to pay the indemnity, as demanded, was not a material breach of said contract, but was within its contractual rights. Appellant further alleged in its answer that on January 31, 1934, appellee's certificate of indemnity and group policy No. 3,000-G were canceled and that group policy No. 6880-G was issued in substitution therefor. The prayer was that appellee take nothing by reason of his suit, and in the alternative that appellee's recovery be limited to past-due installments.

Trial to a jury resulted in findings that appellant had breached and renounced its contract with appellee and that he was entitled to recover the present value of the sixty monthly installments of $36 each or $..... A judgment was duly entered in conformity to the jury's findings, and the court thereupon assessed penalty, attorney's fees and costs, from which this appeal comes.

It is conceded by appellant that the testimony adduced was amply sufficient to show that the insured was totally and permanently disabled on and after October 6, 1933; therefore, this phase of the case will not be further considered.

The major and controlling question in the case relates to the alleged renunciation of the contract by appellant or the measure of recoverable damages. The testimony on this issue of fact is in the form of letters passing between appellant, the railway company employer, and appellee's attorney, supplemented by the admissions of appellant that it denied all liability and had canceled the policy by substitution. The pertinent parts of the letters which are claimed as repudiating the contract are: the railway company employers' letter of April 30, 1934, in response to appellee's notice of disability to the insurer, which is as follows: "A review of the claim file shows Mr. McNeil became disabled October 6, 1933, and was released by his attending physician as fit for service upon January 6, 1934. * * * Mr. McNeil did return to work on January 8, 1934, and worked to and including February 16, 1934, when he again laid off on account of illness and has not been at work since.

"Subsequent to his return to work upon January 8, 1934, and prior to the last date he worked, February 16,

1934, the railway company was compelled to discontinue its former group insurance plan, and a new plan was adopted effective with February 1, 1934. All insured employees in the service actually upon January 31, 1934, had their former group insurance terminated as of that date, * * *. Mr. McNeil's former insurance terminated as described heretofore upon January 31, 1934, for the reason he was actually at work at that time. * * * the new plan became effective for him upon February 1, 1934, and any claim for benefits for absences subsequent to February 16, 1934, would come under the new plan.

"* * *. It will be noted that with the adoption of the new group insurance plan, total and permanent disability benefits were discontinued. In other words, no such benefits are provided for under the new and revised insurance plan. Therefore, for your client to receive such benefits under the former plan, it must be shown that he incurred a total and permanent disability while that plan was in effect, and that such total disability was continuous thereafter. It is obvious that such a situation does not obtain in Mr. McNeil's case for he returned to work upon January 8, 1934, and continued to February 16, 1934. Therefore, if he is now suffering with a total disability, the same became effective February 17, 1934, or 17 days after the former plan terminated and the present plan was placed in effect.

"It is also noted that all claims for health benefits under the former plan have been paid in full.

"Therefore the only possible claim this man might have at this time for benefits would be for the absence beginning February 17, 1934, under the present plan. * * *," and the employer's letter of September 17, 1934, as follows: "It is noticed in your letter that you state your investigations show that disability began October 6, 1933, and has been continuous since. Reference to the third paragraph of our letter of April 30th will reveal this is not a fact; * * *.

"Our letter of April 30th then described the change in our group insurance plan effective February 1, 1934, and advised that so far as we were able to ascertain Mr. McNeil had not filed claim under the new plan for ben-

efits for the period of absence beginning with February 17, 1934.

"As stated in our letter of April 30th, if Mr. McNeil will make claim for this last absence on form GH 24C and have the same certified to by his master mechanic and transmitted to us through the proper channels of the railway company we shall be glad to handle the matter to a conclusion with the insurance company. * * *," and the insurer's letter of October 1, 1934, adopting the stated position of employer in the letters set out above, which is as follows:

"Supplementing our letter of September 25, we have now had an opportunity of reviewing all the information relative to the case of the above.

"We note your contention that your client has suffered continuous total disability since October 6, 1933, despite the fact that there is in our possession from the records of the railway company information to the effect that McNeil worked from January 8th to and including February 16, 1934, and during this period he performed the duties of his occupation satisfactorily.

"As Mr. Rees informed you on February 1st, the contract covering the employees of the Chicago, Rock Island & Pacific Railway Company was changed to a plan which provided weekly health benefits in the event of total disability but eliminated total and permanent disability benefits under the life feature of the contract. It becomes very difficult to understand that your client has been totally and permanently disabled since October 6, 1933, because under date of January 20th Dr. C. E. Witt, the attending physician, supplied us with statement to the effect that McNeil was able to return to work on January 6, 1934, having recovered from the effects of the condition which rendered him totally disabled on October 6, 1933. The statement which accompanied your letter of September 15, 1934, from the same doctor, apparently has been made with complete disregard to his previous statement of recovery and ability to return to work on January 6, 1934.

"You can readily appreciate that contradictory statements of this sort are very hard to reconcile, and

while we are perfectly willing to give Mr. McNeil proper consideration, we cannot disregard that part of the case which is unfavorable to him and deal only with that which is favorable to his claim. All the facts must be carefully weighed in their respective order. It is noted that you are willing to furnish further proof of the continuance of the existence of the condition from October 6, 1933. We would be very pleased to have you do this, but unless there are some extenuating circumstances not yet known to us, Mr. Rees' position in his various letters to you that your client's return to work nullified any claim under the policy, in our opinion, is proper. However, we are entirely willing to consider this case from all angles and to facilitate the submission of further evidence we enclose several of our claim forms for completion."

The only reasonable deduction to be drawn from the correspondence quoted above is that appellant and the employer very firmly took the position that appellee did not suffer total and permanent disability prior to February 1, 1934, when group policy No. 3,000-G was canceled by substitution. This conclusion is irresistible when we consider that appellant's last letter on the subject says: "We are entirely willing to consider this case from all angles and to facilitate the submission of further evidence we enclose several of our claim forms for completion."

When the correspondence is thus construed the legal query arises, does this suffice to show repudiation or renunciation of the insurance contract by the insurer? We have never held that mere denial of liability under contracts of indemnity, unaccompanied by other attending facts and circumstances indicating abandonment constitute a renunciation of such contracts by the insurer. *Ætna Life Insurance Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335.

The nearest approach to this result is *Metropolitan Life Insurance Co.* v. *Harper,* 189 Ark. 170, 70 S. W. (2d) 1042, decided by a divided court, but the denial of liability there interposed was attended by facts and circumstances which tended to show that the insurer declined to be further bound by the contract.

In the more recent case of *Jefferson Standard Life Ins. Co.* v. *Slaughter,* 190 Ark. 402, 79 S. W. (2d) 58, we reviewed our former opinions on this question, and there stated the applicable rule to be that a mere denial of liability based upon resumption of activities by the insured did not constitute an abandonment or renunciation of the contract of indemnity by the insurer.

Irrespective of our former opinions on the question, however, the last case cited brings us within the rule adhered to by the great weight of American authority; and uniformity of opinion on such an important question is more desirable than a too strict adherence to individual views. See *New York Life Ins. Co.* v. *Viglas,* 297 U. S. 672, 56 S. Ct. 615, 80 L. Ed. 971, and cases there cited.

Other errors are urged upon us for review, but the conclusion stated render them unimportant. The branch of the case which determines total and permanent disability is affirmed. The award for total and permanent disability suffered, however, is excessive as heretofore pointed out. The rule is that liability attaches upon the happening of total and permanent disability, although not recoverable until due proof of disability was made. See *Smith* v. *Mutual Life Ins. Co.,* 188 Ark. 1111, 69 S. W. (2d) 874, and cases there cited. Appellee therefore is entitled to recover as a matter of law from October 6, 1933, up to August, 1935, the date of the trial, or sixteen monthly installments of $36 each, aggregating $576.

Judgment will be rendered here for this sum. The judgment for penalty and attorney's fees must be reversed and dismissed because appellee sued for an excessive amount.

Modified and affirmed.

THE EQUITABLE LIFE ASSURANCE SOCIETY *v.* BARTON.

4-4365

Opinion delivered July 13, 1936.

Burch, Minor & McKay and *Wils Davis,* for appellant.

James G. Coston and *J. T. Coston,* for appellee.

JOHNSON, C. J. To compensate an alleged anticipatory breach of two life insurance contracts each of which contained total and permanent disability clauses, this suit was instituted by appellee, Price M. Barton, against appellant, Equitable Life Assurance Society, in the Mississippi County Circuit Court, the prayer of the complaint being for $23,500 as damages, reasonable attorney's fees, penalties and costs. By general denial the allegations of the complaint were put in issue. At the January, 1936, term of said court, a trial to a jury was had, but the trial court instructed the jury that there had been no renunciation or abandonment of the contracts by appellant, and that, therefore, appellee could not recover damages or the present value of the contracts from which direction appellee prosecutes a cross-appeal to this court; and on the issue of total and permanent disability submitted the question to the jury under instructions not here complained of. The jury returned a verdict finding total and permanent disability upon which a judgment was duly entered for past-due installments, a review of which is sought by direct appeal.

On the cross-appeal but little need be said. We are definitely committed to the rule that alleged errors which

do not appear on the face of the record will not be reviewed on cross-appeal unless preserved by motion for a new trial. No such motion was filed. *Ætna Life Ins. Co.* v. *Martin, ante* p. 860, 96 S. W. (2d) 327; *Stacy* v. *Edwards,* 178 Ark. 911, 12 S. W. (2d) 901; *St. Louis Sw. Ry. Co.* v. *Alverson,* 168 Ark. 662, 271 S. W. 27.

Moreover, the conclusion reached by the trial court in respect to the alleged renunciation or abandonment of the contract by the insurer seems to conform to our views this day expressed in *Metropolitan Life Insurance Co.* v. *McNeil, ante* p. 978, 96 S. W. (2d) 476.

The paramount contention presented on direct appeal is to the effect that the testimony adduced is insufficient to support the jury's finding of total and permanent disability, and for this reason the trial court erred in refusing to direct a verdict as appellant requested. The determination of this contention necessitates a review of the testimony adduced at some length. The contracts of indemnity which were the basis of this suit contain the following pertinent definition of total and permanent disability: "(A) Disability is total when it prevents the insured from engaging in any occupation or performing any work for compensation of financial value."

The testimony adduced by appellee when viewed in the light most favorable to him, as we are required to do under repeated opinions of this court, was to the effect that in May, 1932, he received several gunshot wounds; two in the chest and two in the hip, one of which passed through the bowels. As a consequence of said wounds, appellee remained in a hospital four months; he was removed from the hospital at that time in an ambulance; he has been forced to remain under the care of physicians up to the time of the trial; he is an uneducated man, and prior to his injuries made his living expenses by farming, the only business he knew; he could, prior to his injuries, oversee the cultivation on shares of thousands of acres; this necessitated horseback riding for from ten to fifteen hours daily. Subsequent to appellee's injuries, he has been forced to desist share cropping, because he cannot oversee it; he cannot, because of his injuries, ride horseback, and cannot walk more

than 150 yards at a time; he cannot drive a car as he did prior to his injuries because his leg becomes "numb" and "I just haven't got the use of it," in shifting gears; in such circumstances he is required "to hoist his leg with his hand"; appellee cannot now carry a scuttle of coal or a bucket of water, and is unable to load purchases of merchandise into his car; his body is now unbalanced, due to said injuries, one leg being one and three-fourths inches shorter than the other. Appellee now spends much of his time in bed; he cannot perform any kind of manual labor. In 1936, appellee was in the field not more than a time or two, and his farming operations are now carried on by tenants, who own their own farming equipment.

Surgeons of wide and favorable reputation testified that appellee is now suffering from a "bullet in the marrow of the bone in his left leg," and it is inadvisable to remove it; that X-ray pictures reflect that there is "a gradual giving way or absorption of the head or shaft of bone and 'heel' of pelvis bone is eroded"; that the bone is practically destroyed and will gradually grow worse; that the joint where the spine joins the pelvis will in the future get stiff. The surgeons further testified that the last X-ray pictures made in January, 1936, reflect practically the complete destruction of the neck of the bone. They further testified that appellee cannot ride horseback; that he cannot spread his legs; that due to the conditions described, appellee cannot do farm work, and will never be any better. A great mass of testimony was adduced by appellant tending to contradict the above, but since the jury has disregarded it, we shall not enlarge this opinion with a synopsis thereof. Under the facts recited above, was the jury warranted in finding appellee totally and permanently disabled?

Under a contract of indemnity not materially different from the one under consideration here, we stated the applicable rule for ascertaining total and permanent disability as follows: "Our decisions support the view that provisions in accident policies for indemnity, in the event the insured is totally or wholly disabled, do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as

meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way." *Travelers Protective Ass'n of America* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364. The rule as thus stated has been approved and consistently followed in all subsequent cases. *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 61, 56 S. W. (2d) 433; *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520; see, also, *Ætna Life Ins. Co.* v. *Martin, ante* p. 860, 96 S. W. (2d) 327; *Ætna Life Ins. Co.* v. *Person,* 188 Ark. 864, 67 S. W. (2d) 1007. Compare *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600.

The rule of law for ascertaining total and permanent disability is concise and without complications, but the difficulties arise out of the facts in respect to its application. The Snow and Person cases cited, *supra,* relied upon by appellant are fair examples of these difficulties. It is self-evident that each case must of necessity rest upon its peculiar facts and circumstances, and no decided case, when tested by its peculiar facts and circumstances, can be logically said to control another case. Even so in the instant case, we are unwilling to substitute our judgment for that of the jury under the peculiar circumstances of this case. That appellee is seriously and permanently disabled is established by the undisputed facts; and that he will never recover is a reasonable conclusion to be drawn from the facts adduced; that he is not now and will never be able to perform the substantial and material acts in respect to his farming operations, his only familiar vocation, in the usual and customary way is a fair and reasonable conclusion deducible from the testimony, and is well grounded therein. The facts of this case come more nearly within those stated in *Mutual Life Ins. Co.* v. *Dowdle,* 189 Ark. 296, 71 S. W. (2d) 691.

It follows from what we have said that the trial court was correct in submitting this question of fact to the jury for their consideration and judgment, and its findings cannot be said to be without substantial support in the testimony.

The conclusion stated renders it unnecessary to discuss the contentions in respect to partial disability and kindred subjects.

The only remaining contention on direct appeal relates to the admissibility of farmers testifying as experts in respect to the duties incumbent upon them as such, and the necessary physical abilities of one to accomplish such results. In the early case of *Arkansas Midland Railway Co.* v. *Griffith,* 63 Ark. 491, 39 S. W. 550, we recognized the capacity of a farmer to testify as an expert in respect to matters wherein he excelled, and no different status is presented here. This contention therefore is without substantial merit.

No error appearing, the judgment is affirmed.

DEMOCRAT PRINTING & LITHOGRAPHING COMPANY *v.* PARKER, AUDITOR.

4-4383

Opinion delivered July 13, 1936.

Cockrill, Armistead & Rector, for appellant.

Carl E. Bailey, Attorney General, *J. Hugh Wharton,* Assistant, and *Pat Mehaffy*, for appellee.

JOHNSON, C. J. This mandamus action was instituted by appellant, Democrat Printing & Lithographing Company against Charley Parker, State Auditor, in the

Pulaski Circuit Court to compel the delivery of a certain warrant or voucher to it. The complaint in effect alleged that on December 31, 1935, the duly constituted State agency accepted the proposal and offer of the Parkin Printing & Stationery Company to furnish the various departments of the State necessary articles of stationery and office supplies as listed in the "St. Louis Price List," a trade publication of general circulation, and at prices therein designated less a discount of 27 per cent; that said proposal was to cover the biennium beginning January 1, 1936; that on the same date said State agency accepted the proposal and offer of appellant to furnish the several State departments during said biennium all necessary stationery and office supplies not covered by other contracts, at a price of 3 per cent. discount from its current wholesale price list; that in performance of and in conformity to the last mentioned contract, on February 25, 1935, the Governor's office made proper requisition upon the State printing clerk for certain stationery not covered by other contracts, and that subsequently said requisition was duly approved by the State Comptroller's Department, and the State printing clerk; that said requisition and order were thereupon accepted by appellant, and the merchandise therein ordered was duly delivered as directed; that on February 26, 1936, the Governor's office issued a voucher in appellant's favor in the sum of $28.15, the purchase price of the stationery theretofore ordered; that this voucher was duly approved for payment by the State Comptroller's Department as required by the pre-audit act of 1933, and was thereupon delivered to appellee, State Auditor, who immediately approved said voucher and caused State Warrant No. 94,573 to be issued in appellant's favor, but that appellee refused to deliver said State warrant to appellant, and assigned as reason therefor that the Attorney General's office had advised that said warrant, requisition and voucher were invalid. The prayer was that peremptory mandamus issue compelling the delivery of said warrant by appellee to appellant.

Appellee demurred to the complaint thus filed, and as ground therefor alleged that appellant's suit was one against the State, and as such could not be maintained;

secondly, that said complaint did not allege sufficient facts to constitute a cause of action. The trial court sustained appellee's demurrer and dismissed appellant's complaint from which this appeal comes.

The legal sufficiency of the complaint is the controlling question in the case, and we shall confine ourselves to an examination of this issue. The law is well settled here as well as elsewhere that the discretion or discretionary powers of an executive officer of the State will not be controlled by mandamus. *Street Imp. Dist. No. 74* v. *Refunding Board of Arkansas, ante* p. 892, 95 S. W. (2d) 639; *Refunding Board of Arkansas* v. *National Refining Co.,* 191 Ark. 1080, 89 S. W. (2d) 917. But the rule is equally as well settled, and we have always so held, that mandamus is the appropriate remedy to compel an executive State official to perform a ministerial act. *Moore, Auditor,* v. *Alexander,* 85 Ark. 171, 107 S. W. 395; *Jobe, Auditor,* v. *Caldwell,* 93 Ark. 503, 125 S. W. 423; *Jobe, Auditor,* v. *Caldwell,* 99 Ark. 20, 136 S. W. 966; *Jobe, Auditor,* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121; *Cotham* v. *Coffman, Auditor,* 111 Ark. 108, 163 S. W. 1183; *Hodges, Secretary of State,* v. *Lawyer's Cooperative Co.,* 111 Ark. 571, 164 S. W. 294; *Ellison* v. *Oliver, Auditor,* 147 Ark. 252, 227 S. W. 586; *Hopper, Secretary of State,* v. *Fagan,* 151 Ark. 428, 236 S. W. 820.

Under the allegations of appellant's complaint, which for the purposes of the demurrer must be conceded to be true, to the effect that the State Auditor "caused a warrant to be drawn on an unexpended appropriation payable to this plaintiff in the sum of $28.15, being warrant No. 94,573, etc.," but had arbitrarily refused to deliver same to appellant, it is contended that any discretion abiding in the State Auditor under act 63 of 1933 was exercised when said voucher was presented to him for warrant and said warrant was issued, and that thereafter the delivery of said warrant to appellant, after approval and issuance as approved was merely a ministerial act which may be compelled by mandamus. This contention is fundamentally unsound. There is a concord of opinion to the effect that a written contract acquires no validity until delivery, either actual or con-

structive. See 6 R. C. L., § 58, page 642, and cases there cited.

Therefore, if discretion is vested in the Auditor of State in the approval, issuance or delivery of appellant's claimed warrant, mandamus will not issue to compel its delivery. The question then recurs, is discretion vested in the Auditor in these respects? The pertinent provisions of act 63 of 1933 read: "The Auditor shall satisfy himself that all such contracts, resolutions, authorities for expenditure and proceedings are a proper and legal basis for the payment of State funds, and he is authorized to call upon the Attorney General for opinions when he deems proper. * * *

"It shall be the duty of the Auditor to examine said voucher and the supporting papers, and to compare same with the contract or other authority for expenditure, and if in his opinion the voucher is properly supported, and is for a legal and valid claim against the State, and there is an unexpended appropriation for same, he shall approve the original voucher which shall then become a warrant upon the Treasurer, payable to the order of the person entitled to payment, and shall be paid by the Treasurer."

The language of the act just quoted, "The Auditor shall satisfy himself that all such contracts, resolutions, authorities for expenditure and proceedings are a proper and legal basis for the payment of State funds, and he is authorized to call upon the Attorney General for opinions when he deems proper" can mean but one thing, and that is that the Auditor of State is vested with power and authority to examine into all vouchers presented to him for State warrants which are issued upon contracts, resolutions, etc., drawn against State funds, and ascertain their basis and validity, and, when in doubt with reference thereto, he may call upon the Attorney General for advice in the premises. This is discretion by all definitions known to the law. and is especially so under our recent opinions in the Refunding Board cases cited, *supra.*

Cotham v. *Coffman, supra,* cited and relied upon by appellant is not in conflict with the views here expressed.

There the Auditor of State denied the claim of Cotham, a circuit judge, for salary due. The statute under which the claim was presented and denied was § 3412, Kirby's Digest, and it provides: "In all cases of accounts audited and allowed against the State, and in all cases of grants, salaries and expenses allowed by law, the auditor shall draw warrants upon the treasury for the amount due, etc." Under this statute we held that the State Auditor should be compelled by mandamus to issue and deliver to Cotham his salary warrant. A casual reading and comparison of the two statutes involved suffices to demonstrate their wide difference. In the one considered in the Cotham case a peremptory direction to the Auditor appears, whereas, in the one under consideration here the Auditor is authorized, not only to exercise his judgment in respect to the basis of the claim and its validity, but to call upon the Attorney General for advice and directions.

Appellant next urges that irrespective of the discretion resting in the Auditor, he may yet be compelled to act in the premises where there is no dispute as to the validity of the contract or claim. Conceding without deciding that there is no dispute in respect to the validity of appellant's claim against the State; this begs the question of law involved. Discretion, as used in respect to executive State officials, means not only discretion on questions of fact, but on mixed questions of law and fact. Whether such official decides the question right or wrong is immaterial. Having the power to decide at all carries with it the duty to decide as he perceives the law and the facts to be, and the courts have no power to review his determination by mandamus. We have heretofore, in effect, so decided. See *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742. The conclusion reached in the Pitcock case, *supra,* finds support in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 23 S. Ct. 698, 47 L. Ed. 1074. See, also, *Branaman* v. *Harris,* 189 Fed. 461.

The trial court was correct in denying to appellant the peremptory writ of mandamus, and its judgment must be affirmed.

SMITH and MCHANEY, JJ., dissent.

RIGGS *v.* CLAY COUNTY BURIAL ASSOCIATION.

4-4333

Opinion delivered July 13, 1936.

[redacted]

W. J. Schoonover and *G. B. Oliver, Jr.*, for appellant.

O. T. Ward, for appellee.

SMITH, J. The Clay County Burial Association was sued by one of its members in the Western District of Clay county, and a motion was sustained to quash the service of summons, upon the ground that the suit could not be maintained in that district of the county, and this appeal is from that order.

The articles of association of the defendant, hereinafter referred to as the association, which were offered in evidence upon the hearing of the motion to quash the service, recite that "the corporation shall be located in the town of Rector, Arkansas (branch in the town of Piggott, Arkansas)." These articles also recite "that the purpose of the corporation is and shall be the furnishing of funeral or burial benefits to the members of said association." There are five classes of membership, the highest being Class "AA," whose members are entitled to a funeral costing $300. Other classes are awarded funeral services at lower costs, the lowest being Class "D," whose deceased members are given funeral services costing $60. These sums are not paid to the families of the members who die, but the association buries the deceased members in a manner costing not more than the sums allotted to the class to which the deceased members belonged.

The expenses of the funerals are paid by assessments levied against the surviving members of the classes to which the deceased members belonged. The association was organized and is operated by W. H. Irby, who was its secretary and treasurer. He owned and operated what he called funeral parlors at Rector and Piggott, in the Eastern District of Clay county, and at Corning, in the Western District of that county, and testified that he "had been designated funeral director to furnish the benefits for the Clay County Burial Association." If he did not bury a deceased member he employed some other undertaker to do so. The profits derived from these services appear to have been Irby's only compensation.

Irby was the only witness who testified on the hearing of the motion to quash service of summons, and his testimony, in addition to the facts above recited, was to the following effect. He was the active manager. The offices of the association are at Rector, although he maintained funeral parlors in Rector, Piggott and Corning. The assessments are payable to him as treasurer, and receipts therefor are issued in his name as treasurer, either by himself or his representatives in charge of the parlors at Rector, Piggott and Corning. There are between eight and ten thousand members of the association in the Western District of Clay county. Notices of assessments recited that assessments may be paid at Rector, Piggott or Corning, as the members preferred. These notices of assessments contained the names of the members who had been buried by the association, and whose deaths had made the assessments necessary. This arrangement for the payment of assessments is for the convenience of the members. About twenty-five hundred members paid at Corning. He furnished blank receipt books, which are kept at the undertaking parlors in Corning for this purpose. The parlors at Corning is in charge of Wallace Edmonston and Miss Mary Hull, both of whom had authority to collect assessments and to issue receipts therefor, signing the name of Irby as treasurer. Both Edmonston and Miss Hull worked for him. Neither is employed by the association. He pays them

personally. The association pays them nothing. Miss Hull keeps the records and makes report to him of assessments collected at Corning. There are no other records kept at Corning. The association's records are kept at Rector. Miss Hull and Edmonston are his employees. "He (Edmonston) is a funeral director, and does funeral work. Miss Hull works for me and stays there (at Corning) when Mr. Edmonston is out to take calls for the funeral home."

The summons (the service of which was quashed by the order of the court) was served upon Edmonston in Corning, which is the seat of the court for the Western District of Clay county.

To affirm the action of the court below it is pointed out that the act establishing separate courts in the county of Clay (Act XIV, Acts 1881, page 21) provides that the jurisdiction of these courts shall be as separate and distinct as if they were held in different constitutional counties, and it is specifically provided "that no citizen or resident of the Eastern District shall be liable to be sued in said Western District; nor any citizen or resident of the Western District shall be liable to be sued in the said Eastern District in any action whatever."

Treating these districts, therefore, as separate counties for the purpose of ascertaining whether the courts of the Western District have jurisdiction of a cause of action against the association, whose domicile is in the Eastern District of the county, it becomes necessary to decide whether that jurisdiction is conferred on the courts of the Western District under the provisions of § 1152, Crawford & Moses' Digest, as applied to the facts hereinbefore recited. This section reads as follows: "Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of said counties where said corporations so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon

said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations."

It is undisputed that Edmonston kept and maintained an office or other place of business in the Western District of Clay county. The question is whether he kept or maintained such office or place of business as the agent of the association for the transaction of the business of the association.

Numerous cases have considered and construed § 1152, *supra,* in determining whether a branch office or other place of business was maintained by a corporation, either foreign or domestic, within the meaning of this statute so as to confer jurisdiction upon the courts of the county in which such branch office or other place of business was located. Among others the following: *Fort Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 272, 171 S. W. 99; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Arkansas Power & Light Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. (2d) 464; *Mississippi River Fuel Corporation* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255; *Bradley Lbr. Co.* v. *Henry,* 189 Ark. 482, 73 S. W. (2d) 157; *Berryman* v. *Cudahy Packing Co.,* 189 Ark. 1152, 76 S. W. (2d) 956; *Chapman & Dewey Lbr. Co.* v. *Means,* 191 Ark. 1066, 88 S. W. (2d) 829; *Chevrolet Motor Co.* v. *Landers Chevrolet Co.,* 183 Ark. 669, 37 S. W. (2d) 873.

The association relies upon the Chevrolet Motor Company case, last cited, as upholding the order and judgment of the court below to the effect that it did not maintain a branch office or other place of business in the Western District of Clay county, and could not, therefore, be sued in the courts of that district.

After reviewing the facts recited in that opinion the court there said that the corporation did not keep or maintain a branch office or other place of business in the county in which it had been sued. Here, the facts are essentially different from those in the motor company case, *supra.* There appears to be no question that Edmondston and Miss Hull were the agents of the asso-

ciation. They were constantly engaged in the collection of the assessments due it, the source from which the association derived its income. Their authority to perform this service is not questioned. They collected thousands of assessments each year, and issued binding receipts therefor, the validity of none of which is questioned. The ownership of the building in which this was done is not the controlling question. *Ramey* v. *Baker,* 182 Ark. 1043, 34 S. W. (2d) 461. Its use for this purpose was permitted and authorized by the secretary and treasurer of the association, who was its managing officer. Members not only went to this place of business to pay their dues, but other members remitted their dues by mail, which were received and accepted by the association's agents, acting with full authority.

It is argued that Miss Hull and Edmonston were not the agents of the association, because they were not paid for their services by the association, but were paid by Irby. There are two answers to this contention. The first is that, if Miss Hull and Edmonston were in fact agents of the association, it is immaterial whether they received any compensation from it for their services. Section 1152, Crawford & Moses' Digest, copied above, contains no such requirement. Their relation to the association must be determined by a consideration of the duties they were authorized to perform for it and in its behalf, rather than by a consideration of their compensation for the performance of these duties. They made collections of assessments, and issued binding receipts therefor, and made remittances thereof from a fixed and established place of business which was controlled by the association's general manager. Nor does it appear that these services were rendered without compensation. Irby paid them immediately, but the association paid ultimately. His contract with the association required him to bury its members, and he was paid in each instance the amount of the deceased member's burial benefits. Presumptively he received from the association in this manner remuneration for the expense which he incurred in its behalf in enabling it to perform the functions of its articles of association. However, he had clothed Edmons-

ton, upon whom the service was had, and who was in charge of the place of business in Corning, with certain powers, the possession and discharge of which constituted Edmonston as the agent of the principal in whose name and for whose benefit he acted.

We conclude, therefore, that Edmonston was an agent in charge of the branch office or other place of business in Corning, and service upon him was sufficient, therefore, to confer jurisdiction upon the courts of the Western District of Clay county, in which district Corning is situated.

The judgment of the court below is therefore reversed, and the cause will be remanded with directions to overrule the motion to quash the service of the summons.

COCA-COLA BOTTLING COMPANY *v.* STRATHER.

4-4367

Opinion delivered July 13, 1936.

Lyle Brown, J. H. Lookadoo, and *Rowell, Rowell & Dickey,* for appellant.

Fletcher McElhannon, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of $250, rendered in the circuit court of Clark county, in favor of appellee against appellant, in an action based upon the alleged negligence of appellant in bottling and selling Coca-Cola, which contained a poisonous substance, or, more particularly, a spider.

Appellant contends for a reversal of the judgment on the grounds:

First, that the evidence was not sufficient to support the verdict.

Second, that instructions, especially No. 4, given by the court, were prejudicial.

Third, that the court erred in not permitting appellant to call Dr. Bourland as a witness.

And, fourth, that the verdict was the result of passion and prejudice and inconsistent with the other verdicts rendered in the case.

The suit sought to recover $10,000 for Mildred Strather, $3,000 for her father on account of the expenses incurred by him in caring for her when ill and the loss of her services, and $5,000 for M. C. Caruthers. The case was submitted to a jury upon the pleadings, the testimony adduced by the respective parties, and instructions of the court, which resulted in a verdict in favor of appellant as to W. J. Strather and M. C. Caruthers, and a verdict in favor of appellee for $250. No appeal was taken by W. J. Strather and M. C. Caruthers.

The evidence introduced by appellee was, in substance, as follows: Caruthers bought a bottle of Coca-Cola from a merchant in Arkadelphia by the name of James Waldron, who decapped it for him and, after he took a swallow or two, he handed it to Mildred, who took two or three swallows, who handed the bottle to Miss

Fagan, who discovered a decayed or rotten spider in the bottle before drinking any out of it. The merchant poured the remaining contents in a glass and spread out the spider, and one of its legs came off. All the witnesses who were present when the bottle was decapped testified that the spider did not get in the bottle from the time it was decapped until it was discovered. The part of the contents of the bottle drank by Caruthers caused him to get sick in ten or fifteen minutes and to suffer from nausea at short intervals for three or four weeks, and caused him to suffer from pains and cramps in his stomach. The portion drank by Mildred Strather in about fifteen minutes caused her to suffer from nausea, pains and cramps. She vomited up one of the legs of the spider. Dr. Bourland was called in and treated her, but did not continue to administer to her because her father had no money to pay him. Dr. Bryant was then called in and treated her until the time of the trial. He testified that the condition could have been caused by the poison from a spider. Her stomach was irritated, and she could not retain food. She remained in bed most of the time and could not work and during the interval from the time she drank from the bottle of Coca-Cola until the trial she lost in weight from 122 pounds to 101 pounds.

The testimony introduced by appellant was to the effect that its plant in Camden, where the bottle of Coca-Cola from which appellee drank was bottled, was perfect in all its equipment, consisting of the latest and most improved machinery, and that under its system of manufacturing Coca-Cola and its rigid and careful inspection of their bottles, that it was impossible for foreign matter to have gotten into the bottle and that had a spider been in the bottle, it would not have poisoned any one.

According to the theory of appellee and the testimony introduced by her, the only opportunity for the spider to have gotten into the bottle was before or during the process of bottling same and before it was capped.

According to the theory of appellant and the testimony introduced by it, the spider entered the bottle after it was decapped.

The testimony introduced presented issues of fact for determination by the jury. Appellant is bound by the adverse finding of the jury.

The testimony introduced by appellee was sufficient to make a *prima facie* case of negligence against appellant, and the showing made by appellant was not sufficient, as a matter of law, to overcome the *prima facie* showing of negligence. On this point, the instant case is ruled by the case of *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862.

Instruction No. 4, assailed by appellant, is as follows: "If you find for the plaintiff, Mildred Strather, you will assess her damages at such sum as will compensate her for her bodily injuries which she has sustained, if any, as a result of drinking the Coca-Cola; the physical pain and suffering, if any, which she has endured, or which she may suffer in the future as a result of her injuries, if any; the mental anguish which she has suffered, or may suffer in the future, if any; and the effect of the injury on her health according to the degree and probable duration of same, if any."

The defect claimed is that the words "if any" appearing throughout the instruction, do not necessarily call attention to the jury that its finding must be founded on the evidence and based on a preponderance thereof. The words "if any" refer to a preponderance of the evidence mentioned in the first part of the instruction. The jury could not have misunderstood to what the words referred and certainly must have understood that in reaching a verdict they must be governed by the evidence in the case. Not only in instruction No. 4, but in instructions Nos. 5, 6 and 7, given at appellant's request, the jury was told that any finding they made for plaintiff (appellee) must be based on the evidence. Again, if appellant, by specific objection, had suggested that the words "if any" might not confine the jury to the evidence in the case, and had suggested that the phrase "if any as shown by the evidence" be substituted for the words "if any," the court would have promptly made the substitution. No prejudice did or could have resulted to appellant in giving instruction No. 4 as worded, be-

cause, when considered with the other instructions, no other meaning could have attached to the words "if any" than they meant "if any as shown by the evidence."

At the close of all the testimony, appellant announced that it wanted to introduce Dr. Bourland to show that appellee's trouble was poison in the blood and not the result of drinking from the bottle of Coca-Cola. Dr. Bourland gained what information he had from appellee when he was her physician. There had been some disagreement between Dr. Bourland and appellee. She had gotten another physician when he refused to longer attend upon her. She objected to him being introduced as a witness on the ground that her relationship with him was confidential and privileged, and her objection was sustained by the trial court. His testimony was privileged and was inadmissible. Appellant argues, however, that the communications appellee had made with Dr. Bourland were waived by appellee's own testimony in the case. When cross-examined by appellant's attorney, appellee had denied that Dr. Bourland told her that the spider in the Coca-Cola bottle did not cause her trouble, but that her stomach trouble was due to other causes. She said Dr. Bourland told her he was treating her for poison in the stomach. Under the rule of evidence, appellant was not permitted to call Dr. Bourland, appellee's own physician, to contradict on matters it had brought out on cross-examination. *Missouri & North Ark. Ry. Co.* v. *Daniels,* 98 Ark. 352, 136 S. W. 651. She did not waive the privileged communication between herself and Dr. Bourland by answering questions prepounded to her on cross-examination.

Appellant contends that the verdict in favor of appellee was inconsistent with the verdicts rendered against her father and Caruthers, and being returned on the same or identical evidence, must be reversed. This is not the rule. A verdict inconsistent with others is not cause for reversal if there is sufficient substantial evidence to support the verdict sought to be reversed. This insistence is concluded by the cases of *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49; *Smith* v. *Arkansas Power & Light Co.,* 191 Ark. 389, 86 S. W. (2d) 411; and *Green* v. *West*

Memphis Lumber Co., (Ark.), 91 S. W. (2d) 261. It is also argued that the verdict is the result of passion and prejudice, but there is no merit in this contention when the small amount of the verdict is considered along with the fact that the jury returned two verdicts in favor of appellant.

No error appearing, the judgment is affirmed.

JOHNSON *v.* LEHR.

4-4442

Opinion delivered July 13, 1936.

R. V. Wheeler, for appellant.

Armstrong, McCadden, Allen, Braden & Goodman and *W. W. Hughes*, for appellee.

HUMPHREYS, J. This is a suit for specific performance of a contract for the sale of 7.98 acres of land described by metes and bounds in the northeast quarter, southwest quarter, section 12, township 6 north, range 8 east, in Crittenden county, Arkansas. The contract provided that appellant would pay appellee $400 an acre for the land upon presentation of his warranty deed and merchantable title thereto. Presentation of the deed and title was made, which appellant refused to accept on the ground that appellee did not have a fee simple or merchantable title to the land. Objection was made to the title of appellee because it originated in the last will and testament of William Emmett Williams, who devised the land to his wife, Maude Taylor Williams, who conveyed

same to appellee, claiming that said will was not effective to vest appellee with a fee simple title to the land. The paragraph which appellant claims did not vest a fee simple title in appellee through his grantor, Maude Taylor Williams, is as follows: "After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved wife, Maude Taylor Williams, all of my property, both personal and real, wherever situated or located for her own personal use as long as she may live and at her death should there be any property or moneys left after the payment of her funeral expenses and debts are paid, it is my desire that the residue be divided equally between my nephew, Ernest Bland Williams, Jr., and the heirs of my beloved wife, Maude Taylor Williams, meaning that the entire half (½) of the residue, if there be any, shall go to my nephew, Ernest Bland Williams, Jr., and the other one-half to be given to her heirs that she may designate."

The language of this paragraph is unambiguous and clearly devised the unlimited use, with implied power of sale, of all the testator's property, both real and personal, to his wife, Maude Taylor Williams. There is nothing in the clause to indicate that the testator devised a life estate only in the property to his widow with a vested remainder therein to his nephew and to the heirs of his wife to be selected by her. It is true that the testator devised any residue that might not be used by his widow to his nephew and her heirs to be selected by her, but this was far from vesting in the nephew and her heirs a remainder absolute in the estate. Such remainder as they might acquire under the will was contingent upon his widow dying before she used it by sale or otherwise. The widow's deed to appellee under her implied power to sell the property to pay her husband's debts or for her own personal requirements passes or will pass the fee simple title to appellee when accepted by him.

The implied power of sale is just as effective as an express power to sell would have been. There could not be any question, if express power had been given to sell, that a sale would have passed a fee simple title to any

of the property sold by the widow. The rule in Shelley's Case is not applicable.

No error appearing, the decree of the trial court is affirmed.

WASSON, BANK COMMISSIONER *v.* PLEDGER.

4-4349

Opinion delivered July 13, 1936.

Sam Levine, for appellant.

Coleman & Gantt, for appellees.

MEHAFFY, J. This suit was begun by appellees in the Jefferson Chancery Court asking for judgment against the appellant, Marion Wasson, as Bank Com-

missioner of the State of Arkansas in charge of the property and affairs of the Cotton Belt Bank & Trust Company and the National Bank of Commerce of Pine Bluff for $13,850.91 with interest. They asked that it be adjudged a preferred claim entitled to priority, and that it be paid in full before other claims are paid out of the assets of the Cotton Belt Bank & Trust Company.

On May 6, 1932, the county board of education of Jefferson county adopted a resolution designating the three banks of Jefferson county as depositories for the school funds of Jefferson county. On May 11, 1932, the cashier of the Cotton Belt Bank & Trust Company wrote the following letter to the treasurer of Jefferson county.

"Mr. A. C. Pledger, County Treas.,
"Pine Bluff, Arkansas.
"Dear Mr. Pledger:

"We have been informed that the county board of education of Jefferson County on May 6, 1932, adopted a resolution designating all of the banks of Jefferson County as legal depositories of the common school funds of the county.

"Under the provisions of section 74 of the 1931 Edition of the School Laws of Arkansas, we accept the deposits of any school funds made by you as treasurer with us as a preferred deposit.

"Yours truly,
"(Signed) Wendell D. Lee, Cashier."

The appellant filed a response to appellee's petition denying the allegations in said petition, and alleging that § 74 of act 169 of the Acts of the General Assembly of the State of Arkansas for 1931, was unconstitutional; that the county board of education was without authority to name a depository, and, if it had authority, it did not properly designate the Cotton Belt Bank & Trust Company as the depository for school funds; that if the board of education had authority, and properly designated said bank, such designation was of no effect after the term of the particular county board then functioning, and after the expiration of the term of office of the treasurer, and the term of office of the county judge; that

Wendell Lee, cashier, had no authority, without the consent of the officials of the bank, to create a preferred deposit; that no request was made of the bank under § 74 above mentioned, for bonds of the character specified, nor a surety bond; that the bank at the time was in position to deposit bonds of the character required, and was in position to obtain a surety bond; that if the deposit was so made as to become a preferred deposit, the appellees have waived the preference by failing to proceed against the Cotton Belt Bank & Trust Company or the State Bank Commissioner, at the time said bank was placed on a restrictive basis as to deposits, and by accepting 50 per cent. of the deposits April 4, 1934; that the bank did not treat the school deposits as a preferred deposit, but handled them in the same manner that other general deposits of the bank were handled.

The following agreed statement of facts was introduced in evidence: "It is hereby stipulated and agreed by and between the parties hereto that upon the hearing of the petition of A. C. Pledger, the treasurer of Jefferson county, Arkansas, and R. H. Williams, the county judge of Jefferson county, Arkansas, which was filed herein on the 8th day of February, 1935, the following facts shall be considered as having been duly introduced in evidence and proved in this cause, and shall be so taken and acted upon by the court in rendering judgment on the said petition without further proof of said facts, to-wit:

"That the petitioner, A. C. Pledger, is now and has been at all times since the first day of January, 1931, the duly elected, qualified and acting treasurer of Jefferson County, Arkansas; that the term of office as such treasurer which he was serving on the 11th day of May, 1932, expired December 31, 1932; that he entered upon a new term of office on the first day of January, 1933, which expired December 31, 1934, and that he entered upon another new term of office on the first day of January, 1935, which will expire December 31, 1936.

"That the petitioner, R. H. Williams, is now and has been at all times since prior to the first day of January, 1931, the duly elected, qualified and acting county judge

of Jefferson County, Arkansas, serving as such for the several successive terms as prescribed by law during that time.

"That on the 6th day of May, 1932, the duly elected, qualified and acting county board of education of Jefferson County, Arkansas, adopted a resolution designating all the banks of Jefferson County as depositories for school funds of Jefferson County and delivered a copy of the said resolution to the petitioner A. C. Pledger as county treasurer. A copy of the said resolution as adopted by the said county board of education and delivered to the said petitioner is attached hereto, marked exhibit A, and made a part of this agreed statement of facts.

"That at the time of the adoption of the said resolution T. W. Moore was the president, and Mrs. Merlin Moore was the acting secretary of the said county board of education.

"That on the 6th day of May, 1932, and thereafter until the 10th day of March, 1934, the Cotton Belt Bank & Trust Company was a bank duly chartered by the State of Arkansas and engaged in business as a bank in the city of Pine Bluff, Jefferson County, Arkansas, and that Wendell D. Lee was its duly elected and acting cashier.

"That on the 11th day of May, 1932, Wendell D. Lee, as cashier of the said Cotton Belt Bank & Trust Company, wrote and delivered to the petitioner, A. C. Pledger, as treasurer of Jefferson County, Arkansas, a writing which is attached hereto, marked exhibit B, and made a part of this agreed statement of facts.

"That upon the receipt of said writing which is made exhibit B hereto, the petitioner, A. C. Pledger, as treasurer of Jefferson County, Arkansas, opened a new account in the Cotton Belt Bank & Trust Company as 'common school fund of Jefferson County,' and transferred to said account the amount of school funds which had theretofore been deposited in said bank to the credit of A. C. Pledger, county treasurer, and thereafter the said petitioner made deposits of school funds to said new account from time to time. On December 31, 1932, there

was deposited in the Cotton Belt Bank & Trust Company in the said common school fund of Jefferson County, a balance of thirty-two thousand, two hundred and eighteen and 28/100 dollars ($32,218.28).

"That a statement of the amounts deposited to and withdrawn from the said common school fund of Jefferson County in the said Cotton Belt Bank & Trust Company from December 31, 1932, to February 28, 1933, when the said bank was placed under restriction is as follows, to-wit:" (Tables of figures omitted).

"That on the 28th day of February, 1933, the said Cotton Belt Bank & Trust Company was placed under restriction by the Bank Commissioner of the State of Arkansas, and thereafter only five per cent. of the amounts on deposit in said bank or the sum of $15, whichever was the larger amount, was permitted to be withdrawn.

"That on the 10th day of March, 1934, the said Cotton Belt Bank & Trust Company was taken in charge by the Bank Commissioner of the State of Arkansas for liquidation as an insolvent bank, and is now being liquidated by the said Bank Commissioner, through J. E. Williams, Special Deputy Bank Commissioner, under the supervision of the Jefferson Chancery Court in this proceeding.

"That at the time the said Cotton Belt Bank & Trust Company was closed by the State Bank Commissioner, the petitioner, A. C. Pledger, as treasurer of Jefferson County, Arkansas, had on deposit in the said bank school funds in the amount of $27,701.81.

"That under a plan or reorganization approved by the Comptroller of the Currency and Bank Commissioner of the State of Arkansas, one-half of all amounts on deposit in the Cotton Belt Bank & Trust Company which were under restriction was paid by the National Bank of Commerce of Pine Bluff, which took over a portion of the assets of the said Cotton Belt Bank & Trust Company, and began business as a national bank in the place formerly occupied by the said Cotton Belt Bank & Trust Company. Pursuant to the said arrangement, the petitioner, A. C. Pledger, as such treasurer received $13,-

850.90, representing one-half of the restricted deposit to the credit of Common School Fund of Jefferson County and gave his receipt therefor as follows, to-wit:

"Common School Fund of Jefferson County,

"Pine Bluff, Ark., April 4, 1934.

"RECEIVED OF NATIONAL BANK OF COMMERCE OF PINE BLUFF (OF PINE BLUFF, ARKANSAS) THE SUM OF THIRTEEN THOUSAND AND EIGHT HUNDRED FIFTY AND 90/100 DOLLARS ($13,850.90) as EVIDENCED BY DEPOSIT SLIP, IN SUCH AMOUNT, OF EVEN DATE HEREWITH REPRESENTING THE DEPOSIT OF SUCH SUM TO MY CREDIT IN SAID BANK.

"This payment represents 50 per cent. restricted balance of undersigned in Cotton Belt Bank & Trust Company.

"The undersigned hereby acknowledges that the funds paid to the undersigned, as evidenced by this receipt, have been paid from a trust account established (for the benefit of creditors of Cotton Belt Bank & Trust Co., of Pine Bluff, Ark.) with National Bank of Commerce of Pine Bluff, pursuant to plan of reorganization of Cotton Belt Bank & Trust Co. approved by the Comptroller of the Currency and the Bank Commissioner of the State of Arkansas, and also pursuant to contract (made in furtherance of such plan) between Cotton Belt Bank & Trust Co., the Bank Commissioner and National Bank of Commerce of Pine Bluff, a copy of which contract and a written statement of which plan are on file with the Bank Commissioner of Arkansas, and with the Comptroller of Currency at Washington, D. C. And the undersigned, in consideration of the payment to him (in the manner above acknowledged) of the sum represented by this receipt, hereby assents to the plan or reorganization aforesaid, and to all provisions of said reorganization contract, and also acknowledges that he is a direct beneficiary under a loan, mentioned in said contract and contemplated by such plan, made to Cotton Belt Bank & Trust Company, by Reconstruction Finance Corporation, and he hereby approves the procurement of such loan

and the pledge and mortgage of assets made to secure the payment thereof. Provided that the undersigned does not waive any rights which he may have to claim that the deposit in the Cotton Belt Bank & Trust Company is a preferred deposit.

"Common School Fund of Jefferson County,
"By A. C. Pledger, Treas.

"WITNESS: E. W. Alexander."

"That the balance of $13,850.91 of the said deposit to the credit of Common School Fund of Jefferson County remaining unpaid belongs to school districts in Jefferson County, Arkansas, and school funds as follows, to-wit:" (Table of figures omitted).

"That when the Bank Commissioner of the State of Arkansas took charge of the property and affairs of the said Cotton Belt Bank & Trust Company for liquidation on the 10th day of March, 1934, a statement of the assets and liabilities of the said bank as shown by the inventory filed by the said Bank Commissioner in this matter was as follows:" (Inventory of assets of Cotton Belt Bank & Trust Company omitted.)

(Comparative statement of assets and liabilities of Cotton Belt Bank & Trust Company omitted.)

"That during the time hereinbefore mentioned, no bank, banker or trust company made a proposition or bid to become the depository of the public funds of Jefferson County, Arkansas, and no county depository was ever selected or designated by the county court or the county judge of said county.

"That prior to the filing of the said petition herein the county court of Jefferson County, Arkansas, on the 8th day of February, 1935, made and entered an order authorizing and directing the petitioners herein to act for said court in this matter. A copy of the said order, so made and entered, is attached hereto, marked Exhibit 'C' and made a part of this agreed statement of facts.

"Following the making of the said order of the county court and prior to the filing of the said petition herein, the said petitioners made, presented to and filed with the said Special Deputy Bank Commissioner in

charge of the property and affairs of the said Cotton Belt Bank & Trust Company proof of the said claim in the sum of $13,850.91 for said school funds as a preferred deposit entitled to priority of payment. A copy of the said proof of claim so filed is attached hereto, marked Exhibit 'D' and made a part of this agreed statement of facts.

"That no part of the said balance of $13,850.91 has been paid."

After the introduction of other evidence the court entered a decree finding the issues in favor of the claimants and that the claim for school funds on deposit in the Cotton Belt Bank & Trust Company in the amount of $13,850.91 is a preferred claim against the bank and should be paid in full before other claims for deposits are paid. The court found in favor of the National Bank of Commerce of Pine Bluff and dismissed the petition as to it.

Appellant first contends that there was no actual designation of a depository and that the alleged designating authority had ceased to exist before any action accrued to the county. There were but three banks in Jefferson county, and the Board of Education adopted the resolution above set out designating the three. We know of no reason why they could not designate all three banks as depositories, and the Cotton Belt Bank & Trust Company, through its cashier, accepted the deposit as a preferred claim under § 74 of act 169 of 1931.

Section 74 of said act reads as follows: "All general deposits of school funds in banks shall be secured by bonds of the United States, or bonds of the State of Arkansas, or by bonds of a political subdivision thereof which has never defaulted on any of its obligations, in an amount at least equal to the amount of such deposit, or by a bond executed by a surety company authorized to do business in the State of Arkansas; such surety on such bond to be approved by the Commissioner of Education. Provided that if the bank selected by the school board as a depository of its funds shall be unable to secure such school deposit as herein set out, it shall be

authorized to accept said funds as preferred deposit, and in event of insolvency such preferred deposit shall be paid in full before other bank deposits are paid.''

It is argued that it was clearly intended that the designating authority should exercise judgment and discretion in the selection of the depository, and that it is patent from the evidence that the board of education made no effort to ascertain anything about the condition of the bank or its ability to secure the fund by deposit of qualified bonds. We find nothing in the evidence that indicates that the board did not make an effort and did not ascertain the condition of all three banks in Jefferson county, and we think the evidence clearly shows that the bank could not have furnished bonds and could not have made a surety bond.

It is contended, however, that the intention of § 74 was to authorize the school officials under the circumstances indicated to deposit their funds as a special deposit or as a trust deposit to enable them to claim a preference under the provisions of act 107 of the Acts of 1927. That act defines a prior creditor to be the owner of a special deposit, expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business, the beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust, or a trust *ex maleficio,* of which the said bank was trustee and which was evidenced by writing signed by the said bank at the time thereof.

The cashier, in his letter, specifically stated that the deposit was accepted under the provisions of § 74, and would be treated as a preferred deposit. This was at least a substantial compliance with the law, and the law existing at the time became a part of the contract.

It is next contended by appellant that the letter of the cashier relied on as establishing their right of priority did not meet the requirements of the statute, and it is argued that the officials of a going bank do not have the power to specify that in the event of insolvency the creditor will be given preference over other creditors.

Appellant calls attention to *Boone County Board of Education* v. *Taylor,* 185 Ark. 869, 50 S. W. (2d) 241. In that case it was held that the two acts, that is, act 169 of 1931 and the act of 1927, should be construed together, and that construing these acts together, the Legislature evidently meant that in order to accept school money as a preferred deposit, the agreement must be in writing. This agreement was in writing.

Appellant next calls attention to *Ford* v. *State,* 186 Ark. 1197, 53 S. W. (2d) 603. This case held that the agreement must be in writing.

Attention is next called to *Taylor* v. *Gregory Spec. Sch. Dist.,* 187 Ark. 110, 58 S. W. (2d) 420. This case, also, held that the agreement must be in writing. In fact, all of our decisions on the question are to the effect that act 169 of 1931 and the act of 1927 must be construed together; but we have never held that any particular form of writing was necessary. The preferred deposit cannot be created by oral agreement; it must be in writing. But it is contended that the writing is insufficient because it does not provide that the bank will accept the school funds as a special deposit. We do not think the written agreement can be construed to mean anything else.

It is next contended that there is no evidence that the deposit in controversy was accepted as a special deposit. Whether the bank handled the special deposit properly or improperly is immaterial. It accepted it under the law, which became a part of the contract, and accepted it as a preferred deposit.

Attention is called to the evidence of Mr. Hogg, vice-president. He testified that on May 10 the account was split on the books, part of it being carried as Common School Fund of Jefferson county, and the balance continuing under the name of A. C. Pledger, county treasurer. As a matter of fact the evidence conclusively shows that the treasurer deposited this money under the written agreement that it would be a preferred deposit, and the funds were thereupon immediately separated, and the school funds deposited under the agreement of the bank, thereby becoming a preferred deposit.

It is also contended that it is doubtful whether the cashier had authority to write the letter. "The cashier has greater inherent powers than any other officer of the corporation, and is ordinarily the active financial manager and agent of the bank. He is the agent of the bank and not of the directors. His acts, within his official sphere, are binding on the bank, and those who deal with him are presumed to know the extent of his general power, although a limitation of his general authority is not binding on those who are not cognizant thereof." 7 C. J. 549, § 160; *James* v. *Board of Commissioners,* 173 Ark. 517, 292 S. W. 983; *Wasson* v. *Treece,* 189 Ark. 728, 75 S. W. (2d) 71.

It is next contended that the claimant must identify his funds, and to support this contention, appellant cites and relies on *Rainwater* v. *Wildman,* 172 Ark. 521, 289 S. W. 488. In that case the court said: "The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition, there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment."

In the instant case there is the specific recognized equity founded on the agreement. The agreement is that the school funds shall be a preferred deposit. The Legislature had a right to enact this law, and it in no way impairs the obligation of a contract. The statute giving preferences was enacted in 1927. That statute became a part of the contract of every depositor.

It is contended that there was no effort made to obtain security. The evidence shows that the county treasurer of Jefferson county told Mr. Young that he wanted the deposit secured. He talked with Mr. Young a number of times. Mr. Young was a general utility man of the bank, and he testified that Mr. Pledger talked

to him, and regarded him as the agent of the bank. Young said that as the banking situation grew worse and worse, Pledger became more and more importunate. He became so importunate that he almost threatened to withdraw, if the funds were not secured. Young, also, said that any bonds that the bank had, it would have considered it impolitic to put them up to secure the account. Young also testified that before the letter of the cashier was written it was discussed with Mr. Hogg, the vice-president, and possibly with Mr. Handley, the president, and the letter was written to make a secured claim of the common school fund.

Our conclusion is that this was a preferred deposit, and should be paid before the payment of any other deposits. The decree of the chancery court is, therefore, affirmed.

WALDROP *v.* COOPER.

4-4361

Opinion delivered July 13, 1936.

C. A. Holland, for appellants.

R. V. Wheeler, for appellees.

McHANEY, J. On January 17, 1916, Mr. W. A. Carrier was appointed guardian of the estate of appellants who are the sole surviving children and heirs at law of the late C. E. Waldrop. Appellees are the sureties on the bond of said guardian, which was for the sum of $400. In August, 1917, the guardian filed an inventory of the estate of his wards showing that he had collected from the estate of their father $175.55 in cash which was the total amount of their inheritance. On the same day, he presented to the probate court his petition for an order to expend said sum for the support and education

of his wards, stating that they had no other monies or estate whatever, and the court made an order granting the prayer of the petition. No final report and settlement were ever made or filed with the probate court, but in 1923 or 1924, said guardian died. This action was instituted by appellants in May, 1935, in the chancery court, alleging the above facts, and that Mr. Carrier had never accounted to them for said funds, but had converted same to his own use, and praying judgment against appellees for said sum with interest. To this amended complaint a demurrer was interposed and sustained, and appellants elected to stand on their complaint which was dismissed as being without equity. The case is here on appeal.

We agree with the trial court that the complaint failed to state a cause of action cognizable in equity. The guardianship is still pending in the probate court, with no final settlement and no discharge of the guardian. No liability of the guardian has ever been established by an order of the probate court, and no order to pay over money found to be due on any final settlement has been alleged to be in default. Until this is done there is no liability against the bond. It was so held in *Vance, Guardian,* v. *Beattie,* 35 Ark. 93, where it was said: "Before final settlement of the accounts of Malone as guardian, and an order of the probate court for him, or his administrator, to pay over to appellant as his successor in the guardianship, some balance found due his wards on such settlement, appellant had no legal cause of action on the bond of Malone." Citing *Sebastian* v. *Bryan,* 21 Ark. 447; *Norton* v. *Miller,* 25 Ark. 108. See also *Smith* v. *Smithson,* 48 Ark. 261, 3 S. W. 49. As said in *State* v. *Buck,* 63 Ark. 218, 37 S. W. 881. "Until this settlement was made, and the balance due from the guardian ascertained by the court, the appellant had no cause of action that she could enforce, either at law or in equity against the sureties on her guardian's bond." See, also, *Wallace* v. *Swepston,* 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94.

The order of the probate court was that the guardian spend the $175.55 in his hands on his said wards and

report his actions at the next term of court. No such report was filed, and appellants allege that he converted said sum to his own use, and failed to use it for the purpose directed in the order. Jurisdiction lies in the probate court to require guardians to account for the funds of their wards, and appellants' remedy, if any, at this time, is to proceed in said court. Certainly the chancery court had no jurisdiction to lift the guardianship matter out of the probate court and render judgment on the bond in the absence of a settlement and order to pay in the probate court. *Moren* v. *McCown,* 23 Ark. 93; *Watson* v. *Henderson,* 98 Ark. 63, 135 S. W. 461.

The decree, dismissing the complaint, is correct, and must be affirmed.

SAFEWAY CAB & STORAGE COMPANY *v.* KINCANNON, JUDGE.

4-4372

Opinion delivered July 13, 1936.

Hardin & Barton and *R. S. Wilson,* for petitioners.

R. E. Hough, for respondent.

McHANEY, J. Petitioner, Safeway Cab & Storage Co., hereinafter called the company, is a corporation with its only office and place of business in Fort Smith, in Sebastian county, Arkansas. The other petitioners are stockholders and officers of said corporation and all live in Fort Smith. All the petitioners were sued in the Crawford Circuit Court by one Simpson for alleged per-

sonal injuries resulting to him from a collision between the automobile in which he was riding and a taxicab owned by the company and driven by its servant. Service was had on the company in Crawford county by delivering a copy of the summons to a taxi driver of the company, under the provisions of act No. 70 of the Acts of 1935. Service was had on the individual petitioners in Sebastian county.

Petitioners appeared specially in the Crawford Circuit Court and filed a motion to quash the service upon them for want of jurisdiction of the persons of petitioners. This motion was overruled, and this original action is brought in this court for a writ prohibiting the court from proceeding further in the premises.

Section 1 of said act 70 reads as follows: "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 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 by such driver or chauffeur as a servant, agent or employee of any such owner or operator 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."

It is contended by the company that its business is that of operating taxicabs for hire, and that a taxicab is neither a "motor bus," "motor coach" or "motor truck," as said terms are used in said act, and that, therefore, the service had upon its taxi driver in Crawford county is invalid, because not authorized by said

act. We pretermit a discussion of that question at this time. The trial court is a court of general jurisdiction and the subject-matter of the action is within its original jurisdiction. Whether the court has jurisdiction of the persons of the petitioners is a question that may be determined on appeal, if the court is, in fact, without such jurisdiction. Whether a taxicab is such a conveyance as is referred to in said act No. 70 may depend upon a question of fact, to be determined, in the first instance, by the trial court. In this respect the question is ruled by the recent case of *Robinson* v. *Means, ante* p. 816, 95 S. W. (2d) 98, where all the prior recent cases are collected. We there said: "Probably in most instances the facts upon which jurisdiction may rest or be determined are controverted. In other instances, they might be controverted, that is to say, there is the possibility of the facts being disputed. In either event, the matter is one that must be determined by the trial court, and in the proper exercise of the trial court's functions we do not interfere by prohibition. We might differ most seriously from the view taken by the trial court, but if we think the trial court erred, we can correct that only upon appeal."

If petitioners preserve their objections to the jurisdiction of their persons in the trial of this cause, and an adverse verdict and judgment go against them or either of them, then, if erroneous, it may be corrected on appeal. *Robinson* v. *Means, supra; Chapman & Dewey Lbr. Co.* v. *Means,* 191 Ark. 1066, 88 S. W. (2d) 829.

The writ will be denied.

SALIBA *v.* ALLISON.

4-4363

Opinion delivered July 13, 1936.

Frank C. Douglas, for appellants.

James G. Coston and *J. T. Coston*, for appellees.

BAKER, J. Ed Allison and Broda Rogers sued N. S. Saliba, his wife, his two sons, Fred and Alex, Melbiner Saliba and Mabel Simon to recover damages for injuries alleged to have been suffered in a motor vehicle wreck. Allison sought a recovery for the damage done his automobile and Rogers for personal injuries.

The trial court dismissed the action as to all parties except N. S. Saliba, Fred and Alex Saliba.

No instructions are abstracted and, on that account, we must and do presume that the case was submitted under proper instructions, unless the trial court should have directed the verdict for or on account of some of the matters presented upon appeal.

It is argued (1) that the separate causes of action of Broda Rogers and Ed Allison should not have been joined, and (2) the evidence is not sufficient to sustain the verdicts and consequent judgments.

The accident occurred on highway No. 61, a paved roadway 20 feet wide, running out of Memphis, through Joiner and Osceola in Mississippi county. Alex Saliba, who lived with his parents at Joiner, was the driver of a truck from Joiner to Dyess Colony 18 miles away. Several neighbors of the Saliba family had employment at

Dyess Colony and had no means of transportation from their homes to their respective jobs. They were taken back and forth in the truck by Alex Saliba.

It should be said that Alex Saliba was also employed at Dyess Colony and drove each morning to his place of employment, returning each day to his home.

This was the occasion for the use of the truck by him. These neighbors who had no other means of transportation were picked up by Alex Saliba early in the morning and were taken to their employment and returned at night.

The price charged for this transportation service was 25 cents for the round trip payable only on the days the passenger worked, which indicates rather clearly the fact the truck was not operated for a business profit. There is no showing as to any returns over and above expense for gasoline, oil and repairs, on account of which the defendants allege the charge was made.

The defense of Fred Saliba and his father, N. S. Saliba, is that they had nothing to do with the operation of the truck in this matter of furnishing transportation. They say Fred owned the truck, and had bill of sale from the seller to show that fact. He permitted his brother to use the truck.

It appears the laborers did not pay cash, but generally paid at N. S. Saliba's store, either to Fred or N. S. Saliba. Their checks were cashed at the store and the transportation money was deducted.

While this system was in operation the accident happened. The plaintiffs allege and it might well have been found, as it was by the jury, that early in the morning of September 4, 1934, before it was light enough to dispense with lights, Alex Saliba, driving the truck, stopped on the shoulder, off the pavement, on the east side of the road, to take on two laborers, and then turned directly across the highway to enter upon another road leading to Dyess Colony. At this time the truck was headed in a northwesterly direction. It was at this particular moment that plaintiff Allison was approaching from the south driving at a speed of 35 or 40 miles per hour. Plaintiff's step-son, Barnaby, was driving plaintiff's au-

tomobile. They say that although their lights were good, and their brakes in good condition, they did not see the truck in time to stop and avoid the collision. They assert the body of the truck was unpainted and that no tail light was burning. The truck was struck in the rear near the right side.

It is not certain whether the truck, after turning across the highway, continued toward the Dyess Colony road or stopped while still partly on the pavement of highway No. 61, at all events, it was struck while still on the pavement. Plaintiff's car was damaged, Broda Rogers was thrown out upon the pavement, and so injured as to be wholly disabled for several weeks. The amounts recovered, if liability be justly found, $50 for Allison, and $250 for Rogers, cannot be seriously questioned.

Fred Saliba, by cross-complaint, sued Allison for damages done his truck.

The first error urged is that the suits of Allison and Rogers are improperly joined. They allege the same matter of negligence as their respective causes of action. The testimony necessary to sustain each case, if tried separately, is very largely the same. This joinder is in accordance with § 1076 of Crawford & Moses' Digest, therefore not only permissible, but is correct practice.

It is, also, strongly argued that plaintiff, Allison, was operating a rear car following Saliba's truck, and that the law imposed upon the plaintiff the duty to keep a lookout for the front car and to keep his vehicle under control so that a collision would not happen under the rule announced in *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. (2d) 729, to the effect that the forward or leading car has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads. The only error in this contention is that Saliba had ended his forward trip on highway No. 61, had stopped on the road-side, then had turned sharply to his left and had driven upon the highway. No kind of watchfulness could have anticipated this action. But if he had had a tail light the truck's

position might have been observed for such a distance that the collision could have been avoided. At least, the jury so found upon evidence sufficient to sustain the verdict.

The only other question is that of the liability of N. S. Saliba and Fred Saliba.

The driver of the truck was less than 17 years old at the time of the accident, he was still living at home, just as Fred was, who worked in the store. The truck was sometimes used in the business. Fred, the alleged owner of the truck, as well as their father, collected the transportation charges, or, at least, received them. There is no showing that Fred had or made any use of the truck except in the common business in which all were engaged. Both sons were, apparently, from this record, under control of the father. It was not necessary that N. S. Saliba have legal ownership to make him liable. *Pollock Stores Co.* v. *Chatwell, ante* p. 83, 90 S. W. (2d) 213.

The jury might well have found under proper instructions that the operation of the truck was a joint enterprise of the father and two sons, as an aid to increase their aggregate earnings. If so, the driver was servant or agent of all, whose negligence bound them all. *American Baking Co.* v. *Hyman,* 185 Ark. 310, 47 S. W. (2d) 45; *Tchula Co-op. Store* v. *Quattlebaum,* 176 Ark. 780, 4 S. W. (2d) 919.

The questions of negligence and contributory negligence were settled by the verdict. *Kittrell* v. *Wilkerson,* 177 Ark. 1174, 9 S. W. (2d) 788.

No error appearing, judgment is affirmed.

PEKIN WOOD PRODUCTS COMPANY *v.* BURKHARDT.

4-4334

Opinion delivered June 29, 1936.

John C. Sheffield, for appellant.

A. M. Coates, for appellee.

SMITH, J. Appellee recovered a judgment to compensate the damages resulting from a personal injury sustained by him while employed by appellant as the operator of a machine known as a shaper. This machine has a flat steel top, resembling the top of an ordinary table through which protrudes two spindles. Attached to each of these spindles is what is known as a shaper head. This head has four flat faces and is about four or five inches high. There are slots in the face of each head in which are fitted bolts which hold knives onto the face of the head. These heads revolve in opposite directions at a speed of 7,200 revolutions a minute. Along the top of the table is fitted a form through which lumber is passed against the knives to be shaped into the desired forms and dimensions. Because of the enormous speed with which these shaper heads revolve, this machine was known by all parties concerned to be very dangerous and the most hazardous of all the machines operated in appellant's plant.

The type of shaper in use by appellant is operated by two men, one holding the lumber as it passes by one of the shaper heads and the other as it passes by the other head. The cutting or shaping of the lumber is done with a knife which is fitted to the face of the shaper head. The knife is held in position by two bolts, each having a square head on one end and threads on the other upon which screws a hexagonal shaped nut. Under this hexagonal shaped nut fits a round steel washer slightly larger than the nut which fits in between the nut and the knife, when placed on the shaper head. In order to place the knife on the face of the head and to hold it firmly in position, the square heads of the two bolts fit into a slot. These bolts can be moved up and down the slot so as to adjust the position of the knife. In changing the knife on the shaper head if it becomes dull, it is only necessary to unscrew the nuts and to slip a new or sharp knife on in place of the one which had become dull. It is not necessary to remove the bolts from their position in the shaper head.

Appellee was employed as the operator of one of these machines and had been so employed for a number of years. There was no allegation or proof of any failure to instruct him in its use or to warn him of the danger incident to its operation. He was so employed on the morning of April 10, 1935, when a few minutes after he began work, the head of one of the bolts above referred to broke, permitting the bolt to come entirely out of the slot which permitted the top of the knife to swing loose and as a result thereof, the knife caught into the form which appellee was shaping. This not only threw the form with great force against appellee, but the knife broke in many pieces and small parts thereof struck appellee in many places, and he thus sustained the injuries to compensate which this suit was brought.

Appellee grounded his suit upon the proposition that appellant had failed to use ordinary care to furnish him a reasonably safe machine with which to perform his duties, and had failed to use ordinary care to inspect the machine to keep it in a reasonably safe condition. Specifically it is insisted that a defective bolt was used,

which defect could and would have been discovered had due care been employed in its inspection.

The undisputed testimony shows that, because of the dangerous nature of the machine, only the best material was purchased and used. Appellee himself testified that the machines were inspected every other day by a man employed for that purpose, and but for the happening of the accident here complained of, there is no testimony to the effect that this was not as often as due care required, nor was it shown that this usual inspection had not been made. It was shown also that after a bolt had been in use for as much as three months, it was discarded and replaced with a new bolt. There was no testimony showing when the alleged defective bolt had been put in use.

Appellee himself assigned two causes for his injuries. The first is that the bolt (which was metal) was "rotten," and he gave as his reason for this statement the fact that its head had pulled off.

The bolt was not otherwise defective as appellee stated that the threads of the bolt were all right. His second explanation of his injury was that "the knife caught too big a bite in the lumber and it broke." Appellee was asked whether "the break was a straight new break all the way through, or whether it had any evidence of having an old crack in it." He answered, "It did not show any evidence of having an old crack. It was not rusty and there was no dirt on it."

Appellee testified that on some occasions the knives were changed by the inspector. In other cases the change was made by the operator. He states that after he quit work on the afternoon of the day before his injuries, he himself changed the knife and that he was injured by it a few minutes after he began work the next morning.

Appellee insists that his own and other testimony in his behalf makes an affirmative showing of negligence in furnishing a defective bolt, and in failing to make the inspection which would have discovered the defect. He insists that if this is not true, the doctrine of *res ipsa loquitur* applies, in that the injuries would not have

occurred had there been no negligence on the master's part.

It may first be said that while the machine had no guard, the absence thereof is not assigned as negligence. On the contrary the testimony is to the effect that the nature of the machine and its operation is such that it is impossible to place guards around the heads.

The undisputed testimony is to the effect that the knives were changed every six or seven hours, sometimes every five hours, "it depends on how long they run until they need changing." The operator himself was the judge as to when the change should be made. It was also the duty of the operator, if he changed the knives, to adjust them and to screw up the bolts, and appellee had performed this duty the afternoon before his injuries with reference to the knife which injured him.

We think there was no showing of negligence on the part of the master. The law of the case is well settled and has been stated by this court in many opinions. One of the most recent of these is that of *Rice* v. *Henderson,* 183 Ark. 355, 35 S. W. (2d) 1016. It was there said that in order for a servant to recover because of the master's failure to furnish safe appliances, the burden is on the plaintiff to establish the unsafety or defect in the particular appliance, and that the master either had notice of the unsafe or defective condition or could have known of it by making the inspection which due care required. A master is not required to furnish absolutely safe appliances, but is required only to exercise ordinary care in doing so. No presumption of negligence on the part of the master in failing to furnish a safe appliance arises from the mere happening of an accident. The fourth headnote in that case reads as follows: "Evidence, in an action to recover for an employee's hand cut off by saws in a cotton gin, that a rivet in the toggle gear was defective, without proof that the employer knew or by the exercise of ordinary care should have known of the defect, held insufficient to establish the master's negligence."

When these principles are applied to the testimony in this case, the conclusion is reached that no negligence

on the part of the master was shown. There was no evidence of any defect in the bolt except the fact that its head was pulled off. Appellee admits that inspections were made every other day and that the bolt appeared to be in good condition. The break in it was fresh showing that it had not previously existed, and there was no testimony showing that it had been in use long enough to endanger its safety.

The absence of testimony to show negligence on the part of the master is not supplied by the rule of *res ipsa loquitur*. Among the cases cited by appellee in support of this contention is that of *Chiles* v. *Ft. Smith Commission Company,* 139 Ark. 489, 216 S. W. 11. We there quoted and approved the following statement of the law appearing in the article on negligence, 20 R. C. L., page 156, reading as follows: "More precisely, the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as is in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. * * * The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

This statement of the law was again quoted and approved in the case of *Ark. L. & P. Co.* v. *Jackson,* 166 Ark. 633, 267 S. W. 359, also cited by appellee.

The testimony does not make a case which invokes the application of this rule. In the first place, the machine which produced the injury was not shown to have been under the control and management of appellant.

It was under the control and management of appellee. He replaced the knife which injured him and made such adjustments as his long experience suggested were proper and necessary. Nor is there "an absence of any explanation by the defendant tending to show that the injury was not due to his want of care."

The testimony suggests several probable causes of the injuries, for none of which would appellant be liable. One of these was vouchsafed by appellee himself, to-wit: "The knife caught too big a bite in the lumber and it broke." In replacing the knife it was appellee's duty to so adjust it that it would not take too large a bite.

Now it is apparent that if the edge of the knife were placed exactly flush with the face of the shaper head, it would not cut at all and the extent of the bite would depend upon the extent to which the blade protruded beyond the face of the shaper head. The more it protruded, the greater the bite and, in view of the fact that it made 7,200 revolutions per minute, it is apparent that the protrusion of the knife should have been very slight.

Other probable causes of the injuries, for none of which appellant would be liable are these: The bolt may have been screwed too tight. It may have been screwed so tightly as to impair the tensile strength of its head, thus causing the head to break and come off. The bolt may not have been sufficiently tightened, thus leaving enough play, as witnesses expressed it, to take too large a bite in the wood that was being shaped, and the added leverage may have caused both the knife and the bolt to break. The knife may have protruded too far beyond the face of the shaper. We conclude therefore that the rule *res ipsa loquitur* has no application.

The testimony viewed in the light most favorable to appellee is insufficient to support the judgment, and it must, therefore, be reversed, and it is so ordered.

MEHAFFY, J., dissents.

BLACK SPRINGS LUMBER COMPANY *v.* PALMER.

4-4343

Opinion delivered June 29, 1936.

W. L. Parker, Jerry Witt and *Pryor & Pryor,* for appellant.

Osro Cobb and *Isgrig & Robinson,* for appellee.

McHANEY, J. Appellee was severely injured when a tree he and another were engaged in cutting in Montgomery county fell upon his right leg, breaking and crushing the bones therein just above the ankle. He brought this action in Polk county to recover damages for said injuries, which resulted in a verdict and judgment in his favor for $6,500. He alleged that he was a timber cutter in the employ of appellant, felling trees on its property and sawing them into logs; that on May 1,

1934, while engaged in felling a crooked tree, under the immediate direction of his foreman, so as to throw it across and bring to the ground another tree that had become lodged in a standing tree, his fellow-servant, one Barney Wilson, without waiting for his customary signal to remove the saw, suddenly jerked same, causing him to lose his balance and to fall to the ground in the path of the falling tree which caught him; and that the foreman was negligent in directing the cutting of that particular tree under the circumstances. Appellant moved to quash the service had upon it on the ground hereinafter discussed which was overruled. It defended on the grounds of assumed risk, and that appellee was not its employee, but an employee of William Dalton, an independent contractor.

For a reversal of the judgment against it, appellant assigns and argues five errors of the trial court as follows:

1. That the court erred in refusing to quash service. The return of the sheriff shows that service was had on appellant by delivering a copy of the writ to O. B. Witherspoon, its agent in Polk county. Appellant operates a branch plant at Eagleton, in Polk county, under the name of Witherspoon Lumber Company, and O. B. Witherspoon is the manager of said branch office, and lives in Mena, in said county, some twelve miles distant from Eagleton. Service was had on him at his home in Mena, instead of serving him at his office in Eagleton. Service was had under § 1152, Crawford & Moses' Digest, which provides that foreign and domestic corporations who maintain a branch office or other place of business in any of the counties of the State shall be subject to suit in any of the courts of said counties, "and service of summons or other process * * * upon the agent, servant or employee in charge of said office or place of business shall be good and sufficient service," etc. It is contended by appellant that the service, to be good, must be had on its agent at its office or place of business, and not at his residence in another city or town. The statute does not so provide. We think its meaning is that suits may be brought against a corpora-

tion in any county in which it has a branch office or other place of business by serving any agent, servant or employee who "is in charge of said office or place of business," at any place he may be found in such county. The language used by this court in *Ramey* v. *Baker,* 182 Ark. 1043, 34 S. W. (2d) 461, and relied on by appellant, that: "The requirement of the statute is that summons must be served upon its agent at its place of business" is, standing alone, misleading, but the next sentence is explanatory and says: "and that means on the agent in charge of its place of business at any place, irrespective of the kind or character in which it conducts or operates its place of business." This language must be considered in connection with the facts and circumstances of that case, and we think the court did not mean to hold that service must be had, under the statute, at the office or place of business. Witherspoon was the manager of appellant's branch office at Eagleton when at his home in Mena, and we hold the service good.

2. That the evidence is insufficient to support the verdict, and that its request for a directed verdict in its favor should have been given. We cannot agree. Appellee's evidence was to the effect that he was the axman in working with his fellow-servant, Barney Wilson; that he notched the tree to be felled to control the course of its fall; that he and Wilson then sawed the tree, and, when it was ready to fall, he gave the signal to Wilson to remove the saw; that upon this occasion Wilson jerked the saw out without waiting for his signal, and before he was ready for it to be removed, as he wanted to cut his corner another stroke or two to better control the direction of the fall, which unexpected jerk caused him to lose his balance and fall to the ground with his head down hill, preventing his escape from the falling tree; and that, theretofore, Wilson had always awaited his signal and had never jerked the saw out prior thereto. In this respect this case differs from the recent case of *Union Sawmill Co.* v. *Hayes, ante* p. 17, 90 S. W. (2d) 209, relied upon by appellant. A careful reading of that case will disclose that there was no negligence on the part of the master, and that the injuries received were the re-

sult of the ordinary dangers and hazards incident to felling of trees, which were assumed by the servant. Here there is proof of a positive negligent act on the part of the fellow-servant which was not assumed by the appellee as a matter of law. The questions of contributory negligence and assumption of risk were submitted to the jury under instructions not complained of. We think there was substantial evidence to take the case to the jury, and the court did not err in refusing the request for a peremptory instruction.

3. It is next contended by appellant that its logging operations were let to one William Dalton, an independent contractor, and that appellee was his employee, and that he alone is liable for appellee's injuries, if any one is. Appellant introduced a written contract between it and Dalton, which, standing alone, would make Dalton an independent contractor. But this is not all the evidence on the subject. Appellee and others in the same work, testified they were employed by appellant, worked for it, were paid by it, and that deductions were made from their pay for medical treatment and insurance without their consent. Appellant also reserved and exercised the right to direct Dalton when and where to work, when to shut down operations, the lengths of logs and kind of timber to cut. It owned the teams used and its name was painted on the trucks operated by Dalton. There are other facts and circumstances in evidence, but those above detailed are sufficient to take the question to the jury. For recent cases on the subject see *Hobbs-Western Tie Co.* v. *Carmical, ante* p. 59, 91 S. W. (2d) 605, and *Chapman & Dewey Lumber Co.* v. *Andrews, ante* p. 291, 91 S. W. (2d) 1026.

4 and 5. Error is assigned in the admission of certain testimony, and in the giving and refusal of certain instructions. We think it unnecessary to discuss these matters in detail. We have carefully examined them, and find no prejudicial error in either assignment. The close point in the case is the sufficiency of the evidence, but we are of the opinion it was sufficient to make a jury question.

Affirmed.

CLUCK *v.* STATE.

Crim. 3994

Opinion delivered June 29, 1936.

[redacted]

Rains & Rains, for appellant.

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

SMITH, J. Appellant was given a sentence of one year in the penitentiary upon his trial under an indictment, which, omitting its formal parts, reads as follows: "The said George Cluck in the county and State aforesaid, on the 26th day of November, A. D., 1935, on his examination as witness for the defendant in the trial of the case of *State of Arkansas* v. *Emmitt Cluck,* charged with grand larceny, at the November, 1935, term of the Crawford Circuit Court at Van Buren, after having been duly sworn to tell the truth, the whole truth and nothing but the truth by Homer Mitchell, circuit clerk, a person duly authorized to administer oaths, he, the said George Cluck did and then and there wilfully, unlawfully and feloniously swore that he was present about the 7th day of July, 1935, at his home near Whitewater in Crawford County, and saw Elvin Davis sell Emmitt Cluck two large hogs and four smaller hogs, same being the hogs Emmitt Cluck was on trial for stealing, that Elvin Davis was driving a gray and black mare, the ones he

had been driving previously to Davis' wagon, that he saw Emmitt Cluck pay Elvin Davis sixteen dollars for said hogs, and that Emmitt Cluck was at the time 19 years old, which said testimony was material in the trial of said cause, but was false and known to be false by the said George Cluck at the time he so testified. The truth being that said hogs had been previously stolen by Emmitt Cluck from Johnnie Barnes, Jimmie Fields, and Jim Davis, that Elvin Davis did not sell hogs to George Cluck or Emmitt Cluck, in the presence of George Cluck on or about the 7th day of July, 1935, and that the said Emmitt Cluck was at the time 23 years old. All of said testimony given by the said George Cluck being false and untrue and that the said George Cluck did falsely, wilfully, corruptly, maliciously, unlawfully, and feloniously commit wilful and corrupt perjury, and against the peace and dignity of the State of Arkansas."

It will be observed that the indictment alleges that appellant was sworn as a witness by Homer Mitchell, circuit clerk of the court in which the alleged false testimony was given, whereas testimony was admitted without objection or exception to the effect that appellant was in fact sworn by the Hon. J. O. Kincannon, the judge presiding at the trial.

The question whether the allegation of the name and title of the officer administering the oath is a material allegation, and, if so, whether there is a material variance between the allegation and the testimony presents the principal and the most serious question raised on this appeal, which has been duly prosecuted to reverse the judgment of conviction.

It must be confessed that at common-law this was an essential allegation and this difference between the allegation and the proof would constitute a material variance, which would require a reversal of the judgment. There are many cases to this effect. The question here presented is whether this allegation is material under our statutes; and, whether this difference between *allegata et probata* constitutes a material variance.

The case of *Loudermilk* v. *State,* 110 Ark. 549, 162 S. W. 569, points out some of the relaxations in the

technical strictness of the common-law in prosecutions for perjury. It was there pointed out that an indictment for perjury would be held sufficient when it alleges that the perjured testimony was material, but did not specify how it was material. Our statute modifying the common-law so provides. It was there also held that it was not necessary for an indictment for perjury to expressly state that the court had jurisdiction of the case in which the false testimony was given, but that an allegation that the court had authority to administer the oath was sufficient.

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

In the chapter on criminal procedure, the following section appears: "In an indictment for perjury, it is not necessary to set forth the pleadings, record or proceedings with which the oath is connected, so that the substance of the controversy, or matters in respect to which the offense was committed, is properly stated; nor is it necessary to set forth the commission or authority of the court or person before whom the oath alleged to be false was taken, so that it be stated in what court or before whom it was taken, and that the court or person was authorized to administer the oath." Section 3023, Crawford & Moses' Digest.

The effect of these sections is that the allegation that the court had authority to administer the oath is sufficient, and that allegation sufficiently appears in the indictment copied herein. It would appear therefore that the allegation that appellant was sworn "by Homer

Mitchell, circuit clerk" was unnecessary as the indictment would otherwise have been sufficient without naming the officer who had administered the oath, and without recitation of the title of his office.

In the chapter on perjury, 48 Corpus Juris, page 875, a paragraph of § 124 thereof has the caption "Naming Officer" who administered the oath. It was there said: "While such designation may call for an averment of the name of such officer, it is generally held that where the offense was committed in a judicial proceeding, it is not necessary to name the officer before whom the false oath was taken, designating the court being considered sufficient; and where the court or presiding judicial officer acts through another in administering the oath, an averment that the oath was administered by the court or by the presiding judicial officer is sufficient." Numerous cases are there cited in support of the text quoted.

If naming the officer, with the title of his office, is not essential, what is the effect of this unnecessary allegation and the failure to prove it?

Among the numerous cases which answer this question, that of *West* v. *U. S.*, 169 C. C. A. 429, 258 Fed. 413, is directly in point. The authority of this case is enhanced by the fact that the decision thereof turned upon the construction of Federal statutes in many respects identical with, and in no material respect different from, our own statutes applicable to the question under consideration. The indictment in that case alleged that the accused had been sworn by his Honor, John E. Sater, the presiding judge, whereas the testimony was to the effect that the oath had been administered by a deputy clerk of the court. The indictment was based upon a Federal statute reading as follows: "It shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, averring such court or person to have competent authority to administer the same, * * * and without setting forth the commission or authority of the court or person before whom the perjury was committed."

A comparison of this statute with § 2590 of our statutes, set out above, shows their substantial identity.

Circuit Judge Knappen, for the circuit court of appeals, there said that: "The indictment was sufficient in form and the deputy clerk had full authority to administer the oath in the court's presence. It was not necessary to allege the name of the clerk who administered the oath or that of the judge who took it." (Citing cases.) The court said: "Apparently the word 'and,' italicized above, means 'or'." It is not necessary to invoke this construction of our statute for it will be observed that our statute employs the disjunctive "or" rather than the conjunctive conjunction "and." The court said: "If there is merit in the objection that the evidence of the administering of the oath was insufficient, it can only be because of a fatal *variance* between the indictment and the proof."

In holding there was no such variance, the court said that, assuming the intention was to charge that Judge SATER personally administered the oath, the variance was not fatal. It was there said: "Were there reason to believe that plaintiff in error was misled to his prejudice, in preparation for defense or otherwise, by an allegation, express or implied, however unnecessarily made, that Judge SATER personally administered the oath, the case would be different," but that no such showing was made and that the frame of the indictment was such as to preclude all possibility of a second prosecution for the same offense. Unquestionably there can be no second prosecution here for the offense charged in the indictment.

The court of appeals assigned as its reason for holding that the variance was not fatal the provisions of § 1691 of the Compiled Statutes, reading as follows: "No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

We have the same statute. Section 3014, Crawford & Moses' Digest, reads as follows: "No indictment is

insufficient, nor can the trial, judgment or other proceedings thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

The court concluded its review of the effect of these two sections of the Federal statutes, substantially identical with our own, by saying: "While neither of these sections attempts to sanction a violation of substantial rights or to disregard prejudice, yet an immaterial and nonprejudicial variance between allegation and proof is not cause for reversal." Citing among other cases, that of *Matthews* v. *U. S.*, 161 U. S. 500, 40 L. Ed. 786, 16 S. Ct. 640. See also *Cain* v. *State,* 73 S. E. 623, where a headnote prepared by the court of appeals of Georgia, reads as follows: "When, in the course of a judicial investigation, an attorney at law, by the authority or permission of the court, administers the oath to a witness, he does so in behalf of the court. Consequently it may properly be alleged, in an indictment assigning perjury upon the testimony of such a witness delivered in a court of inquiry, that the oath was administered by the presiding magistrate."

A headnote in the case of *State* v. *Caywood,* 96 Ia. 367, 65 N. W. 385, reads as follows: "Held, that the judge sitting as a court has power to administer oaths, and an indictment charging that defendant, during a trial, was sworn by 'the court,' is sustained by evidence that the oath was administered either by the presiding judge or by the clerk under his direction."

A headnote in the case of *State* v. *Pratt,* 21 S. Dak. 305, 112 N. W. 152, reads as follows: "In a prosecution for perjury, where the information alleges that the defendant was sworn by the court at the time of the alleged perjury, and the evidence shows that the oath was administered by the duly elected, qualified and acting clerk in open court, in the presence of the presiding judge, there was not a fatal variance." See also *Strader* v. *Commonwealth,* 240 Ky. 559, 42 S. W. (2d) 736; *Commonwealth* v. *Kane,* 92 Ky. 457, 18 S. W. 7; *Ruff* v. *State,* 17 Ga. App. 337, 86 S. E. 784; *Smith* v. *People,* 32 Colo.

251, 75 Pac. 914; *People* v. *Nolte,* 44 N. Y. S. 443; *State* v. *Spencer,* 6 Oregon 152.

In the case of *Cutter* v. *Territory,* 8 Okla. 101, 56 Pac. 861, an indictment for perjury alleged that the oath had been administered by the court, whereas the testimony showed its administration by the clerk of the court. The Supreme Court of Oklahoma said: "A district court consists of a judge, clerk, and other officers. A clerk is as necessary to a properly constituted district court as a judge, and it has been frequently held that what the clerk does in open court, in the presence of the judge, is the act of the court. At common-law it was necessary to allege the name and office of the person administering the oath, and a variance in this respect was fatal. 2 Whart. Cr. Law, 1287. This rule is still adhered to in many of the States. But it has been held, under Codes similar to ours, that it is sufficient to allege the taking of an oath in the court, or before the court, and proof of taking the oath before any officer of the court, in the presence of the court, will sustain an allegation of being sworn by or before the court. (Citing authorities.) Swearing before a clerk in open court is equivalent to swearing before the court."

The Supreme Court of Oklahoma, after holding as appears from the above quotation that an allegation as to the particular officer administering the oath was unnecessary and that, in the absence of such an allegation proof of administration of the oath by either the judge or the clerk of the court would have sufficed, proceeded to say that the unnecessary allegation having been made, it was necessary to prove it.

This, however, is not our practice in regard to immaterial allegations which are treated as surplusage. In the case of *Jenks* v. *State,* 63 Ark. 312, 39 S. W. 361, the appellant, a convict, had been convicted of escaping from the State penitentiary. The testimony showed that he had effected his escape in the county in which the penitentiary was located, but not from the penitentiary, as charged in the indictment. In holding this variance immaterial, Justice Riddick said: "It is a violation of the statute for a convict to escape at any

place, whether from the penitentiary or not. To determine the venue and jurisdiction over the offense, it was necessary to allege and prove the county in which the crime was committed, and that was done in this case. Beyond this, the reference to the penitentiary or place from which the convict escaped was wholly unnecessary and immaterial, and may therefore be rejected as surplusage. It is not necessary to show that such an offense was committed in the place alleged, if it be shown to have been committed in some other place in the same county."

We therefore hold that the variance is immaterial.

It is insisted that the testimony does not show that the allegation that Elvin Davis was driving a gray and black mare was false, but it was affirmatively shown that Davis did have, and drove, a black and gray mare. This, however, was not the testimony traversed as being false. The testimony traversed as being false was that appellant saw Elvin Davis sell the defendant Emmit Cluck certain hogs, whereas the hogs had been previously stolen by Cluck from certain parties named, and that Davis did not sell the hogs to Cluck.

It is insisted that the testimony does not show that Emmitt Cluck was ever tried for the larceny of the hogs nor does it show the court in which the trial occurred. The clerk of the court, after testifying that he was the clerk of the Crawford Circuit Court, and had attended the November, 1935, term of the court in that capacity, stated that he knew of his own knowledge that appellant had testified in the trial of Emmitt Cluck. The stenographer who had reported that trial read from his notes the testimony of appellant given at the trial of Emmitt Cluck upon the charge of stealing the hogs.

The objection that the testimony does not show when the alleged false testimony was given is answered by saying that the clerk testified that Emmitt Cluck was tried at the July, 1935, term of court which was within three years of the date of the indictment.

The only other assignment of error which we regard as of sufficient importance to require discussion relates to the refusal of the court to grant a continuance

on account of the absence of John Atwell, who was unable to attend court on account of illness and who if present would have testified "that Elvin Davis came to his (Atwell's) house hunting hogs and that he asked him what kind of hogs he was looking for and he testified that just any kind of hogs that he could find; he would also testify that Elvin Davis' character is bad and that he would not believe him on oath."

A brother of the absent witness testified that he was present when the alleged remark about the hogs was made, and that it was made by Bill Davis, a brother of Elvin, in Elvin's presence.

It is not shown of what value it would have been to appellant to make it appear that the man appellant had sworn had sold the hogs to Cluck was a man who had stated that he did not care whose hogs he found except by way of impeachment of Elvin Davis as a witness. It would certainly not have tended to show the good faith of the alleged purchase from Elvin Davis and was merely cumulative of other evidence tending to impeach Elvin Davis.

When objection was made to the proof of the statement of Elvin Davis by the witness Roland Atwell, appellant's counsel said: "It is not for the purpose of impeaching Davis. The purpose is for showing that he was looking for these hogs." The recited testimony of the absent witness was not competent or of value for any purpose except that of impeaching Davis. There was therefore no error in refusing a continuance on account of the absence of a witness whose testimony would have been of no value except for the purpose of impeachment, and for this purpose it would have been cumulative of other testimony tending to impeach Elvin Davis offered by appellant. It has been uniformly held that it is not error to refuse a continuance on account of the absence of a witness whose testimony would have been merely cumulative. *James* v. *State,* 161 Ark. 389, 256 S. W. 372.

Upon a consideration of the whole case we think no error appears, and the judgment must be affirmed. It is so ordered.

JOHNSON, C. J., BUTLER, and BAKER, JJ., dissent.

STATE *v.* GRAY ET AL.

Crim. 3996

Opinion delivered June 29, 1936.

Carl E. Bailey, Attorney General, and *J. F. Koone,* Assistant, for appellant.

Blansett & Blansett, for appellees.

A. P. Patton, amicus curiae.

JOHNSON, C. J. On relation of the prosecuting attorney of and for the Fourteenth Judicial Circuit, proceedings were instituted in a justice of the peace court of Benton county, the object of which was to have appellees, Jack Gray and T. G. Allen, adjudged in violation of the provisions of act 186 of 1935, p. 501 and to require payment of the occupation tax therein levied. At the instance of appellees the justice of the peace declared the act unconstitutional and void and a like result occurred in the circuit court on appeal. This appeal is prosecuted by the Attorney General seeking reversal.

Constitutional questions should be approached and considered in the cardinal light that all legislative acts are presumed to be constitutional and valid and all

doubts in reference thereto should be resolved in favor of their validity. *Wiseman, Commissioner* v. *Phillips,* 191 Ark. 63, 84 S. W. (2d) 91, and cases there cited. Section 1 of the act provides: "That the vocation, occupation or business of going into and about the city or county soliciting orders through the sale of coupons, or otherwise, for portrait work, enlargements and tinted portraits in water colors or in oils, by nonresident photographers not having a permanently established place of business within this State, is hereby declared to be a privilege and taxable for the use and benefit of the county general school fund of the county in which so operating, and the rate of tax upon such privilege shall be as hereinafter fixed; the privilege tax so fixed herein shall be paid to the clerk of the county court who shall issue his receipt therefor when satisfied that the applicant is a nonresident photographer within the meaning of this act. The receipt so issued may be cancelled by the clerk at any time before its expiration on a showing that same was procured by fraud or misrepresentations." Section 2 thereof expressly defines "itinerant nonresident photographers" as employed in said act. This section provides: "That for the purposes of this act the term 'itinerant nonresident photographer' is defined to be any person, firm or corporation, engaged in the business of going into and about the city or county soliciting orders through the sale of coupons, or otherwise, for portrait photographic work, enlargements or portraits, and tinted portraits whether in water colors or in oils, and not having within this State a permanently established and *bona fide* place of business of at least one year standing before applying for the license permit to do business."

The opinions and consequent judgments of the justice of the peace and the circuit court are sought to be upheld, first upon the theory that the act is applicable only to nonresidents or citizens of other States and is, therefore, discriminatory and repugnant to § 18 of art. 2 of the Constitution of 1874.

This contention cannot be sustained if we give any meaning or effect to § 2 of said act. This section clearly

and definitely defines who are "itinerant nonresident photographers" as designated in said act and plainly and expressly provides that such "itinerant nonresident photographers" are those not having within the State a permanently established *bona fide* place of business of at least one year's standing, etc.

The language of the act last quoted, when considered and construed with its other provisions can have but one meaning and that is that the provisions of act 186 of 1935, p. 501 apply to all photographers doing business in this State, resident and nonresident, citizens of this State and citizens of other States alike and upon equal terms saving those only from payment of the tax who have a permanently established business of one year's duration immediately prior to the application for the privilege of doing such business. These and those only who have such established place of business are exempt from paying the tax. The act being thus construed is a proper classification for the purposes of taxation and does not offend § 18 of art. 2 of the Constitution.

Next, the judgments of the lower courts are sought to be sustained because as it is said the act offends the Fourteenth Amendment of the Constitution of the United States which by its terms guarantees to all citizens equal protection of the laws. Ex parte *Deeds*, 75 Ark. 542, 87 S. W. 1030, is cited as sustaining the contention urged. Seemingly, this citation sustains the contention. This case was decided by this court on May 27, 1905. Subsequently, the Supreme Court of the United States had under consideration an Alabama statute which classified for the purposes of taxation on the basis of those "having regular stores established in the different counties." It was there urged as here that the statute offended the Fourteenth Amendment, but the court disposed of the contention by saying: "It is said there is no sufficient ground for a distinction, with respect to taxing the occupation, between the business of selling sewing machines from a regularly established store and the business of selling them from a delivery wagon. But there is an evident difference, in the mode of doing business, between the local trades and the itinerant dealer, and we

are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the States necessarily enjoy a wide range of discretion, and it would require a clear case to justify the court in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed. This is not such a case. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431; *Cook* v. *Marshall County,* 196 U. S. 261, 49 L. Ed. 471, 25 S. Ct. 233; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 50 L. Ed. 451, 26 S. Ct. 232; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 54 L. Ed. 688, 30 S. Ct. 496." *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 58 L. Ed. 974, 34 S. Ct. 493.

We believe that the quotation from the Singer Sewing Machine Company case, last cited, is decisive of the contention here urged and if there be conflict between it and our pronouncement in the Deeds case, *supra,* we should and do yield to the Supreme Court's pronouncement. It appears, therefore, that the act does not offend the Fourteenth Amendment and the judgments of the lower courts cannot be sustained upon this theory.

Finally it is contended for affirmance that the act offends the "commerce clause" of the Federal Constitution art. 1, § 8, cl. 3, because, as it is argued, it levies a tax upon interstate commerce. Compare *Crenshaw* v. *Arkansas,* 227 U. S. 389, 33 S. Ct. 294, 57 L. Ed. 565. But such is not the effect of act 186 of 1935, p. 501. This exact contention was urged and decided adversely to appellee's contention in the Singer Sewing Machine case, cited, *supra,* where the court in disposing of the contention said: "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the Legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all.

The statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from interstate commerce."

It should be superfluous for us to undertake to add to the arguments advanced by the Supreme Court of the United States, last quoted, and it will, therefore, suffice to say that we adopt its reasoning as our own in the disposition of this contention.

It follows from what we have said that act 186 of 1935 is a valid and constitutional enactment and the lower court erred in deciding otherwise.

The case will be reversed, and remanded with directions to proceed in conformity to law, and not inconsistent with this opinion.

LEADER *v.* MATHEWS.

4-4362

Opinion delivered July 6, 1936.

E. G. Ward, for appellants.

Arthur Sneed, for appellees.

BAKER, J. The appellants sued the appellees in the chancery court praying for a mandatory injunction to require appellees to remove a certain dam or levee

erected along the dividing line between the properties belonging to appellants on the north side of said dam, or levee, and appellees on the south side thereof. It is alleged in the complaint that Raft Slough is a watercourse flowing in a southwesterly direction, across property belonging to the plaintiffs thence south upon and across property belonging to the defendants, and that the defendants by the construction of a levee or dam upon their own land, but just south of the line dividing the two properties, has impounded water so as to overflow forty or fifty acres of land belonging to the appellants, damaged crops that were growing thereon, and that the defendants wrongfully maintained the said levee, which is about 400 feet long, about 6 feet thick at the bottom, 2 feet thick at the top, and 3 or 4 feet high. There is no serious controversy between the parties relative to the law in this case, but there is a conflict as to the questions of fact, as well as the application of principles of law applicable to these facts when they are determined. The appellants here were the plaintiffs below and they insist that the body of water across which the dam has been built is a watercourse as defined by this court in the case of *Boone* v. *Wilson,* 125 Ark. 364, 368, 188 S. W. 1160.

The court there said: "A watercourse is defined to be a running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or extraordinary causes."

Several witnesses testified, and their descriptions of the conditions that prevail are such that it might well be determined from what they have said that the dam is across a watercourse. It is, also, true that the appellees have offered a considerable amount of testimony to the effect that at the location of the dam there is a swale, or slash, or slough, or depression, which was probably at one time, but not within the memory of witnesses testi-

fying, the channel or course of a stream. Some of appellants' witnesses say that the beginning of this slough is at a point on the river where it breaks over during high water, and they trace its course for a distance of six or seven miles where it flows into a channel known as Old River.

In an effort to consider all the facts in this case, we think the following statements, if not undisputed, are sustained by a great preponderance of the testimony.

On appellant's lands there is a long hole, or reservoir, perhaps two or three hundred feet long and several feet deep. The appellants had cut some ditches, drained water into this reservoir, or depression. A part of this same depression, or low ground, extends south on the Caldwell lands, and still further south upon these lands is another hole, or reservoir, or long pool, similar to that on lands of appellants. East of the lands belonging to these parties is drainage ditch No. 9, which crosses the so-called Raft Slough at a point north or northeast of all of their lands. Appellants have attempted, with one or two ditches, to drain water from this hole or depression on the Leader lands into drainage ditch No. 9. The distance is about 900 feet, and in that distance there is a fall of little more than two feet. This ditch, however, does not always operate to drain the water from the lands into the ditch, because of the fact that when water accumulates in the ditch to a depth of three or four feet it flows back or west upon appellants' lands. No flood-gates have been put in to prevent this back-flow. On account, however, of this trouble the appellants at one time put in some pipes, flues from an old boiler, and then dammed above these, which permits a slow flow of water in whatever direction conditions may determine. Appellants insist that if the dam put up by appellees were cut or taken out the water would flow on south across the lands of appellees and leave their lands, as well as appellees' lands, comparatively dry, except in the bed of the watercourse.

While these facts were denied by witnesses of appellees who are equally positive, there are certain physical facts which should be taken into consideration. Witnesses who testified for appellants say that about a year

ago they measured the water immediately north of the dam and it was there found to be about twenty-six inches deep; that immediately south of the dam the water was four or five inches deep.

No explanation is made why this water south of the dam did not flow on further south according to their contention. All of the witnesses testify that north of Leader's land is a roadway across this draw, slash, depression, or swale. Some of the witnesses say that Leader helped to fill up this roadway by hauling in dirt and sand and making the dam or embankment there for the road. But there is no water impounded by this road so built up, although there is no culvert or other passageway permitting the water to flow across the roadway. Whatever water accumulates at that place must necessarily pass off by the road ditches.

Appellants offered as their witness a Mr. Laffier, who took levels of lands affected by this so-called overflow condition. His levels show that immediately south of this levee, or dam, the lowest lands on this depression are slightly higher than the lowest lands in the depression north of the dam, and according to these levels as taken the dam was built across the south end of the depression; and, while there are some low lands still south of the dam, the larger part of the low lands are north of it. This fact, perhaps, accounts for the water remaining five or six inches deep south of the ditch and being twenty-six inches deep north of the ditch at the time the measurements were taken.

Of course, if the dam were not there, the water north of the dam would seek its level and flow to the south filling the depression and some of it flow away; but, according to the measurements shown, much of the water would have to remain upon the land until it was absorbed or taken up by evaporation. High water would, of course, force large quantities of it on to the south under the same conditions that prevail when water flows from drainage ditch No. 9 on the east side west into Raft Slough. The so-called swale, or depression, if the dam were removed, would, no doubt, to some extent, lower the water north of the dam. But if these measurements are

correct, Raft Slough would not operate as a drainage canal for either appellants' or appellees' lands unless some channel or ditch be cut upon appellees' lands for the flow of the water. A part of the so-called bed is in cultivation.

There is testimony to the effect that at the south end of the Caldwell lands some ditches have been cut to drain out some of these low places.

We have set out these physical facts somewhat in detail as they were presented to the court, for the reason that it must be apparent, with these facts stated, that this Raft Slough is more in the nature of a reservoir, or depression, than a watercourse.

Appellants are responsible for proof to the effect that flood waters are drawn away by this depression or slough. These flood waters flowing into the low places and filling them to overflowing do not necessarily constitute watercourses, and a land owner is justified in defending against such flood waters and can do so without incurring liability, unless he unnecessarily injures or damages another. *McCoy* v. *Board Directors of Plum Bayou Levee Dist.,* 95 Ark. 345, 129 S. W. 1097; *Beck* v. *State, ex rel. Attorney General,* 179 Ark. 102, 14 S. W. (2d) 1101.

We have already stated that the removal of the dam would perhaps lower the water level on land of appellants, but would not operate to drain the land unless a ditch be cut on the land of Caldwell and others to the south. Some of the water would still remain on the lands of appellants. More land, however, of appellees would be covered by removal of dam, unless there were a ditch cut to carry water away. Caldwell is under no obligation to cut or open any ditch upon his land to afford that drainage. *Missouri Pac. Rd. Co.* v. *Parker,* 167 Ark. 42, 266 S. W. 959; *Ayer-Lord Tie Co.* v. *Puckett,* 169 Ark. 271, 273 S. W. 715.

The waters causing the most serious trouble in this case are overflow waters when waters are high, or they are surface waters at other times, and against either one of these a land owner has the right to defend himself as against a common enemy, without rendering himself lia-

ble for damages, unless he unnecessarily injures or damages another for his own protection. *Baker* v. *Allen*, 66 Ark. 271, 50 S. W. 511.

"A watercourse consists of bed, banks and water; yet the water need not flow continually; and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, in times of freshet, or melting of ice and snow, descend from hills and inundate the country." Section 4, Angel on Watercourses, p. 2.

The chancellor was most probably correct in holding there was no water course obstructed by the dam.

Another well-considered case, which was first decided in the same court as the instant case, we think is conclusive of the rights of the parties here. The case is *Jackson* v. *Keller*, 95 Ark. 242, 129 S. W. 296. In that case Jackson had cut a ditch about 60 rods long between his two forties. The ditch was about four feet wide at the top and two feet deep, ran due south from the point of beginning on appellant's land to the dividing line between land of appellant and appellee, thence east to the point of high land. He said in his testimony that the object in cutting this ditch was to concentrate the water of these ponds to the old ditch west of Keller's land. About twenty rods of this ditch was cut through land that did not overflow except in very high water. That twenty rods was intended to catch the water before it got into these ponds. The appellee in that case constructed a dam or levee upon his land to protect it from the water concentrated and accumulated by the appellants' ditches. This court said in that case: "The chancellor evidently found that appellant was at fault in digging ditches that turned the water on to appellee's land in greater volume than it would have gone had it been permitted to run in its natural course along and into the swale that existed where the waters passed from appellant's land on to the land of appellee. Appellant, while protecting himself from the surface water that accumulated on his land, had no right to con-

centrate and throw it by ditches with greater force and volume than it otherwise would have gone upon appellee's land, so as to unnecessarily damage him. See *St. L., I. M. & S. R. Co.* v. *Magness,* 93 Ark. 46, 123 S. W. 786. Appellee had the right to erect an embankment to protect his land against such increased flow upon it. In the draining of one's land of surface water it is not permissible to direct the flow of the water upon the adjoining land, or to increase the volume of the flow by the construction of a drain or ditch. Tiedeman on Real Property, § 615, p. 587. The doctrine of *Baker* v. *Allen,* 66 Ark. 275, 50 S. W. 511, when applied to the facts of this case, shows that the decree was correct."

The same conditions prevail in this case as in the case of *Jackson* v. *Keller, supra.*

The chancellor's decision is supported by the preponderance of the testimony; if not, the evidence presented is in such sharp conflict that the chancellor's finding will be deemed to be correct.

The decree is, therefore, affirmed.

HERRING *v.* MISHAWAKA RUBBER & WOOLEN MANUFACTURING COMPANY.

4-4350

Opinion delivered July 6, 1936.

Culbert L. Pearce, for appellant.

Barber & Henry, for appellee.

BAKER, J. The Mishawaka Rubber & Woolen Mfg. Co., a corporation, filed its suit in the circuit court of White county against H. E. Herring and H. Benson, partners, who had operated a retail mercantile business at Imboden, Arkansas, under the firm name of Herring & Benson, alleging that the said partnership was indebted to the plaintiff in the sum of $245.89 for goods, wares and merchandise sold by the plaintiff and purchased by the defendants. On January 1, 1934, Herring filed separate answer in which he denied that he and his co-defendant were partners in such business after September 3, 1932, and denied the purchase and indebtedness for the goods; pleaded further, by way of affirmative defense, that he and Herbert Benson were partners in a retail mercantile business at Imboden, in this State, from October 1, 1930, to September 3, 1932; that in August, 1932, they agreed to dissolve the partnership and organized a corporation. This was done and the corporation became Herring & Benson, Inc. They filed articles of agreement and incorporation in Lawrence county, on August 31, 1932. On September 3d said articles of incorporation, together with the clerk's certificate, were filed with the Secretary of State. Herring then resided at McRae, White county, where he was engaged in a retail mercantile business under the name of H. E. Herring, General Merchant. At no time did he reside at Imboden or participate actively in the management and operation of the business, and disclaims liability to plaintiff for merchandise shipped and delivered to the corporation after September 3, 1932.

Upon proper motion, and by agreement, the suit was transferred to the chancery court, where a decree was rendered in favor of the plaintiff against Benson, as one of the partners and against Mrs. Herring, as executrix of the last will and testament of the other partner, who had died. From this decree against the estate of Herring, this appeal has been prosecuted. The only question presented here is that of liability of the partners under the conditions or facts developed upon this trial.

The substantial facts are not in dispute, and for that reason detailed statements of the several witnesses will be omitted. The amount of the account is not in question. As we understand the record the following facts are not controverted:

Benson was in charge of the business at Imboden. Mr. Herring was at that place of business perhaps not very often. Benson gave or made the order for the goods for or on behalf of the partnership, but only three days before the corporation was formed.

The goods were shipped in accordance with the order to Herring & Benson. They were received by Herring & Benson, Inc. This delivery was made according to order, perhaps, about thirty days after the formation of the corporation, but at a time when the plaintiff had not yet learned of the formation of the corporation. The incorporators were the two former partners, Mr. Herring, Mr. Benson and Mrs. Herring, the wife of one of the partners, the executrix of his last will and testament, prosecuting this appeal. The capital stock of Herring & Benson, Inc., was paid for by the stock of merchandise owned by the partnership.

It is argued here that the plaintiff, appellee on this appeal, was required to take notice of the dissolution of the partnership, as the filing with the Secretary of State of articles of agreement by Herring & Benson was constructive notice of the formation of the corporation. It is not contended that the appellee had any other information or knowledge of the dissolution of the partnership before the shipment of goods, except constructive notice, so given by filing the articles of agreement forming the corporation.

Counsel cited § 3 of act 255 of Acts of 1931, which declares that the existence of a corporation shall begin with the filing of articles of incorporation in the office of Secretary of State. If it should be conceded or determined that everybody must take notice of the organization of the corporation, upon the proper filing of the articles of agreement with the Secretary of State, this would be far short of giving notice of the dissolution of the partnership. The abstract furnished us and the argu-

ment of counsel presenting the case contain no reference to any record or statement in the articles of agreement for incorporation, tending to show that Herring and Benson had dissolved their partnership. All proof of the fact of their dissolution is extraneous to the matter of the organization of the corporation.

We have just recited above that the capital stock of the corporation was paid for by the merchandise belonging to the partnership. This information is not obtained by any reference to any of the articles of agreement to incorporate.

Counsel cite us to numerous cases and authorities to the effect that a corporation, organized as this one was to succeed the partnership in its business, becomes liable for the partnership debts or obligations and to the further effect that partners would not be liable on contracts entered into or for debts contracted by the corporation or in the corporate name for the corporation, unless the other party dealt with them as partners and did not have actual or constructive notice of the incorporation. Citing 14 C. J. 307; also 7 R. C. L. 84.

These citations we think clearly and concisely state propositions of law that are not applicable here. If the plaintiff had sued the corporation and the corporation were denying its liability as a successor of the partnership, the citations given would be in point. The fact that the corporation may have made itself liable would not *ipso facto* release the partners.

There was proof introduced to the effect that Herring & Benson, Inc., made an assignment for the benefit of creditors, that the merchandise was sold for $3,500 cash and this was used in payment upon $7,363.66 indebtedness. At the time of this assignment there was due the plaintiff $362.14. There was paid a dividend of $121.40, but the creditor refused to accept this distribution in discharge of the obligation due it, but reserved the right to sue the partnership.

"The dissolution of a firm does not relieve any of its members from liability for existing obligations, including liability on existing contract." 47 C. J., page 1122, § 792.

"When a person holds himself out as a co-partner, those who deal with the firm on the faith of such representation are entitled to act on the presumption that the relationship continues until notice of some kind is given of its discontinuance." *Gershner* v. *Scott-Mayer Commission Co.*, 93 Ark. 301, 124 S. W. 772; *Watkins* v. *Moore*, 178 Ark. 350, 10 S. W. (2d) 850.

It follows that the decree of the chancery court is correct. It is affirmed.

SAFEWAY STORES, INC. *v.* MOSELY.

4-4360

Opinion delivered July 6, 1936.

Roscoe R. Lynn and *June P. Wooten*, for appellant.

Strait & Strait, for appellee.

BUTLER, J. W. J. Mosely, the appellee, was in the employ of Safeway Stores, Inc., as a manager in charge of its store at Morrilton. He worked in the store as any other employee, but had general supervision over its operation with authority to issue orders to the other employees and to require them to perform their duties. On November 7, 1934, appellee was injured by falling to the floor of the rear compartment of the store while engaged in carrying a sack of shorts weighing approximately one hundred pounds. He brought suit against his employer

to recover damages for his injury on the theory that it was caused by the negligence of a fellow-servant.

At the conclusion of the testimony the appellant moved for an instructed verdict. This motion was overruled and exceptions thereto duly saved. The trial resulted in a verdict and judgment in favor of the appellee from which this appeal is duly prosecuted.

We find it necessary to consider only the question raised by the appellant for an instructed verdict. In viewing the evidence adduced, we must give to it its highest probative value in favor of the appellee and indulge every inference reasonably deducible from the testimony to support the finding of the jury. *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. (2d) 760.

There is practically no dispute in the testimony as to the essential and material facts. On the day of appellee's injury, November 7, 1934, the store was being served by three employees—the appellee, Henry Welter and A. L. Brown. Appellee and Welter were working in the general grocery department of the store and Brown was in charge of the meat department. About 9:30 a. m. a customer who conducted a sandwich shop came in to purchase a number of heads of lettuce. Because of the character of his trade he required lettuce that was fresh and his purchases of this vegetable were usually made from the ice-box located in a separate compartment of the store, separated from the general grocery store and meat market by a partition in which there was an opening. When the customer came into the store, appellee directed Henry Welter to wait upon him. Welter went to the ice-box and from there sold him from eight to a dozen heads of lettuce, put them into a container of some kind, and delivered it to the customer. Some time after the sale of this lettuce, appellee went into the storage room at the rear of the store where the ice-box was located, and, picking up a sack of shorts weighing a hundred pounds, turned and started to the front of the store. While doing so he stepped upon a lettuce leaf lying on the floor and slipped and fell, resulting in his injury.

The negligence of the fellow-servant alleged is that he carelessly and negligently dropped a lettuce leaf on

the floor and carelessly failed to perform his duty in permitting it to fall and remain upon the floor. The evidence on this question is to the effect that Welter and Ray Ellison, the customer, went to the ice-box for the lettuce where it was delivered to Ellison and he came out with it through the front of the store; that afterwards, perhaps a half an hour, appellee stepped on a lettuce leaf lying on the floor about four feet from the ice-box; that he (the appellee), on opening the store that morning, had swept it out and at that time the floor was free of lettuce leaves. On the question as to whether or not Welter dropped the lettuce leaf there is no testimony whatever. Appellee admits that he did not see Welter drop the leaf. Welter himself did not testify that he dropped one, but stated that he did not deliver the lettuce to Ellison at the place where the shorts were stacked or where the appellee fell and that there would have been no occasion for him to be in either of those places when making the delivery in question. He stated that it was not uncommon for lettuce leaves to fall and remain on the floor during the operation of the store and that he had seen lettuce leaves thus lying; that if he was not then busy he would pick them up; that at times he had seen them on the floor and had not picked them up. There is no testimony, however, to the effect that Welter saw the particular leaf which caused appellee's fall, or that it was lying where he or Ellison might have dropped it, or where he would have been likely to see it while making the delivery to Ellison or in coming out of the rear compartment from which the delivery was made. The evidence is to the effect that the shorts were stacked about eight feet away from the ice-box, and that when appellee fell he was about four feet from the ice-box. Appellee stated that it was dark in the back room; that there was a sixty-watt globe in this room, but he did not switch it on when he went for the shorts and did not see the lettuce leaf upon which he stepped.

We think, under the circumstances of this case, it is purely a matter of speculation as to how the lettuce leaf happened to be at the place it was when stepped upon by the appellee, and that the evidence fails to show any neg-

ligence on the part of Welter in failing to observe it. The most that can be said is that his duty required him to pick up only those leaves he saw and not to make an inspection for other leaves which might be lying around. We therefore conclude that the evidence, when given its greatest weight, wholly fails to establish any negligent act on the part of Welter as the proximate cause of the fall sustained by the appellee. The question as to the assumption of risk is therefore not necessary to consider as the verdict has no substantial evidence to support it on the question of negligence.

As the case appears to have been fully developed, the judgment of the trial court will be reversed, and the case dismissed.

J. B. PEARSON FLOUR & FEED CO. *v.* PITTMAN.

4-4355

Opinion delivered July 6, 1936.

T. H. Humphreys, Jr., and *Geo. A. McConnell,* for appellant.

L. L. Mitchell and *Ned A. Stewart,* for appellees.

BUTLER, J. This is an appeal from a judgment of the circuit court of Nevada county denying the motion of appellant for judgment against Arlice E. Pittman, sheriff, and Maryland Casualty Company, the surety on his official bond, for failure to return an execution within sixty day issued out of said court on January 21, 1935, on a judgment appellant obtained against E. L. Cox, J. R. Cox, J. W. Bostick and L. E. Atkins on January 7, 1935,

in the sum of $873.57, interest and costs. In the motion, judgment was prayed against appellees for the amount of the judgment aforesaid, with interest at 6 per cent. per annum, costs of $15.25, and 10 per cent. penalty on the amount of said judgment for failure to return said execution within sixty days from the date thereof.

The facts disclosed by the record are as follows:

On June 13, 1933, appellant sold to E. L. Cox, who resided at Prescott, a large amount of merchandise and received therefor checks drawn by him on the bank of Prescott. E. L. Cox represented that the checks would be honored by the bank when presented for payment. The checks were presented in due course, and payment was refused by the bank. Thereupon, appellant demanded a return of the merchandise, but E. L. Cox refused to return it. Appellant brought suit against E. L. Cox in specific attachment, and the merchandise was seized under the writ. The merchandise was released to E. L. Cox, who gave the sheriff a bond, signed by himself and three sureties, to perform the judgment of the court in the action. On January 7, 1935, the case was tried on the pleadings and evidence introduced by the plaintiff, the defendant failing to appear, and upon which pleadings and evidence, the court sustained the attachment and rendered judgment in favor of appellant for $873.57 and interest against E. L. Cox and his bondsmen, J. R. Cox, L. E. Atkins and J. W. Bostick and directed that execution issue upon the judgment. The execution was issued against E. L. Cox, L. E. Atkins, J. R. Cox and J. W. Bostick on the 21st day of January, 1935, commanding him to collect the judgment in the sum of $873.57, interest in the sum of $2.03 and costs, and to make due return of the writ within sixty days from the date thereof. The execution was delivered to and accepted by the sheriff on the day of its issuance. At the same term of court, the judgment against two of the bondsmen, J. R. Cox and J. W. Bostick, was set aside on the ground that their names had been forged to the dissolving bond. On the 31st day of May, 1935, the sheriff, Arlice E. Pittman, returned the execution with the following indorsement thereon:

"This execution came to my hands on January 21, 1935, and is being returned unsatisfied on account of this judgment being set aside as to J. R. Cox and J. W. Bostick and not finding sufficient property in the hands of E. L. Cox and L. E. Atkins subject to execution."

Appellant contends the trial court erred in refusing to render judgment in its favor for the amount of the judgment with interest, costs, and 10 per cent. penalty. The fact is undisputed that the sheriff failed to return the execution within the 60 days from its date. He received it on January 21, 1935, and did not return it until May 31, 1935. His only excuse for not doing so, according to the record, was because the judgment had been set aside against J. R. Cox and J. W. Bostick after he received the execution, on the ground that their names had been forged to the dissolving bond. Section 4353 of Crawford & Moses' Digest provides that: "All executions shall be returnable within sixty days from their date." Section 6256 of Crawford & Moses' Digest provides that for failure to return an execution as required by law, the sheriff shall be liable for the amount of the judgment on which it was issued, including all costs and 10 per cent. thereof. These statutes are mandatory. The cases of *Smith* v. *Drake,* 174 Ark. 715, 297 S. W. 817, and *Ghent* v. *State, use School Districts,* 189 Ark. 747, 75 S. W. (2d) 67, and the general rule announced in §§ 142 and 232, 57 C. J., at pp. 781 and 313, respectively, support the contention of appellant. The fact that during the time the sheriff held the execution the judgment was set aside as to two of the bondsmen did not excuse him from making the return within the proper time. This suggestion on the part of appellees is without merit.

On account of the error indicated, the judgment is reversed, and judgment is directed to be entered here against appellees for $873.57, with interest at the rate of 6 per cent. per annum from January 7, 1935, the date of the original judgment, 10 per cent. of said judgment as a penalty, and $15.25 costs, together with all costs accrued on account of this appeal.

PLUNKETT *v.* METROPOLITAN LIFE INSURANCE COMPANY.

4-4353

Opinion delivered July 6, 1936.

Lawrence E. Wilson, for appellant.

Harry Cole Bates, Moore, Gray, Burrow & Chowning and *Streett & Streett,* for appellee.

SMITH, J. The Metropolitan Life Insurance Company (hereinafter referred to as appellee) issued to Vernon E. Manning's employer certain group policies of insurance, pursuant to which certificates were issued to Manning and other employees, affording them certain specified insurance protection under the group policies. These certificates recite that they were issued under and pursuant to the terms and provisions of the group or master policies and were referable to those policies for the determination of the insurance coverage.

Manning brought this suit, which, after his death, was revived in the name of a special administrator, on the certificate so issued to him, and the case was tried upon an agreed statement of facts, from which we copy the essential and controlling stipulations as follows: "2. It is agreed that the attached certificate, Serial Number 38481, was issued and delivered to plaintiff on March 1, 1934; the same being issued under the terms, conditions and provisions of Master Group Policy No. 1864-G. This same certificate was also issued under the terms and provisions of Master Policy No. 10-G. A. D. D., under which policy no liability is or has been claimed.

This certificate was also issued under the terms and provisions of Master Policy No. 187-GH, providing ten dollars a week for twenty-six weeks, if plaintiff became prevented, by injury or disease, from performing his work for that length of time. Under this last Master Policy claim was made by plaintiff and the defendant company paid him the sum of $260, in full settlement and payment of its liability under said Group Policy No. 187-G. H.

"3. It is agreed and stipulated that said Group Policy No. 1864-G, contains, among others, the following provision, to-wit:

" 'Total and Permanent Disability Benefits.—Upon receipt, at the home office in the city of New York, of due proof that any employee, while insured hereunder, and prior to his sixtieth birthday, has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the company will, in lieu of the payment at death of the insurance on the life of the said employee, as herein provided, pay equal monthly installments, as hereinafter described, to the said employee, or to a person designated by him for the purpose, or, if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record of the said employee.

" 'Such monthly installment payments shall be made during the continuance of said disability, but in no event shall they exceed one monthly installment in the amount, determined as described below, for each fifty dollars of insurance (to the nearest fifty dollars) in force on the life of the said employee, under this policy, at the date of receipt of due proofs of said disability, provided, however, that in no event shall more than sixty such monthly installments be payable hereunder.

" '* * *'

"4. It is agreed that on or about December 27, 1934, and while employed at the Camden plant of the Southern Kraft Corporation, and while insured under said certificate No. 38481, Group Policy No. 1864-G, the plain-

tiff, Vernon E. Manning, was struck by an automobile, resulting in a broken right leg.

"5. It is admitted by the defendant that, as a result of such injury, plaintiff became totally disabled and remained in that condition for nine months, or until September 27, 1935; during which time he was unable to engage in any work or occupation for wage or profit.

"6. It is admitted by plaintiff that his said disability is not permanent and was never considered permanent; and that on or about September 27, 1935, he had recovered from said injury and disability and was able to return to work.

"7. It is the contention of plaintiff that he is entitled to recover nine payments of $51.04 each, with interest thereon in the sum of $15.75, because it is proved and admitted that he suffered a condition of total, but not permanent, disability for such period of time.

"8. It is the contention of defendant that it is not liable under the certificate and group policy sued on in this action, because it is proved and admitted that at no time while insured thereunder did plaintiff suffer a condition of total and permanent disability."

The cause was submitted to and heard by the court upon this agreed statement of facts, and the court found, in view of the stipulation, that appellant was not totally and permanently disabled, there could be no recovery, and rendered judgment accordingly, from which is this appeal.

The briefs do not cite, nor have we been able to find, any case requiring the insurer to pay the insured for an admittedly temporary disability under a policy insuring against death or total and permanent disability. Appellant cites the case of *Sovereign Camp Woodmen of the World* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567, as so holding. But such is not the effect of that case. The point there decided is reflected in the headnote, which reads as follows: "Under a benefit certificate providing for recovery if insured should suffer bodily injury and furnish satisfactory proof of total disability, *held* the right to recover depends upon insured's total disability during the life of the certificate, and not upon

the receipt of the proof of total disability, no time being fixed for making such proof."

In that case there was no question as to the permanency of the insured's disability. Its totality was the point in issue, together with the sufficiency of the proof thereof. The decision of that case turned upon the question whether proof of disability was a condition precedent to recovery under the policy there involved—a question not presented in this case.

Appellant appears not to question that the provision of the certificate, copied in the agreed statement of facts, entitling his intestate to benefits after he "has become totally and permanently disabled" (hereinafter referred to as the first quotation), if read by itself, would prevent a recovery of the benefits inuring for total and permanent disability, inasmuch as intestate was not permanently disabled; but he insists that such is not the meaning of the certificate when read in connection with the provision that "such monthly installment payments shall be made during the continuance of said disability" (hereinafter referred to as the second quotation), appearing in the certificate sued on. The argument is that the language of the certificate last quoted should be construed to mean that, having become disabled, the benefits payable only in case of total and permanent disability should be paid during the continuance of the disability, although the disability was not, in fact, permanent, because the disability was total while it did continue.

To so hold would require the certificate to be rewritten and a new certificate of insurance made. It would eliminate and render of no effect the word permanent. This court has several times quoted and approved the language of the Supreme Court of the United States in the case of *Bergholm* v. *Peoria Life Ins. Co.*, 52 S. Ct. 230, 76 L. Ed. 416, 284 U. S. 489, as follows: "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. (Citing cases.) This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no

warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings."

The quotation from the certificate last above appearing does not import into the first quotation any ambiguity which renders the meaning of the first quotation doubtful, nor does it give support to the contention that benefits were to be payable except only in case of total and permanent disability, as the certificate plainly provides.

The obvious purpose of the last quotation, which appellant insists renders the first quotation ambiguous, is just this: Disability is not a fact which, like death, exists or does not exist. *Missouri State Life Ins. Co.* v. *King,* 186 Ark. 983, 57 S. W. (2d) 400. It may be a fact about which difference of opinion would arise. The statement of its existence may appear to be true, and yet be false. It may appear to be permanent, and yet later prove not to be so, but to have been, in fact, only temporary. Proof might be made which apparently established the permanency of the disability and which would require the payment of the monthly installments of benefits, and the insured might later recover and be no longer disabled. He would, in that event, be no longer entitled to receive benefits which were contracted for in the event only of permanent disability. The second quotation was designed and intended to cover that contingency. Proof of apparent permanent disability would entitle him to receive the monthly installment payments only during the continuance of said disability, although he had previously been paid benefits upon the apparent showing that the disability was permanent, when, in fact, it was not.

Here, however, it is not contended that appellant is permanently disabled. On the contrary, it is stipulated that the disability is not permanent, and was never considered permanent. Payments of benefits for permanent disability were never made, and no question arises as to the length of time for which they should continue, because it is stipulated that the conditions under which

they were payable never arose or were in existence. The word permanent, as used in the insurance contract here sued on, contemplates that the disability will continue permanently, that is, for life, though it may not, in fact, do so. It is used in its commonly accepted sense as the antithesis of, and not as a synonym for, the word temporary. The insurer has, by this second quotation, protected itself against the contingency of being required to pay benefits after the disability has ceased to exist, although it had begun to make payments upon the assumption that total and permanent disability existed.

This construction of the contract is supported by the opinion of the court of appeals of the State of New York in the case of *Ginell* v. *Prudential Ins. Co. of America,* 237 N. Y. 554, 143 N. E. 740. That opinion reversed the decision of the Supreme Court, Appellate Division, 200 N. Y. S. 261; 205 App. Div. 494. The headnote to the opinion of the Supreme Court, Appellate Division, reads as follows: "Tuberculosis is a permanent disease, within a policy insuring against 'permanent disability' and providing that, if insured recovers from such a state of disability, no further payments will be made; 'permanent' being applicable to a condition of disability, which, while not transient or ephemeral, still may pass away."

Justice Van Kirk wrote an opinion dissenting from the view that the word permanent could be applied to a condition which might and had in fact passed away. He said: "The construction approved gives no natural meaning to the word 'permanent.' If the meaning approved be the true meaning, the word 'permanent' could as well have been omitted from the policy, or the word 'temporary' substituted. Under the terms of the policy the premium is to be waived, and the payment made, if due proof to the company of the total permanent disability be made. The payment is not dependent upon actual total permanent disability, but on proof of such; and it is no uncommon experience that that is established by proof to be a fact which in truth was never a fact. The policy defines certain losses of members which shall conclusively establish permanent total disability, but leaves

it open to proof that total permanent disability exists due to other inflictions or afflictions. The insured did not suffer a permanent total disability within the class defined as such. It must have been a matter of common understanding between the parties to such insurance policy that a condition which at the time appeared to cause total and permanent disability would often improve; and it is very natural to provide in the contract that, if that which appeared to be a total permanent disability did improve, the benefits should not be realized. The provision that the benefits should be realized during the continuance of the total disability only does not indicate to me that the parties contemplated that the word 'permanent' was a synonym of 'temporary,' in light of the (to me) significant fact that the benefits are to be realized upon proof of total disability being furnished, rather than upon actual total disability. The realization of the benefits is to begin six months after the proof is furnished. This is said to indicate that the total disability which continued for six months is to be considered permanent disability within the meaning of the policy."

The dissenting justice proceeded to say: "The learned justice at the trial term cited a number of authorities and illustrations indicating that the word 'permanent' does not always mean 'forever' (119 Misc. Rep. 467, 196 N. Y. Supp. 337); but he has cited none which indicate that the word 'permanent' sometimes means 'temporary,' and in no case was the word 'permanent' given a construction in conflict with its ordinary meaning in the connection used."

The court of appeals, in a *per curiam* opinion, *supra,* in which all the judges concurred, on the appeal to that court, adopted the dissenting opinion of Justice Van Kirk as a correct definition of the word permanent as it appeared in the policy sued on.

This was the view of the trial court here. It will be noted that appellant's certificate entitled him, under one of the group policies to which it was related, to certain temporary disability benefits. These, according to the stipulation, have been paid him.

The judgment of the court below is correct, and is therefore affirmed.

STONE *v.* WHITMAN.

4-4352

Opinion delivered July 6, 1936.

Nat T. Dyer, for appellant.
Herrn Northcutt, for appellee.

JOHNSON, C. J. On January 18, 1932, one Jack Hornbuckle by executory contract agreed to sell to H. W. Stone the west half of the southwest quarter of section 6, township 19 north, range 13 west. The purchaser paid $50 in cash and agreed to pay $50 November 1, 1932; $100 November 1, 1933, and $100 November 1, 1934, with interest. This contract of purchase in part provided: "There is a mortgage due against said lands together with another 80-acre tract adjoining on the south and east and that in the event said mortgage should be foreclosed, both parties hereto will work together and endeavor to pay same off and save title to all said lands." The purchaser made payments on this contract as follows: June 6, 1933, $20; September 10, 1933, $100.

On June 6, 1933, H. W. Stone by executory contract agreed to sell the 80-acre tract purchased from Hornbuckle together with a 5-acre adjoining tract to G. T. Whitman for a recited consideration of $1,350. One hun-

dred fifty dollars of the recited consideration was paid in cash and the balance was evidenced by promissory notes as follows: $400 on or before September 15, 1933, and $800 on or before January 1, 1936, with interest. This contract further provided that when the $400 obligation was paid on September 15, 1933, an abstract showing title and a warranty deed conveying said property to Whitman would be executed by Stone and placed in escrow in the Farmers' & Merchants' Bank of Mountain Home, to be delivered to Whitman when the $800 obligation was fully paid.

On September 14, 1933, Jack Hornbuckle by executory contract agreed to sell and convey to G. T. Whitman for a recited consideration of "one 1928 model Duplex Victory 6 Dodge Car," and the assumption by Whitman of an outstanding mortgage indebtedness to one M. J. McPhee, for the sum of $400, the 80-acre tract of land which was the subject of the contract between Hornbuckle and Stone, and Stone and Whitman and also an adjoining 80-acre tract. Upon the payment and discharge by Whitman of the McPhee mortgage Hornbuckle and wife by warranty deed conveyed the 160-acre tract to the Whitmans.

After Whitman obtained his deed from Hornbuckle conveying to him the 80-acre tract and after demand upon the bank to deliver to him the Stone conveyance, then in escrow, covering the 5-acre tract, this suit was instituted by Whitman against Stone and the escrow bank seeking specific performance, delivery of the deed held in escrow by the bank and a judgment against Stone for $100, an alleged overpayment. Stone denied generally the allegations of the complaint, and by way of cross-complaint alleged a balance due him on the purchase price of the lands described in the contract of date June 6, 1933, of $400 and accrued interest.

After hearing all the testimony adduced by the parties, the chancellor decreed, specific performance, directed delivery of the deed to the 5-acre tract held in escrow by the bank, and a judgment in favor of Whitman against Stone for the sum of $100 overpayment,

and dismissed appellant's cross-complaint for want of equity from which this appeal comes.

The testimony adduced by the parties aids but little in the determination of the question of fact presented on this appeal; therefore, we do not undertake to set it out in detail or discuss it at length.

Under the law the burden of proof rested upon appellee to show by a preponderance of the testimony that he had paid or otherwise discharged his $1,200 obligations to Stone before being entitled to specific performance. *Moody* v. *Kahn,* 174 Ark. 1072, 298 S. W. 353; *Fox* v. *Hutton,* 142 Ark. 530, 219 S. W. 28.

It is admitted by all parties that the $400 obligation which matured on September 15, 1933, was paid promptly; and it was also admitted that Whitman discharged a mortgage incumbrance to McPhee on the tracts of land involved, in the sum of $400 for which he was given credit by Stone on the $800 obligation which matured on January 1, 1936. This inquiry, therefore, narrows to an ascertainment of whether or not the balance of $400 on the $800 obligation had been paid or discharged by Whitman. If this obligation had been paid or discharged by Whitman, the chancellor's decree is correct, and should be affirmed; if not, the decree is wrong, and must be reversed.

Appellee's theory of the case is that Stone's title to the 80-acre tract failed; that to protect himself he was required to purchase the title from Hornbuckle and that the purchase price due Stone should be abated to the extent of the purchase price. This position is not tenable. Appellee had a right to pay off valid outstanding incumbrances and charge Stone with the sums necessary to effect this result; he also had the right to acquire a valid outstanding title and charge Stone with the sums necessarily expended in this behalf, but nothing more. *Brodie* v. *Watkins*, 31 Ark. 319; *Lewis* v. *Boskins*, 27 Ark. 61.

After discharging the mortgage debt to McPhee, for which sums Whitman has already received credit on the $800 obligation to Stone, Whitman's only claim is that he delivered to Hornbuckle a second-hand Dodge car in

discharge of all his outstanding obligations. For this car, however, Whitman received from Hornbuckle an additional 80 acres of land. Certainly Stone should not be charged with the value of this car under the facts and circumstances of this record. We think it is clear from the whole record that Whitman yet owes Stone a balance of $400 and interest on the purchase price of the 5-acre tract of land, and the chancellor erred in deciding otherwise.

For the reasons assigned the cause will be reversed and remanded with directions to enter a decree in favor of Stone upon his cross-complaint, and not inconsistent with this opinion.

CRIDER *v.* SIMMONS.

4-4288

Opinion delivered July 6, 1936.

Ross Mathis and *Verne McMillen*, for appellants.

Jonas F. Dyson, for appellees.

BUTLER, J. J. W. Simmons, as administrator of the estate of E. W. Crider, deceased, presented his petition to the probate court of Woodruff county alleging that the personal property of his intestate was insufficient to pay the debts which had been proved against the

estate, and praying for an order directing the sale of lot 13, block 28, Lynch's Addition to the town of Cotton Plant, Arkansas, to pay said debts. On October 24, 1932, the court made and entered the following order: "On this date is presented to the court a petition of the administrator asking for an order to sell lot 13 in block 28 of Lynch Addition to the town of Cotton Plant, Arkansas, to pay debts and expenses of the administration. The court being well advised in the premises as to the law and facts doth find for said petitioner: It is, therefore, by the court considered, ordered, and adjudged that it would be to the best interest of the creditors of said estate for said property to be sold, and the proceeds of said sale applied to said debts, and as there is no personal property or a sufficient amount to pay the allowed claims, said administrator is hereby directed to sell said property after having complied with the laws of this State in matters of sales of this character, and report his action to this court for its approval."

Subsequent to the date of this order, at the instance of the administrator, an appraisal was made of the said lot in the sum of $400. It appears that the sale was made and reported to the court, the report showing that at the sale Mrs. Lidie Simmons, the wife of the administrator, J. W. Simmons, had purchased said lot for the price of $270. It is uncertain on what day the sale was made or when the report thereof was filed with the probate court, but the court made an order on December 12, 1933, reciting the filing of the report, and, finding no objections had been filed thereto, confirmed the report and directed the administrator to make and deliver his deed as administrator to Mrs. Lidie Simmons and, of the amount of $270 bid, after collecting the same, to pay to Mrs. E. W. Crider, $90 as her dower interest therein. He was ordered also to pay $50 to an attorney for services in the matter of making the sale. On the same day Mrs. E. W. Crider executed to Mrs. Lidie Simmons a quitclaim deed conveying to Mrs. Simmons her dower interest in the lot sold, and on December 17, 1933, the administrator, J. W. Simmons, executed to Mrs. Lidie Simmons his deed as administrator to the said property.

Subsequent to the purchase by Mrs. Lidie Simmons, she insured the dwelling house situated on the lot with the Royal Exchange Assurance of London in the sum of $1,000. This policy was issued on April 7, 1934, after which the dwelling was totally destroyed by fire at a time when the policy was in full force and effect. On November 6, 1934, the appellants, who were the heirs of E. W. Crider, deceased, instituted an action in the chancery court of Woodruff county in which they sought to have set aside the sale and deed to Mrs. Lidie Simmons on the ground of fraud. They prayed that the title to the property be vested in fee simple in the appellants, and that the amount of $1,000 under the insurance policy be adjudged and decreed to them. J. W. Simmons and Mrs. E. W. Crider (styled in the complaint as Mrs. Mae M. Crider) were made party defendants. Mr. and Mrs. Simmons answered denying the allegations of fraud, alleging that the sale was regular, and that the contract of insurance was entered into at a time when Mrs. Simmons was in the legal possession of the property, and that she was entitled to the proceeds of said policy for which she prayed judgment against the insurance company. The insurance company answered, setting out a provision of the policy as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the assured in fee simple."

It alleged that Mrs. Lidie Simmons was not the sole and unconditional owner of the property insured at the date of the policy; that, therefore, she was not entitled to recover under the provisions of the policy, and that same should be canceled and declared void.

Evidence was adduced on the issues joined, and a decree was rendered sustaining the sale to Mrs. Simmons, and the title conveyed by reason thereof to her by the administrator. The complaint was dismissed for want of equity, and judgment was rendered against the insurance company for the face of the policy. From

that judgment the heirs of E. W. Crider and the insurance company have appealed. Appellee, Mrs. Lidie Simmons, has cross-appealed on the ground that since the insurance company has denied liability it became liable to appellee for twelve per cent. penalty and a reasonable attorney's fee to be ascertained by the trial court on remand.

As this is a collateral attack on the proceedings in the probate court, the appellees rely upon § 181 of Crawford & Moses' Digest, which provides that the finding and recitals of a decree of the probate court authorizing a sale by an administrator, and ordering the same, that the administrator was duly and legally appointed, etc., and that the facts set forth in the petition which entitled the administrator to make the sale, shall be conclusive on all parties claiming an interest in said sale save upon direct appeal to the circuit court, and that the finding and judgment of the probate court shall not be open to collateral attack save for fraud or duress.

The order set out contains none of the recitals of the requirements prescribed by statute as preliminary requisites for the sale of the real estate of a decedent for the payment of his debts, §§ 153, 156, 157, 158, 161, Crawford & Moses' Digest, and, therefore, no presumption arises as to the regularity of the sale. By its express terms, the statute provides for collateral attack on a judgment for fraud or duress. In *Watson* v. *Lester*, 182 Ark. 386, 31 S. W. (2d) 955, in holding that a judgment of the probate court was open to collateral attack, § 181 of Crawford & Moses' Digest was considered, and it was held that "as fraud vitiates everything," and that such was proved, the judgment of the probate court should be set aside, and the deed based thereon was ordered canceled.

The lot involved had a dwelling on it, and E. W. Crider, in his lifetime, had purchased the property for the sum of $400, but we are of the opinion that a preponderance of the evidence establishes its value at not less than $1,000, and, at the time of its purchase by Crider, it was insured for $1,500. At the time of the sale under the probate court proceeding, the dwelling

situated on the lot was insured for $500, and afterward Mrs. Lidie Simmons procured insurance on the same in the sum of $1,000. While it was not in a desirable residential district, it seems clear that the intrinsic value was at least in that amount. It was a six room cottage, built of finished lumber with brick pillars and canvassed and papered on the inside. Mr. Biatt, who sold the house to Mr. Crider for $400, explained that he sold the property because he was living in Arizona, and had lived there about two years at the time of the sale; that he had to leave Cotton Plant on account of his health, and that he did not think he received the full value of the property. Two of the appraisers testified in the case. One stated that he thought the property should be worth about $1,000. He testified as to some argument between the appraisers and Judge J. W. Simmons, the administrator, as to the value, as follows: "I don't remember just how it was now, but it was my idea to fix the value of $1,000, and he insisted on the appraisers holding the value down." The other appraiser who testified spoke also of a controversy as to the value of the property, and stated that a house of the kind on the property would run $1,500, and that the value should have been at least between eight hundred and a thousand dollars as it stood; that the appraisement was fixed in order for the administrator to sell at an offer which witness understood he had, and that witness was influenced by this in fixing the value at $400.

Mrs. Simmons testified that she paid the purchase price with her money. J. W. Simmons testified that he kept this as his fee, except $90 paid for the widow's dower interest and $50 to the attorney. The net result was that the estate got nothing. The record also fails to show that any claims for debts due the estate were filed in the office of the clerk of the probate court or proved and allowed by the court, although the testimony of the administrator is to the effect that there had been over two thousand dollars worth of claims filed with him. Who these claimants are, and the nature and amount of their several claims remains solely within the knowledge of the administrator. Where and when the sale was had

is not disclosed by the evidence. All we know is that there was only one bidder who appeared by an attorney.

Other circumstances tending to establish the grounds for the cancellation of sale are an entire lack of compliance with the provisions of our statutes relating to sales by administrators of real estate for payment of debts due by the estate. While these, in themselves, are not sufficient to warrant the cancellation of the sale on collateral attack, they tend to support the allegations of fraud in the appellants' complaint, and, in connection with the other circumstances stated, are sufficient to establish a legal fraud—while perhaps not an actual one—which, in our opinion, warrants the setting aside of the judgment of the probate court, and the sale resting thereon.

We recognize, as a fundamental principle, that the finding of a chancellor will be sustained unless it is against the preponderance of the evidence, and that in cases where fraud is alleged as a foundation for a cause of action, the fraud must be clearly proved to entitle the party asserting it to the relief prayed. In controversies between administrators and those standing in near relation to him, and the heirs and distributees and creditors of the estate, circumstances are sufficient to establish such misconduct on his part as amounts to a legal fraud, which, in ordinary cases, would not be sufficient. He represents the heirs and creditors and it becomes his duty to act with the utmost good faith, and he can, neither directly nor indirectly, profit at their expense. This duty is based on sound public policy which treats him as a trustee, and the heirs and others interested in the distribution of the estate as beneficiaries of the trust. This rule forbids the purchase by the administrator of real estate sold to pay debts, and this is true although the purchase may not be made directly by him; but, if he is interested therein, the legal prohibition applies. *Gibson* v. *Herriott,* 55 Ark. 85, 17 S. W. 589. Because of the relationship existing between an attorney and client, the attorney of an administrator who files a petition and obtains an order for the sale of property is not allowed to purchase at the sale. *West* v. *Waddill,* 33 Ark. 575.

The law demands so strict an adherence to the administrator's duty that no temptation to weigh self-interest against integrity can be placed in the trustee's way. Therefore, a sale by an administrator of his intestate's land to his wife for an inadequate price, where he benefits in any way, is equivalent to having sold it to himself. *Woodward and Wife* v. *Jaggars,* 48 Ark. 248, 2 S. W. 851. "The fact that he may seek to evade the law, rather than openly violate it by causing another to appear as the purchaser, can avail him nothing. * * * Where he has a duty to perform as vendor, and takes an interest by the purchase, the inquiry is not whether there was or was not fraud in fact; the law stamps the act as fraudulent *per se,* and the purchase will be set aside at the instance of the *cestui que trust.*" *McGaughey* v. *Brown,* 46 Ark. 25.

In the instant case the sale was made for an inadequate price to the attorney who had prepared the petition for sale of the property. The purchase was made by him for the wife of the administrator, one-third of the proceeds paid to the widow, $50 paid to the attorney, and the remainder retained by the administrator for his personal use. Because of this, and the other circumstances relating to the sale above stated, the judgment of the probate court should be set aside, and the administrator's deed based thereon cancelled. This result must follow, although it does not appear that any actual fraud was contemplated by the administrator. Certainly, none appears with which the attorney can be charged, and any such imputation is strongly disavowed by counsel for appellants.

There remains to be considered, first, the contention of the insurer that the policy was void, and should be canceled, and second, if this contention be erroneous, the relationship of Mrs. Lidie Simmons with respect to the policy, and the heirs and persons interested in the estate.

1. The clause of the policy with reference to sole and unconditional ownership is inserted to protect the insurer against taking risk on property for an amount disproportionate to the value of the interest of the insured. *National Liberty Ins. Co.* v. *Spharler,* 172 Ark.

715, 290 S. W. 594. Or, as stated in Couch Cyc. of Ins. Law, vol. 4, page 3179, "This rule of validity is based upon the theory that the purpose of such provisions is to prevent over-insurance and resulting fire loss, due to intentional fraud or to the negligent failure of the insured to use reasonable precautions to avoid loss." To constitute the insured an absolute owner, it is not necessary that his title be wholly indefeasible and good against the world. For this reason, conveyances which are good between the parties, but which may nevertheless be set aside as in fraud of others, may be regarded as constituting the grantee the absolute owner within the meaning of a provision of a policy similar to that alleged as a defense by the insured in the case at bar. Cooley's Briefs on Insurance (2d ed.) vol. 3, page 2148.

In the case of *Atlas Fire Ins. Co.* v. *Malone,* 99 Ark. 428, 138 S. W. 962, it was held that the insured was the real and substantial owner of the property within the meaning of the terms of the policy where he was in its undisputed possession, and claiming to be the sole owner under a deed conveying unconditionally the whole estate to him, and, as such, was entitled to recover under a policy of insurance providing that it should be void if the interest of the insured was other than unconditional and sole ownership, both legal and equitable. This seems to be the general rule. *Phoenix Ins. Co.* v. *Mitchell,* 67 Ill. 43; *Phoenix Ins. Co.* v. *Bowdre,* 67 Miss. 620, 7 So. 596, 19 Am. St. Rep. 326, (quoting headnote): "Condition avoiding policy if interest of the insured be other than an absolute fee-simple means only that he shall not have a limited interest, but shall claim and hold under a conveyance purporting to invest him with an estate in fee, * * *." See, also, *Travis* v. *Continental Ins. Co.,* 47 Mo. App. 482.

2. Inasmuch as the sale to Mrs. Lidie Simmons must be set aside, whatever benefit she might derive by reason of her occupancy under the administrator's deed must be deemed to be held by her as trustee for the heirs and creditors of the estate. *McGaughey* v. *Brown, supra.* Therefore, the proceeds of the insurance policy due the estate should be paid to the administrator to be

distributed by him in accordance with the law. The interest, if any, in the policy arising by her ownership of the dower interest and her right to be reimbursed for the money actually paid by her to the administrator for the purchase of the property are matters properly for the consideration and decision of the court on remand.

On cross-appeal, Mrs. Lidie Simmons contends that the insurer should be charged with a twelve per cent. penalty and attorney's fee. This question seems to have been waived by consent of all parties because of the doubt existing as to the validity of the insurance contract, and as to who was entitled to its proceeds. The administrator, as the representative of the appellants, and the creditors of the estate, would be the only interested party, and as this question appears to have been waived by him and the other litigants, the relief prayed on cross-appeal will be denied.

The decree of the trial court is reversed, and the cause remanded for further proceedings according to law, and not inconsistent with this opinion.

McHaney and Baker, JJ., dissent.

McLerkin *v.* Schilling.

4-4359

Opinion delivered July 6, 1936.

Jeff Bratton, for appellant.

Partlow & Rhine, for appellee.

McHaney, J. Appellant is the widow of the late W. R. McLerkin who, at the time of his death intestate

in December, 1934, was engaged in the automobile business as a partner with the appellee, Arthur Schilling, under the firm name of Paragould Motor Service Company. He left no personal property except his one-half interest in said partnership assets, which partnership indebtedness exceeded its assets. Appellant filed her claim in the probate court for the statutory allowance of $300 in her favor under § 80, Crawford & Moses' Digest. Her claim was disallowed in said court and again disallowed in the circuit court. She has brought the case here for review. The facts are stipulated, and, in addition to the above, the following: "The only question to be determined by the litigation involved herein is: Can a widow, under the provisions of § 80 of Crawford & Moses' Digest of the statutes of Arkansas, claim and receive from and out of the partnership personal property wherein her husband is interested, the statutory allowance of three hundred dollars ($300) as provided for in said section where and when the indebtedness of the partnership exceeds the value of the assets?

"It is conceded that in this case the only personal property, from and out of which the widow could claim under any circumstances, are the partnership assets; that W. R. McLerkin had no other property from and out of which the widow could claim her statutory allowance."

The answer to this question must be in the negative, just as it was in the probate and circuit courts. The statute, said § 80 provides: "When any person shall die leaving a widow * * * and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow * * * when the court is satisfied that reasonable funeral expenses of such person not to exceed twenty-five dollars have been paid or secured and *in all cases* where the personal estate exceeds in value the sum of three hundred dollars a widow * * * may retain the amount of three hundred dollars out of such personal property at its appraised valuation."

It will be noticed that the statute is applicable to "the personal estate of such deceased person." Partnership assets are not the personal estate of the individual partners during their lifetime, and death of one of the partners does not make them such. Partnership assets belong to the partnership, and not to the individual partners. Such assets never become the personal estate of the individual partners until the partnership is dissolved, its debts paid, and the remaining funds distributed. The death of one of the partners dissolves the partnership. We have so held since *Bernie* v. *Vandever*, 16 Ark. 616. In the same case and ever since, it was and has been held that the surviving partner is entitled to the partnership property and effects for the purpose of paying the debts of the firm. *Marlatt* v. *Scantland*, 19 Ark. 443; *Adams* v. *Ward*, 26 Ark. 135; *Cline* v. *Wilson*, 26 Ark. 154; *Hill* v. *Draper*, 54 Ark. 395, 15 S. W. 1025; *Coolidge* v. *Burke*, 69 Ark. 237, 62 S. W. 583; *Evans* v. *Hoyt*, 153 Ark. 334, 240 S. W. 409. In the early case of *Richardson* v. *Adler, Goldman & Co.*, 46 Ark. 43, it was said: "The members of any insolvent firm are not entitled to the exemptions, allowed by law, out of the partnership property after it has been seized to satisfy the demands of creditors of the firm. This proposition is well settled both upon reason and authority. The interest of each partner in the partnership assets is his portion of the *residuum* after all the liabilities of the firm are liquidated and discharged. Property belonging to the firm cannot be said to belong to either partner as his separate property. It is contingent and uncertain whether any of it will belong to him on the winding up of the business, and the settlement of his accounts with the firm. 'Joint property is deemed a trust fund, primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners; that is to say, the partners have a right *inter sese*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right, except to his own share of the

residue, and the joint creditors, are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts.' " Citing cases.

In *Porch* v. *Arkansas Milling Co.,* 65 Ark. 40, 45 S. W. 51, the Richardson case was cited and the above quotation copied and followed, and it was there further said: "In opposition to the doctrine of these cases," (cases previously cited that exemption statutes should receive a liberal construction) "the weight of authority sustains the rule that partners cannot, during the continuance of the partnership, claim an individual exemption in the partnership property." Citing a number of cases. Continuing, the court said: "The rule is said to rest upon the principle, well recognized in the decisions, that the title and ownership of partnership property is in the partnership, and neither partner has any exclusive right to any part of it. * * * When the debts of the partnership are paid, if any surplus of partnership property remains, he can claim his exemption in his part of this surplus." See, also, *Swift & Co.* v. *Cox,* 138 Ark. 606, 212 S. W. 83. In the recent case of *Rogers* v. *Ownbey,* 190 Ark. 1144, 83 S. W. (2d) 818, we held, to quote a syllabus: "One having a mortgage on a partner's share in the firm property has a lien only on the interest of the partner in the surplus remaining after payment of all the partnership debts, whether the debts were incurred before or after the mortgage was executed."

In *Coolidge* v. *Burke, supra,* Judge Wood quoted from Chief Justice Shaw in *Howard* v. *Priest,* 5 Metc. (Mass.) 582, the following: "The true and actual interest of each partner in the common stock is the balance found due him after the payment of the debts, and the adjustment of the partnership account. * * * And, as the widow and heirs claim only in the right of the husband and father, such derivative right, in equity, will extend no further in behalf of the wife and children than that of the partner from whom it was derived." The court then said: "This is the inevitable result, it seems to us, under the law peculiar to partnership property. The law of descent and distribution operates upon the prop-

erty of the individual, and not upon the property of the firm, and there is no individual property until the firm property is at an end, which does not occur until its debts are paid, its affairs closed, and the residue of the assets distributed."

So here, as stated above, the statute, said § 80, operates only on the personal property of the deceased, and, since Mr. McLerkin had no individual personal property, there was nothing out of which appellant could claim the benefits of the statute. To permit her claim to be allowed out of assets of the insolvent partnership, would be tantamount to allowing the claim against appellee personally, as he is liable for the unpaid debts of the partnership, which would be augmented by the amount of appellant's claim.

The judgment must be affirmed.

HORTON *v.* STATE.

Crim. 4004

Opinion delivered July 6, 1936.

W. A. Jackson and *W. P. Smith,* for appellant.

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

MCHANEY, J. Appellant was jointly indicted with Edwin Aaron, John Hudson and Ralph Freeling, charged in the first count with the larceny of two mules, the property of Andy Henson; and in the second count, with receiving the same stolen property knowing it to be stolen.

All the parties so charged plead guilty, except appellant. On a trial he was found guilty on the second count and sentenced to one year in the penitentiary.

For a reversal of the judgment appellant first contends that the evidence is insufficient to support the verdict and that there is no evidence to corroborate the accomplices. It is undisputed in this record, (in fact, no testimony was offered by appellant or in his behalf) that Andy Henson's mules were stolen and that John Hudson, Edwin Aaron and Abe Decker actually did the stealing. It is undisputed that appellant and Freeling were engaged as partners in the business of buying and selling livestock. Appellant owned the barn and lot in which the stock was kept and his home was adjacent thereto. Freeling arranged with Hudson, Aaron and Decker to steal Henson's mules. They went to the barn and got a saddle horse and some halters with which to lead the stolen mules back to the barn. The mules were stolen that same night, brought back and turned loose in appellant's lot. That same night they were taken to St. Louis and sold. Purchases were made in St. Louis of some mares or horses which were brought back to Walnut Ridge and put in appellant's trading lot. Freeling testified that appellant was his partner and shared in this as well as other thefts. As to whether the testimony of the accomplices is sufficiently corroborated, we think it sufficient to go to the jury. Appellant's home was adjacent to the stock lot, and it is difficult to see how he could have been ignorant of what was going on. Even if he did not know that the thieves got his horse and some halters out of the barn, brought the mules back and turned them in his lot in the very shadow of his home, and that they were taken out that night and trucked to St. Louis, he must have known that the horses or mares that were brought back from St. Louis and put in his lot were not purchased with his money. It was sufficient to put him on inquiry as to how they were acquired. In conversations with the sheriff and another, he stated that he was not guilty, but it looked like they might hook it on him. We think this evidence made a question for the jury as to his guilt and as to the sufficiency of the corroboration. *Powell* v. *State,*

177 Ark. 938, 9 S. W. (2d) 583; *Estes* v. *State,* 180 Ark. 656, 22 S. W. (2d) 172; *Taylor* v. *State,* 182 Ark. 54, 30 S. W. (2d) 836.

It is next said the court erred in its examination of the witness Aaron. During the examination of this witness by the state's attorney, he appeared to be an unwilling witness, and the court asked some questions with the evident view of eliciting the truth from him. It is said the court conveyed the impression that he thought appellant guilty. A careful reading of the questions by the court fails to convince us that the court even intimated such to be his belief.

It is finally urged that the prosecuting attorney made an erroneous closing argument. What the prosecuting attorney is alleged to have said is not found in the bill of exceptions, so we cannot consider this assignment.

The court fully and fairly instructed the jury on the law of the case, including presumption of innocence, burden of proof and reasonable doubt, and the jury has found him guilty. No error appearing, we must permit the judgment of conviction to stand.

Affirmed.

BUTLER, J., dissents.

LONG *v.* STATE AND BLEVINS *v.* STATE.

Crim. 4000-4001

Opinion delivered September 28, 1936.

Glenn Wimmer and *W. A. Leach,* for appellants.

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

SMITH, J. Appellants were convicted of receiving stolen property, and seek a reversal of the judgments sentencing each of them to a term of one year in the penitentiary upon the following assignments of error: (1) The admission of certain incompetent testimony; and (2) the insufficiency of the testimony. They were separately indicted and tried, but as the cases are substantially identical they have been briefed and submitted together. Appellants were charged with receiving the same stolen property, consisting of four Jersey heifers, two of them yellow, and fifteen months old, the other two brown, and eighteen months old at the time they were stolen.

The indictments alleged ownership of the stolen property in Bert Holt, who testified that the cattle disappeared from the range near his home the latter part of May, 1935, and had not since been seen by him. It is insisted that the testimony does not sufficiently identify the cattle received by appellants and sold by them as the cattle belonging to Holt which disappeared.

The cattle were stolen by Ralph and Elton Johnson and another young man named Sheppard, all of whom confessed their guilt, and have pleaded guilty to the larceny, and have been sentenced pursuant to their pleas of guilty.

By way of identifying the cattle stolen by the Johnsons and Sheppard, Holt was permitted to testify that he had a conversation about the cattle with Elton Johnson, in the absence of both appellants, and that Johnson admitted stealing the cattle which Holt described as his missing cattle. This testimony appears in the record in each case, and its admission is assigned as error. If it be conceded that the admission of this testimony was error—which we do not decide—no error prejudicial to either appellant was committed, for the reason that Elton Johnson made the same statement as a witness in each trial. Moreover, appellants admit receiving the four head of cattle which Johnson said he had stolen, and the testimony of both the Johnsons at both trials identified the stolen cattle as the property of Holt.

At the trial of appellant Blevins one Buster Haynes was permitted to testify, over Blevins' objection, that about the time Holt's cattle were stolen, Blevins had made him a proposition to pay $8 per head for any cattle witness might steal and deliver to Blevins. This testimony was denied by Blevins, who insists that the testimony was incompetent, as there was no relation between the crime here charged and the one Haynes was solicited to commit. The case of *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398, is cited to sustain the contention that this testimony was erroneous and prejudicial. But such, we think, is not its effect.

In the case just cited the defendant was convicted of receiving stolen goods. The prosecution was permitted to show that at a previous time other stolen property had been found in the possession of the accused. We held that this testimony did not come within any of the exceptions to the general rule under which evidence of another crime may be shown. In so holding we said: "There was no attempt to show that there was any scheme or plan or practice whereby appellant received stolen goods, or that the dresses (the stolen property) were received by appellant pursuant to any scheme or plan; * * * and, in the absence of substantial testimony tending to show that it was appellant's business or prac-

tice to receive stolen goods, this testimony was incompetent and prejudicial." But it was there, also, said that "* * * while the general rule is that evidence of the commission of other crimes is admissible only when such evidence tends, directly or indirectly, to establish the defendant's guilt of the crime charged in the indictment, or some essential ingredient thereof, yet evidence of the commission of other crimes of a similar nature about the same time may be admitted if such testimony tends to show the guilt of the accused of the crime charged by disclosing the criminal intent, guilty knowledge, or identifies the defendant, or is a part of a common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other."

It was the theory of the prosecution in this case that appellants were engaged in the business of receiving and selling stolen cattle, and that Blevins had attempted to beguile Haynes into the general conspiracy to steal cattle, in which enterprise such assistance as the Johnsons rendered was essential to the consummation of their general plan.

It is reasonably certain that appellants carried Holt's cattle to Memphis and sold them. Their own testimony leaves no doubt about that fact, and it is equally as certain that the cattle were stolen. Blevins testified that he was in the business of buying and selling cattle and other live stock and transporting them to market to sell for himself and for others, and he admitted that other live stock so disposed of by him had been stolen by the persons who had employed him to transport their stock to market. He testified that he had never hauled any stolen property with knowledge that it had been stolen, and that he was unaware that the four heifers here in question had been stolen.

It was essential to sustain a conviction to show, not only that the cattle had been stolen, but that appellants were aware of that fact when they received the stolen property, and the court so instructed the jury. The testimony of Haynes was competent, therefore, as tending to show that appellants were operating pursuant

to a general plan to receive, transport and sell stolen cattle, pursuant to which plan such assistance was required as Haynes testified he was solicited to render.

The Johnsons testified that they stole the heifers pursuant to their agreement with appellants that the proceeds of the sale, less the expenses thereof, should be equally divided between Sheppard, themselves, and appellants, and that they and Sheppard each received $3 as their part of the net proceeds.

The testimony of appellants was to the effect that appellant Blevins owned a truck which he employed appellant Long to operate. Long was Blevins' employee, worked for a monthly salary, and had no interest in Blevins' business. Blevins bought and sold live stock. He also transported live stock for others to the Memphis market for a charge of 25 cents per hundred pounds. He hauled other freight, and while appellants admit hauling the four heifers to Memphis, where they were sold, they testified that this was done as a carrier for the usual hauling charge, and that they accounted to the Johnsons for the entire net proceeds of the sale, less their hauling charge. If the testimony of the Johnsons is true, there can be no question about the guilt of appellants of the crime of knowingly receiving the stolen property. But it is very earnestly insisted that there is no corroboration of this testimony sufficient to sustain the conviction. It is true, of course, that the receiver of stolen goods and the thief from whom he received them are accomplices within the meaning of § 3181, Crawford & Moses' Digest. *Hester* v. *State,* 149 Ark. 625, 233 S. W. 774. This section provides that a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

We think the testimony is sufficient to meet the requirements of this statute. Appellants admit receiving and selling the heifers. It remained, therefore, only to

prove that they had received them knowing they had been stolen. The testimony of Haynes, above discussed, relates to this issue. There was conflicting testimony as to appellants' reputation, and Blevins admitted buying other live stock which later proved to have been stolen, although he denied knowing that fact at the time of their purchase. Appellants admitted that the truck was sent for the heifers after dark, and reached Des Arc about daylight. There was testimony to the effect that it was not unusual to haul live stock at night; indeed, it was preferable to do so in the summer, and appellants testified that after the heifers had been loaded into the truck it was parked on one of the principal streets of Des Arc while appellants were endeavoring to get other freight to haul to Memphis.

The Johnsons testified that they were to receive one-half the net proceeds of the sale. Appellants testified that they hauled the cattle to Memphis as a carrier, and sold them as the agent of the Johnsons. No sales ticket was offered in evidence showing to whom and at what price the heifers were sold. Appellants admit selling the heifers in their own name, but they stated this was the usual method of selling live stock. Blevins' testimony about the settlement with the Johnsons is not entirely clear, but he stated that he paid them "Somewhere around $20." After all expenses, such as sales tax, insurance, yardage, and commission, had been paid, the heifers brought $23, and he got nothing but 25 cents per hundred pounds for hauling them. The prosecution insists that appellants knew the Johnsons did not own any cattle, and Blevins virtually admits having this knowledge. He testified: "I figured the cattle belonged to their folks."

Larceny and receiving stolen property are crimes usually committed as clandestinely as possible, yet neither party to such crimes can be convicted on the uncorroborated testimony of the other. However, this corroboration may be supplied by proof of the acts, conduct or declarations of the party informed against either before or after the commission of the crime. *Stroud*

v. *State,* 167 Ark. 502, 268 S. W. 850. So, here, the facts above recited, including the conduct and admissions of appellants themselves, suffice to furnish the corroboration which the law requires.

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

BIRMINGHAM *v.* STATE.

Opinion delivered September 28, 1936.

Dene H. Coleman and *Chas. F. Cole,* for appellant.

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

BUTLER, J. The appellant was tried and convicted for the crime of larceny and on appeal, as ground for reversal of the judgment, he insists that the trial court

erred in refusing to grant him a continuance or postponement of the trial and, also, that the evidence is insufficient to support a conviction.

To support the first contention, appellant calls attention to the fact that he was placed on trial on April 16, 1936, two days after he had been arrested during which time he was confined in jail and without opportunity to discuss his case with his attorney, and that the attorney, when the case was called, had had no opportunity to talk with the witnesses. In the motion for continuance, filed by the Honorable Dene H. Coleman, these facts were alleged, and further, that the attorney was not advised whether the defense witnesses were present and praying that if, upon the call of said witnesses, any of the material witnesses were not present, the defendant be given an opportunity to confer with his attorney and prepare proper motion for continuance for want of the testimony of such absent witnesses. The record is silent as to the disposition of this motion, but it is stated in the appellant's brief that the motion was overruled. Whether or not exceptions were saved to the alleged action of the court we are not advised.

This court has always been reluctant to interfere with the discretion of the trial court in matters relating to continuances. A presiding judge, from personal observation, is familiar with the attendant circumstances and has the best opportunity to form a correct opinion upon the case presented, and is presumed to have in mind his duty to properly protect the interests of the accused as well as the rights of society. In reviewing his action, there is much to be considered—the imminence of an adjournment of the court, the length of time which will elapse before the court will sit again, the number of witnesses in attendance, the reluctance of defendants to submit to trial, and the shifts often employed to escape or delay justice. Therefore to be reversible error, the refusal to grant continuance must be a palpable error without the correction of which manifest injustice will be done. As is said in *Loftin* v. *State,* 41 Ark. 153: "It must be a flagrant instance of arbitrary or capricious

exercise of power by the circuit court, operating to the denial of justice, that will induce us to interfere."

Although it might have been that the trial court could have consistently granted the continuance, we are unwilling to say that his refusal to do so was an arbitrary or capricious exercise of his power. The appellant was accused of having stolen six hogs, the property of A. P. Kennedy, and although he was not indicted for the theft until the April term, 1936, of the Independence circuit court, the larceny had been discovered and he had been arrested as the guilty person early in the preceding December. From the circumstances preceding and attendant upon appellant's arrest, it must have been reasonably certain that he would be prosecuted for the alleged larceny and he had ample opportunity to employ and confer with an attorney of his choice and make preparation for his defense. Notwithstanding the fact that Mr. Coleman had withdrawn from the case, appellant was in fact represented by counsel who appear to have ably presented his case. He had procured subpoenas to be issued on April 14 for his witnesses, all of whom appear to have been served except two who could not be found. No suggestion was made that these absent witnesses were material or that the facts within their knowledge could not be established by others who were present. In so far as we are advised, all the witnesses except these two were present. Some testified, who, if believed by the jury, would have established appellant's complete innocence as this testimony was to the effect that they knew of their own knowledge that the hogs which the appellant was accused of stealing were in fact his own. We are of the opinion therefore that the refusal to grant a continuance, was not error, such as to call for reversal of the case.

The contention that the evidence was insufficient is based on the testimony of Kennedy who had lost the six hogs which appellant was accused of stealing. In searching for his hogs, Kennedy found the heads of six hogs in appellant's smokehouse. He stated that they looked like his hogs, but that he could not be positive.

It is argued that this was a failure to sufficiently identify the hogs since the appellant had testified that the heads were from hogs that he, himself, had raised and that this testimony was corroborated by the positive testimony of two other witnesses. Of course, if the jury had believed the testimony of appellant and his witnesses, he would have been acquitted, but there were circumstances in proof tending strongly to negative this testimony and raising a question of fact as to the ownership of the hogs. Kennedy owned six hogs, five of which were red and one yellow or reddish yellow. These ranged in a bottom and with them a sow belonging to Albert Stair, a neighbor. They were fed at frequent intervals by their owners and were last seen and fed on the third of December. On December 5th Kennedy went to the range for the purpose of putting his hogs in a corn field, and found them and the sow missing. In searching for the hogs, the sow was found near appellant's house a mile and a half or two miles from where the hogs ranged. Learning that appellant had killed some hogs about the time his hogs were missing from the range, Kennedy, accompanied by Stair, went to appellant's home and found in his smokehouse six freshly cleaned hogs' heads and a quantity of meat. From the hair left on these heads it was ascertained they were of the same color as the hogs which had disappeared, and apparently of the same size and weight. Four of the red hogs belonging to Kennedy were estimated to weigh about 150 pounds each, the yellow hog about 135 pounds, and one red hog about 100 pounds. On the six heads sufficient hair was found to indicate their color and they apparently corresponded to the size and weight of Kennedy's hogs, but could not be identified by the ear marks as the ears had been cut off even with the head. It was further in testimony that appellant had stated, about two months before, that he had no hogs which would be large enough to kill and that he would not be able to have any meat. There was also evidence to the effect that such hogs as appellant had were much smaller than those which he had killed. While there is no direct

testimony as to the ownership of the hogs found in appellant's smokehouse, we think the circumstances in proof sufficiently cogent to sustain the verdict of the jury.

Judgment affirmed.

JOHNSON, C. J., dissents.

JOHNSON, C. J. (dissenting). I cannot persuade myself that this case should be affirmed. Appellant was arrested on April 14, 1936, and on failure to make bail was incarcerated in the county jail. Immediately after arrest he communicated with Mr. Coleman and employed him as attorney to defend his case. Mr. Coleman was busily engaged in the trial of other cases in the circuit court on the 14th and 15th of April. On April 16 appellant's case was called to trial and Mr. Coleman apprised the court of his recent employment and that he had had no time or opportunity to discuss the facts of appellant's case with him or with the witnesses; and that he had had no time or opportunity to investigate the law in reference thereto. Mr. Coleman requested the court to postpone the case for a few days or continue it for the term and thereby give him reasonable opportunity to make necessary investigation. The trial court refused to either postpone the case for a few days or continue the case for the term and thereupon Mr. Coleman withdrew from the case as attorney. Then the court of its own motion appointed two other attorneys to defend appellant with the result here appealed from. I concede that it is the established rule in this state that the postponement of a case for a few days or a few hours rests in the sound discretion of the trial court and that this court will not reverse a case unless it is made to appear that the trial court has abused its discretion; but, as I perceive, such is the showing here made. My experience of more than 25 years in the law has convinced me that the appointment or employment of counsel, however capable they may be, is futile unless they have a reasonable time to consult with the client, study the case, and inquire into the law and the facts and circumstances surrounding it and be thereby afforded an opportunity to be of

some service to the client or person whose rights such attorney undertakes to protect and defend. Courts of great learning have expressed similar views. See *Samuals* v. *Commonwealth,* 154 Ky. 758, 159 S. W. 575; *Reliford* v. *State,* 140 Georgia 777, 79 S. E. 1128; *North* v. *People*, 139 Ill. 81, 28 N. E. 966; *State* v. *Deschamps,* 41 La. Ann. 1051, 7 So. 133; *State* v. *Lewis*, 74 Mo. 222; *Miller* v. *U. S.,* 8 Okla. 351, 57 Pac. 836; *Commonwealth* v. *Delero*, 218 Pa. 487, 67 Atl. 764; *Reg.* v. *Taylor,* 11 Cox. C. C. 340. The denial of such right is reversible error, see cases cited *supra,* also 16 C. J. 483. Moreover, all the cases point out that the fact that the employed counsel is engaged in other business before the same court during the period of delay and that the accused is confined in jail during the period aggravate rather than ameliorate the rigor of the rule.

The idea seems to prevail in some of the courts of this state that the guarantee of "a speedy and public trial" to an accused as provided in § 10 of art. 2 of the Constitution of 1874, affords authority to the state to demand immediate trials in criminal cases irrespective of the rights of the accused. Obviously this provision of the declaration of rights is for the benefit of the accused and not the state.

I respectfully register my dissent.

STATE *v.* BOATRIGHT.

Crim. 4009

Opinion delivered September 28, 1936.

Carl E. Bailey, Attorney General, and *J. F. Koone,* Assistant, for appellant.

G. T. Sullins, W. N. Ivie and *Charles Ivie,* for appellee.

McHaney, J. Appellee was indicted charged with defrauding the Valley Bank of Hindsville of a large sum of money, a felony. He was tried upon said charge and at the conclusion of the state's testimony, the court, on motion of appellee that there was a fatal variance between the allegations of the indictment and the proof in that indictment alleged he defrauded the bank of "gold, silver and paper money," whereas the proof showed he received from the bank its draft on its correspondent bank in St. Louis, which he cashed the same day, instructed the jury to return a verdict for appellee, which was done.

The state has appealed under the provisions of §§ 3410 and 3411, Crawford & Moses' Digest. Since appellee was acquitted of the charge, it being a charge punishable by imprisonment, we cannot reverse the case. Section 3412, Crawford & Moses' Digest; art. 2, § 8, Const. 1874; *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057; *State* v. *Gray,* 160 Ark. 580, 255 S. W. 304.

We have examined the record and it fails to show that any final judgment was ever entered on the verdict discharging appellee. The record shows the verdict of the jury and that an appeal was prayed and granted, but there is no record of a judgment. There is therefore nothing from which the state might appeal, and nothing for this court to affirm, reverse or modify. It has been many times held that an appeal will be dismissed for want of a final judgment. See cases cited in Crawford's Digest under Appeal and Error, § 22, vol. 1, p. 130.

What we have said must not be construed, in any manner, to approve the action of the trial court in in-

structing a verdict for appellee. On the contrary, we are of the opinion the court fell into error. There is no variance. Appellee received a draft on which he got the money. See *Kent* v. *State,* 143 Ark. 439, 220 S. W. 814; *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61; *Cook* v. *State,* 130 Ark. 90, 196 S. W. 922; *Spears* v. *State,* 173 Ark. 1071, 294 S. W. 66.

Let the appeal be dismissed for want of a final judgment in the record.

WHITE AND MCCORMICK *v.* STATE.

Crim. 4003

Opinion delivered September 28, 1936.

Russell J. Baxter, for appellant.

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

HUMPHREYS, J. Appellants were indicted jointly with Willie Smith by the grand jury of Drew county for murder in the first degree in the following language:

"The said Willie Smith, Beverly White and Farlander McCormick in the county and State aforesaid, on or about the 16th day of January, 1936, did unlawfully, willfully, feloniously, and with malice aforethought, and after deliberation and premeditation, and with a felonious intent then and there to rob Samson Lee and Emaline Lee did assault, kill, and murder the said Emaline Lee by strangulation and suffocation, beating and striking the said Emaline Lee in the head and body by binding the nose and mouth of the said Emaline Lee with a cloth held in their hands, and by beating and striking the said Emaline Lee on the head and body with a blunt instrument then and there held in the hands of the said Willie Smith, Beverly White and Farlander McCormick being then and there present aiding and abetting and participating, and from such strangulation, suffocation and striking and beating the said Emaline Lee did within one year and one day thereafter die.

"Contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Arkansas."

There was a severance of the Willie Smith case, and he was tried and convicted for murder in the first degree. He prosecuted an appeal to this court, and the judgment of conviction was affirmed. *Smith* v. *State, ante* p. 967, 96 S. W. (2d) 1.

Subsequently, appellants were tried and convicted of murder in the first degree, from which judgment of conviction is this appeal. The facts developed on the trial of appellants were not materially different from the facts developed on the trial of Willie Smith, and reference is made to that case for a statement of the facts herein, with the added statement that appellants testified to the amount each received out of the division of the $2,700 they obtained from Samson and Emaline Lee when the three of them robbed them, and where they had hidden it; also that the three of them went to the

home of Samson and Emaline for the purpose of robbing them and without any intention of killing either of them, and that they accomplished their purpose without inflicting bodily injury upon either, and that when they left with the money, both Samson and Emaline were uninjured and alive. The voluntary confessions of appellants were introduced in evidence, which, in substance, were the same as their evidence.

Appellants seek a reversal of the judgments of conviction on the following grounds:

"First. Because the indictment is defective in that it fails to allege that the appellants unlawfully, willfully, feloniously, and with malice aforethought, and after deliberation and premeditation killed Emaline Lee, the allegation of the indictment being that the appellants intended to rob Samson and Emaline Lee.

"Second. The State failed to meet its burden of proving each and every allegation contained in the indictment in that it failed to prove:

"(a) The identity of the person or persons who killed Emaline Lee and especially failed to prove that the appellants or either of them killed Emaline Lee.

"(b) That the appellants or either of them killed Emaline Lee by strangulation with a cloth or by striking or beating the said Emaline Lee on the head and body with a blunt instrument as charged in the indictment.

"Third. The testimony of Samson Lee, the husband of deceased, was inadmissible for the reason that Samson Lee was totally incompetent to testify because of his decrepit condition both physically and mentally."

1.

The assignment of error that the indictment is fatally defective because it failed to allege that appellants unlawfully, willfully, feloniously, and with malice aforethought, and after deliberation and premeditation killed Emaline Lee is without merit. It is charged in the indictment that they killed her in perpetrating the robbery. Section 2343 of Crawford & Moses' Digest provides that all murder "which shall be committed in perpetration of or in the attempt to perpetrate * * * rob-

bery, shall be deemed murder in the first degree." The charge in the indictment was that the appellants, with another, killed Emaline Lee in the commission of a robbery, and this was a sufficient charge of murder in the first degree under the statute quoted above. The statute would mean nothing if it were necessary to allege an intentional and willful killing.

2.

(a) The assignment of error that the state failed to prove that the appellants or either of them killed Emaline Lee cannot be sustained. Appellants admit holding Samson and Emaline Lee while Willie searched the house and found $2,700, which they afterwards divided. Samson Lee testified that three negro men filling the description of Willie Smith and appellants, committed the robbery and, in doing so, beat him up and killed his wife, Emaline, by striking her with some instrument. Not more than twenty or thirty minutes after appellants and Smith left the house, neighbors began to come in. They found Emaline Lee dead, lying on the floor. The back of her head was as soft as cotton, and they found Samson wounded and bleeding and found a stick of wood lying on the floor near the body of Emaline that had a flat surface on one side and also a strip of cloth under her head that might have been used for strangulation. They also found the room in which the dead body was lying in a state of disorder. The furniture was out of place, a trunk had been opened and the contents scattered, and the dresser drawers also opened. In view of these facts, the suggestion that some other person had entered after the robbery and killed Emaline and beaten up Samson or that Emaline died of fright is unreasonable. Nothing in the record indicates that any other person entered the house before the neighbors assembled. The jury was justified in finding that the admitted robbers also took the life of this old defenseless woman in the perpetration of the robbery. Appellants were sufficiently identified by all the facts and circumstances to sustain the finding of the jury that appellants and Smith were the murderers.

(b) The evidence is also sufficient to uphold the finding of the jury that appellants either committed the murder by strangulation or by hitting her on the back of the head with a blunt instrument as charged in the indictment.

3.

The assignment of error that testimony of Samson Lee, the husband of deceased, was inadmissible for the reason that Samson Lee was totally incompetent to testify because of his decrepit condition both physically and mentally has no foundation in the record. It is true he was old and his vision very poor, but the record does not reflect that he could not have seen these three negroes when they entered his home and perpetrated the robbery and killed his wife. His testimony indicates that he was perfectly sane, and there is nothing in the record to show to the contrary.

It is suggested by the attorney who defended appellants that on account of the gravity of the charge, the trial court abused its discretion to the prejudice of appellants in appointing a young, inexperienced lawyer to defend them. The entire record, as well as the able brief filed by Mr. Baxter, indicates that every right vouchsafed under the law and Constitution to appellants was protected by the able defense he made for them. The result was not due to inability or unskillfulness of their attorney, but because all the facts and circumstances pointed unerringly to appellants' guilt.

The judgments are affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* JONES.

4-4323

Opinion delivered on rehearing October 5, 1936.

Harry Cole Bates, Moore, Gray, Burrow & Chowning, Gaughan, Sifford, Godwin & Gaughan and *Streett & Streett,* for appellant.

Lawrence E. Wilson, for appellee.

BUTLER, J. The appellee, Jewell Jones, was insured with the appellant, Metropolitan Life Insurance Company, as an employee of the George & Sherrard Paper Company of Camden, Arkansas, a subsidiary of the International Paper Company, under two certain group policies. One, No. 1864G, was for life insurance and for monthly indemnities in the event of total and permanent disability. The other insurance was under a certificate numbered 187GH providing for weekly indemnity for total temporary disability. Both of these policies were in force in November, 1932, at which time appellee became totally disabled by reason of "skin eruption from cement irritation." The insurance company settled with the insured for this claim. About September 28, 1934, the insured made claim for total and permanent disability benefits under his certificate No. 1864G and for the same disability for which he had received compensation under the claim that it was temporary.

On November 1, 1934, appellee filed suit to recover for his total and permanent disability. The appellant filed a motion to require appellee to allege the date and

character of proof, if any, furnished, and also a motion to abate and dismiss because no such proof had been furnished. These motions were overruled, whereupon an answer was filed denying the total and permanent disability of appellee and further denying that any notice or proof had been furnished on the issue relating to total and permanent disability. The case was submitted to the jury on these issues and a verdict was returned in favor of the appellee in the sum of $1,366.44. The court thereupon assessed a penalty of 12 per cent. on the amount and an attorney's fee in the sum of $250.

It is insisted by appellant for reversal and dismissal of the case that the verdict of the jury finding the appellee totally and permanently disabled was without substantial evidence to support it. It is true the proofs made in 1932 claimed that the disability was temporary, and there is evidence to the effect that since the payment by the insurer of the claim for total temporary disability appellee has continued to work at manual labor in his usual and customary manner with no signs of being incapacitated to perform that kind of work. On the other hand, there is substantial testimony to the effect that whatever work he has performed since November, 1932, has been with extreme discomfort. The evidence justifies the inference that appellee and his physicians were mistaken in November, 1932, when the disability was thought to be only temporary, and that instead it has continued and appellee is now, and has been, in such physical condition as to render it dangerous for him to engage in heavy manual labor. Appellee is a common laborer, not fitted to make a living in any other way. The evidence was therefore sufficient to support the verdict of the jury on the question of total and permanent disability.

The fair intention of the parties when entering into contracts like the one under consideration is that the insured shall receive indemnity when he is so disabled as to prevent him from engaging in the work for which he is fitted without injury to himself, and, if by reason of his disability he is unable to perform all of the substantial and material acts of the work or business in

which he is engaged in the usual and customary way, he is totally disabled. *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433.

It is next contended that the action is premature and the verdict of the jury excessive. These contentions are based on the contract of insurance which provides: "Upon receipt at the home office in the city of New York of due proof that any employee * * * has become totally and permanently disabled * * * the company will pay equal monthly installments * * *. The first monthly installment payment will be paid upon receipt of the proof of total and permanent disability * * *."

In answer to this contention the appellee urges that as early as November, 1932, the appellant had knowledge of his disability and ample opportunity to investigate this claim before suit was brought. He cites, and relies upon, the cases of *Hope Spoke Company* v. *Maryland Casualty Company,* 102 Ark. 1, 143 S. W. 85; 38 L. R. A. (N. S.) 62, Ann. Cas. 1914A 268; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 416, and the recent case of *Mutual Life Ins. Co.* v. *Morris,* 191 Ark. 88, 83 S. W. (2d) 842, announcing the doctrine that except in cases where the proof of liability is made a condition precedent, it is the existence of disability that fixes liability and not proof thereof. These cases have no application to the questions involved in the case at bar for the reason that there is no contention that the proof of disability is a condition precedent to the fixing of liability, but only that it is a prerequisite to the institution of an action to recover for the liability.

It is a fact that appellant had notice in November, 1932, that the appellee was disabled, but there was no notice that his disability was permanent. Appellee calls attention to the claim signed by him on November 25, 1932, to which is appended the statement by Dr. Robins, and in which claim reference is made to the policy insuring against total and permanent disability. No significance can be attached to the reference made to the policy

under which the appellee would be entitled, if totally and permanently disabled, to monthly benefits because no claim was made to the effect that the insured was totally and permanently disabled. The claim was treated by both the insured and insurer as one for total disability temporary in its nature and settlement was made on that basis. The proof is clear that the first time the insurer was notified of any claim for permanent disability was by letter of appellee's attorney dated September 28, 1934. After some correspondence the insurer advised the attorney on October 30, 1934, that appellee's insurance had expired, and, without waiving any rights it might have, enclosed blanks for making proof of disability claims. There is no contention made, either in proof or in argument, that said blanks were not received, but, instead of forwarding proof of disability as required under the terms of the policy, appellee filed this suit.

Under the language of the policy the appellant restricted the time in which payments should begin to be made until the receipt of proof of permanent disability. This is similar to the contract involved in *Atlas Life Ins. Co.* v. *Wells,* 187 Ark. 979, 63 S. W. (2d) 533. In that case we quoted with approval the rule announced in 1 C. J., 107, 108, as follows: "By the weight of authority, it is ground for abatement that the action was prematurely brought, even though the right of action has matured before trial as, in most jurisdictions, where an action is brought before maturity on a note or other debt; where the time for payment of a note or other debt has been extended by agreement, and an action is brought before expiration of the period of the extension; where an action is brought before the happening of an event upon the happening of which the right to commence the action is to accrue; and in many other like cases." In that case we held, following the authority cited, that a suit was premature where the policy provided for payments to begin at a certain time after receipt of proof of disability and suit was filed before that time elapsed, even though the right of action might have matured before the trial.

The evidence touching the disability of the appellee appears to have been fully developed and it might appear that no useful purpose could be served by reversal of the judgment, but, under the authority of *Atlas Life Ins. Co.* v. *Wells, supra,* which is supported by the weight of authority, a dismissal of the case becomes necessary. This action, however, does not prejudice the right of the appellee to bring another suit without making further proof of disability since the appellant is now fully apprised of what the proof would show. In view of the possibility of another trial, we deem it appropriate to state that the contention of appellant that disability payments are to be computed from the time of receipt of proof rather than from the happening of the disability is erroneous and is not supported by the case of *Mutual Life Ins. Co.* v. *Marsh, supra.* Under the terms of the contract of insurance the appellee, if totally and permanently disabled, would be due the stipulated monthly benefits from the happening of the disability and not from the date of receipt of proof as contended by appellant.

It follows that the petition for rehearing should be granted. The opinion delivered June 8, 1936, is therefore withdrawn, the above and foregoing is substituted therefor, and the judgment is reversed, and the case dismissed without prejudice.

BANK OF RUSSELLVILLE *v.* WALTHALL.

4-4358

Opinion delivered October 5, 1936.

C. C. Wait, for appellant.

Bob Bailey, for appellee.

BUTLER, J. The proceedings from whence this appeal comes originated in the Pope circuit court by the filing, on the 11th day of December, 1935, the following pleadings:

"Comes the defendant, E. F. Walthall, and moves the court to set aside judgment rendered in the circuit court of Pope county, Arkansas, on the 4th day of April, 1935, and states: That suit was filed in this case July 10, 1934, and judgment was rendered in the justice of peace court by default upon the part of the defendant on August 6, 1934. That notice was given of appeal at the same time affidavit filed on August 23, 1934, for appeal to the circuit court of Pope county, Arkansas.

"That Robert Bailey was the attorney for the defendant in said litigation and without any reason or notice whatever, although the attorney was present in court at all times, judgment was rendered against the defendants dismissing the appeal at the April term, 1935, of the circuit court of Pope county, Arkansas.

"That the taking of said judgment or dismissing of said appeal by plaintiff was a fraud practiced by the plaintiff in obtaining the judgment and the defendant has a meritorious defense to said cause of action.

"Wherefore, premises seen, defendant prays that said judgment be set aside and held for naught."

The Bank of Russellville filed its general demurrer to the motion and also answered as provided in § 1193 of the C. & M. Dig. The demurrer was overruled and, after having heard the evidence adduced, the court made an order setting aside the judgment dismissing the appeal of the appellee, Walthall. From the evidence it appears that a judgment was rendered July 10, 1934, against

Walthall in favor of the appellant bank in an action for the recovery of the balance due on a promissory note owned by the bank. This judgment was rendered by default and in apt time an appeal was prosecuted to the circuit court of Pope county which was docketed at the November term, 1934. The case was passed until the April term, 1935. It appears that the regular judge set the docket for the April term. In doing so he announced his disqualifications in this case and in five others which were marked by him as "Special" and set down for trial for the fifth day of April, 1935. On that day, Honorable Sam Rorex was elected special judge to try these cases. Not having disposed of all these cases on the fifth of April, he continued the instant case until the following day—Saturday, April 6. On that day he rendered a judgment dismissing Walthall's appeal. Later, after the term of the court had expired, an execution was issued out of the court of justice of the peace whereupon the motion to set aside the judgment of dismissal was filed.

A court, after lapse of the term, loses control over its final judgment and, in the absence of a statute conferring such power, cannot at a subsequent term alter or vacate the same. *Johnson* v. *Campbell*, 52 Ark. 316, 12 S. W. 578. Only in the provisions of §§ 571 and 573 of the Civil Code, now §§ 6290 and 6292 of Crawford & Moses' Digest, is that authority to be found which can be exercised only in such manner and upon such terms as are prescribed therein. *Ayers* v. *Anderson Tully Co.*, 89 Ark. 160, 116 S. W. 199. It is therefore necessary both to plead and prove the allegations relied upon for a vacation of the judgment, as well as a *prima facie* showing of a valid defense to the original action. The allegation upon which the judgment in the instant case is sought to be set aside is that "the taking of said judgment or dismissal of said appeal * * * was a fraud practiced by the plaintiff in obtaining the judgment." This allegation was a mere conclusion of the pleader and insufficient to meet the rule that acts constituting fraud must be specifically alleged. *Twombly* v. *Kimbrough*,

24 Ark. 459; *Dashbrook* v. *Tri-County Highway Imp. Dist.*, 152 Ark. 461, 238 S. W. 601. Not only was the allegation insufficient, but also the proof adduced to establish the fraud. At most it was to the effect that the judgment was rendered in the absence of defendant's attorney and on a day when it was not customary to hold court, and that when a case was called it was the usual procedure to call the absent attorney and notify him that the case was on call; that the office of the defendant's attorney was only a block from the court house and he could have been easily reached and notified. The evidence fails to show any affirmative conduct on the part of the bank or its attorney on the occasion of the dismissal of Walthall's appeal tending to show any imposition or fraud practiced upon the court in procuring the order. This was necessary to establish fraud sufficient to warrant the setting aside of the judgment after the lapse of the term. *Boynton* v. *Ashabranner*, 75 Ark. 415, 88 S. W. 566, 1011; 91 S. W. 20; *H. G. Pugh & Co.* v. *Martin*, 164 Ark. 423, 262 S. W. 308.

Having reached the conclusion that fraud was not properly alleged or sufficiently proved, it becomes unnecessary to notice the other questions raised by the litigants in their respective briefs. It is suggested by counsel for appellee that the evidence shows that Rorex was not elected special judge on the 5th day of April, but on the 6th, and that therefore his order issued on the 5th continuing the case to the next day was at a time when he had no authority to act. It is true the clerk appears to have been confused and gave some testimony which might support the contention of Walthall. This, however, is clearly disproved by the certified copy of the record showing the election of Rorex as special judge on April 5, 1935.

It follows that the trial court erred in vacating the judgment of dismissal. Its judgment is, therefore, reversed, and the motion to vacate is dismissed.

LAEL *v.* CROOK.

4-4354

Opinion delivered October 5, 1936.

Thomas W. Raines, for appellant.

A. J. Johnson, for appellee.

MEHAFFY, J. On January 6, 1909, A. J. White and M. A. White, his wife, executed and delivered to W. H. Lyle the following deed:

"Know all men by these presents:

"That we, A. J. White and M. A. White, his wife, for and in consideration of the sum of Seventy-five and No/100 Dollars cash in hand to us paid by W. H. Lyle, commander of Camp Ben McCullough of Lincoln County, Arkansas, do hereby grant, bargain, sell and convey unto the said W. H. Lyle, commander of Camp Ben McCullough and unto his successors and assigns in office forever the following lands situated in the County of Lincoln and State of Arkansas, to-wit:

"The northeast quarter of southwest quarter of section twenty (20), township nine (9) south, range seven (7) west, containing ten (10) acres of land, more or less, with all water privileges, that is to say, to have the use of the water of both springs free of all charges with free ingress and egress to and across the northeast quarter of southwest quarter of said section 20 to and from the lands herein conveyed to the two springs of water herein mentioned.

"To have and to hold the same unto the said W. H. Lyle, commander of Camp Ben McCullough and unto his successors and assigns forever, with all appurtenances thereunto belonging. And we hereby covenant with the said W. H. Lyle, commander of Camp Ben McCullough, and unto his successors and assigns forever, that we will forever warrant and defend the title to the said lands against all lawful claims whatsoever. And I, M. A. White, wife of the said A. J. White, for and in consideration of the said sum of money, do hereby release and relinquish unto the said W. H. Lyle, commander of Camp Ben McCullough, and his successors and assigns forever, all my right of dower and homestead in and to said lands.

"WITNESS our hands and seals this 6th day of January, 1909.

"A. J. WHITE,
"M. A. WHITE."

Said deed was properly acknowledged and recorded.

On July 19, 1929, Camp Ben McCullough of confederate veterans adopted a resolution authorizing W. M. Crook, commander of the camp, to execute a deed to the property described in the deed from White to the camp, to camp Wiley Crook, Sons of Confederate Veterans, and chapter J. Mart Meroney, U. D. C. of Lincoln county, Arkansas. On August 6, 1930, the deed, as provided for in the resolution, was executed by W. M. Crook, commander.

On December 6, 1934, the appellant, J. A. Lael, brought this suit asking that the deed from A. J. White and wife be construed as a tenancy in common in the plaintiff and surviving members of camp Ben McCul-

lough, parties who paid the consideration, and that the deed from camp Ben McCullough to camp Wiley Crook be canceled and title divested out of it and vested in appellant and other survivors who paid the consideration for the deed, and that the deed to J. L. Scott be canceled and title be divested out of J. L. Scott and vested in appellant and other survivors who paid said consideration.

The following statement of facts was agreed to and introduced in evidence:

"In addition to the written documentary evidence introduced before the court the following witnesses were duly sworn as follows: J. A. Lael, W. M. Crook and R. Lee Fish.

"J. A. Lael testified that he was the plaintiff; that he was a member of Camp Ben McCullough, No. 542, of the United Confederate Veterans in Lincoln County; that in the year 1909 Camp Ben McCullough as such purchased from A. J. White and wife the lands involved in this suit and took his deed thereto which was introduced in evidence. That at the time of the purchase of said lands the camp had a membership of seventy-two (72); that the grounds or lands involved have been used by the camp since that time as a reunion ground.

"W. M. Crook testified that he was the present commander of the Camp Ben McCullough No. 542 of the United Confederate Veterans; that the camp had no written constitution; that it conducted all its business including the purchase, lease or sale of its lands by motion or resolution passed by a majority of the members present at the annual meeting of the camp in July of each year. That the conveyance to sons and daughters involved and introduced in evidence before the court here was so authorized and executed and was without consideration except to maintain the reunion.

"R. Lee Fish testified that he was familiar with the transaction and took the acknowledgment to the deed executed by A. J. White and M. A. White to W. H. Lyle, then commander of Camp Ben McCullough No. 542 of the Confederate Veterans; that the lands had been used

for the purpose of a reunion ground since that time; that the camp held a reunion in July of each year and has been conducted and held by the camp itself consisting of the membership of old soldiers as long as they were physically able to conduct the reunion celebration. About 1930, owing largely if not wholly to their physical weaknesses, they turned over the responsibility of maintaining the reunion to the sons and daughters. The grounds have been used for the purpose of this celebration solely and only since 1909."

The chancery court entered a decree in favor of appellees, and this appeal is prosecuted to reverse said decree.

It is contended by the appellant that since the evidence shows that Camp Ben McCullough had no constitution and by-laws authorizing it to take and hold property in the name of W. H. Lyle, commander, that the deed from White and wife to Lyle was in effect a conveyance to an unincorporated association, and that the title to said property by said conveyance vested in the individual members of the association of confederate veterans, known as Camp Ben McCullough. Appellant calls attention first to the case of *German Land Ass'n* v. *Scholer*, 10 Minn. 331.

The court said in that case: "The German Land Association, being a mere voluntary association of persons unincorporated, had no legal capacity to take or hold real property. A grant to such association *eo nomine* would pass no legal title."

The court also said in that case: "The authorities in the United States are by no means harmonious as to the source or extent of the power of courts in this class of cases."

The court in the case mentioned, however, held that there was no person or persons named as grantee in said deed, and for that reason if any title passed, it went to the persons who made up the old association. But the court did not hold that the deed would be void if made to certain named persons as trustees.

The next case relied on by appellant is *Clark* v. *Brown,* 108 S. W. 421. The court in this case said: "Members of voluntary, unincorporated associations, can hold property in no other way than through the medium of trustees, acting as depositaries of the legal title, and this equitable interest entitles each beneficiary to the same voice in the management and control of the property as if he were a joint owner and holder of a legal title. The rights of members of churches and other voluntary associations not organized for commercial purposes, in the property held for a common use, is one of user only." This case, however, was concerned chiefly about the rights of the church membership, and the right to create unions, etc. It does not discuss the question involved in the instant case.

The next case to which appellant calls attention is *Douthit* v. *Stinson*, 63 Mo. 268. In this case it was said: "In *Austin* v. *Shaw,* (10 Allen (Mass.) 552), it was decided that where a man mortgaged his land to certain persons named in the mortgage deed, but described as officers of an unincorporated association, the legal title vested in the persons described and not in the company. * * * Had the deed been made to one or more of this supposed board by name, describing them as directors or trustees, the deed might have been upheld on the authority of the Massachusetts and New Jersey cases above referred to, although the decision in Minnesota holds the deed void even in such cases."

Appellant also calls attention to 5 C. J. 1343, which holds that a voluntary association, having no legal existence, is ordinarily incapable as an organization, of taking or holding property in its associate name; but the paragraph immediately following this, on page 1344, is as follows: "To avoid the inconveniences resulting from the incapacity of a voluntary association to take and hold property as an organization, conveyances may be made to trustees for the use and benefit of the association or its members. In such case, the legal title vests in the trustees."

Attention is next called to the case of *Ward* v. *McMath,* 153 Ark. 506, 241 S. W. 3. In that case we held that by the terms of the deed the grantor expressly conveyed to the parties named therein, designated trustees of Pat Cleburne Camp, United Confederate Veterans No. 191, and unto their successors and assigns forever, for the consideration named therein, the land in controversy, describing it. The court also held in that case that the language of the deed showed clearly that the land conveyed was trust property to be held in trust by the trustees, their successors and assigns for the use and benefit of the camp. That the legal title was thus vested by the unmistakable language of the deed in the trustees as individuals, while the equitable title was vested in and held by those who then constituted the members of the camp and who could be readily ascertained according to the constitution and by-laws of the association governing its membership. The deed was held not to be obnoxious to the rule against perpetuities which prevents alienation.

Another case mentioned by appellant is *Hopkins* v. *Crossley,* 132 Mich. 612, 96 N. W. 499. In that case the court held that such a trust as the facts showed existed there was only sustainable as a charity, and since the doctrine of charitable uses did not exist in Michigan, the trust was void. The principles announced there have no application to the case at bar.

Counsel also call attention to the case of *Goesele* v. *Bimeler,* 14 How. 589, 14 L. Ed. 554. In that case a number of persons formed a society and purchased land amounting to about 10,000 acres. It was paid for by the labor of the members of the society. It was alleged that Bimeler acted fraudulently as their agent in taking the deed and title papers to himself and his heirs forever. There seems to be nothing in that case in conflict with the principles announced here.

In Devlin on Real Estate, vol. 1, p. 179, the question of deed to trustees of an unincorporated association is discussed, and it is announced that in a deed to a number of persons who are described as trustees of an associa-

tion not appearing to be incorporated, it is to be assumed that the association is a partnership of individuals of which the grantees were members. They are not to be considered mere trustees, holding simply a nominal title. It is immaterial whether such deed is to be regarded as made to the grantees named individually or as a conveyance for their benefit, and that of others. In either case, the persons named as grantees have the authority to sell the property and to convey good title.

In the instant case the property was conveyed by White and wife to Lyle, commander. He had the legal title, and had the right to convey it. It was held, of course, in trust for the camp, but under our decisions it was a valid deed to Lyle. Not only has this court held that a deed made to persons, naming them, as trustees, conveys good title and that trustees have the legal title and may convey the property; but this seems to be supported by the weight of authority. *East Haddam Central Baptist Church* v. *East Haddam Baptist Ecclesiastical Society,* 44 Conn. 259.

The deed from White and wife is valid. The deed made by Crook, commander, to camp Wiley Crook, Sons of Confederate Veterans, and Chapter J. Mart Meroney, Daughters of Confederacy, is not valid, because it was made to the unincorporated association which had no power to acquire property in its name. *Philadelphia Baptist Association* v. *Hart,* 4 Wheat. 1, 4 L. Ed. 499.

In conveyances of real estate there must be a grantee, and the grantee must be capable of contracting. The requisites of a deed are that there be persons able to contract with for the purpose intended by the deed, so that in every grant there must be a grantee, a grantor, and thing to be granted. It is essential that the grantee be a person, natural or artificial, capable of taking a title at the time of the conveyance. *Duffield* v. *Duffield,* 268 Ill. 29, 108 N. E. 673, Ann. Cas. 1916D 859; *Wiehl* v. *Robertson,* 97 Tenn. 458, 37 S. W. 274, 39 L. R. A. 423.

As the deed made by Crook was to an unincorporated association, it was invalid. But the appellant's rights were in no way affected by the deed. The legal title was

still in the successor of Lyle. The property was devoted to the same use that was intended in the original conveyance, and the legal title, still being in the successor of Lyle, the appellant had no cause of action. It is stated, however, in the brief that the chancellor, in his oral findings, and declarations of law, suggested that the commander should convey, as commander, to the ranking officer of the organizations, and that this has been accomplished and a new deed made from the commander to the commanding officers of the organizations. This conveyance, if made to the ranking officer as trustee, would be a valid conveyance.

It is not claimed that there was a breach of the trust. There is no claim that the property had been diverted to any other use than that originally intended. The opinion in *Gravette* v. *Veach,* 186 Ark. 544, 54 S. W. (2d) 704, in so far as in conflict with this opinion is overruled. The decree of the chancery court is correct, and it is therefore affirmed.

[redacted]

PAVING DISTRICT NO. 3 OF HARRISON *v.* FOWLER.

4-4357

Opinion delivered October 5, 1936.

[redacted]

V. D. Willis, for appellant.

Shouse & Walker, for appellee.

MCHANEY, J. Appellee is the owner of lots 1, 3, 5 and 7, block 15, in the original town of Harrison, Arkansas, which is included in the boundaries of appellant district. When the district was organized, there was an

assessment of benefits against said property in the sum of $2,250 and the property at that time was vacant. Later appellee made valuable improvements upon said property, and, in the latter part of the year 1929, the board of assessors for appellant district, reassessed said property on account of said improvements and increased the benefits to the sum of $4,000. This reassessment was promptly filed with the city council, notice published for the time and in the manner provided by law, and within the time provided by § 5664, of Crawford & Moses' Digest, appellee appealed to the city council on the ground that the reassessment was excessive, and the city council at its next meeting, passed a resolution reducing the assessed benefits on said property to $3,500. Appellee refused to pay the annual tax levied on the $4,000 assessment, but tendered payment based on the $3,500 assessment, as adjusted by the city council. Appellant accepted such payments under protest, refusing to recognize the action of the city council in reducing the assessment, because, as it contends, there was no legal action by the city council to effect the reduction. It brought this action to recover the difference in the amount of the tax paid and the amount claimed due by it based on the $4,000 assessment. Trial resulted in a decree in appellee's favor from which is this appeal.

We think the court erred in so holding as it is apparent that the provisions of § 10, act 64, of the Acts of 1929, have been overlooked. Section 5664, Crawford & Moses' Digest, provides for the revision of the original assessment of benefits not oftener than once per year, "increasing or diminishing the assessment against particular pieces of property as justice may require." The last sentence in said section provides: "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." Section 5661 provides for an appeal to the city council by filing with the city clerk a notice of his appeal in writing within ten days from the publication of the notice of reassessment and that the appeal shall be heard by the city council *de novo* at the next meeting

after the appeal is taken. Section 5662 provides that the council shall enter on its minutes the result of its finding on appeal and shall certify a copy thereof to the board of assessors, which shall make its assessment conform thereto if any change has been made by the city council. Section 10 of said act 64 of the Acts of 1929, reads as follows: "Where assessments 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 the chancery court within thirty days after publication of the notice provided for in § 5664 for the purpose of correcting the same." It will be seen that this section is in direct conflict with that provision of § 5664 of Crawford & Moses' Digest, relating to the manner of appeals from reassessments of property made by the board of assessors. The jurisdiction of the city council in such cases has been taken away and vested in the chancery court. This act was approved February 28, 1929, and because of the emergency clause went immediately into effect. The reassessment of appellee's property occurred subsequent to the effective date of said act 64. Therefore, the provisions of said act apply to the manner of appeals by property-owners from reassessment of benefits in municipal improvement districts and the only remedy, therefore, is a suit in the chancery court within thirty days after the publication of the notice to correct the reassessment. Appellee failed to take this procedure. Therefore, under the plain provisions of said § 10, his assessment became "final and conclusive," after the lapse of thirty days from the giving of the notice, and the action of the city council in reducing his assessment was without authority and is void. See *City Council of Camden* v. *Merchants & Planters Bank,* 191 Ark. 1139, 89 S. W. (2d) 739.

The judgment will be reversed, and the cause remanded with directions to enter a decree in favor of the district for the amount of the tax claimed. It is so ordered.

ISABEL *v.* GENERAL MOTORS ACCEPTANCE CORPORATION.

4-4368

Opinion delivered October 12, 1936.

John A. Fogleman and *R. V. Wheeler,* for appellant.

Dixon, Williams & Edmondson, Walter N. Killough and *Elton A. Rieves, Jr.,* for appellee.

JOHNSON, C. J. This appeal comes from a judgment of the Cross circuit court wherein the appellants failed to appear and make defense. The suit was predicated upon a title retaining contract of sale and purchase. The complaint did not allege compliance with § 7403 of Crawford & Moses' Digest, requiring a verified itemized statement of account to be delivered before the suit is filed and this is the first question presented for consideration on appeal.

The suit was in replevin and damages for the wrongful detention were alleged to be $50, but a recovery of $250 was permitted by the trial court upon a trial to a jury and this is the second error alleged.

It was not necessary for plaintiff to deliver to the original defendant a verified itemized statement of account prior to the filing of the suit as required by § 7403

of Crawford & Moses' Digest for the reason that said statute applies only to mortgagors, mortgagees and those occupying that status and does not apply to vendors in conditional sales contracts or their assignees. The statute reads as follows: "Before any mortgagee, trustee or other person shall proceed to foreclose any mortgage, deed of trust (of) or to replevy under such mortgage, deed of trust or other instrument, any personal property, such mortgagee, trustee or other person shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due. Provided, if the mortgagor disposes or attempts to dispose of any of the property mortgaged, or absconds or removes from the county, such statement shall not be necessary."

This section of the statutes is § 2 of act 99 of 1893. The title to this act provides: "An Act to Regulate the Execution and Foreclosure of Mortgages on Personal Property, etc."

It will be observed that vendors in conditional sales contracts are not mentioned in the body of the act nor in the title thereof. The title to the act which may be resorted to to ascertain the legislative intent in doubtful cases, *Morrow* v. *Strait,* 186 Ark. 384, 53 S. W. (2d) 857; *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. (2d) 909, restricts the application of the act to "mortgages" and also the proviso of the act limits its application to "mortgagors" and "property mortgaged."

The phrase, "or other instruments," as employed in the act and which lends color to appellants' contention that the act applies to conditional vendors is especially without force when the preceding language of the act is considered, namely: "before any mortgagee, trustee or other person shall proceed to foreclose any mortgage, deed of trust, etc."

Although not argued in briefs we will say in passing that the views here expressed are not in conflict with those entertained in *Passwater Chevrolet Co.* v. *Whitten,* 178 Ark. 136, 9 S. W. (2d) 1057, wherein we determined that § 8654a, Crawford & Moses' Digest, applied

to conditional sales vendors. This section is a part of act 158 of 1901, p. 303. This act has no proviso as does the act of 1893 and moreover, the title is not restricted to "mortgage" foreclosure as is the act of 1893.

In respect to the contention that the court erred in permitting a recovery for the wrongful detention of the property in a greater amount than the sum claimed in the original complaint, but little need be said. Appellants are the sureties upon the cross-bond executed by the original defendants in the action. By virtue of this obligation said defendant retained the property during the pendency of the suit. Section 8655 of Crawford & Moses' Digest authorizes a recovery by the plaintiff in replevin actions where a cross-bond has been filed by the defendant and his surety "for the value of the property and also damages * * * as the same may be found by the court or jury trying such cause." This language is amply broad to permit a recovery by a plaintiff in replevin where a cross-bond has been filed and property retained thereunder up to the date of the trial, and the trial court was correct in so deciding.

No error appearing, the judgment is affirmed.

THOMAS *v.* ARNOLD.

4-4376

Opinion delivered October 12, 1936.

[redacted]

W. T. Pate, Jr., for appellant.

Joe B. Norbury and *Tom W. Campbell*, for appellee.

McHaney, J. Appellee sued appellant on a promissory note for $1,500, dated April 12, 1934, due one year after date with interest from date at 6 per cent. Appellant answered denying all the material allegations of the complaint, but without setting up any affirmative defense. The case was set for trial for October 30, 1935, at which time appellant made default. A jury was empaneled, evidence heard, and a verdict rendered for appellee on the instruction of the court so to do, upon which judgment was entered. Within apt time a motion for a new trial was filed in which it was alleged that the court was advised on the day of trial by counsel that appellant was ill and unable to attend court and that permission was granted counsel to have his client examined by a physician to ascertain his condition; that while he was absent getting an examination made, the case was heard and determined in his absence; that he secured a certificate from a physician to the effect appellant was too ill to attend court, which was filed with his motion for a new trial. On February 28, 1936, by permission of the court, appellant filed an amendment to his motion in which he alleged he had a meritorious defense to the action on the note in that the note was secured by appellee through the fraudulent representation that he was a lawyer and that appellant thought the note was given for legal services, when, in fact, appellee was not a lawyer and that he was only indebted to him for services in

securing evidence which was used in the trial of his case. Appellee responded denying all the grounds set up in both the motion and the amendment thereto. A hearing was had on the motion at which the physician making the affidavit above referred to and Mrs. Ben Young, keeper of the hotel where appellant was living, testified to his physical condition on the date of the trial, October 30, 1935. The physician made his examination about 1:00 p. m. on said date and thought at that time appellant was too ill to attend court. He was not appellant's regular physician and examined him on said date to determine his condition. According to Mrs. Young, appellant had not consulted a physician or been previously treated by one during his stay at her hotel.

The court overruled the motion for a new trial and the amendment and this appeal followed.

As stated by counsel for appellant: "The only question involved in this appeal is the proper exercise of the discretion of the court in the trial of this action." It is conceded that the granting of a new trial rests in the sound discretion of the trial court and that this court will not reverse on this account except for a manifest abuse of such discretion. But it is insisted that the court abused its discretion, calling for a reversal. We cannot agree. In *Drake* v. *McDonald,* 170 Ark. 919, 281 S. W. 674, it was held, quoting headnotes:

"Where a default judgment was entered on account of the absence of defendant, the granting of a new trial is within the sound discretion of the trial court.

"Refusal to set aside a default judgment will not be reversed where the defendant was fifteen minutes late in appearing in court and waited two days before asking to have the judgment set aside, and in his motion set up a different defense from that pleaded in his answer."

In the case at bar appellant did not appear. He made no effort in advance to make a showing for a continuance on account of illness, and when granted permission to make such showing it took several hours to do so, and in the meantime the case was heard and determined. The trial court has a wide discretion in controlling the orderly dispatch of business, and it was not required to

suspend its business and await the convenience of appellant to make a proper showing for a continuance. No diligence was shown and the court did not abuse its discretion in this regard.

As to the meritorious defense sought to be set up some four months later, appellant is again concluded by the holding in *Drake* v. *McDonald, supra.* In his answer he denied executing and delivering the note. In the amendment, he admits giving the note, but claims fraud in its procurement. The statute, § 6293 of Crawford & Moses' Digest, provides: "A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered * * *." His alleged defense set up in the amendment was not claimed for four months, was controverted by denial and no proof offered to sustain it. Moreover, appellee had testified on the trial of the case that the note was given him for services rendered in securing evidence for appellant in the trial of another case, and that he saw appellant sign same.

Let the judgment be affirmed.

RAPRICH *v.* STATE.

Crim. 4006

Opinion delivered October 12, 1936.

Trimble, Trimble & McCrary and *Thos. D. Williams,* for appellant.

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

SMITH, J. This appeal is from the judgment of the Lonoke circuit court sentencing appellant to a term in the penitentiary for the crime of burglary, and the reversal of this judgment is asked upon the grounds that incompetent testimony was admitted, and that the prosecuting attorney was permitted to make an improper and prejudicial argument before the jury.

The undisputed testimony shows that during the night of February 16, 1935, appellant and three other young men broke into a bakery shop in the town of Lonoke, and removed therefrom an iron safe containing something more than $300 in money. Entrance into the building was effected through a skylight. A rope was let down into the building, on which one of the young men slid down and opened a rear door. The safe was loaded into an automobile owned, or at least driven, by appellant, and carried some miles out of town and broken open and the contents divided. Appellant and two of his associates left Lonoke about 3 p. m., and returned about 7 p. m. They drove through Lonoke on their return and invited another young man named Burrus to join their party. After the commission of the crime, in which Burrus participated, they drove back to Little Rock, which city they reached about 2 or 3 a. m. Burrus left the car before reaching Little Rock.

The evidence as to the crime itself consists largely of the narration of appellant's confession, which appears to have been freely made, and shows a crime intelligently planned and successfully executed.

Appellant's participation is not denied, and the defense of insanity was interposed, and testimony was offered in support of that plea. The case was submitted under instructions to which no objections are made.

Two physicians testifying as experts expressed the opinion that appellant was insane. Other testimony by lay witnesses was given to the same effect. Two physicians testified on behalf of the state as experts that appellant was sane, one of these less positively than the other. Certain non-expert witnesses were permitted to express the opinion that appellant was sane, and the admission of this testimony is assigned as error. The testimony of W. J. Beard and Mrs. Tom Morris is especially complained of.

Beard testified that he was a justice of the peace, and had known appellant from his childhood. The witness was asked: "During that time you have seen him and talked with him and observed him from time to time?" Witness answered that he had. Witness also testified that he knew appellant in February, 1935, and in his opinion appellant was sane at that time. This testimony was admitted without objection. On his cross-examination witness stated that appellant was tried in his court for breaking into the bakery; that appellant did not testify at that time. Appellant had been in witness' house in 1931, where he had a conversation with him. Had no other conversation with appellant, but in the capacity of justice of the peace had tried appellant upon the charge of driving an overloaded truck. On his redirect examination witness testified that he had seen appellant on the streets, "passed him a number of times." Saw him every few days, and knew him like he did other young men in town.

A motion to exclude this testimony, upon the ground that no proper foundation had been laid for its admission, was overruled.

Mrs. Morris was permitted to testify that her son was one of the young men who broke into the bakery, and that appellant had twice come to her house just before the burglary looking for her son. The first occasion was about a week before the burglary, the second about two days before that event. She had known appellant all of his life, and had seen him frequently. She testified, in part, as follows: "Q. Mrs. Morris, have you ever had conversations with him? A. Not exactly. Q. But you say that he has been to your house? A. Yes, sir. Q. Have you ever heard him talk to other people? A. Yes, sir. Q. How often? A. I have known him—I knew him when he was a school boy, and I have seen him and heard him talk. Q. When he came up to your house a few days before this robbery took place, did you talk to him on both occasions? A. Yes, sir. Q. Did he talk like a crazy person? A. No. Q. Did he talk like any other person would? A. Yes, sir. Q. Did he talk like he was an insane person? A. No, sir. Q. Do you tell the jury that, in your opinion, he knows right from wrong? A. Yes, sir. Q. Do you think that he knew it was wrong to commit a robbery? A. Yes, sir."

At the conclusion of the direct examination appellant's counsel moved to exclude the testimony of Mrs. Morris, upon the ground that she had not sufficiently qualified herself to be permitted to express an opinion.

Upon her cross-examination she testified as follows: "Q. To what extent did you talk to him on these two occasions? A. He asked me where Floyd was, and I told him he had gone to Little Rock, and he said to tell him when he came back he wanted to see him. Q. Was that the extent of your conversation, and is that all the conversation you have had with him during his life? A. Yes. Q. Did you ever see him on the street, bareheaded and barefooted? A. No, sir. Q. You don't know anything about his drinking liquor or anything like that? A. No, sir. Q. He never has been in your home? A. He has been there a few times. Q. And the extent of your acquaintanceship with him is the time he was there to see your son, Floyd, and that was the extent of your conversation with him? A. Yes, sir, but I have heard him

talk to other people. Q. To whom? A. I don't remember—but I have heard him talking on the street. Q. Did you ever hear what he said to other people? A. I never heard him say anything that sounded like he was crazy. Q. Were you paying any particular attention to him? A. No, sir."

It is insisted that it was error to permit these witnesses to express an opinion as to appellant's sanity, for the reason that they were not shown to have had sufficient opportunity to form an intelligent and rational opinion upon that subject, and this appears to be the most serious question presented on this appeal.

The note of the annotator in the case of *State* v. *Schneider,* 72 A. L. R. 579, deals very extensively with the conditions under which a non-expert witness may be permitted to express an opinion as to another's sanity. We do not cite or review any of these cases, as we have many cases of our own on the subject. The late case of *Spence* v. *State,* 184 Ark. 139, 40 S. W. (2d) 986, cites a number of these cases and, among others, the case of *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679.

It is very earnestly insisted that the testimony in the instant case is sufficiently like that in the Shaeffer case to be controlled by it and to require the reversal of the judgment in the instant case as was ordered in the Shaeffer case. In announcing the test for the admission of the opinion of non-experts judge BATTLE said that such witness must recite the facts upon which the opinion is based, and the testimony must show such relations to have existed between the party alleged to be insane and the witness as fairly to lead to the conclusion that the witness has a reasonable foundation upon which to base the opinion; and that whether the information is sufficient for that purpose is a preliminary question for the court to decide affirmatively before such testimony may be admitted at all, and after its admission the weight to be given such testimony is a question for the jury to decide.

It is very earnestly insisted that there is the same lack of foundation for the admission of the testimony of the non-experts as existed in the Shaeffer case, and

that the judgment in the instant case must be reversed as was done in the Shaeffer case.

We think, however, that the cases are distinguishable on the facts. The opinion in the Shaeffer case sets out the testimony of the non-experts, and points out the lack of foundation for the admission of their opinions. The witnesses there were J. L. Moore and B. C. Black, and their testimony is there recited as follows: "Moore testified as follows: 'I have known the defendant for five or six years. I have never had him working around me. From what I have seen of him during that time and observed, I don't think there is anything wrong with him.' Black said: 'I have seen the defendant on the street for several years. I never noticed anything peculiar about him. From what I have seen of him, I never thought but that he was all right!' "

It will be observed that neither of these witnesses had ever had any conversation or association with the accused. They had known him five or six years, and had merely seen him on the streets. Here, the witnesses, Mrs. Morris and Beard, had better opportunities to observe the accused. Beard had known him all his life. Appellant had twice appeared as a defendant in Beard's court. Witness had a conversation with appellant in witness' home, and had thereafter seen him "pretty often." Mrs. Morris had also known appellant all his life. He was the associate of her son. She had conversed with appellant twice within a week of the burglary. Appellant had a mission which he sought to perform, and in furtherance of it he asked an appointment, which was evidently later made and kept. The witnesses in the instant case, therefore, had an association with the accused and opportunities to acquire information about him which were totally absent in the Shaeffer case.

While the testimony is not entirely satisfactory, we are unable to say that the trial court abused the discretion he was required to exercise in passing upon the preliminary question of the competency of the testimony.

The same learned judge who wrote the opinion in the Shaeffer case also wrote the opinion in the case of *Green* v. *State*, 64 Ark. 523, 43 S. W. 973. Involved in

that case was the question of the competency of an expert to express an opinion as to the sanity of the accused. Judge BATTLE there said: "No rule can be laid down by which it can be accurately determined how much skill, knowledge, or experience a witness must possess to qualify and entitle him to testify as an expert. He must at least have sufficient to enable him to be of some assistance. 'That question, however, rests within the fair discretion of the court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinion of any value.' His (circuit court's) decision of the question will not be reviewed by this court, unless it clearly appears to be wrong."

The same rule would, of course, be applied in passing upon the action of the trial court in admitting the testimony of a non-expert witness. Such witness must show that he possesses such qualifications as to be of some assistance, and when that showing is made the decision of the trial court will not be reversed unless it clearly appears to be wrong.

In the Shaeffer case, *supra,* there was an entire lack of such showing on the part of the non-expert witnesses; but not so here.

See also *Jackson* v. *State,* 142 Ark. 96, 218 S. W. 369; *Woodall* v. *State,* 149 Ark. 33, 231 S. W. 186; *Griffin* v. *Union Trust Co.,* 166 Ark. 347, 266 S. W. 289.

In Smoot on Insanity (§ 597), in discussing the question of the competency of non-experts, it is said: "Just what amount of knowledge and acquaintance is necessary to qualify such a witness is largely governed by the facts of each case, and within the sound discretion of the trial judge, who may declare the witness incompetent where the preliminary examination shows the facts are insufficient to qualify the witness to express an opinion. But where such witness shows any reasonable opportunity to acquire knowledge of the subject's sanity through observation and association, and is able to state any facts upon which to predicate an opinion, the meagerness of such facts goes rather to the weight to be given the opinion than to its admissibility; and the opinion formed at the time, with the facts upon which

it is based, should go to the jury for what it is worth. The weight to be given to such testimony is exclusively within the province of the jury, if the facts upon which the opinion is founded themselves tend to show sanity or insanity." See also vol. II, Wharton's Criminal Evidence, (11th ed.), p. 1746.

In his concluding argument the prosecuting attorney commented upon the fact that appellant's three associates had entered pleas of guilty and had been sentenced to the penitentiary and stated that "It would not be fair to send those boys to the penitentiary and to acquit appellant."

Upon this subject the prosecuting attorney said: "Gentlemen, you only have such law and order in your county as is brought about by the enforcement of the laws, and if the jury goes out and turns a fellow loose who is financially able to get up a defense and the other fellow who has no money is sent to the penitentiary * * *."

Upon objection being made to the argument by counsel for appellant the court said: "Gentlemen of the jury, the financial standing of a defendant has nothing to do with the law. If a man is rich or poor if he violates the law then he should be punished. And if he is as poor as Lazarus he should be protected if he is not guilty. The jury will be governed only by the testimony. What the counsel say has nothing to do with the law."

Appellant's counsel objected that "There is no evidence here showing the financial ability, in any degree, of any one."

This objection was sustained, and the court said: "Gentlemen of the jury, there is no evidence in this case as to the worth of any one connected with it. Rich or poor you are entitled to the same protection at the hands of the court, as stated to you before; you have been chosen to try this case on the law and the testimony, and no other cause should guide you in your deliberations. Decide this case upon the law and the testimony and let your verdict be accordingly."

Conceding this argument to be improper, the error, if any, was cured by the admonition of the court.

Answering what appears to have been the argument of the counsel for appellant, that appellant, through his mental condition, lacked the power to resist the commission of a wrongful act, the prosecuting attorney said:

"Look at this defendant! This boy has had the advantages of a good education; he graduated from high school and had a year in college—but look at these other poor boys he led into this crime—they didn't have the fine opportunities that this boy had—they didn't know how to resist wrong like this defendant did; they never had the chance this boy had! And yet, with all his chances and education, he came back home from college and got three ignorant boys into all of this trouble, and then after they have been sent to the State penitentiary and are now serving their time, this boy comes in here and tells you that he ought not to be sent down there to serve his just time,—because he was suffering from an 'irresistible impulse' and not a witness * * *."

The objection was made to this argument that "There is no such testimony showing that this defendant got any one into trouble."

The court said: "An attorney has a right to express his opinion to the jury, and he has a reasonable range to express his said opinion on what might have happened—but your verdict, gentlemen of the jury, will be based upon the law and the evidence, and not the argument of counsel."

The prosecuting attorney proceeded to say: "The evidence in this case, gentlemen of the jury, bears out the statement I have just made to you. Two witnesses have just testified from the stand here today—Mrs. Morris testified that he was at her house twice, one time about a week before the robbery, and the second time about two days before it, after her boy Floyd Morris. Another gentleman took the stand, Mr. Lilly, and stated that on the day before and the day after the robbery Raprich was out to Burris' home; that he got him the day before the robbery and brought him home the day after the crime was committed. Now that shows that he was running after these boys and these boys were not leading him. Who said he couldn't resist it? Gentlemen, it was

the other boys who couldn't resist, not him! Yes, here we have a boy who finished high school with the highest honors, who won the State contest in Latin, who had a year in college—and he comes down here and leads these poor ignorant boys astray, and he thinks he can come in here and * * *."

Upon objection being made to the continuance of this argument the court said: "The prosecuting attorney can express opinion in his argument but his opinion is not the law in the case nor the evidence. You must decide this case upon the law and the testimony and not the argument on either side."

It was not improper for the prosecuting attorney to argue that appellant was not an irresponsible person who had been led into the commission of an act which he did not know was wrong, or, knowing that it was wrong, lacked the power to resist. The testimony reviewed by the prosecuting attorney furnished some foundation for the argument that appellant was not an irresponsible person who lacked the capacity to resist the solicitation of others to commit what would be a crime if done by a sane person, and the court properly ruled this was a question for the jury. We conclude, therefore, there was no error in this respect.

Considered in its entirety, we find no error in the record, and the judgment must be affirmed, and it is so ordered.

McEachin & McEachin *v.* Hill.

4-4378

Opinion delivered October 12, 1936.

Reynolds & Maze, for appellant.

Carter & Taylor, J. E. Yates and *Partain & Agee,* for appellee.

BUTLER, J. Appellee, Richard Hill, was in the employ of appellant corporation which was engaged in the construction of a bridge in Franklin county. His duty was to keep a gasoline engine in operation which furnished the power to run the pumps. The pumps and engine were located in an excavation, and the object was to remove water from the same so that the men would be able to work the next day. Appellee worked at night and on the second night of his employment, while acting within the line of his duty, he suffered an injury from the explosion of gasoline and instituted an action against appellant which resulted in a verdict and judgment for him in the sum of $25,000.

It is conceded that the trial court properly instructed the jury as to the applicable law except, it is insisted, that under the undisputed evidence in the case, a verdict should have been directed for the appellant; first, because of failure of appellee to establish his case by substantial evidence, and second, that appellee had assumed the risk as a matter of law.

The injury to appellee occurred while he was engaged in filling a five-gallon container with gasoline from a barrel or tank which rested on a truck about 175 feet

from the pump he was operating. Appellee's purpose was to renew the gasoline in the engine which was done by bringing it in the five-gallon container from the truck and then pouring it into the tank attached to the engine. In order to afford light he used a gasoline lamp which he placed in the vicinity of the truck while withdrawing the gasoline from it. While doing this there was an explosion of some character which threw ignited gasoline on appellee's legs resulting in severe and permanent injury.

The negligence alleged was the failure of appellant to furnish a lantern in good condition; that the lantern furnished was defective in that that part of the mechanism of the lantern called the generator and the parts connected therewith were old, worn and not of proper size to be used in the lantern and not properly fitted therein; that the generator and the parts connected therewith had become clogged with carbon preventing the lantern from properly functioning and causing it to explode thereby communicating flames to the gasoline being handled by appellee. There is some dispute in the testimony regarding the manner in which the lantern came into appellee's possession on the night of the accident and its position with relation to the truck at the time of the explosion. The jury have resolved the disputed questions in favor of the appellee and the testimony tending to support its verdict may be stated as follows:

At about 10:30 p. m. on the night of the accident the lantern was given appellee by his foreman. Other employees had been using it prior to that time in a different part of the work. When the lantern was brought in it appeared to be out of order, and the foreman attempted to remedy its condition, but was unable to do so, but told appellee that he would have to use it that night as it was the only lantern available. So far as it can be determined from the testimony only four lanterns were in use on the job, all known as "Coleman" lanterns, or of similar construction. Shortly after the accident these lanterns were taken to a mechanic in Fort Smith who found all of them defective, three of them being without generators and the other, identified by him at the

trial as one of the four brought to him for inspection, was, at the time when brought, defective with relation to the generator which he replaced with a new one.

A witness, who had done mechanical and blacksmithing work for the appellant some three or four weeks before appellee's injury, but who was not in appellant's employ at that time, testified that it was his duty, among other things, to keep the lanterns going. He stated that the proper gas to use in the lanterns was white gas. He discovered, while filling the lanterns, that the gasoline was not of that character. It was discolored and apparently, by some means, had had an addition of some other substance. Witness stated that they would have to get some new gasoline, but this was not done until most of the adulterated gasoline had been used. This caused the generators to clog from deposits of carbon rendering it necessary to clean out the holes in the generators which made these openings larger than they should have been. The effect of this caused the gasoline to spew and blow out. All of the lanterns on the job were affected, and all had to be cleaned out. When this was done, witness told the foreman they would have to have new generators. New generators were obtained, but they did not fit the lanterns in use.

Mr. Berry Collins, who qualified as an expert with relation to the structure and operation of "Coleman" lanterns, testified that they were considered the most efficient in general use and that the lantern exhibited (supposed to have been the one used by appellee on the night of the accident) was not a "Coleman" lantern, but similar in structure, there being no material difference between the two. This witness described a "Coleman" lantern, as follows: "A Coleman lantern operates under pressure, has a generator, a mixing tube and a tank sealed air-tight and a pump to pump air in the tank. The generator is a piece of tube with wicking or something in it to hold that gasoline from flooding the mantles and it has a strainer. The heat of the generator boils the gasoline into a vapor and it vaporizes into a mixing tube and it is mixed with a certain per cent. of air and burns on the mantles a perfectly dry gas if the genera-

tor is good and a good grade of fuel is used. The hole in the generator is exactly the right size to furnish the right amount of gas. The generator is close enough to the mantles to boil the gasoline. That is the function of all gasoline machines that burn under pressure. The mantles heat the generator and the generator furnishes the gas to the mantles, that is carried around and around.'' This witness further stated in effect that if a lantern was in good condition there would ordinarily be no danger in setting it lighted close to where gasoline was being changed from one container to another. He stated that generators are made of soft brass and when the holes become clogged by carbon the insertion of a point of a needle would tend to enlarge them so as to cause an excess amount of gasoline to come through and pass beyond the point of incandescence and out of the lantern creating danger of an explosion, but not necessarily of sufficient violence to shatter the lantern.

We think there is abundant evidence that the lanterns in use at the work of appellant on the night of the accident to appellee were not in proper condition and justified the jury in the conclusion that their use in such condition was negligence. It remains to be seen whether there is evidence tending to show that such negligence was the proximate cause of appellee's injury.

Appellee stated that when he was preparing to fill his can he placed the lighted lantern some distance from the truck which he estimated at 25 or 30 feet, that a funnel was furnished for the purpose of removing the gas from one container to another, but this was broken and could not be used; that he had about filled the can when he heard a noise at the lantern which he designated as a ''puff,'' and saw flame come on its outside; that he was immediately enveloped in flaming gasoline. There was some question as to which way the wind was blowing and its degree of force, but this was a circumstance which the jury considered in determining the cause of the explosion at the truck. When it is remembered that the testimony is practically undisputed to the effect that there would be but little, if any, danger from a gasoline lantern in proper condition, the inference is justly to be

drawn that there was flaming gasoline projected in some manner from the lantern which ignited the gasoline at the truck.

On the question of assumption of risk little need be said. The court fully and fairly instructed the jury on this issue, and it cannot be said as a matter of law that appellee had such peculiar knowledge of the danger attendant upon the use of a defective lantern as to make that danger so obvious that one of his information would not expose himself thereto. The doctrine of assumed risk is predicated upon the knowledge of the servant of the risks to be encountered and his consent to be subjected thereto. *Chicago R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15. It is not shown that appellee had any knowledge of, or was accustomed to use, gasoline lanterns for any considerable time. He had only worked one night, and before that his work was such as would not acquaint him with facts from which he might reasonably conclude there was any danger in the use of a defective lantern and he testified that he did not know there was any such danger. He had the right to rely upon the judgment of his employer and to assume that he would not be subjected to any extraordinary danger.

Appellant suggests that certain incompetent evidence was admitted over its objection and exception which calls for a reversal of the case. This is the testimony relating to the use of improper fluid in the lanterns. It is insisted that no allegation was contained in the complaint relative to the use of such fluids and that the amendment which alleged such improper use had been withdrawn. The evidence did not relate to the character of gasoline used at the time of appellee's accident, but only to such as was used prior thereto which explained in part the defective condition of the lantern. That is to say, a few weeks before the accident improper gasoline was used in the lantern which necessitated the cleaning out of the openings in the generator resulting in increasing their size. The evidence was competent for this purpose, and did not tend to indicate the character of gasoline in use at the time of the accident.

There remains to be considered the contention that the verdict is excessive. The appellee was 26 years old at the time of his injury. He was not fitted by education or experience to earn a livelihood except by manual labor. At the time of his accident he was earning forty cents per hour which appears to be a less sum than he was ordinarily capable of earning. There is evidence of a substantial character to the effect that appellee's injuries are such as to permanently prevent him from earning wages by manual labor. In addition to this, the evidence leaves no doubt as to his having suffered intense pain, and that he will, in the future, suffer much discomfort. Taking into consideration his age, earning capacity at the time of his injury, and the handicaps which he will suffer during the remainder of his life, we cannot say that the verdict is excessive.

It follows that the judgment of the trial court is correct, and is therefore affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* JONES, JUDGE.

4-4375

Opinion delivered October 12, 1936.

Moore, Gray, Burrow & Chowning, for petitioner.

S. E. Gilliam, for respondent.

MEHAFFY, J. Paul Elam filed suit in the Union circuit court on August 9, 1935, alleging that he was the holder of two policies of life insurance issued by the Metropolitan Life Insurance Company, and that each policy contained a provision for the payment to him of $25 per month in the event he should become totally and permanently disabled. He alleged that he had become totally and permanently disabled after the policies were issued and before filing of the suit, and that the insurance company had made disability payments to him under these policies for a period of time, and then discontinued the payments. He prayed for judgment for the back payments due him up to the date of the filing of the suit.

At the time the suit was filed and for some months prior thereto, Paul Elam had been a prisoner in the federal penitentiary; first at Leavenworth, Kansas, and was afterwards transferred to the United States narcotics farm at Lexington, Kentucky, where he is now continuing his sentence.

The petitioner filed motion to quash service, and appeared specially and solely for that purpose. It was alleged that Elam was, at the time of filing the suit, and still is, a resident of Mississippi county, and that his alleged disability did not occur in Union county, Arkansas, and that the circuit court of Union county had no jurisdiction to try the issue involved in the suit.

There was a hearing upon this motion, and after hearing the testimony and argument of counsel, the court overruled the petitioner's motion to quash service of summons, to which action of the court the petitioner saved its exceptions. After the motion to quash was overruled, the petitioner filed its petition in this court, praying that the circuit court of Union county be prohibited from proceeding further in said cause.

A response was filed denying the allegations of the petition. The evidence shows that Paul Elam lived in Mississippi county, and while living there he was convicted and sentenced to the federal penitentiary.

Paul Elam testified by deposition that he is now detained in the United States narcotic farm at Lex-

ington, Kentucky, under a sentence which has not yet expired; that his wife, Louise Elam, lives in El Dorado, Arkansas, having moved there about November, 1934; they have one child. Witness and wife had planned to move to El Dorado from Blytheville, prior to the beginning of his sentence; they had deferred moving to El Dorado until after his trial; he had planned to go to El Dorado in 1932, but could not get arrangements so that he could move before he was arrested. He had formerly lived in Union county, and his relatives lived there. Mrs. Elam purchased a home in El Dorado at the direction of Paul Elam, using the money paid by the insurance company for Elam's disability to make payments on the home in El Dorado. Witness had made to his wife a power of attorney to transact all business in Arkansas. At the time witness was sentenced he told his wife to break up housekeeping and move to El Dorado, and at all times since witness left Blytheville, he has abandoned Blytheville as his home and has no present intention of returning there. He claims El Dorado as his residence and claimed it ever since he directed his wife to move there and purchase a home. He intends to go there when he is released. He does not own any property in Blytheville, or elsewhere in Arkansas, except the home in El Dorado. His home formerly had at Blytheville is now being foreclosed by the mortgagee. Neither witness nor his wife has any control over same; does not own a home anywhere besides the home in El Dorado.

Mrs. Louise Elam testified that she lives in El Dorado, Union county, Arkansas. Witness was married to Paul Elam, May 25, 1922, and has one child who lives with witness. Paul Elam was arrested on narcotic charge November, 1933, and was out on bond until November, 1934, when he was sentenced. He left Mississippi county for the penitentiary on December 1, 1934. Witness brought with her to El Dorado her husband's sister and his niece, and witness' child. They had been planning to move to El Dorado before he was sentenced. When she moved to El Dorado they were losing their home in Mississippi county. She was getting plaintiff's

check for $50 a month from the defendant company. She went to Union county and purchased a home in pursuance to the direction of her husband. The people who owned the mortgage on the property at Blytheville have control of it and other people are living in it. Neither witness nor her husband has possession or control of the property at Blytheville. She has been in constant correspondence with her husband ever since he has been in the penitentiary. The home was purchased in El Dorado in April, 1935.

The petitioner quotes and relies on § 6150 of Crawford & Moses' Digest. That section provides that an action may be brought against the insurance company taking the risk in the county where the loss occurs. There is no contention that the loss occurred in Union county. That section also provides that the action may be maintained in the county of the residence of the party whose life was insured, and it is earnestly contended that Union county was not the residence of Paul Elam.

They also quote and rely on § 5151 of Crawford & Moses' Digest, which provides that the action may be brought in the county of the residence of the party insured. They also quote and rely on § 5975E of Castle's 1927 Supplement. This section provides that all the provisions applicable to insurance companies shall, so far as the same are applicable, govern and apply to all insurance companies transacting any other kind of business.

The case of *Continental Casualty Co.* v. *Toler*, 188 Ark. 139, 64 S. W. (2d) 322, is cited by petitioner. There is nothing in that case, as we understand it, that touches the question involved here. The court there held that the venue statutes relate to both life and accident insurance.

In this case the contention of the appellant is that Elam was not a resident of Union county. If he was a resident of Union county then it is conceded that the court had jurisdiction. Elam was in the penitentiary in Kentucky, and of course he had no residence in the State of Kentucky in the penitentiary in the sense of our statute as to residence.

The evidence in this case shows that he and his wife had abandoned their home in Mississippi county; that foreclosure proceedings had been begun, and that neither Elam nor his wife had possession or control of what was formerly their home in Mississippi county.

The question before the court was whether Elam's residence was in Union county. In the case of *Grant* v. *Dalliber,* 11 Conn. 234, Dalliber was confined in the State prison as a convict and the court said: "We think it may be said generally, that the place in which a married man's family resides, with his consent, and where he has voluntarily resided with them, as his home, and which he has never abandoned, may well be considered as the place of his abode, unless such residence has been, and was intended to be, temporary and for transient purposes. And such place of residence or usual abode, is not changed or abandoned, by a constrained removal, as by imprisonment." The court further said: "The ground assumed, by the defendant, upon this question, must result in the conclusion, that civil process against persons confined in the state's prison, must always be served upon them personally, within the walls of the prison. If this be so, every officer or indifferent person serving process, must, at all times, have the right and authority to enter the prison, and have intercourse with the convicts. Such a power would be found inconsistent with the safekeeping of prisoners, as well as subversive of the necessary and salutary discipline of the prison; and such a power cannot be exercised."

Elam was imprisoned, not in the State of Arkansas, but in another state, and his residence in Mississippi county was abandoned. He could not go personally to El Dorado with his family because he was confined in the penitentiary, but he did everything he could do after abandoning his home in Mississippi county to establish a residence in Union county. He directed his wife to purchase a home in El Dorado, Union county, with the money he was receiving from the insurance company. She purchased the place and moved with her family to

Union county, and Elam had no other residence. He could not have been a resident, in the sense of our statutes, of the penitentiary or prison in Kentucky. He had clearly abandoned his residence in Mississippi county. Therefore, if he had any place of residence at all, it was in Union county where his family resided at his direction.

The New York court held that his residence could not be in the penitentiary, and that court stated: "Whether the word 'residence' be taken in the sense of domicile or of abode, it implies a place where the party is situated through choice, and where, in some conceivable manner, his personal belongings would be the more readily found; and it has been distinctly ruled that neither in its legal nor in its popular meaning, is the word 'residence' satisfied by an incarceration in any particular place." *American Surety Co. of N. Y.* v. *Cosgrove,* 81 N. Y. S. 945, 40 Miss. 262.

We think the evidence in this case shows that Elam's residence was in Union county, Arkansas; but whether that were true or not, it was a question of mixed law and fact. In the case of *Jarrell* v. *Leeper,* 178 Ark. 6, 9 S. W. (2d) 778, this court said: "The question of residence is a mixed one of law and fact." The court further said in that case: "We may conclude from the cases that, in contemplation of the attachment laws generally, residence implies an established abode, fixed permanently for a time, for business or other purpose, although there may be an intent existing all the while, to return at some time or another to the true domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstances that the determination of this question may present that the courts say that, subject to the general rule, each case must be decided on its own state of facts."

It is well settled that where the jurisdiction is disputable the granting or refusal of the writ of prohibition is discretionary. *Merchants & Planters Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421.

This court has uniformly held that if the existence or nonexistence depends on contested facts which the

inferior court is competent to inquire into and determine, a writ of prohibition will not be granted although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower court, and if rightly determined, would have ousted the jurisdiction. *Roach* v. *Henry,* 186 Ark. 884, 56 S. W. (2d) 577; *Merchants & Planters Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421; *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. (2d) 1030.

In this case the question before the trial court on petitioner's motion to quash was one that the trial court had a right to determine, and whether it determined it right or wrong is immaterial. If the trial court had a right to determine the question, and did determine it, then the only remedy was by appeal, and prohibition will not lie.

The writ is denied.

JOHNSON, C. J., concurs in the judgment.

JOHNSON, C. J., (concurring). I concur in the judgment of the court denying the writ of prohibition, but I cannot agree with other portions of the opinion.

In recent cases, notably, *Safeway Cab & Storage Co.* v. *Kincannon, Judge, ante* p. 1019, 96 S. W. (2d) 7, and *Robinson* v. *Means,* 95 S. W. (2d) 98, all the justices concurring, we expressly held that we would not review issuable questions of fact on applications for writs of prohibition and that such applications would be remitted to the trial courts for determination, appeal and consequent review here.

The original opinion recognizes the force of these cases and reaffirms the court's allegiance thereto, but turns about face and expressly decides the issuable facts against the applicant. These issuable facts should not be decided by this court until the cause reaches this court on appeal.

PROGRESSIVE LIFE INSURANCE COMPANY *v.* DEAN.

4-4373

Opinion delivered October 12, 1936.

Moore & Burke, E. M. Arnold and *Duty & Duty,* for appellant.

W. G. Dinning, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $300 with a penalty of 12 per cent. and an attorney's fee in favor of appellee, rendered in the circuit court of Phillips county, against appellant, on an insurance policy it issued on the life of C. D. Ward on the 16th day of February, 1933, in which appellee, Ward's sister, was named as the beneficiary.

The record reflects that C. D. Ward, the insured, was convicted of the crime of rape in the state of Missouri, and on the 19th day of August, was executed for the crime.

The record also reflects a sharp conflict in the testimony as to whether the premiums on the policy of insurance were paid as they matured, or within the grace period.

The testimony introduced by appellant tended to show that default was made in the payment of the premium due July 1, 1933, and that, on application, reinstatement was made on August 26, 1933; that the policy lapsed again for the nonpayment of the October, 1933,

premium, but was reinstated on application on November 28, 1933; also that the policy lapsed for nonpayment of the January, 1935, premium, and that it was not reinstated after lapsing.

The testimony introduced by appellee tended to show that the policy never lapsed for failure to pay any of the premiums during the life of C. D. Ward and that same was in force and effect when Ward was executed for the crime he committed in Missouri.

The issues of fact arising out of the conflicting testimony were submited to the jury under correct instructions and were resolved against appellant. We cannot invade the exclusive province of the jury to determine issues arising out of disputed facts to pass upon the credibility of the several witnesses or the weight to be given to the testimony of each. We look to the record only to ascertain whether there is any substantial evidence to sustain the verdict. There is ample evidence in the instant case to sustain the verdict and consequent judgment.

The only remaining question to determine on this appeal is whether the public policy of this state will forbid a recovery against an insurance company where the insured has been legally executed for a crime. There is no provision in the policy exempting appellant from liability to the beneficiary in case the insured commits a crime for which he was executed. In the case of *Hugh Collins, Exr., etc., of Robert Kilpatric, Deceased* v. *Metropolitan Life Insurance Company*, 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129, it was decided (quoting syllabus 1), that: "The personal representative of an insured is not precluded from enforcing payment of his policy by the fact that insured was executed for crime, where the Constitution declares that no conviction shall work a corruption of blood or forfeiture of estate, and the statutes make no exception in the case in the rules of descent and distribution."

In the case of *Fields* v. *Metropolitan Insurance Company,* 147 Tenn. 464, 249 S. W. 798, 36 A. L. R. 1250, it was decided (quoting syllabus), that: "In view of

Const., art. 1, § 12, prohibiting corruption of blood or forfeiture of estate and deodands, which established the public policy of the state as opposed to forfeitures for conviction for crimes, it is not contrary to public policy for a life insurance company to pay to the beneficiary the amount of the policy upon the life of one who had been executed by the state for murder."

In both cases referred to, life insurance contracts are treated as property (choses in action) and correctly so. In both these cases it is decided that one who is executed for crime does not forfeit any of his property rights. He may make such disposition of his property before he is executed as he pleases, and if he does not dispose of his property in any manner known to the law prior to his death, the statute of descents and distributions will dispose of it for him just as it would the property of any one else who died intestate. The reason assigned for the rule announced is that the constitution of the state declares a conviction for crime shall not work a corruption of the blood or forfeiture of estate. In both cases notice is taken of the two cases decided by the Supreme Court of the United States and relied upon by appellant, holding that it is contrary to public policy for a beneficiary to recover on an insurance policy if the insured was legally executed for a crime. The cases of the United States Supreme Court cited by appellant are styled as follows: *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216, and *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234, 32 S. Ct. 220; 56 L. Ed. 419, 38 L. R. A. (N. S.) 57.

In the Illinois and Tennessee cases referred to above, mention is made of the fact that the Supreme Court of the United States did not take into account the constitutional provisions in our nation and states prohibiting forfeiture of estate of one attainted with crime, but, on the contrary, followed the opinion of the Lord Chancellor for the House of Lords, delivered July 9, 1830, in the case of *Amicable Society* v. *Bourland*, 4 Bligh (N. S.) 194, 6 Eng. Reprint 630. At the time the Lord Chancellor rendered the opinion, "at common law, all the property, real and personal, if one attainted was forfeited, and his

blood was so corrupted that nothing could pass by inheritance to, from, or through him. Thus, the wife, children, and collateral relations of the attainted person suffered with him."

The Constitution of the United States and this state has removed us from these harsh rules of the common law, and they should not be enforced in this free country on the ground of public policy.

Article 1, § 10, of the Constitution of the United States, is as follows: "No state * * * shall pass any bill of attainder."

Article 2, § 17, of the Constitution of Arkansas, is as follows: "No bill of attainder * * * shall ever be passed."

It has been wisely said: "The public policy of a State has to be sought for in its Constitution, legislative enactments, and judicial decisions."

Of course, in arriving at the public policy of a State, legislative enactments must yield to constitutional provisions, and judicial decisions must recognize and yield to constitutional provisions and legislative enactments.

Our Constitution has declared the public policy applicable to the case at bar, and we must respect it as the first and highest declaration of public policy.

No error appearing, the judgment is affirmed.

WALTON *v.* MCDONALD, SECRETARY OF STATE.

4-4551

Opinion delivered October 15, 1936.

Miles & Amsler, for petitioner.

A. L. Rotenberry and *June P. Wooten*, for respondents.

SMITH, J. A. D. Walton, as a citizen, taxpayer and elector of this State, has filed an original proceeding in this court for the purpose of questioning the sufficiency of the ballot title of a proposed initiated act.

The question presented, that of the sufficiency of ballot titles, has been definitely decided in previous opinions of this court, and we find it unnecessary to review any of the numerous cases in other jurisdictions on the subject.

The title of the proposed act reads as follows: "An act to provide for the assistance of aged and/or blind persons and funds therefor, the administration and distribution of same, penalties for the violation of act, and for other purposes."

The act contains forty-nine sections, but, without reciting its various provisions and administrative details, it may be said that it proposes to levy a permanent

general sales tax of two per cent., and to appropriate thirty-three and one-third per cent. of the gross proceeds of the tax on horse and dog racing to the old age and pension fund, and appropriates fifteen million dollars of the funds so to be raised for the purposes of the act for the biennial period ending June 30, 1939, if that sum shall be raised by its operation.

It will be observed that the ballot title consists of thirty-two words, and sixteen of these convey no information regarding the provisions of the proposed law. It does recite that it is "An act to provide for the assistance of aged and/or blind persons and funds therefor, * * *." The additional words, "* * * the administration and distribution of same, penalties for the violation of act, and for other purposes," furnish no explanation of its provisions, and afford the elector no information upon which to base intelligent action.

The title carries an appeal to all humane instincts. Few would object to some provision being made for the support of the aged and blind; but to levy a general sales tax of two per cent. for that, or any other purpose, is a different question altogether, and would furnish the elector, however generous his impulses might be, serious ground for reflection if that information were imparted to him by the title of the question upon which he exercised his right of suffrage. Especially would this be true if he were also advised that the act appropriates to its purposes thirty-three and one-third per cent. of the gross proceeds of the tax on horse and dog racing, which amounted, during the last biennium, to the gross sum of $379,059.73.

In *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. (2d) 356, 44 S. W. (2d) 331, the rule in regard to the sufficiency of a ballot title was stated as follows: "The ballot title should be complete enough to convey an intelligible idea of the scope and import of the proposed law, and it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must contain no partisan coloring."

The rule thus announced was reaffirmed in the case of *Shepard* v. *McDonald,* 189 Ark. 29, 70 S. W. (2d) 566, where it was said: "The rule thus stated is broad enough to be all-inclusive and flexible enough to afford ample relief in all meritorious cases; therefore, we reaffirm it without citing or discussing authorities from other jurisdictions."

These cases were cited and approved in *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. (2d) 248, and in *Blocker* v. *Sewell,* 189 Ark. 924, 75 S. W. (2d) 658. In the case of *Coleman* v. *Sherrill, supra,* it was said: "It may be observed that if the ballot title were intended to be so elaborate as to set forth all the details of the act, the publication or advertisement might, for that very obvious reason, be omitted. Perhaps, no set rule or formula can be announced as to what a ballot title shall contain, but it may be safely stated that, if it shall identify the proposed act and shall fairly allege the general purposes thereof, it is sufficient."

The conclusion to be deduced from all these opinions is that, while the ballot title need not be so elaborate as to set forth the details of the act, it must identify the proposed act and recite its general purposes. In view of these decisions further discussion or amplification of the requisites of a valid title appear to be unnecessary.

The proposed ballot title fails to disclose the vital portion of this act, which is, not whether some provision shall be made for the aged and the blind, but how that provision is to be made. We do not hold that it is essential that the ballot title should have disclosed what the provisions for the aged and blind should be, or the amount thereof. But we do hold that the manner of making this provision is of the essence of the act. It is an essential fact which should be disclosed to the elector, and could have been done by the addition of only a few more words and without recitation of details. Every one knows the general operation of a sales tax. The undisclosed fact is that such a law will be put in operation. The ballot title does not, therefore, meet the test that it shall be free from any misleading tendency, whether of

amplification or of omission, and we, therefore, hold it insufficient. It may be said, in this connection, that our present sales tax law expires, by its own limitations, on July 1, 1937. Section 20A, act 233, Acts 1935, page 603.

It is suggested that the elector could, through the publication and public discussion of this and other initiated acts, acquire full information concerning their provisions. This is, no doubt, true in the case of many electors. But, even so, the law contemplates that all electors shall have certain information before them at the very time they exercise their right of suffrage, and this the ballot title here under review fails to furnish.

It is insisted that the sufficiency of the ballot title has not been questioned in apt time. It is argued that had this been done at an earlier date any defect in the title could have been supplied. It is true the Initiative and Referendum Amendment (Amendment No. 7), pursuant to which proponents have proceeded, provides that, if the Secretary of State, in the case of state-wide petitions, shall decide any petition defective, he shall permit thirty days for amendment; and this applies to the ballot title, as it is a portion of the petition. *Shepard* v. *McDonald,* 188 Ark. 124, 64 S. W. (2d) 559. But this provision of the amendment applies only in the case of adverse action on the part of the Secretary of State, and has no application to original suits brought in this court. The only limitation as to the time of action by the courts is that "The failure of the courts to decide prior to the election as to the sufficiency of the petition shall not prevent the question from being placed upon the ballot at the election named in such petition." There has been no such delay in the instant case.

The prayer for a writ of injunction against the certification of the act to the election officers of the state is therefore granted, and the writ awarded.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J., (dissenting). The only question in this case is whether the ballot title is sufficient. The majority hold that it is insufficient, and I do not agree in this conclusion.

In order to determine whether a ballot title is sufficient or not, it is important to inquire into the purpose of the ballot title. The majority opinion states: "Perhaps no set rule or formula can be announced as to what a valid title should contain, but it may be safely stated that if it shall identify the proposed act and fairly allege the general purposes thereof, it is sufficient."

I think even under this rule announced by the majority that the ballot title is sufficient; although I do not think there is anything in the constitution or the law that requires the ballot title to fairly allege the general purposes of the act.

The constitution provides: "At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on state-wide measures, shall be submitted to the State Board of Election Commissioners who shall certify such title to the Secretary of State to be placed upon the ballot; on county and municipal measures such title shall be submitted to the county election board and shall by said board be placed upon the ballot in such county or municipal election." Amendment No. 7.

There is nothing in this provision of the constitution prescribing what the ballot title shall contain. It simply provides that the exact title to be used on the ballot shall be by the petitioners submitted with the petition. Why this provision in the constitution and what does it mean? Manifestly, the exact title must be used so that persons examining the ballot title filed with the petition may be able, when they see the ballot title on the ballot, to identify it with the one filed with the petition.

Certainly this ballot title comes within the provision of the constitution. It is not contended that the ballot title intended to be used on the ballot was not the exact title filed with the petition, and this is all the constitution requires. It cannot be said that there is anything in

the constitution, other than what I have quoted above, with reference to ballot titles.

There is no intimation or suggestion in the constitution or the law as to what the ballot title shall contain. The law requires an exact copy of the act to be filed with the petition, and the law also requires that the act must be published in every county in the state for four months. Why publish the act? Why spend thousands of dollars in publishing an act in every county in the state if the voter can get from the ballot title what the opinion of the majority says the ballot title should contain?

The majority opinion states: "While the ballot title need not be so elaborate as to set forth the details of the act, it must identify the proposed act and recite its general purposes." If that is true it would be perfectly useless to publish the act in every county in the state; but it is not true. It was not the intention that the ballot title should do more than identify the title on the ballot with the title that the voter is supposed to have seen, either in the Secretary of State's office or in the publications. He is supposed to have read the act and the title, and, then, when he sees the title on the ballot, he identifies it with the act that he has read.

I think the decisions of the court have annulled the amendment to the constitution. The Supreme Court of Oregon, in discussing ballot title, said: "There is nothing in the constitution as amended implying that the full title as appears in the proposed measure shall appear upon the ballot, nor does the act under consideration so require. The method provided is adequate to identify the bill, as indicated on the ballot, with the proposed measure on file in the office of the Secretary of State, the full title and text of which appear in pamphlets, a copy of which, under the law in force at the time the local option law was voted on, was presumably in the hands of each voter. The method then in use, and as since improved upon, was, and is, analogous to the proceeding before the legislative assembly. There, before the roll call for voting on a proposed measure is had, the pre-

siding officer announces that "We are about to vote on House (or Senate) Bill No. 104, or whatever number the bill may have, which number as thus announced identifies the bill to be voted upon with the printed bill on the desk of each member. True, the title is previously read, as is the entire bill, and so it is presumed to have been previously read by each voter under the initiative system.

"The only question, then, to determine is, does the title as designated and used on the ballot come within the purview of the constitution as amended and supplemented by the act of 1903? We think it does. * * * As above stated, the title of a bill before the legislative assembly is required to be read with the measure to be voted upon, and the full title is presumed to appear thereon. This method under the initiative would be impracticable; for, as manifest from the length of the title of the act under consideration, if many measures should be submitted to the voters at one time, to print upon the ballot a full title to each would require the ballot to contain many pages of printed matter, which cumbersome method was plainly intended to be avoided. To recognize the rule invoked by appellant would defeat the very purpose contemplated by the adoption of our fundamental laws of our direct, and additional, system of lawmaking. The system provided, as above considered, was obviously designed to take the place of that employed by the Legislature, and accomplishes the same result." *State* v. *Langworthy,* 55 Ore. 303, 104 Pac. 424, 106 Pac. 336. See, also, In re *Referendum Petition No. 30, State Question No. 94,* 71 Okla. 91, 175 Pac. 500; *Wagner* v. *City of LeGrande,* 89 Ore. 192, 173 Pac. 305; *Schumacher* v. *Byrne,* 61 N. D. 220, 237 N. W. 714.

If the majority opinion is correct it would be impossible for the voters, in the time allowed by law, to learn one act, much less be able to vote for all state, county and township officers, because they are limited to five minutes in the voting booth. Section 3800 of Crawford & Moses' Digest, among other things provides: "No elector shall be allowed to occupy a booth or com-

partment for the purpose of voting, for a longer time than five minutes." Imagine an average voter, in five minutes time, learning what the majority says he must get from the ballot title.

As I have already said, the only purpose of the ballot title is to identify it with the bill the voter is supposed to have read, either in the Secretary of State's office or from the publication required.

When neither the constitution nor the law has anything at all to say about what the ballot title must contain, except that it must be the exact title as that filed with the petition, and when the voter is limited to five minutes in the voting booth, it is obvious that it was not intended that the ballot title should contain what the majority opinion says it must contain.

There is something said in the majority opinion about the merits of the act, but that question is not before us. It may be a good act or a bad act, but our sole concern is as to the sufficiency of the ballot title.

This act was not only filed with the Secretary of State and published in every county, but the measure has been discussed all over the state. The holding of the court in the majority opinion, I think, repeals the I. & R. Amendment. This amendment was adopted by the people, and if repealed at all, it should be done by the people, and not by this court.

There is another act to be voted on, and the title to that act is "AN ACT to amend, modify and improve judicial procedure and the criminal law, and for other purposes." It may be said that the title to this act was not attacked. That is true, but the point is that it was prepared by a committee of lawyers after a great deal of study, and they evidently thought that the only purpose of the title of a ballot was to identify it with the title filed with the petition, and that published in the newspapers.

This court quoted with approval recently the following statement from the Maryland Supreme Court (*Mayor, etc., of City of Baltimore* v. *Stewart,* 92 Md. 535, 48 Atl. 165): "It has never been understood that

the title of a statute should disclose the details embodied in the act. It is intended simply to indicate the subject to which the statute relates." *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. (2d) 248.

The court also said in that case: "The real objection urged to the title of the act, which we are now treating as the ballot title, is the fact that it is not sufficiently elaborate. Any other ballot title would be susceptible of the same criticism unless it were in itself a complete abstract of the act, which would be impracticable under ordinary conditions."

This court said in the case of *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. (2d) 72: "Another reason, not less cogent, is that amendment No. 7 permits the exercise of the power reserved to the people to control, to some extent at least, the policies of the state, but more particularly of counties and municipalities, as distinguished from the exercise of similar power by the Legislature, and, since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction."

The title of the act here proposed is as follows: "AN ACT to provide for the assistance of aged and or blind persons and funds therefor, the administration and distribution of same, penalties for the violation of act and for other purposes."

I think the title above copied is sufficient under the rule announced by the majority. It says that it is for the assistance of the aged and blind person, and to provide funds therefor. Every voter knows that the funds can be provided only by taxation, so they are advised by the title itself that there must be a tax to provide the funds. The title shows that the act provides for the administration and distribution of the funds, and penalties for violation of the act.

The Initiative & Referendum Amendment was adopted by the people for the purpose of giving them the right not only to have laws referred, but to initiate laws, and the acts of the people should not be thwarted by

technical construction, but they should have a right to vote on the question.

I think the ballot title is sufficient. Mr. Justice HUMPHREYS agrees with me in this dissenting opinion.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* BLANTON.

4-4381

Opinion delivered October 19, 1936.

Barber & Henry and *Ira J. Mack,* for appellant.

J. F. Parish, for appellee.

BUTLER, J. On March 21, 1934, Della Blanton signed an application for a life insurance policy upon which, March 26, a policy was issued by appellant company. She died on May 8, 1934, the premiums due on said policy having all been regularly paid. Notice of death was given by appellee, the daughter of Della Blanton and the ben-

eficiary named in the policy. On June 29, 1934, appellee was paid the sum of $3.60 by the appellant company, the amount of premiums which had been paid by the assured or her agents, and executed a written instrument which recited that the above sum was accepted in settlement of all claims under the policy which she surrendered for the following reason: "Not an insurable risk." After this appellee filed suit against the appellant to recover the face of the policy in the sum of $540 less the $3.60. She alleged that the policy was in full force at the time of the death of the assured, and, further, that appellant had denied liability on account of the policy, and, through misrepresentation, threats and fraud, obtained a release from her which she alleged was not binding upon her.

The answer denied the allegation relating to the procurement of the release which was pleaded in full satisfaction of appellee's demand and the further defense was tendered that the assured, in her application, stated that she was in sound health and not suffering from any diseases named in the policy for which no obligation was assumed by the insurer; that appellant did not require a medical examination, but relied upon the statements made by the assured in her application which she well knew at the time were false; that at the time of the said application and at the time of the delivery of the policy the assured was in unsound health and suffering from diseases of the heart, liver, kidneys and lungs and her general health was poor and had been for some years as she well knew.

On the issues joined at the trial of the case evidence was adduced which resulted in a verdict and judgment in favor of the appellee for the amount sued for. The court thereupon assessed a penalty of twelve per cent. and an attorney's fee, which, together with the amount of the verdict, aggregated the sum of $752.54. From that judgment an appeal has been duly prosecuted and the judgment is sought to be reversed for failure of the trial court to direct a verdict in behalf of appellant on its motion duly made. This motion was grounded upon the contention that the policy was void because of misrepre-

sentations by the assured regarding her health, which, it is claimed, were established by the undisputed evidence; also, upon the ground that the evidence failed to establish the invalidity of the release for the causes alleged by the appellee.

On the first contention it may be said that the question of the health of the assured was one of fact. *Old American Ins. Co.* v. *Davis,* 175 Ark. 1170, 300 S. W. 415. The evidence adduced on behalf of appellee consisted of the testimony of a number of lay witnesses who testified that they had known the assured for some considerable time before her death and, in a general way, testified that during that time she had not been well. Some testified as to conversations had with her in which she had stated around the first of March, 1934, that she had been sick with the flu a month or two previous to that time. Some testified that she seemed to have "smothering spells" and that her legs were swollen to such extent that one had big blisters raised on it which burst, causing a discharge of water. One of the witnesses, Mrs. Virgil Hutchinson, testified that early in March, 1934, witness went with the assured to Newport to see Dr. Gray and on reaching the town she had a kind of spell and fainted and had to wait an hour or two before they went to the doctor's office; that assured was in Dr. Gray's office for thirty minutes, but witness did not go in with her.

One of the witnesses testified that she visited the assured on the afternoon preceding her death that night. She sent for a doctor who gave her a "shot"; that witness had seen a number suffering with pneumonia and in her opinion the assured was not afflicted with, and did not die from, that disease.

The testimony of these witnesses is not undisputed. The beneficiary in the policy, a daughter of the assured, testified that except for bad teeth and a sinus trouble from which her mother suffered a great deal, she had not been sick enough to be in bed but two or three times during the four years preceding witness' testimony; that she was sick in the winter of 1932 and had a case of flu in the winter of 1933; that at the time she made the appli-

cation for insurance, which was at the home of a Mr. Gist and in witness' presence, she was in good health. Witness stated that the cause of her mother's death was pneumonia with which she had been ill about a week or ten days preceding her death.

A Mr. Trentham, who took the assured's application for insurance as the agent for appellant company, testified that he had known Mrs. Blanton for some time before she signed the application. He failed to make any statement in his testimony as to the assured's health at the time the application was taken.

Dr. Gray, a physician, who, as the testimony of appellant disclosed, had been visited by the assured early in March, 1934, testified that she came to his office, but that he did not recollect any particular examination he made. He stated that he must have made one, however, or he would not have written a prescription for her. Several prescriptions were introduced in evidence and the doctor stated that he could say definitely, because of the character of these prescriptions, that the assured was not suffering from any ailment of the heart. He further stated that Mrs. Blanton was a relief patient, but that he gave such patients the same kind of examination as those who were able to pay and that he would have been able to find out in thirty minutes what her trouble was. The prescriptions he had given Mrs. Blanton were for quinine and laxatives—one was a sedative, but the doctor did not recall for what it was prescribed.

The beneficiary, Imah Blanton, also testified that one of her mother's legs was swollen as a result of an injury she received in a fall.

The doctor who attended Mrs. Blanton on the afternoon of the last day of her life was not called as a witness and did not testify. The failure to procure this testimony leaves the exact cause of the insured's death uncertain.

The provision of the policy relied on by the appellant is to the effect that no obligation is assumed by the company if the assured should not be in sound health on the date of the policy, or if, before that date, she "has

had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * *." It is insisted by the appellant that the finding of the jury necessarily implied by its verdict is so clearly and palpably against the weight of the evidence as to shock the sense of justice of a reasonable person and appellant invokes the doctrine announced in *Singer Manufacturing Company* v. *Rogers,* 70 Ark. 385, 68 S. W. 153, where the court said: "The rule established in this court is that, even where there may be some conflict in the evidence, a new trial will be granted where the verdict is so clearly and palpably against the weight of evidence as to shock the sense of justice of a reasonable person." This case followed and approved the rule announced in *Oliver* v. *State,* 34 Ark. 632, quoting therefrom as follows: "But in all cases, even those of conflict, this court will direct a new trial, when, upon inspection of the evidence, the verdict is so clearly and palpably against the weight of the evidence as to shock a sense of justice. The line lies between a mere preponderance within the bounds of a fair difference of opinion and that gross preponderance which indicates an unreasoning passion or prejudice on the part of the jury, or misapprehension of the law, or disregard of the legitimate sphere of their action."

In the case of *Chalfant* v. *Haralson,* 176 Ark. 375, 3 S. W. (2d) 38, reference was made to the cases *supra,* and in that connection the court said: "In so far that it might be said that these cases sustain a holding that this court will set aside a verdict of the jury where there is any substantial evidence to sustain it, they are against the current of decisions in this state and contrary to the long settled rule of this court on the subject." The jury is the sole judge of the credibility of the witnesses and necessarily has to pass upon the truthfulness of the testimony in determining the weight to be given it. The jury accepted the testimony adduced on behalf of the appellee as establishing the true facts in the case and we are unable to say that this testimony was palpably false to that degree which would warrant our invasion of the province of the jury. Accepting this testimony as true and giving

to it its greatest probative value, we think it of a substantial nature. If Mrs. Blanton had been in such condition as testified to by appellant's witnesses, certainly Dr. Gray would have observed it for he had ample opportunity to do so, since, according to the testimony of a witness for the appellant, she was in his office for thirty minutes. This reasonably implies that the doctor made an examination of Mrs. Blanton and, while he was unable to recall what the examination was, he was prepared to, and did, say that the prescriptions he gave her failed to indicate any serious complaint. If her condition was, indeed, that described by appellant's witnesses, it would have been discernible from a casual observation. Mr. Trentham must not have observed any indication of disease, else he would have been called upon to relate the result of his observation. This circumstance, together with the failure to call as a witness the physician who last administered to the assured, corroborates the testimony of the appellee and gives to her evidence substantial weight. This view renders it unnecessary to notice the contention of the appellee that even though the representations made in the application may have been false these were not sufficient to avoid the policy, there being no evidence that they were knowingly and wilfully made by the assured with the intent of deceiving the insurer.

On the question of the method of procuring the release the testimony is in irreconcilable conflict. The appellee testified that the proof of death and claim for the policy benefit was delivered to her by Mr. Trentham, the company's agent; that she gave him the insurance policy and receipt book on his representation that it would be necessary to send them in to the home office in order for her to receive payment of the sum for which her mother was insured; that she heard nothing about the claim until about the 28th or 29th of June when several men, representing themselves to be the agents of the appellant, visited her and stated it had been discovered that her mother had defrauded the appellant into issuing the policy and if she tried to get the insurance she would be sent to the penitentiary; that these men then offered to return

the premiums upon her signing a receipt and accepting the same in full settlement of her claim under the policy; that she did not sign the receipt and accept the money on that afternoon, but saw Mr. Trentham the next day and, after talking with him, signed the receipt. He advised her that she might be in "a tough spot" and about the best thing he could advise her to do would be to accept the amount offered. It was then that she signed the receipt and release.

In the statement regarding the manner in which the receipt and release were obtained, appellee was corroborated by the testimony of a witness who overheard the conversation between her and appellant's agents. This testimony was denied by the agents who testified in the case, but as the jury accepted the testimony of the appellee as true, so must we. This establishes such duress as to render the contract of release unenforceable.

It is a fundamental principle that contracts, to be valid, must be voluntarily made, and, where executed under such circumstances as would enslave the will, the contract is void. This court, in the early case of *Burr* v. *Burton,* 18 Ark. 214, declared the rule that "A contract made by a party, under compulsion, is void; because consent is of the essence of a contract, and where there is compulsion, there is no consent, for this must be voluntary. Such a contract is void for another reason. It is founded in wrong or fraud. It is not, however, all compulsion which has this effect; it must amount to duress. But this duress may be either actual violence, or threat. * * * Duress, by threats, * * * exists not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death, or great bodily injury, or unlawful imprisonment."

In *Fonville* v. *Wichita State Bank & Trust Co.,* 161 Ark. 93, 255 S. W. 561, 33 A. L. R. 125, we said, in effect, that to constitute duress sufficient to render void a contract because of threats it is necessary that the threats and circumstances be of a character sufficient to excite the reasonable fears of a person of ordinary courage. This,

of course, does not mean an ideal person, but one similar to the person affected and surrounded by similar circumstances. Manifestly, the threats which would induce the greatest fear in one person and constrain his acts might have no influence on another and a person of "ordinary courage" is one similar to the person against whom the threats are made as to age, sex, mentality and information surrounded by the same, or similar, conditions. 13 C. J., § 315, p. 400; § 319, p. 402.

It is clearly inferable from the evidence that the appellee is a woman of limited information unaccustomed to business transactions. The threats made by the agents of appellant company would have had no influence on many persons, but to us, they appear to have been sufficient to submit to the jury whether sufficient to overcome the appellee's mind and to prevent her from exercising her own free will and to cause her to execute the release.

It follows from the views expressed that the judgment of the lower court is correct and should be affirmed. It is so ordered.

[redacted]